

24 March 2023

New South Wales Sentencing Council
GPO Box 31
Sydney NSW 2001

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

Review of sentencing for firearms, knives and weapons offences: preliminary submission

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (ALS). Thank you for the opportunity to make a preliminary submission to the NSW Sentencing Council's review of sentencing for firearms, knives and other weapons offences ('the Review').

The ALS is a proud Aboriginal community-controlled organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. The ALS currently undertakes legal work in criminal law, children's care and protection law, and family law; as well as broader work in law reform and wrap-around programs for community wellbeing. We provide this response based on our direct involvement with and representation of Aboriginal and Torres Strait Islander people who are too often forced into the quicksand of the criminal justice system.

In preparing this preliminary submission we sought feedback from ALS solicitors who appear in the local and children's court criminal law jurisdictions. This preliminary submission will focus on areas highlighted in feedback—namely, the offence of custody of a knife.

Custody of Knife Offences

Characteristics of Offenders¹

A review of ALS data between 2018 and 2022 indicates that the most common weapons offences our clients are charged with are custody of knife offences under s 11C of the *Summary Offences Act 1988*.² This is supported by anecdotal evidence from our solicitors, who indicate custody of knife charges are not only common, but also an offence in need of reform.

Under s 11C, it is an offence to have custody of a knife in a public place without reasonable excuse. Section 3 of the Act defines knife to include any blade.

Many ALS clients are charged with custody of a knife when they are found to be in possession of items such as scissors, a dart or a waiter's friend.³ These blades are small or blunt (or both). They are not capable of inflicting serious harm with ease in the way that sharper knives and blades are.

ALS solicitors have identified characteristics of offenders that are frequently charged with custody of knife:

1. Clients experiencing homelessness,
2. Women who are experiencing domestic violence,

¹ See Term of Reference 2.

² When including both first and subsequent offences (Law Part Codes 70624 and 70625, respectively).

³ A waiter's friend is a type of corkscrew with a folding design. It includes a small blade resembling a pocketknife.

3. Clients with cognitive impairment or intellectual disability,
4. Clients with mental health issues, and
5. Young people.

In many instances clients fall into two or more of the above categories. Through consultation with our solicitors, the following main groups emerged:

- Men experiencing with a cognitive impairment experiencing homelessness; and
- Young people.

Men with Cognitive Impairment experiencing Homelessness

The *Australian Institute of Health and Welfare* has previously described people experiencing homelessness as “among Australia’s most socially and economically disadvantaged”.⁴

“Custody of knife offences are so frequently seen in our practice. I have found that [they] are very often the same clients as repeat offenders.

More likely than not they are male clients (aged 35+) who often have periods of homelessness and transience. They frequently have a cognitive impairment/intellectual disability/mental health condition of some kind.

The carrying of the knife becomes a habit, and the police continually pick them up and this results in appearances before a custody court and often bail refusal.

Much of the time these clients don’t actually have a violent history to accompany the carrying of the knife.”

ALS Solicitor, Redfern office

In our experience, explanations given by clients for having custody of a ‘knife’ often correlate with their homeless status, for example having blades such as box cutters for practical purposes like cutting up ropes to make shelters or tie tarps, or cutting up cardboard to make signs. Similarly, they might possess a swiss army knife which has not only small practical implements such as knives for cutting ropes but also items such as scissors that can be used for trimming hair or nails.

While s 11C does not criminalise custody of a knife where the person has a reasonable excuse for that custody, it is often difficult for clients to defend these matters at court. In our experience some clients prefer to plead guilty to expedite the matter and avoid remaining on bail or in custody. Often clients will prefer to plead guilty rather than give evidence, generally out of a concern that their account will not be accepted. Even where matters are successfully defended on the basis of reasonable excuse, the client has often still undergone the experience of being publicly searched, stopped and possibly arrested. This can occur even where a client provided police with their reasonable excuse during pre-charge investigation, but were not believed.

Young People

ALS data indicates that 16.1% of ALS clients charged with a custody of knife offence are laid against clients under the age of 18 years. In the experience of ALS solicitors this charge often relates to the possession of scissors.

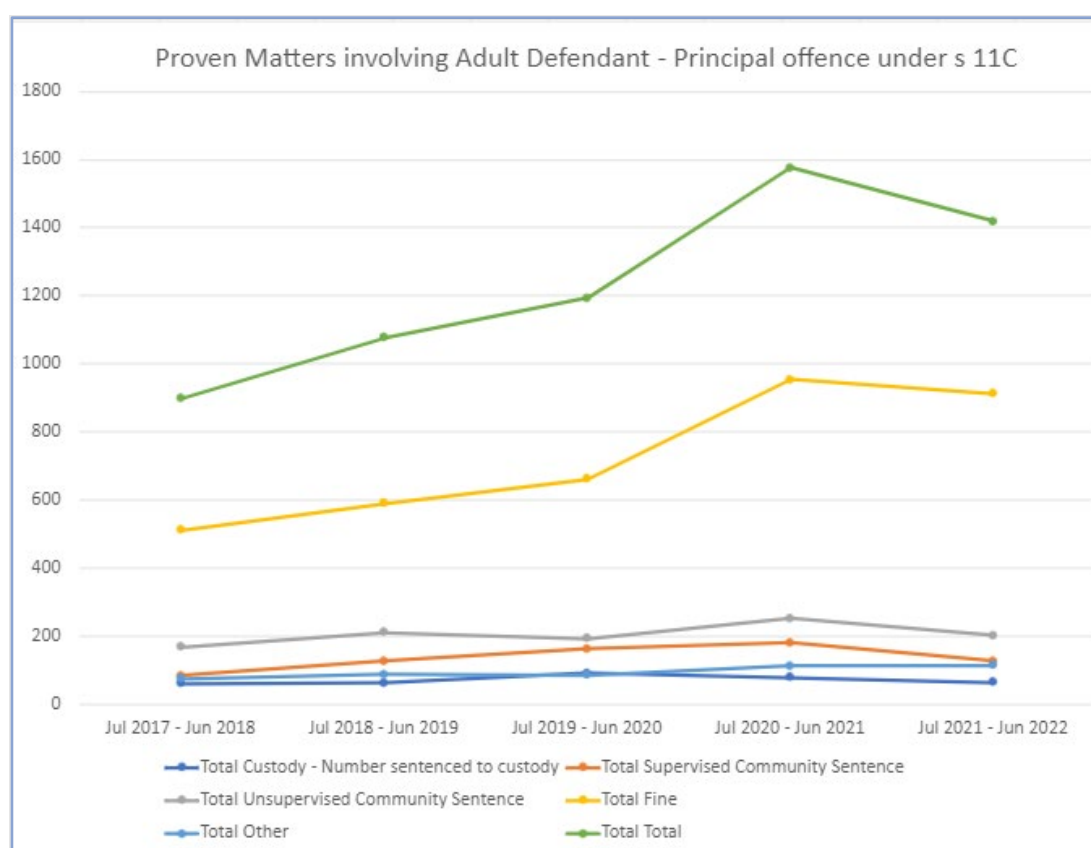
⁴ Australian Institute of Health and Welfare (AIHW), ‘Health of People Experiencing Homelessness’ (Web page, 7 December) <<https://www.aihw.gov.au/reports/australias-health/health-of-people-experiencing-homelessness>>.

In many of these instances, clients are not charged with any offences beyond ‘custody of a knife’.

Sentencing for Custody of Knife Offences⁵

The NSW Bureau of Crime Statistics and Research (‘BOCSAR’) has provided data on sentencing for matters where the principal offence was custody of a knife pursuant to s 11C of the *Summary Offences Act 1988*.⁶

BOCSAR data indicates that since July 2017 there has been an increase in proven court appearances for these offences. This is shown in the below chart. The data includes both Aboriginal and non-Aboriginal defendants.



Source: BOCSAR, 2023.⁷

This chart shows a sustained increase in 11C offences proven in court between July 2017 and June 2022. Between July 2017 and June 2018 there were 898 11C offences proven. This steadily increased, reaching a peak of 1577 offences in 2020 to 2021. Between July 2021 and June 2022 it dropped to 1419 matters.

It is impossible to ascertain the item that constituted a ‘knife’ on the available data. However, it is clear a large portion of the increase is referable to matters which resulted in a fine, suggesting the increase in proven s 11C offences is a result of offending deemed at the lower end of objective seriousness.

⁵ See Terms of Reference 2 and 3.

⁶ NSW Bureau of Crime Statistics and Research, 2023, Reference: sr23-22278.

⁷ Ibid (BOCSAR), chart generated in excel.

Change to the definition of ‘knife’⁸

The ALS submits that the Council should give specific consideration to the definition of the term ‘knife.’

As the majority of s 11C offences are dealt with in the Local Court, there are few Local Court judgments and no binding judgments addressing the meaning of knife.

The Local Court decision of *Police v O’Brien*,⁹ considered whether a pair of scissors fell within the definition of blade and was therefore a knife.

His Honour Magistrate Favretto considered the application of similar laws in England, the purpose of the legislation and Parliament’s intention when passing these laws. His Honour ultimately found that the intention of the legislation was not for items such as scissors and screwdrivers to fall into the category of a ‘knife’. He found scissors did not constitute a knife for the purposes of the Act, and the accused was found not guilty.

The decision of *Police v O’Brien* has also been referenced favourably by the Supreme Court in *DPP v Zheng* [2021] NSWSC 131.

However, in our experience adults and young people continue to be charged for custody of a knife in a public place and at hearing Magistrates find that items such as scissors, screwdrivers or darts constitute a knife for the purpose of the Act.

Closing the Gap

The NSW Government is currently undertaking an extensive program of work regarding Closing the Gap. It is vital that the Sentencing Council in its review, consider not merely the impact of any reform on the overrepresentation of Aboriginal people, but is bold in recommending alternative approaches that are consistent with the targets, the spirit and the Priority Reforms of the Closing the Gap agreement; namely Priority Reform 3 which calls on Government to transform the way they work with Aboriginal people, to identify racism and systemic disadvantage and to be creative about developing solutions.

The ALS would welcome the opportunity for further consultation as the Review progresses. If you have any questions regarding this preliminary submission, please contact the ALS Policy team via email at policy@alsnswact.org.au.

Sincerely,



Keisha Hopgood
A/Principal Legal Officer
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⁸ Term of Reference 8.

⁹ [2012] NSWLC 7.