THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC:JWrg2011376

18 January 2021

The Hon Robert Borsak MLC
Portfolio Committee No. 5 – Legal Affairs
Chair
Parliament House
Macquarie Street
Sydney NSW 200

By email: PortfolioCommittee5@parliament.nsw.gov.au

Dear Mr Borsak,

Inquiry into the provisions of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 – questions taken on notice

On 10 December 2020, Ms Sanders and Mr Leary appeared on behalf of the Law Society and gave evidence before the Portfolio Committee No. 5 – Legal Affairs (Committee), as part of its inquiry into the provisions of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020.

We have received a transcript of Ms Sanders' and Mr Leary's evidence. We have one correction to make to the transcript, on page 6, in the first paragraph, "Mr Rogers" should read "Mr Odgers". We note that questions were taken on notice at pages 9 – 11, which we have responded to below.

Given that, what is the Law Society's view about expressly extending that search power into a private premise if the private premise is subject to an FPO?

A Firearm Prohibition Order (FPO) allows police to search the person subject to the FPO, and to enter and search premises occupied by them, without warrant or reasonable suspicion. However, the current FPO provisions do not allow police to search other people on the premises (unless the search is justified by another provision, e.g. s21 of the *Law Enforcement (Powers and Responsibilities) Act 2002*).

Proposed s74A(2A) would allow police, if they have entered premises pursuant to an FPO, to search any other person who the police officer "reasonably suspects is in possession of a firearm, firearm part or ammunition and who is present on those premises". This would give police some additional powers that they do not currently have in private premises.

We are not opposed to this provision; however, we suggest that the word "unlawfully" be added before "in possession". This would prohibit police from conducting oppressive searches on people who are lawfully entitled to be in possession of firearms.

We have run out of time, but there is just one other question on which I would be grateful for the views of the Law Society. It is about the issue of strict liability in the offence. It is a matter that the New South Wales Bar Association's submission deals with. Again, if you could give us some assistance with what I find to be the somewhat baffling answer that the police have given to a question on notice. I will read you the question and the answer from Acting Deputy Commissioner Walton. I put to him:

> **Again, I will ask if you could provide on notice whether or not the Minister's proposition in the second reading speech accurately reflects 51J(1)(b), where he says "For the new offence to apply, the person must be aware that the manufacture is illegal, that it is not authorised under a firearms dealer's licence". That statement from the Minister seems to be in error, but I would be interested if you would respond to that on notice.**

The Acting Deputy Commissioner responds:

> **The legislation provides that a person must knowingly or ought to have known that the manufacture is illegal.**

Then we get this:

> **The rationale for the introduction of 'ought to have known', i.e. the introduction of a strict liability or 'negligence' fault element is because there is an absolute test in firearms manufacturing in that either a person is licensed or not – which requires a baseline enquiry in order to establish this fact.**

I do not know what that means, but perhaps you could shed some light on it.

In the Law Society's view, if s51J(1)(b) is enacted in the form proposed in the Bill, it will create an offence where an accused knowingly takes part in the manufacture of a firearm or firearm part in two situations.

Firstly, where the accused person "knowingly takes part" and actually knows that the manufacture of the firearm or firearm part is not authorised by a licence or permit, an offence is committed.

Secondly, where a tribunal of fact (typically a jury), finds beyond reasonable doubt that the accused "ought reasonably to know" that the manufacture is not authorised by a licence or permit, an accused person will also have committed the offence.

In the second situation a person may be guilty of the offence despite the fact that the person did not actually know that the manufacture was unauthorised.

Absent some provision similar in nature to that contained in paragraph (b), the new section would criminalise conduct which is otherwise authorised in the Act, such as taking part in the manufacture of a firearm under the authority of a firearms dealer's licence. This cannot be the legislative intent.

An offence committed with full knowledge that the manufacture is not authorised is potentially qualitatively quite different to an offence committed in circumstances where the accused "ought to have known".

An accused person might not know the manufacture is unauthorised because they have not made any enquiries, or they may have made some limited enquiries, or they may have made extensive enquiries, or they may have been actively misled by the principal manufacturer that

the manufacture is in fact authorised. The accused may have a genuine belief that the manufacture is authorised or may simply not have turned their mind to the issue.

Liability in each of those situations will depend upon the court's view as to whether in the particular circumstances of the case the accused ought reasonably to have known.

We oppose a requirement that anything less than actual knowledge form the basis for liability for the new offence.

However, if this submission is not accepted, we suggest that a separate offence with a lesser maximum penalty should apply in circumstances where it can be proved beyond reasonable doubt that the accused "ought reasonably to know".

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on or at

Yours sincerely,

Juliana Warner
President