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11 December 2023

The Hon Peter McClellan AM KC
Chair of the NSW Sentencing Council
Locked Bag 5000
Parramatta NSW 2124

By email: sentencingcouncil@dcj.nsw.gov.au

Dear Mr McClellan,

Firearms, knives and other weapons offences

1. The New South Wales Bar Association (the Association) thanks the NSW Sentencing Council (the Sentencing Council) for the opportunity to respond to its Consultation Paper 'weapons-related offences: sentencing adult offenders' (the Consultation Paper) and Issues Paper 'weapons-related offences: sentencing young offenders' (the Issues Paper).

Introduction

2. As observed in the Issues Paper, rates of violent crimes involving knives or firearms have been declining over the past 20 years for both those under 18 and adults.¹ Data from the NSW Bureau of Crime Statistics and Research indicates that the number of murders, attempted murders, assaults and robberies involving knives or firearms were lower in the year to March 2023 than in almost any other year in the past two decades.²
3. While the Association acknowledges the harm of weapons-related offending and community concern arising from recent high-profile knife-related incidents in NSW, it is crucial that any reform to the sentencing laws takes into account these broader trends and reduces, rather than increases, unnecessary interaction of lower level offenders, including children and young people, with the criminal justice system. When assessing the appropriateness of a maximum penalty it is important to consider the seriousness of the offence, including the various conduct captured by the offence; the maximum penalties of comparable offences; and any clear evidence that current maximum penalties are inadequate.
4. Any reform should also consider broader issues including the high rates of incarceration of First Nations people and the NSW Government commitment to Closing the Gap, the cost of imprisonment, and whether prosecution and imprisonment is an effective means of reducing reoffending and rehabilitating offenders.

¹ See Sentencing Council, 'Weapons-related offences: sentencing young offenders', Issues Paper, 2023, figure 4.1 (knives) and figure 4.2 (firearms).

² NSW Bureau of Crime Statistics and Research, 'Offences involving weapons', March 2023, available at https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/weapons.aspx

5. In this context, the Association submits that increasing current maximum penalties in relation to firearms, knives, and other weapons offences is neither necessary nor justified.
6. In summary, the Association's positions in relation to the Sentencing Council's proposals are that it:
 - a. does not support increased maximum penalties or the introduction of mandatory minimum sentences;
 - b. supports the introduction of a tiered maximum penalty regime for possession or use of a prohibited weapon, and possession or use of a prohibited weapon in contravention of a weapons prohibition order, under sections 7 and 34 of the *Weapons Prohibition Act 1998* (NSW) respectively;
 - c. does not support increased maximum penalties for 'prohibited persons';
 - d. recommends that gel blasters be removed from the definition of 'firearm' under the *Firearms Act 1996* (NSW) and submits that it should not be assumed that gel blasters require incorporation within the *Paintball Act 2018* (NSW) or any other regulatory regime;
 - e. recommends that the SNPP for the offence of unauthorised possession or use of a prohibited weapon in section 7(1) of the *Weapons Prohibition Act 1998* (NSW) be abolished or reduced, and does not otherwise support expansion of the Standard Non-Parole Period Scheme in respect of firearms and weapons offences;
 - f. supports increased diversionary opportunities for children and young people involved in weapons related crime, more restorative justice programs, targeted rehabilitation and diversion programmes, and wraparound supports; and
 - g. opposes knife crime prevention orders or random scanning/wandering of individuals by NSW Police officers in designated areas.

Maximum Penalties

Possession or Use of a Prohibited Weapon

7. Section 7 of the *Weapons Prohibition Act 1998* (NSW) provides for a maximum penalty of 14 years' imprisonment for the offence of unauthorised possession or use of a prohibited weapon. The Association agrees with the concerns raised by stakeholders that it is inappropriate to have a single maximum penalty which applies to a broad range of conduct. We consider that this maximum penalty should be confined to the most serious military-style prohibited weapons. A significantly lower maximum penalty should be introduced for the possession or use of the remaining, less serious, prohibited weapons.
8. The list of prohibited weapons in Schedule 1 of the *Weapons Prohibition Act 1998* (NSW) includes a wide range of different weapons in terms of function and capacity to cause harm. For example, prohibited weapons include small knives, yet also include military-style weapons such as rockets. Coverage of such a wide variety of weapons by a single possession or use offence raises obstacles in sentencing when assessing objective seriousness and ensuring consistent sentencing results.
9. The case for a lower maximum penalty for non-military-style prohibited weapons is also made when considering the sentencing statistics for these matters in the Local Court and District Court, as set out at paragraphs 3.22 - 3.24 of the Consultation Paper. The statistics indicate that there is a

low average non-parole period of five months for an offence that carries a maximum penalty of 14 years' imprisonment, showing the practical appropriateness of a lower level maximum penalty for this category of offending.

10. A two-tiered sentencing approach would address the risk of potentially unfair and disproportionate sentences in relation to low level offending.
11. Differentiating between military-style weapons which are capable of causing widespread harm and other prohibited weapons by creating separate maximum penalties for each would clearly delineate between the objective seriousness of the two categories of prohibited weapons. The current maximum penalty of 14 years would be reserved for the most serious category of prohibited weapons and a lesser maximum penalty would be reserved for all other prohibited weapons.
12. The sale and manufacture of "military-style weapons" is delineated from the sale and manufacture of prohibited weapons generally. The former are subject to a higher maximum penalty of 20 years' imprisonment and the latter being subject to a lower maximum penalty of 14 years' imprisonment. It is not suggested that a higher maximum penalty of 20 years imprisonment be imposed for the possession or use of a military style prohibited weapon. It would be appropriate, given that the offence is one of possession or use, that the current maximum penalty for possession or use of a prohibited weapon be retained for possessing or using this objectively more serious category of prohibited weapons.

Possession or use in breach of a Weapons Prohibition Order

13. In relation to the maximum penalty of 10 years' imprisonment for possession or use of a prohibited weapon in contravention of a weapons prohibition order, it is acknowledged that this maximum penalty is currently lower than the maximum penalty of 14 years' imprisonment for possession or use of a prohibited weapon.
14. Assuming the adoption of the Association's recommendation that two different maximum penalties apply to the offence of unauthorised possession or use of a prohibited weapon, the offence for possession or use of a prohibited weapon in contravention of a weapons prohibition order should also be amended accordingly. That is, the offence for possession or use of a prohibited weapon in contravention of a weapons prohibition order should also have two different maximum penalties. The higher maximum penalty would apply to offences involving the more serious military-style prohibited weapons in Schedule 1 of the *Weapons Prohibition Act 1998* (NSW) and the lower maximum penalty would apply to the remaining less serious prohibited weapons in Schedule 1. The exact maximum penalties should be determined in light of the two maximum penalties set for the offence of unauthorised possession or use of a prohibited weapon.

Prohibited Persons

15. In relation to increased maximum penalties for 'prohibited persons', it is not apparent why this would be a necessary step to take and what persons would be considered 'prohibited' for the purposes of any increased maximum penalties. While the Victorian *Firearms Act 1996* has increasing penalties for 'prohibited persons', there is no available data that we are aware of as to the reasoning and efficacy of increasing maximum penalties based on categorisation of persons. It would also

appear to be unnecessary in light of the existing firearms prohibition order scheme in NSW and restrictions on possession of firearms by respondents to Apprehended Violence Orders under the NSW *Crimes (Domestic and Personal) Violence Act 1997* (NSW).³

Subsequent Firearms Offences

16. The Association does not support increased maximum penalties for subsequent offences of firearm possession. There is ample evidence that the impact of increasing the severity of penalties on deterrence is limited; the maximum deterrent value is found in the risk of apprehension and conviction. Further, we are not aware of any data which supports the conclusion that increased maximum penalties for subsequent offences of unauthorised firearm possession has an effect on deterring recidivist offenders. NSW already carries some of the highest penalties for unauthorised firearm possession in Australia, which is of sufficient deterrent value. Research has suggested that legislative approaches play a 'subsidiary role in reducing ... weapon possession and carriage' and more research is needed to document any correlation between increased sentences and the incidence of knife crime in a particular area.⁴
17. It is also noted that section 21A(2)(d) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that it is an aggravating factor on sentence if "the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences)".

Mandatory Sentencing

18. The Association strongly opposes the introduction of mandatory sentences, including for any firearm offences. Such an approach inappropriately undermines judicial discretion and can lead to arbitrary and unjust results.
19. The Association refers to the Mandatory Sentencing Policy Discussion Paper published by the Law Council of Australia in May 2014.⁵ The Law Council concluded that mandatory sentencing:
 - a. potentially results in unjust, harsh and disproportionate sentences where the punishment does not fit the crime. It is not possible for Parliament to know in advance whether a minimum mandatory penalty will be just and appropriate across the full range of circumstances in which an offence may be committed. There are already numerous reported examples where mandatory sentencing has applied with anomalous or unjust results;
 - b. when adopted, fails to produce convincing evidence which demonstrates that increases in penalties for offences deter crime;

³ Under sections 85 & 86 of the *Law Enforcement (Powers and Responsibilities) Act*, a police officer who enters a home to investigate a domestic violence offence must ask if there are firearms on the premises. If there are, the officer must take all reasonable action to search for and seize them. Note also the recommendations made by the NSW State Coroner, Teresa O'Sullivan, following the Edwards coronial inquest.

⁴ Lorana Bartels, "'Knife crime' in Australia: Incidence, aetiology and responses", Australian Institute of Criminology, 2011, p 35.

⁵ Law Council of Australia, 'Policy Discussion Paper - Mandatory Sentencing', May 2014, available at: <https://lawcouncil.au/resources/policies-and-guidelines/policy-discussion-paper-mandatory-sentencing>

- c. potentially increases the likelihood of recidivism because prisoners are placed in a learning environment for crime, which reinforces criminal identity and fails to address the underlying causes of crime;
 - d. provides short to medium term incapacitation of offenders without regard for rehabilitation prospects and the likelihood of prisoners reoffending once released back into the community;
 - e. wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole. In-depth research demonstrates that when members of the public are fully informed about the particular circumstances of the case and the offender, 90 per cent view judges' sentences as appropriate;
 - f. displaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing;
 - g. results in significant economic costs to the community, both in terms of increasing incarceration rates and increasing the burden upon the already under-resourced criminal justice system, without sufficient evidence to suggest a commensurate reduction in crime; and
 - h. is inconsistent with Australia's international obligations, including:
 - i. the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR);
 - ii. the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR; and
 - iii. key obligations concerning children under Articles 3, 37 and 40 of the Convention on the Rights of the Child.
20. The Association endorses the Law Council's findings, which support and inform the Association's concerns about the introduction of mandatory sentencing in relation to weapons and firearms offences.
21. The Association's primary objection to such laws is that they remove judicial sentencing discretion, with the consequence that the actual circumstances of the offence and the offender will not be considered on sentence. Given the myriad of factual circumstances in which a firearms offence may occur and the potential individual circumstances of offenders, mandatory sentencing will inevitably lead to unjust outcomes.
22. Offenders often do not rationally consider the consequences of their offending. It is not likely that a mandatory sentence will provide for a more effective deterrent beyond the current serious maximum penalties.
23. Mandatory sentencing would also undermine the objectives of the 2018 Early Appropriate Guilty Plea reforms. There is no incentive to plead guilty where an offender is facing the same penalty regardless of the timing or nature of their plea. Accused persons charged with a firearms offence will likely defend the charge, resulting in expensive trials and unnecessary distress for alleged victims and witnesses and their families.

Gel Blasters

24. Gel blasters propel hydrated gel pellets through a mechanism involving a spring or compressed air. Although gel blasters have a much lower risk of harm and are likely to be considered by many as children's toys, they are classified as firearms in NSW under the *Firearms Act 1996* (NSW).⁶ It is an offence to possess or use a firearm, pistol, or prohibited firearm without a licence or permit.⁷ Gel blasters fall within the definition of an airgun, and are therefore firearms, and may also be classified as pistols or imitation firearms.⁸ No genuine reason exists to possess or use a gel blaster in NSW therefore, an individual cannot obtain a firearms licence for a gel blaster.⁹ Consequently, an individual cannot obtain a Permit to Acquire¹⁰ or register¹¹ a gel blaster. It is an offence to supply, acquire, or use a firearm that is not registered.¹²
25. Depending upon whether a gel blaster is classified as a pistol, the maximum penalties for possession of a gel blaster range from 5 to 14 years' imprisonment.¹³ If a gel blaster is classified as a pistol, the higher maximum penalty of 14 years' imprisonment applies.¹⁴ Possession of more than three gel blasters (if one of which is a pistol or prohibited firearm) is a strictly indictable offence under to section 51D(2) of the *Firearms Act 1996* (NSW) and subject to a maximum penalty of imprisonment for 20 years.
26. In contrast to NSW, gel blasters are not criminalised or subject to licensing requirements across the border in Queensland.¹⁵ However, the Queensland government has recently announced their intention to prohibit the sale of certain replica firearms (including gel blasters) to juveniles.¹⁶ Gel blasters are marketed as toys and are readily available online. Gel blasters can differ dramatically in shape and form. Some remain in boxes displaying children playing with them, while others are used on properties as toys and for recreation. Replacement pellets for gel blaster pellets can be readily purchased online and at various large stores.
27. The Association submits that the maximum penalties for the possession of gel blasters in NSW are disproportionate and that gel blasters should be removed from the definition of 'firearm' under the *Firearms Act 1996* (NSW). The need for reform was highlighted by Judge Paul Conlon SC ADCJ in *R v Smith* [2023] NSWDC 88 at [19]:

In my view there is urgent need for Parliament to review the situation in respect of gel blasters and if it is considered they should remain illegal in NSW, they should be placed into a category of their own with appropriate penalties (including fines).

⁶ *R v Smith* [2023] NSWDC 88 at [9], [16] - [19]; In *R v Lucas* [2023] NSWSC 1357 an offence of possession of a gel blaster in contravention of section 7A(1) of the *Firearms Act 1996* (NSW) was dealt with under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The Crown did not take issue with this approach.

⁷ Sections 7, 7A(1) of the *Firearms Act 1996* (NSW).

⁸ See: *R v Zerafa* [2021] NSWDC 547 at [12] and *R v Smith* [2023] NSWDC 88 at [9], [18], and [20] - [22].

⁹ Section 12, *Firearms Act 1996* (NSW).

¹⁰ Section 31(1), *Firearms Act 1996* (NSW).

¹¹ Section 34(3), *Firearms Act 1996* (NSW).

¹² Section 36(1), *Firearms Act 1996* (NSW).

¹³ Sections 7, 7A(1) of the *Firearms Act 1996* (NSW).

¹⁴ Sections 7, 7A(1), *Firearms Act 1996* (NSW).

¹⁵ *R v Smith* [2023] NSWDC 88 at [10].

¹⁶ The Honourable Mark Ryan, 'New laws to restrict the sale of knives and replica gel blasters to juveniles to enhance community safety', Media Release, 5 November 2023.

28. The Association submits that if gel blasters are removed from the definition of ‘firearm’ in the *Firearms Act 1996* (NSW), it should not be assumed that gel blasters require incorporation within the *Paintball Act 2018* (NSW) or any other regulatory regime. Expert evidence in *R v Smith* [2023] NSWDC 88 indicated that a paintball marker’s impact force is 14 times higher than the gel blaster.¹⁷ Therefore, it may not be proportionate or appropriate to require the use of gel blasters at certain venues¹⁸ or require a permit to possess a gel blaster outside certain venues¹⁹, as is the case in relation to paintball markers. Children should not be criminalised for pursuing recreation involving what should be considered a children’s toy. The approach adopted by Queensland should be considered more favourably because it is more proportionate to the actual risks involved.
29. If gel blasters are removed from the definition of ‘firearm’ in the *Firearms Act 1996* (NSW), and it is determined that gel blasters require certain regulatory controls, only then should consideration be given to incorporating gel blasters within the *Paintball Act 2018* (NSW), with appropriate adjustments, or within another regulatory regime outside the *Firearms Act 1996* (NSW).²⁰ The *Paintball Act 2018* (NSW) does provide for more proportionate maximum penalties. For example, the maximum penalty for possessing a paintball marker without a permit (other than at an authorised paintball venue), is 12 months’ imprisonment or 200 penalty units or both.²¹
30. Gel blasters can and should still be considered to be an ‘offensive weapon or instrument’ for the purpose of relevant criminal offences within the *Crimes Act 1900* (NSW).²² This was the approach adopted in relation to paintball markers.²³ As noted by the Office of the Director of Public Prosecutions, if gel blasters were removed from the definition of ‘firearm’ under the *Firearms Act 1996* (NSW) but a particular gel blaster substantially duplicated in appearance a firearm and was not produced and identified as a children’s toy, it may qualify as an ‘imitation firearm’, which would be a ‘dangerous weapon’ under the *Crimes Act 1900* (NSW).²⁴ It is also noted that section 21A(2)(c) of the *Crimes (Sentencing Procedures) Act 1999* (NSW) provides that if an offence ‘involved the actual or threatened use of a weapon’, that is an aggravating factor to be taken into account on sentence.
31. Regardless of the reform approach ultimately recommended by the Sentencing Council, public education campaigns via schools, social media and PCYCs regarding the legality of possession and use of gel blasters, particularly in regional NSW and the Far North Coast and to Queensland retailers will be critical in preventing the unnecessary criminalisation of young people and their parents.

¹⁷ *R v Smith* [2023] NSWDC 88 at [16].

¹⁸ See: Section 5, *Paintball Act 2018* (NSW).

¹⁹ See: Section 6, *Paintball Act 2018* (NSW).

²⁰ It is noted that the June 2022 report of the Statutory Review into the *Paint Ball Act 2018* states that there were a large number of submissions calling for gel blasters to be regulated in the same fashion as paintball markers. However, the review did not make a recommendation in relation to this issue as it was a matter for the NSW Police Force and beyond the scope of the review.

²¹ Section 6, *Paintball Act 2018* (NSW).

²² See *R v Gagnuss* [2023] NSWDC 265 per Haesler J at [16].

²³ See section 4(7A), *Crimes Act 1900* (NSW).

²⁴ See section 4D, *Firearms Act 1996* (NSW); Office of the Director of Public Prosecutions, Preliminary Submission, Sentencing Council review of sentencing for firearms, knives and other weapons offences, p 3.

Standard Non-Parole Periods

32. The Association does not generally support the Standard Non-Parole Period (**SNPP**) scheme, and does not support expansion of the scheme in respect of firearms and weapons offences. While noting that maximum penalties and SNPPs are legislative guideposts²⁵, it is important to guard against the undermining of judicial discretion in the sentencing of offenders, which is essential to individualised justice. The answers provided below to particular issues assume the retention of the SNPP scheme.

Principles

33. The Association considers that the principles set out in the Consultation Paper are mostly appropriate for determining whether weapons offences should be included in, retained, or removed from the SNPP scheme. However, a cautious approach should be adopted when considering the prevalence or frequency of offending. The most prevalent offences are minor offences, which are summary weapons offences. The prevalence or frequency of offending does not necessarily reflect the potential harm caused by an offence, the extent of community concern about an offence, or the adequacy of sentences imposed.

Similar Offences

34. The offence of unauthorised possession or use of a pistol or prohibited firearm in section 7 of the *Firearms Act 1996* (NSW) has a maximum penalty of 14 years' imprisonment and a SNPP of 4 years.²⁶ However, the Consultation Paper highlights similar offences in the *Firearms Act 1996* (NSW) that also carry a maximum penalty of 14 years' imprisonment but do not have a SNPP. These offences include:
- a. The offence of supplying, acquiring, possessing, or using an unregistered pistol or prohibited firearm (s 36(1));
 - b. The offence of acquiring, possessing, or using a pistol or prohibited firearm in contravention of a firearms prohibition order (s 74(1));
 - c. The offence of shortening a firearm, or possessing or supplying a shortened firearm (s 62(1)).
35. Although it is acknowledged that there are inconsistencies in relation to the application of the SNPPs, this is not, in and of itself, sufficient justification for the expansion of the SNPP scheme. The maximum penalty for these offences indicates that the legislature considers these offences to be serious offences; however, this fact alone does not provide a sufficient justification to add these offences to the SNPP scheme.
36. In relation to the offence of supplying, acquiring, possessing, or using an unregistered pistol or prohibited firearm (section 36(1)), this offence currently covers a wide range of criminal conduct and applying a SNPP to this offence would therefore be inappropriate. Similarly, the offence in s 62(1) criminalises the very act of shortening a firearm as well as possessing and supplying a shortened firearm, encompassing very different levels of criminal conduct and culpability.

²⁵ *Muldrock v The Queen* [2011] HCA 39 at [27].

²⁶ Item 20, Table of Standard Non-Parole Periods, *Crimes (Sentencing Procedure) Act 1999* (NSW).

Offence of unauthorised possession or use of prohibited weapon

37. The SNPP for the offence of unauthorised possession or use of prohibited weapon provided for in section 7(1) of the *Weapons Prohibition Act 1998* (NSW) should be abolished, or in the alternative, reduced from 5 to 3 years. The SNPP for the equivalent offence of unauthorised possession of a pistol or prohibited firearm is 4 years. A lower SNPP for the s 7(1) offence, or the abolition of the SNPP altogether, reflects the very wide variety of weapons in the non-military categories of prohibited weapons which make the application of a SNPP very difficult. As is noted in the Consultation Paper, difficulty in assessing what type of offending would be in the mid-range of objective seriousness for the purposes of determining an appropriate SNPP has been judicially noted.²⁷ It is noted that reform to the SNPP in relation to this offence will depend on the approach ultimately taken to the underlying maximum penalty in light of the concerns raised in paragraphs 7 – 12 above.

Sentencing Principles and Factors

38. The Association does not consider a new guideline judgment in relation to weapons offences is required given the range and variety of possible circumstances involved in the commission of such offences.

Other Issues

Criminal Legislation Amendment (Knife Crimes) Act 2023

39. The Association did not support the Criminal Legislation Amendment (Knife Crimes) Bill 2023, which passed the NSW Parliament on 29 June 2023.

40. The new offences in sections 93IB and 93IC of the *Crimes Act 1900* (NSW) have maximum penalties of four years' imprisonment, which is double the previous maximum penalties under sections 11C and 11E of the *Summary Offences Act 1988* (NSW). New offences should not be created without compelling reasons. While the Association acknowledges that knife-related crimes are unacceptable, there is no empirical evidence to suggest that instances of knife-related crimes are rising. As noted at the outset, the evidence suggests otherwise.

41. These reforms will disproportionately affect Indigenous young people. They may also negatively impact Aboriginal and Torres Strait Islander adults, vulnerable itinerant persons, and individuals with cognitive and mental health impairment.

Summary offences being made indictable

42. The Association strongly opposes any current summary knife offences being made indictable. This would unnecessarily criminalise farm workers and gardeners in regional areas and would disproportionately impact vulnerable people, including homeless people. Knives are often carried by homeless people to prepare food and maintain shelter and these individuals have insufficient means to legally defend themselves. Inserting 'homelessness' as a reasonable excuse within section 93IB of the *Crimes Act 1900* (NSW) should be considered to address these circumstances.

²⁷ See, for example: *Jacob v R* [2014] NSWCCA 65 [181]-[185].

Penalty notice offences

43. Any expansion of the number of penalty notice offences needs to be carefully considered. Penalty notices have many advantages including reducing costs for the justice system; providing an immediate and certain penalty, which is lower than the maximum penalty; and allowing a recipient to avoid a criminal record.²⁸ However, a fixed financial penalty will have a different impact depending upon a person's ability to pay the penalty.²⁹ A person on a low income may accumulate multiple penalty notices, which undermines their ability to pay for basic necessities and care for dependants leading to more crime and continuing disadvantage.³⁰
44. That said, the Association agrees, in response to Question 6.3(2), that penalty notices should be available for second or subsequent custody of knife offences in circumstances where the person's only previous knife-related offence is custody of knife and/or offensive implement. Those that have committed a violent knife offence should not be eligible.

Sentencing of Young Offenders

45. The Association strongly supports the diversion of juvenile offenders from the criminal justice system to community support services as the optimal response to the problem of juvenile crime, including weapons-related offending. As noted in the Issues Paper, diversion assists children and young people to gain insight into their offending conduct and the impact it has on others and the community. Diversion avoids sanctions which are overtly punitive and the stigma associated with prosecution and conviction. Diversion also allows a first minor offender to avoid contact with serious or recidivist offenders.
46. Diversion is an important aspect of many juvenile justice systems throughout the world, consistent with the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) which provide that consideration should be given to dealing with juvenile offenders without resorting to formal trial.³¹
47. The Association's firm position is that raising the age of criminal responsibility from 10 to 14 would be single most beneficial reform. Children who have contact with police, courts, and jails are more likely to reoffend and commit crimes as adults. First Nations children in particular are significantly overrepresented in the criminal justice system. The consensus within the medical community is that a child's brain has not properly developed at the ages of 10-14.
48. The Association supports the greater use of restorative justice programs, targeted rehabilitation and diversion programmes and wraparound supports for children at risk of offending as effective therapeutic based alternatives to formal criminal justice interventions. Key findings of a recent UK review into knife crime include that increases in knife crime have, in part, been driven by austerity and cuts to preventive services.³²

²⁸ NSW Law Reform Commission, 'Penalty Notices – Report 132', 2012, p xv.

²⁹ Ibid, pp 316-318.

³⁰ Ibid.

³¹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Adopted by General Assembly resolution 40/33 of 29 November 1985, 11.1

³² Her Majesty's Inspectorate of Probation, Promising Approaches to Knife Crime: An Exploratory Study, Research and Analysis Bulletin 2022/03 (2022) 24–26.

49. Youth and adolescent mental health issues can be extremely complex, emerging in young adults or short lived. If a young offender who has mental health issues commits a weapon-related crime, then all attempts should be made to divert the child into supportive health related care.
50. When considering weapons-related crime in particular, it is important to consider both the underlying reasons why the child may carry a weapon and the type of weapon; the characteristics of offenders and overall sentencing trends.
51. On the last issue, as previously noted, the number of violent incidents involving children and knives has reduced significantly. The Association agrees with Youth Justice NSW that the data would seem to indicate at least with respect to young people that there is no basis for increasing the severity of sentencing for crimes involving firearms and weapons given the low numbers and downward trends for young people and the recidivist impact of a control order on a young person.³³
52. First Nations children and young people are already significantly overrepresented in court appearances for weapons-related offending.³⁴ The latest BOCSAR figures from June 2023 show that Aboriginal young people represent 58.9% of the juvenile detention population in NSW and that the numbers of Aboriginal young people in remand increased by a staggering 95.2% from June 2021 to June 2023, with receptions rising by 41%.³⁵
53. This is despite Closing the Gap targets to reduce the incarceration rate of Aboriginal children by at least 30%.

Children and Gel Blasters

54. The Association's concerns about the current legislative approach to gel blasters are amplified in relation to children and young people. Gel blasters are deliberately marketed to children as toys, and children do not understand the reason why they may be committing a serious offence by possessing one or more gel blasters. Advertisements online demonstrate that they are easily ordered and purchased online from stores within Australia.³⁶
55. A weapons related offence on a record can have life-long consequences, and where the "weapon" is a gel blaster, and mistaken as a toy, that impact far outweighs the criminality as represented in a criminal record.
56. For these reasons, it is important gel blasters are removed from the definition of 'firearm' under the *Firearms Act 1996* (NSW) and that children are excluded, or able to be diverted, in relation to remaining criminal offences involving the possession or use of a gel blaster / imitation firearm. At a minimum, such offences should be available for diversion under the *Young Offenders Act 1997* (NSW).

³³ Sentencing Council, 'Weapons-related offences: sentencing young offenders', Issues Paper, 2023, at [4.13].

³⁴ Ibid, at [4.31].

³⁵ NSW Bureau of Crime Statistics and Research, 'Aboriginal over-representation in the NSW Criminal Justice System', June 2023, available at: https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Aboriginal-over-representation.aspx

³⁶ See, for example: <https://www.tactoy.com.au>; and <https://x-forcetactical.com.au>

Over-Policing

57. When assessing the impact of the criminal justice system on young people, there needs to be an awareness of the range of measures utilised by law enforcement. In addition to any immediate criminal penalties, a young person may be the subject of a Weapons Prohibition Order or a Firearms Prohibition Order, which increases the risk that the young person will be further exposed to the criminal justice system. The imposition of such orders leads to the over-policing of children and their families. Firearms Prohibition Orders enable extensive personal and property search powers and this, in and of itself, is a form of punishment of young persons. A diversionary approach will lessen the potential trauma and other negative effects associated with young people having continuing contact with police and the criminal justice system.

Sentencing Principles and Factors

Mandatory Minimums

58. The Association's previously expressed concerns in respect of mandatory minimum sentences are amplified in the context of children and young people. Such reform would violate Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on the Rights of the Child (**CROC**) and risks perverse, harsh and discriminatory outcomes.

Knife crime prevention orders

59. The Association would not support the introduction of a knife crime prevention order scheme in NSW. It is neither necessary or justified. NSW already has a scheme of Weapons Prohibition Orders largely similar to the proposed prevention orders. Secondly, the Association is not aware of any evidence that such an order will have any impact in reducing knife crime. On the contrary, young people as a cohort are the least likely to be deterred by such orders and increase the risk of children entering the criminal justice system and subsequent adult offending, ultimately undermining community safety.
60. Lastly, such orders would disproportionately impact on First Nations young people who are already overpoliced and subject to discriminatory policing practices, as evidenced by the following:
- a. the significantly higher rates of prosecution (as opposed to cautioning) of First Nations young people. By age 17, 40.7% of young First Nations offenders are prosecuted (as opposed to cautioned), compared with 16.9% of young non-First Nations offenders. The probability of a First Nations young person being cautioned rather than prosecuted is approximately half that of a young non-First Nations person.³⁷
 - b. the grossly disproportionate application of NSW consorting laws to First Nations peoples. Between February 2019 and February 2022, 42% of people subjected to consorting laws

³⁷ Don Weatherburn and Brendan Thomas, 'The influence of Indigenous status on the issue of police cautions', *Journal of Criminology* (2022) Vol 56(2)-(3) 1-25.

under Part 3A Division 7 *Crimes Act 1900* (NSW) were First Nations. Of the 48 young people issued with a warning for consorting, 12 were First Nations.³⁸

- c. The gross over-representation of young Aboriginal people selected for targeting by police - 48% of the total cohort - in the recently discontinued STMP and the resulting overuse of overt and intrusive policing tactics applied by the NSW Police Force resulting in unreasonable surveillance and monitoring of young people, as highlighted by the recent Law Enforcement Conduct Commission Report *Operation Telipo*.³⁹

61. These concerns are also borne out by troubling evidence cited at paragraph 6.30 of the Issues Paper that knife crime prevention orders in the UK have been “disproportionality employed to regulate the behaviour of ‘difficult’ populations”, such as “black children” and where 57% of such orders were made against “black” people.

Penalty notices

62. While the Association acknowledges that penalty notices may be a more appropriate way to deal with low level offending by young people than prosecution, it would be inaccurate for penalty notices to be described as a form of diversion of young people from the criminal justice system. As with vulnerable adults, issuing multiple penalty notices to a young person who does not have the income or family support to pay them may result in SDRO action, loss of employment and restitution orders which prevent the young person from obtaining their drivers licence. This leads to an increased risk of crime and longer term contact with the criminal justice system. It also risks net-widening and means valuable opportunities for diversion into appropriate treatment and/or supports are wasted.
63. The Association considers a far preferable approach to these issues would be to expand diversion opportunities for young people involved in low level knife and weapons related crime including the custody of a knife offences introduced in the *Crimes Act 1900* (NSW) since 23 October 2023, noting the broad discretion available to police in s20(3) of the *Young Offenders Act 1997* (NSW) in deciding whether it is appropriate to issue a caution.
64. Should the penalty notice scheme be expanded in respect of young people, then the Association supports the safeguards recommended by the NSW Law Reform Commission’s Report 132 *Penalty Notices*.

Police powers to conduct random searches

65. The Association strongly opposes any proposed “random scanning” powers by the NSW Police. Such powers would be a concerning encroachment on civil liberties in NSW and constitute an unjustified overreach of police powers in light of the extensive search and seizure powers held by

³⁸ Law Enforcement Conduct Commission, *Review of the operation of amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900*, February 2023. Available at: <https://www.parliament.nsw.gov.au/tp/files/84070/LECC%20Consorting%20Review%20Final%20Report%20Feb%202023.pdf>.

³⁹ Law Enforcement Conduct Commission, ‘An investigation into the use of the NSW Police Force Suspect Targeting Management Plan on children and young people’, October 2023, p 24.

NSW Police under LEPPRA, in addition to powers in relation to consorting⁴⁰, serious crime prevention orders⁴¹ and public safety orders⁴².

66. Such “random scanning” would also disproportionately impact First Nations and other socio-economically disadvantaged people. We repeat our submissions at paragraph 59 above concerning biased policing practices in NSW.
67. Finally, there is also no evidence that such high-visibility police tactics are effective in reducing crime. To the contrary, the LECC Operation Telipo Report starkly demonstrated that such tactics create mistrust between the community and the police, where intergenerational mistrust of police (because of past negative experiences) is also an experience of many young Aboriginal people.⁴³

Conclusion

68. Thank you again for the opportunity to provide a submission to the Review. Should you have any questions in relation to this letter, please contact
at first instance.

Yours sincerely

Ruth Higgins SC
President

⁴⁰ See: Part 3A, Division 7, *Crimes Act 1900* (NSW)

⁴¹ See: *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW)

⁴² See: Part 6B, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)

⁴³ Law Enforcement Conduct Commission, ‘An investigation into the use of the NSW Police Force Suspect Targeting Management Plan on children and young people’, October 2023, p 46.