Legislative Assembly

12/11/2002

Security Industry Amendment Bill

Hansard

Extract

Second Reading

Mr GAUDRY (Newcastle—Parliamentary Secretary), on behalf of Mr Iemma [11.31 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the *Security Industry Amendment Bill 2002*.

The Government introduces this Bill in order to strengthen the security industry—an industry of 38,000 guards protecting icons and infrastructure across the State.

This Government has identified, with the hard work and diligence of NSW Police, opportunities for organised criminals and terrorists to manipulate the current security licensing process.

As part of the Government's enhanced counter-terrorism capability, we are seeking to minimise such opportunities, decrease the risk of criminal activity within the security industry and to increase enforcement of current licensing requirements.

It is considered that improvements must be made in the proof of identity procedures employed for the issue of security licences.
The authority conferred by a security licence permits the holder to engage in security activities with access to a wide range of high risk facilities including banks, airports and government buildings.

This enables fraudulent licence holders to develop "inside knowledge" which may then be used against the employer. Also, the holding of a certain security licence gives some in the industry the ability to be licensed for and have access to firearms.

Given the level of trust placed in licensed security personnel, the Government believes it must be in a position to ensure all possible measures are taken to guarantee the identity and bona fides of licence holders.

<u>Identifying Unlawful Carriage of Firearms By Security Guards</u>

NSW Police have identified a need for frontline police to be able to instantly identify when a licensed security guard is carrying a firearm without the proper authority. Under the current law, embodied in the *Firearms Act 1996* and part 7 of the *Firearms (General) Regulation 1997*, only those security personnel with a licence for guarding premises or property are permitted to obtain a firearm licence for the genuine reason of security.

Firearms are not able to be owned by individual security personnel, but must be owned by the security company which must store the firearms safely and keep precise records of usage.

Security personnel who are licensed to carry firearms are only authorised to do so for the purposes of their work, and must return firearms to their place of safe storage after the period of duty.

Arrangements for off-duty possession of pistols by security personnel can be made only with written authorisation of the Commissioner of Police.

Despite these laws, in practice it is difficult for frontline police to determine whether carriage of a firearm by a security guard in public is bona fide.

Individual guards, if questioned by police, may simply claim that they are on their way to their place of work. It is therefore proposed to require that security personnel must be wearing their security uniform whilst carrying their security firearm.

The penalty for breaching this requirement will be seizure of the firearm, suspension of the individual's security licence, and the issue of a "show cause" notice on the master licence holder as to why the master licence should not be suspended due to unlawful issue of a firearm to an off-duty security officer.

There are very few circumstances where security personnel need to be out of uniform to perform their duties. In these few cases, such as the covert delivery of large sums of cash or jewellery, it is proposed that

the commissioner may issue special authority for the carriage of firearms when not in uniform. Such personnel must carry this authority with them when going armed.

Identifying Security Industry Firearms Used to Commit Crime.

The bill introduces a power for the random ballistic testing of security industry firearms by NSW Police to identify those which have been used in firearm crime.

The NSW Police Integrated Ballistics Identification System [IBIS] is a computer system which allows police to match cartridge cases, bullets, and bullet fragments to the firearm from which they were shot, enabling police to solve firearm related crimes.

It is proposed that Police be provided with the power to randomly test security industry firearms against the IBIS system to ascertain whether the firearms have been used in the commission of a firearm crime, and to store details of the test for future reference.

This will bring the security industry into line with the requirements for police. All police firearms are progressively being tested using IBIS and the data stored for reference purposes. The principles and objects of the *Firearms Act* in section 3 of the Act include "to confirm firearm possession and use as being a privilege that is conditional on the overriding need to ensure public safety, and to improve public safety by imposing strict controls on the possession and use of firearms."

Possession of a firearm by a security company or a security guard should therefore only be granted, or continue, on the condition that the controls in place balance the needs of public safety.

Unlawful Loaning by Companies to Criminals

The unlawful loaning of a firearm is an offence under section 7 of the *Firearms Act 1996*, which provides that a person must not possess or use a firearm unless authorised to do so by a licence or a permit.

In addition, a person who uses a firearm for any purpose other than in connection with the genuine reason for which their licence was issued, or who contravenes any condition of the licence, is guilty of this offence. Persons who provide their licensed firearm to an unlicensed individual may therefore be prosecuted for an offence under section 7.

Under current law there is no clear power for police to enter security company premises and test the company firearms for compatibility with evidence which has been left at the scene of the crime. This enables police to potentially link security guns which had been loaned out or used by a member of the company to a crime which had been committed with that gun. This would at the very least provide police with sufficient grounds to query from the licence holder why the security licence should be permitted to continue if sufficient control is not being exercised over weapons held under that licence.

Unlawful Use of Firearms by Employees.

Currently, security companies cannot be assured that the firearms used by their employees are not being used by those employees to commit crimes. Test firing of security guns into the IBIS would allow for comparison with the shell casings were left at the scene of the shooting.

The ability to randomly test security company firearms using the IBIS would allow police to identify any guns which have been used in crime. Police, with the cooperation of the security company, can then investigate further to identify those guards within the company who are involved in the commission of criminal acts.

The instigation of a random testing regime by NSW Police would mean that all security companies would be subject to testing of their firearms. Currently, a search warrant is required to perform forensic testing of security industry firearms. However this alerts the principals of the company to police interest and provides time to destroy or "lose" relevant firearms. A general power to test security firearms at any time is less likely to have such a specific impact.

In addition, testing of all new firearms entering the industry will have a preventative effect.

It is therefore proposed to amend the *Firearms Act 1996* to require that security industry master licence holders must allow IBIS testing of all firearms held subject to their security licence.

The testing of security industry firearms will be phased in over 18 months, commencing with targeted and random testing of companies and testing of all new firearms entering the industry; and progressing to testing of all security industry firearms.

In addition, it is proposed to ensure that any modifications which are made to an IBIS tested security industry firearm which would change the characteristics of any firing occurring post the change, such as a barrel or firing pin change for example, must be reported to police.

A re-test will then be required to ensure that the ballistics record retained by police matches any future firings from the gun.

In order to facilitate such testing on a random basis, police should also be provided with a power of inspection of security company firearms and firearm safe storage facilities at any time and without notice.

Currently, police may only inspect firearm safe storage upon arrangement with the licence holder—*Firearms Act* section 19(2)(c).

The risk of the firearms being utilised for criminal purposes is higher in circumstances where there is increased access by different persons to the firearms.

To assist with enforcement, police should also be provided with the ability to remove from company premises those records required under law to be kept for the purposes of copying them.

Currently, although provided with the power to examine and copy such records, police are not able to remove the records for external copying where the company denies them the use of company photocopiers.

Similar to section 110 (3A) of the *Liquor Act 1982*, police should also be able, where they consider it necessary to do so for the purposes of obtaining evidence of the commission of an offence, seize any registers, books, records or other documents relating to the business conducted by a security master licence holder and require any person to answer any question relating to any such registers, books, records or other documents or any other relevant matter.

Verifying Security Licence Applicants' Identity.

Currently, section 18 of the *Security Industry Act 1997* allows the Commissioner to take fingerprints of security licence applicants in order to confirm the applicant's identity. However this power only applies where there is a reasonable doubt as to the applicant's identity and proof of the applicant's identity cannot be confirmed by any other means that are available in the circumstances. Fingerprints obtained via this power are also required to be destroyed as soon as they are no longer needed in connection with the application to which they relate.

These provisions were included in the Act in an attempt to balance the public interest of ensuring that licence applicants were identified, against the personal privacy interests of the applicant.

However, NSW Police has advised that this provision is failing to prevent fraudulent applications for licences, and failing to identify those persons who apply for a licence utilising fake identification documents. As it currently stands, the section acts against the greater public interest in favour of the interests of licence applicants who are fraudulently applying for licences.

At least one security company has been involved in producing false security licences and training certificates, as well as false identification documents.

In addition, NSW Police has identified a pattern for applications to be made by persons who have legally changed their name, in order to circumvent the criminal records checks.

For example, a person with a disqualifying criminal history may change his/her name with the Register of Births, Deaths and Marriages, obtain identification documents in this name and then apply for a security licence without reference to the previous name.
Similarly, a licence holder who has a licence revoked can legally change their name and make application for licence under a different name, thus legally obtaining another security licence.

Administrative mechanisms to address this are being discussed with the Register of Births, Deaths and Marriages. However indications at this stage are that the register will not release the contents of its database to Police on privacy grounds, and Police are similarly restricted from releasing the contents of the security licensing database.

In any case, whilst name changes made within NSW could theoretically be identified via reference to the New South Wales Births, Deaths and Marriages records, this would only pick up persons who have changed their name within this state. Persons with a disqualifying criminal history who change their name outside New South Wales could not be identified without reference to all state and territory registries.

Establishment of identity is a significant problem for police. For example, Police records indicate that to March 2002, 22,971 offenders had been fingerprinted as part of the implementation of the new LiveScan electronic fingerprinting technology. Of those, 1,438 have been identified as providing false particulars. That is, 1,438 people lied to police about their identity when they knew they were to be fingerprinted. This constitutes 6 per cent of the offenders fingerprinted.

Police suspect that identity fraud is being perpetrated within the security industry licensing system. Identity fraud amongst security licence holders is a high risk situation, as it is an indicator of propensity towards criminal activity which poses both a financial and a public safety threat to the industry and to the public.

Security guards are employed to protect large sums of cash and expensive merchandise, as well as property and persons. Access to security systems which ensure the safety of goods, as well as physical access to the goods themselves, provides significant opportunity for theft.

The recovery of a RTA licence production machine from a crime syndicate highlights the likelihood that the industry is being targeted by organised crime as a means of obtaining easy access to premises and goods. Licence production machines are used by the RTA to produce driver licences; security industry licences; and firearm licences.

There is clearly considerable risk for the industry from the illegal manufacture and sale of fake security licences, as they would enable criminals to gain access to premises and goods under the guise of legitimate employment as a security guard.

NSW Police has advised that the only means of reducing this risk to manageable levels is to provide for mandatory fingerprinting and photographing of all security licence applicants. Without fingerprinting and photographing of all security licence holders, the high financial risk to industry and to public safety will continue.

It is therefore proposed to adopt similar requirements for security personnel as for police, by amending section 18 of the *Security Industry Act 1997* to provide for the mandatory fingerprinting and photographing of all security licence applicants and licence holders. All police are fingerprinted and their records retained during the course of their employment. Upon cessation of employment, police officers can make a written request to have their records removed, at which time this application is assessed and either granted or denied.

As an interim measure until such time as the new LiveScan digital fingerprint technology is installed statewide, fingerprints of applicants will be taken manually at police stations.

Once the roll-out of the PhotoTrac digital photograph capacity is complete, the applicant will also be photographed at the police station. The photograph will then be attached to the NSW Police issued photographic advice form, which is sent to the successful applicant.

The applicant then takes this form to the RTA, who will check the photograph against that on the advice form and then issue the licence. As an interim measure it is proposed that a copy of the digital image stocks held by the RTA of security industry licence holders be transferred to NSW Police.

This will allow operational police access to the images to verify the identities of security guards, and assist with identifying where a licence has been forged or the photograph substituted.

Retaining fingerprints and photographs of security licence applicants and licence holders will allow them to be checked against unsolved crime databases, as well as allow future applications to be verified against both criminal records and previous applications for security licences.

This will mean police can easily identify where a person has changed their name after being refused a licence in order to apply under the new name.

Mandatory Refusal of Licence Based on Fit and Proper Person Grounds.

Currently, section 15(1) of the *Security Industry Act* provides that the Commissioner of Police must refuse a security licence application if the Commissioner is satisfied that the applicant is not a fit and proper person to hold the class of licence which is being sought. However, there is no definition of "fit and proper person" in the legislation.

As a result, the current security licensing system allows persons who are not fit and proper persons, because they are suspected but not charged or convicted of criminal or terrorist links, access to sensitive information and premises as a result of being granted a security licence.

The difficulty from a licensing perspective is that such persons of concern have not been subjected to a charge which would automatically preclude them from obtaining a security licence.
This may be due to the fact that victims are afraid to lay charges against the person, or that they withdraw charges following threats against them. The only basis the commissioner could refuse a security licence under these circumstances would therefore be on the grounds that the applicant is "not fit and proper" or it is "not in the public interest" that he/she receive a licence.

The intention of the *Security Industry Act* is to ensure that high standards of integrity and conduct are maintained within the security industry. Entry to the industry is restricted by the licensing system in order to protect the public interest by diminishing the likelihood of criminal activity within the industry. For this reason, persons convicted of specified offences are barred from working in security.

It is the view of NSW Police that persons who are known to have extensive links to organised crime figures, who are members of an outlaw motor cycle gang linked to organised crime, or who are suspected of offences relating to drug trafficking, murder or other violence offences, should be regarded as "not fit and proper" to hold a security licence.

However, the determination of whether a person is "fit and proper" is contextual, as has been recognised in common law. For example, in Australian Broadcasting Tribunal v Bond, Justices Toohey and Gaudron found that:

"The expression "fit and proper person" standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper person" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of those activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not

occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question."

The Deputy President of the Administrative Decisions Tribunal has also held that there should be some 'nexus' between the conduct complained of and the activities to which the licence relates. This would apply, for example, in the case of a security guard who is reported to be associated with criminals with convictions for the armed robbery of banks. It is therefore considered that there is insufficient direction within the Security Industry Act to ensure that the balance is maintained between the interests of public safety in ensuring a crime free security industry, and the interests of individual licence holders in retaining their licences to work within the industry.

To this end, it is proposed to clarify the definition of "fit and proper person" in section 15 of the Act such that it can be clearly seen to include, but is not limited to, circumstances where:

criminal intelligence is held on a licence applicant-holder which has a relationship to the duties performed under the licence applied for/held;

which cause the Commissioner of Police to conclude that improper conduct is likely to occur if the person were to be granted/continue holding a security licence; or

which cause the Commissioner of Police to not have confidence that improper conduct will not occur if the person were granted/continued to hold a security licence.

Clearly, it is in the public interest that persons thought by police to present a public safety or a criminal risk are not given special access to premises, persons or goods under the security licensing system. This should apply even where the person has yet to be charged with a specific criminal offence.

Mandatory Revocation of Licence For All Reasons A Licence Must Be Refused

Currently, section 16 of the *Security Industry Act* provides that the Commissioner must refuse to grant an application for a licence if he is satisfied that the applicant, has been convicted in the preceding 10 years or been found guilty (but with no conviction being recorded) in the previous 5 years, of a prescribed offence, or has been removed or dismissed from a Police Force in the preceding 10 years.

The disqualifying offences are prescribed in the Regulation in clause 11 and include:

(a) Offences relating to firearms or weapons
(b) Offences relating to prohibited drugs
(c) Offences involving assault
(d) Offences involving fraud, dishonesty or stealing
(e) Offences involving robbery
(f) Offences involving industrial relations matters - In the case of an application for a master licence only

Under section 16(3-4), the Commissioner must also refuse to grant an application for a licence if:

he is of the opinion that the applicant is not suitable to hold a licence because the applicant has been involved in corrupt conduct; or

he is of the opinion that a master licence applicant (or, if the applicant is a corporation, any person who is a director or who is concerned in the management of the corporation) has, within the period of 5 years before the application was made, been declared bankrupt.

However, despite the Commissioner being required by the legislation to refuse all applications for a security licence which meet these disqualifying provisions, there is no similar requirement in relation to revocation of existing licences.

Section 26 (1)(a) of the Act currently states that a licence may be revoked under these same conditions. This means that the decision is at the discretion of the Commissioner, and is open to being overturned on appeal.

It is necessary that section 26 is amended to render it consistent with section 16 and to make it mandatory that the Commissioner revoke a licence for any reason for which a person would be refused a licence of that class.

The current situation not only represents a risk to public safety, it is inequitable and anti-competitive for persons seeking to enter the security, and is unfair on the licence holder who, at the time of re-application following expiry of the licence term, must be refused a new licence under the provisions of section 16.

It is therefore proposed to amend section 26(1)(a) of the Act to provide that the Commissioner must revoke the licence under the conditions.

Mandatory Revocation of licence for not undertaking firearm safety training

The Bill includes amendment of the *Firearms Act 1996* to provide for the mandatory revocation of firearm licences for security guards who fail to undertake required firearm safety training.

NSW Police has advised that there are currently a large number of security guards who are licensed to carry security firearms who have failed to attend an annual firearms safety training course.

Clause 69(2) of the Firearms (General) Regulation 1997 requires that a security guard who possesses a firearm must undertake, at least once a year, an approved firearms safety training course.

It is vital to public safety that all security guards who are authorised to carry firearms as part of their work complete safety training. Like police, security guards carry firearms in public places, and may be called upon to use them in pursuit of their duties.

In order to avoid endangering the general public, security guards should therefore be required to pass an annual firearms safety re-accreditation course.

The Bill will make it mandatory for the Commissioner to revoke a security guard firearm licence where the holder has failed to undertake annual safety training.

The effect of this will be to ensure that a security guard automatically loses the authority to possess and use a security firearm if he/she does not attend mandatory safety training.

There will not be an avenue of appeal in relation to the revocation, however the security guard's security licence will not be affected and the guard may thus continue to work within the industry, albeit without access to a firearm. If the guard requires a firearm for his/her duties, he/she may attend safety training and reapply for a security firearm licence.

Extending the Time for Proceedings for Offences

Currently proceedings for offences under the security legislation must be commenced within 6 months of the date of the alleged offence, as section 56 of the *Justices Act 1902* provides that:

> "an information or complaint may, unless some other time is specially limited by the Act dealing with the matter, be laid or made at any time within six months from the time when the matter of the information or complaint arose."

However, a separate, longer period is required in relation to offences against the Security Industry Act, to allow for the enforcement of breaches of the Act and Regulations which are identified close to the period of six months from the time of offence or outside this time.

It is therefore proposed to adopt the 3 year time limit for initiating proceedings for offences which currently applies in respect of certain offences in the *Liquor Act 1982*.

The offences specified in section 145(2A) of the *Liquor Act* as qualifying for the 3 year time limit are of the same nature as those within the security industry licensing regime, and are directly relevant to maintaining the integrity of the licensing scheme.

Without the ability to enforce breaches of licensing conditions which are discovered after a reasonable period of time has elapsed, the aims of the licensing scheme to increase safety, integrity, ethical conduct and the quality of service provided to the public cannot be upheld.

Permanent Residency Requirement

NSW Police have identified a high risk that persons who are not permanent residents of Australia who obtain a security licence may be more easily targeted to be involved in criminal activity or activity which otherwise poses a threat to the public.

There is currently no legislative restriction on granting a licence to persons who are not permanent residents of Australia. In consequence, people who are temporary residents or who hold overseas student visas are not restricted from obtaining licences.

When granting a security licence to a person other than a permanent resident, Police rely on the production of a visa to satisfy the mandatory integrity requirements required under the security legislation.

The administrative cost associated with obtaining criminal history checks on all overseas applicants is prohibitive, as is the timeframe for obtaining relevant record checks from overseas law enforcement agencies.

However NSW Police has found that it cannot rely on the understanding that visas are only issued to persons without an overseas criminal record.

In addition, the requirements for obtaining a visa do not include the extensive criminal record checks that are required of Australian permanent residents who apply for a security licence. NSW Police is concerned that a number of overseas persons with records which would exclude them if they were permanent residents are potentially being issued with a licence.

Not obtaining criminal history checks is inconsistent with the requirements imposed on permanent Australian residents, and presents both a criminal threat to the industry as well as a threat to public safety. This is particularly the case as, once licensed, a security guard may obtain access to firearms in order to perform his/her security duties.

To reduce this threat it is proposed that legislation be amended to provide for the issue of security licences only to persons who are citizens or permanent residents of Australia.

This is consistent with the requirements for police officers. Section 94 of the *Police Act 1990* provides that a person is eligible to be appointed as a member of NSW Police only if the person is an Australian citizen or a permanent Australian resident.

A permanent Australian resident is defined as a person resident in Australia whose continued presence in Australia is not subject to any limitation as to time imposed by or in accordance with law.

To ensure the integrity of the licensing system, it is proposed to adopt similar requirements for security industry licence holders.

It is proposed that the permanent residency requirement would be phased in over time. Those persons who are not currently permanent residents would be allowed to continue until their licence expires, and no new licenses would be issued to non-residents.

Enforcement by issue of Infringement Notices

Currently the *Security Industry Act* does not allow for the issue of infringement notices. Enforcement of the Act and Regulations is by way of summons or court attendance notice, both which require court attendance by the offender and police, or by way of suspension of licence which may be appealed to the Administrative Decisions Tribunal. This is both uneconomical and inefficient.

The practical effect detracts from enforcement of minor breaches, due to the perception by officers that the minor nature of the breach is outweighed by the impost on police and court resources currently required to enforce it.

The ability to issue infringement notices allows police to use their discretion to deal with minor matters in an appropriate way. In the case of minor offences which do not impact adversely on public safety, it is appropriate to use penalty notices.

A penalty notice system is an ideal way of enforcing minor breaches of the less serious conditions or some regulatory type offences in the Act. It provides a simple and effective method of encouraging licence or permit holders to comply with the letter of the law.

The availability of penalty notices will result in a higher level of enforcement and compliance. This will benefit both the industry and the consumer, by ensuring that standards are maintained and safety measures obeyed.

It is proposed that the Bill provide that police be permitted to issue infringement notices for certain offences. The relevant offences and penalty levels for the notices are to be determined following consultation with industry and then placed in the Regulation.

As is the case with other penalty notices, the Infringement Processing Bureau will be responsible for initial enforcement of the penalty notice. The *Fines Act 1996* is also being amended to apply its enforcement provisions to the new infringement notices, if payment is not made to the IPB.

The *Fines Act 1996* provides that a penalty reminder notice may be served on a person who has not paid the penalty amount. Continued failure to pay results in service of a fine enforcement order. Enforcement action that may then take place by the State Debt Recovery Office.

I commend this Bill to the House.