

**INQUIRY INTO PROVISIONS OF THE FIREARMS AND
WEAPONS LEGISLATION AMENDMENT (CRIMINAL
USE) BILL 2020**

Organisation: The Law Society of New South Wales
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30 July 2020

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

Dear Mr Borsak,

Inquiry into the provisions of the Firearms and Weapons Legislation (Criminal Use) Bill 2020

The Law Society welcomes the opportunity to make a submission to the Inquiry into the provisions of the Firearms and Weapons Legislation (Criminal Use) Bill 2020 (the Bill).

The Law Society's Criminal Law Committee has contributed to this submission.

Knowingly take part in unauthorised manufacture of firearms or firearm parts/or prohibited weapons or weapon parts – ss 51J/25E

We are of the view that the proposed penalty of 20 years imprisonment for all offences under both s51J of the *Firearms Act 1996*, and s25E of the *Weapons Prohibition Act 1998*, is disproportionate.

Taking part in the manufacture of a weapon, weapon part, firearm or firearm part (regardless of whether a weapon, weapon part, firearm or firearm part is actually manufactured) has a maximum penalty of 20 years. It is egregious that a person could be sentenced to a maximum of five years imprisonment for actual firearms parts possession (s7A *Firearms Act 1996*), but up to 20 years for possession of a picture of how to make one.

We submit that the offences should be tailored to cover the broad spectrum of offending covered by the proposed provisions. The definition of "weapon precursor" covers a vast array of weapons from thumb cuffs to missiles.¹ Section 51J(2)(d) and s25E(2)(d) are offences of possession, and should be a separate and less serious offence in both Acts, with a lower maximum penalty.

We note the existing offences in ss50A and 51F of the *Firearms Act 1996*, and ss25A, 25B of the *Weapons Prohibition Act 1998*, of unauthorised manufacture of firearms/prohibited weapons, and possession of digital blueprints for manufacture. The Bill provides no guidance for the Crown in terms of charge selection. This is likely to lead to inconsistency in the application of the provisions. To avoid a substantial amount of duplication, the existing sections

¹ Proposed s 25E(3) and Schedule 1, *Weapons Prohibition Act 1998*.

could be amended by including “knowingly take part” offences with an appropriate spectrum of maximum penalties.

We further note that s51G of the *Firearms Act 1996* and s25C of the *Weapons Prohibition Act 1998* provide defences for the respective offences of possession of digital blueprints for manufacture. Nothing similar is provided in the Bill for s51J(2)(d) or s25E(2)(d), and defences should be uniform across similar offences. Incorporating the new offences into the existing provisions would address this omission.

Power to seize – ss 51K and 25F

Proposed s51K(1) of the *Firearms Act 1996*, and s25F(1) of the *Weapons Prohibition Act 1998*, authorise a police officer to seize any firearm, firearm part or firearm precursor, including a computer or data storage device on which a precursor is contained, that may provide evidence of the commission of the new offence. In exercising the power, a police officer may direct a person who is in charge of, or responsible for, the item seized to provide assistance or information (including computer passwords) that may be required to access information held (s51K(2), s25F(2)).

It will be an offence to fail to comply, without reasonable excuse, with a direction to provide information, or to provide information knowing it is false or misleading. The maximum penalty will be a fine of \$5,500 and/or imprisonment for two years (s51K(3), s25F(3)).

We are opposed to proposed s51K(2) and (3), and s25F(2) and (3), and submit they should be deleted. The power to demand information or face a penalty is contrary to the privilege against self-incrimination, and the general right to silence at common law with respect to criminal proceedings. We are unaware of any other NSW legislation that gives police this power.

We note that proposed s51K(4) and s25K(4) state that Division 1 of Part 17 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) applies to anything seized under the section. The reference to Division 1 limits the return of seized goods to dangerous articles and dangerous implements, and does not provide for the return of any other seized goods, such as mobile phones, computers or data storage devices. Section 51K(4) and s25K(4) should be amended so that all of Part 17 of LEPRA applies to goods seized under s51K and s25K.

Section 73A - Review of firearms prohibition orders

In the report ‘*Review of police use of the firearms prohibition order search powers: Section 74A of the Firearms Act 1996*’, the Ombudsman recommended that a Firearms Prohibition Order (FPO) should expire after five years from the date it is served.² Currently FPOs apply for life or until revoked.

Proposed s73A requires the Commissioner to “review” an FPO every 10 years. We are opposed to this amendment, and strongly submit that it be replaced by an amendment providing that an FPO expires after five years, as recommended by the Ombudsman. Such an amendment will reduce the risk of people being subject to arbitrary or unreasonable searches for an indefinite period, and in appropriate circumstances the Commissioner could make a further FPO against the same person at the expiry of the five-year period.³

² NSW Ombudsman, *Review of police use of the firearms prohibition order search powers: Section 74A of the Firearms Act 1996*, August 2016, Recommendation 8, p12.

³ *Ibid.*, v.

Similarly, we support the implementation of Recommendation 15 of the Ombudsman, which recommends a further independent and objective evaluation of the effectiveness of FPO search powers once they have been in operation at least five years.⁴ Without such a provision there is no obligation to review the exercise of these extraordinary powers. The Ombudsman found that in 14% of searches, police conducted the search on the mistaken understanding that a search can be conducted merely because the person is an FPO subject.⁵ As the Ombudsman observed:

It is not a roving search power to be used randomly on FPO subjects, but a power to be used in a targeted way to examine if firearms control legislation is being properly observed.⁶

The need for a further review is also supported by the fact that firearms, ammunition and firearm parts were found in only 2% of all searches.⁷ Nothing was found in 90% of searches and the remaining 8% of searches found small amounts of drugs and drug paraphernalia.⁸

Section 74A(2A) – powers of police to search for firearms in connection with firearm prohibition order

The existing power to search without the requirement to obtain a warrant from an independent judicial officer applies to a person who is the subject of an FPO, their premises and vehicles. Proposed s74A(2A)(a) expands the search powers by allowing police who enter the premises of the person subject to an FPO to search any person present who is reasonably suspected of possessing a firearm, part or ammunition. This amendment further erodes judicial oversight and increases the risk of arbitrary or unreasonable searches taking place.

Further, s74A(2A)(b) allows any vehicle on the premises to be searched – it would no longer have to be controlled or managed by the person subject to an FPO. We submit that if s74A(2A) is to be retained, then similar to s74A(2A)(a), it should be amended to require the police officer to form a reasonable suspicion prior to searching any vehicle.

Children

We submit that FPOs and Weapon Prohibition Orders (WPOs) should not be made in relation to children. The orders expose children to extensive infringements of their civil liberties, in particular because of the extensive personal and property search powers provided for by the Acts.

Section 75(1A) effectively prohibits any child from appealing an FPO, as they are not permitted to hold a firearms licence. This creates an inherent unfairness. We submit that the general ineligibility of children to attain firearm and weapon permits is sufficient to meet policy aims, and there is not a sufficient case for children to be subject to either FPOs or WPOs.

To that end, we propose an amendment to s73 of the *Firearms Act* and s33 of the *Weapons Prohibition Act* to the effect that an FPO or WPO cannot be made in respect of a person under 18 years of age.

We also submit that the legislation should be amended to prohibit searches of children conducted by reason only of the child being present when a person subject to an FPO is

⁴ Ibid., p12.

⁵ Ibid., iv.

⁶ Ibid.

⁷ Ibid., p10.

⁸ Ibid.

searched.⁹ We note that s21 of LEPR provides a power to search a child present during an FPO search, if police hold a reasonable suspicion specifically in relation to that child. In the absence of such a specific suspicion, we submit there is not a sufficient case for a power to search children.

If children are to continue to be subjected to FPOs and WPOs, we submit that safeguards be implemented in respect of children under 18 years of age that mirror those in place for forensic procedures under the *Crimes (Forensic Procedures) Act 2000*. Specifically, we propose:

- 1) that the Commissioner be required to make any application for an order for a person under 18 years to the Children's Court;
- 2) that the Children's Court may make such order only if satisfied that the order is reasonably necessary; both to prevent the young person from possessing a firearm or prohibited weapon, and for the protection of the community;
- 3) that appeal against such orders is available to the District Court; and
- 4) that orders made by the Children's Court against persons under 18 years expire twelve months from the date of the order, unless an application for extension is made by the Commissioner.

If these proposals are not adopted, we submit that the Acts should be amended to require that, if the Commissioner makes an FPO or WPO against a child, the order must be reviewed within 3 months of the child reaching 18 years of age.

Additionally, s75 of the *Firearms Act* and s35 of the *Weapons Prohibition Act* should be amended to allow the Civil and Administrative Tribunal to review FPOs and WPOs made against children, for a period of 12 months from the date they are advised of the Commissioner's determination after review at 18 years of age.

We look forward to the Inquiry's report on the Bill.

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

Yours sincerely

Richard Harvey
President

⁹ We note the Ombudsman's finding at 5.1 (p46) that seven people under 18 years of age were searched in the review period, with none being the subject of an FPO.