



NSW Police Force submission on the 'Weapons-related offences: sentencing adult offenders' consultation paper

The NSW Police Force (NSWPF) appreciates the opportunity to provide comment on the 'Weapons-related offences: sentencing adult offenders' consultation paper as part of the NSW Sentencing Council review of sentencing for firearms, knives and other weapons offences (the Review).

Our submission is structured according to the chapters and order of content within the consultation paper. We are happy to discuss these comments and any material from our earlier submissions further. Please make requests to the contact person detailed at the end of this submission.

Overarching principles

The NSW regulatory regimes for firearms and prohibited weapons are underpinned by the key principle that possession and use of a firearm or prohibited weapon is a privilege that is conditional on the overriding need to ensure community safety. For firearms, this is outlined by the National Firearms Agreement 2017 which constitutes the national approach for firearms regulation as agreed between the Commonwealth and all Australian states and territories. Diminishing the severity of firearms or weapons offences or reducing current penalties available within the legislative framework could detrimentally impact public safety by reducing deterrents for offending, returning serious offenders into the community and potentially increasing firearms or weapons related crime within NSW. For these reasons, the Sentencing Council should be cautioned against recommending moderation of offences or reductions in sentences.

Chapter 2 - The Offences

Focus offences

The NSWPF agrees with the focus offences outlined in this chapter being included in the Review. This approach recognises the higher levels of offending for possession and use, while ensuring the scope of the Review is not too broad. In addition, we propose that offences for manufacture firearms which are currently listed for exclusion (paragraph 2.59), are considered in the Review.

The NSWPF requests that the offence of unauthorised manufacture pistol or prohibited firearm under section 50A(2) of the *Firearms Act 1996* (Firearms Act) be included with consideration of providing a standard non-parole period for this offence. This is discussed further in our chapter 4 comments.

We view that the manufacture of concealable firearms, such as a pen gun or keyring gun, is done for a specific purpose to create a firearm that is easy to conceal on a person. Noting the Review is focusing on possessing (carrying) a firearm, it would be beneficial to consider the sentencing of the enabler (the manufacturer) at the same time.

Chapter 3 - Maximum Penalties

Prohibited weapons possession or use offences

Schedule 1 of the *Weapons Prohibition Act 1998* (Weapons Prohibition Act) lists weapons that are prohibited in NSW without a permit due to the danger they present in the community. It includes the likes of tasers, grenades, zombie knives and cross bows. Regulation through offences and penalties for non-compliance is necessary to ensure responsible possession,



use and storage for the protection of the community. The NSWPF considers the maximum penalty for possession or use of a prohibited weapon is appropriate. The maximum penalty for military style weapons is 20 years' imprisonment and the maximum penalty for other prohibited weapons is 14 years' imprisonment.

The NSWPF considers there should be changes to sentencing guidelines so that heavier penalties are imposed by magistrates upon conviction commensurate to the seriousness and danger posed by these offences to the community. In this regard, the evidence presented in the consultation paper at paragraphs 3.22 to 3.25 shows that in 2022, the majority of offenders found guilty in the Local Court of possessing or using a prohibited weapon received either a fine, or no penalty or had no conviction recorded. In the small number of cases where a custodial sentence was recorded, the average non-parole was only 5 months. Similarly, in relation to illegal possession or use of a firearm, over 60% of convicted offenders received either a fine, or no penalty or had no conviction recorded. Only 10% received a custodial sentence with the average parole period of 6 months (paragraph 3.48). We consider that these sentences may not be commensurate to the seriousness of the offending, potentially reducing the deterrence effect of the offences which could lead to repeat offending.

Regarding illegal possession or use of a pistol or prohibited firearm, 18% of convicted people received a custodial sentence in the Local Court with an average non-parole period of 8 months (paragraph 3.45). Whilst NSWPF recognises many factors impact on sentences, collectively these statistics suggest sentencing practices may not be reflecting the seriousness of these offences as prescribed by the legislation.

The NSWPF is supportive of consideration being given to creating aggravating offences for factors such as repeat offences or possession by a prohibited person as part of the Review, given the higher level of danger these aggravating factors present.

This should extend to carrying a knife on public transport or at a public transport hub. These are high risk for incidents when considering the mass of people concentrated in these areas and potential vulnerability of people using public transport. Knives and blades are also used to commit malicious damage such as seat slashing on public transport. A separate offence for carrying a knife in, on, or around public transportation and hubs should be considered. This approach could provide a more useful deterrent to offending than increasing the current maximum penalties.

Differentiating categories for prohibited weapons

The consultation paper references the suggestion by the NSW Office of the Director of Public Prosecutions (ODPP) to differentiate between weapons that are capable of inflicting serious injury and those of a more miscellaneous nature. Whilst we recognise the objective seriousness of a particular weapon being more dangerous than another, we would be concerned with any diminishment of the seriousness of carrying a prohibited weapon. We are cognisant that any prohibited weapon can inflict serious injury to an individual and the intent of the offender and context/purpose they are carrying the weapon significantly alters the risk to the community.

Very careful consideration of the nature and potential harm caused by any weapon would need to be given before any changes are contemplated. An example of a prohibited weapon that could potentially be considered of a 'miscellaneous nature' is a laser pointer, for which possession could carry a maximum penalty of 5 years' imprisonment. This is consistent with an offence contrary to section 7A of the Firearms Act. Other prohibited weapons could retain



the maximum penalty of 14 years' imprisonment, as is consistent with an offence contrary to section 7 of the Firearms Act.

We further note the evidence presented in the consultation paper at paragraphs 3.22 to 3.25 on sentences does not suggest "low level offenders" are receiving "disproportionately higher penalties". To the contrary, the majority of offenders possessing or using a prohibited weapon received either a fine, or no penalty or had no conviction recorded.

Possession contrary to a weapons prohibition order

The consultation paper poses whether the maximum penalty for possession of a prohibited weapon contrary to a weapons prohibition order is appropriate and refers to the comparative example of the Firearms Act having consistent maximum penalties (paragraph 3.35).

The NSWPF note the following for consideration in this context:

If it is accepted that the essence of the offence for possession or use of a prohibited weapon in contravention of a weapons prohibition order is the contravention itself, then the maximum penalty is appropriate as an additional charge under section 7 of the Weapons Prohibition Act would not be precluded. If this is not the case, then the penalty for contravening the weapons prohibition order should be at least equal to the penalty for the possession of a prohibited weapon.

By comparison, the wording of section 74 of the Firearms Act makes it is less likely that police could proceed with both a possession offence under section 7A and a breach offence under section 74 of the Firearms Act, as the possession offence is wholly subsumed within the offence under section 74 of the Firearms Act.

The intent of the weapons prohibition order is to prohibit a person being in possession of a weapon due to their known criminal history. Non-compliance should attract an equal or higher penalty to the original offending behaviour. Community risk of an offender in possession of a prohibited weapon and subject to a weapons prohibition order is higher than for an offender who is not.

Separate penalties for prohibited persons

Possession offences in the Victorian legislation are subdivided into whether possession is by a 'prohibited' or 'non-prohibited' person, as outlined at paragraphs 3.55 to 3.57. The status of a 'prohibited' person is given to someone who automatically meets criteria under the legislation.

The NSWPF views that a similar provision in NSW would provide a greater deterrent against repeat offending. We suggest the criterion for a person to be a 'prohibited' person would include most of the grounds contained within section 11(5) of the Firearms Act. These are the grounds on which the Commissioner of Police must not issue a firearms licence.

Subsequent offences

As with increasing penalties for 'prohibited persons', consideration should be given to increasing the maximum penalties for second or subsequent offences. The maximum penalties for repeat offenders or offences committed by prohibited persons could be 10 years' imprisonment for offences involving a firearm other than a pistol or prohibited firearm, and 20 years' imprisonment for offences that involve a pistol or prohibited firearm. This would be



consistent with the aggravated circumstance offences contained within section 51D of the Firearms Act.

Alternatively, noting that if a person the subject of a firearm prohibition order acquires, possesses or uses a firearm, they face a maximum penalty of 14 years' imprisonment (for a pistol or prohibited firearm) or 5 years' imprisonment in any other case – for any prohibited person (regardless of what the firearm is) the maximum penalty of 14 years' imprisonment could apply. An aggravation offence for any further breaches could be considered to increase the maximum penalty should the offending continue.

Minimum or mandatory sentences for firearm offences

The NSWPF recognises concerns about the current penalties for firearms offences that have led to suggestions for imposing minimum or mandatory sentences.

We view that minimum or mandatory sentences for certain offences, such as using a firearm in an offence or act of violence and repeat offending, could warrant consideration. The Queensland legislation referred to in the consultation paper (paragraph 3.65) serves as a useful guide for additional circumstances where minimum sentences could be considered.

In the alternative, the NSWPF recommends sentencing guidelines be amended to better reflect the seriousness of firearms related offending, while preserving judicial discretion in the circumstances.

Imitation firearms

For the purposes of the firearms regulatory regime, an imitation firearm is taken to be a firearm, and an imitation prohibited firearm is taken to be a prohibited firearm. The NSWPF does not support any reduction in sentences for offences relating to imitation firearms within the definition of section 4D of the Firearms Act.

Consistent with the commitment to the National Firearms Agreement, NSW has also adopted a strong position on the control of imitation firearms. Even where an imitation firearm is not capable of causing physical injury itself, it may still be used in connection with criminal activities and therefore pose a genuine risk to public safety. Unless a person can demonstrate why they have a genuine reason for the possession of such an item, the NSW Government currently considers that such possession should remain prohibited without an appropriate permit.

Judicial officers have discretion to impose appropriate sentences that reflect the seriousness of a particular offender's actions. Should these penalties reduce, the discretion becomes significantly limited and the severity of possessing an item that looks like a functioning firearm and capable of causing significant injury through use is curtailed, leading to a reduced deterrence effect.

Gel blasters

We note the increasing prevalence of gel blasters and the differing legislative approach to possession and use of gel blasters between states and territories may be problematic. A person can lawfully purchase a firearm in Coolangatta, Queensland and then cross the NSW border to Tweed Heads and be charged with firearm possession. The current penalties and consequences for possession of a gel blaster in NSW is the same as for possession of a firearm or prohibited firearm, being a maximum penalty of 5 years' imprisonment or 14 years' imprisonment respectively.



The NSWPF is of the view that legislative reform regarding recreational use of gel blasters could be considered in NSW to address stakeholder concerns regarding the severity of consequences for possession and use, given the lower level of risk they present.

The circumstances surrounding the appearance and use of a gel blaster in the commission of an offence, an act of violence or for intimidation purposes should be treated in line with current sentencing.

Chapter 4 - Standard non-parole periods

We have reviewed the content on standard non-parole periods and have no significant concerns for consideration in the Review.

As mentioned earlier in this submission, the offence of unauthorised manufacture pistol or prohibited firearm contained in section 50A(2) of the Firearms Act should be included with consideration of providing a standard non-parole period for this offence. It is an offence which is strictly indictable, carries a maximum penalty of 20 years' imprisonment, and involves risk of serious consequences to the community.

The consultation paper also references the ODPD observation regarding inconsistencies between similar offences within the Firearms Act not all having a standard non-parole period and we agree with this point.

Chapter 5 - Sentencing principles and factors

Aggravating factors and mitigating factors

We have reviewed the aggravating and mitigating factors contained within the consultation paper as cited from the *Crimes (Sentencing Procedure) Act 1999* and find the circumstances listed as sufficient. We have no additional suggestions in this regard.

Guideline judgement for armed robbery: *R v Henry*

We have no concerns with the application of *R v Henry* to offences under section 97(1) of the *Crimes Act 1900* and consider it an appropriate assessment. There will always be variables in any given factual circumstance.

The consultation paper further poses the question as to whether there is a need for any new guideline judgements in relation to weapons offences. We consider that *R v Henry* factors should be used to assess the seriousness of any weapons offence, including factors such as the nature of the weapon, vulnerability of the victim, planning and impulsiveness, intensity of threat and use of force, number of offenders, proceeds taken and effect on the victim.

Chapter 6 - Other issues

Knife offences under the Summary Offences Act

The *Criminal Legislation Amendment (Knife Crime) Act 2023* has commenced and doubles the maximum penalty for the offences of possession of a knife in a public place or school, and for using or carrying a knife in a public place or school (previously sections 11C and 11E of the *Summary Offences Act 1988* (Summary Offences Act)).

The Prosecutors' round table discussed whether the offences under sections 11D and 11F of the Summary Offences Act should also be indictable offences. The NSWPF view is that consideration should be given to making offences currently contained in sections 11D and 11F of the Summary Offences Act as table 1 indictable offences.



We note the conduct applicable to sections 11D and 11F of the Summary Offences Act is potentially equivalent to a person who aids and abets the commission of a minor indictable offence per section 351 of the *Crimes Act 1900*, which states:

351 Trial and punishment of abettors of minor indictable offences

Any person who aids, abets, counsels, or procures, the commission of a minor indictable offence, whether the same is an offence at Common Law or by any statute, may be proceeded against and convicted together with or before or after the conviction of the principal offender and may be indicted, convicted, and punished as a principal offender.

Penalty notices for subsequent custody of knife offences

The NSWPF considers that penalty notices should not be available for second and subsequent knife offences. The new knife offences contained within the *Crimes Act 1900*, as introduced by the *Criminal Legislation Amendment (Knife Crime) Act 2023*, recognise the seriousness of knife offending and carry penalties of up to 4 years' imprisonment as table 1 offences. Schedule 4 of the Criminal Procedure Regulation 2017 excludes penalty notices being issued in cases where the person has previously been dealt with for a previous knife related offence. Additionally, we note the offence previously referred to as wielding a knife in a public place or school is not a penalty notice offence, even for a first offence.

Penalty notice offences for prohibited weapons

The Weapons Prohibition Act and Weapons Prohibition Regulation 2017 have 14 fine-only offences for prohibited weapons which are outlined in *Table 6.1 Penalty notice offences for prohibited weapons* of the consultation paper. We have reviewed this table and have no objection to penalty notices being an option for these fine only offences.

Contact: