Submission No 169

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

Name: Mr Mark Warton

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I make the following submissions in relation to the Bill which is being considered by the Committee;

Section 51J

The draft subsection 51J (1) creates an offence which requires that a person "*knowingly takes part in the manufacture of a firearm or firearm part,...*" The draft subsection 51J(2) then lists various acts which are to be treated as taking part. In the High Court decision of ***Ke Kaw Teh v R***, *Wilson J*, observed in relation to issues of knowledge that; "*Ultimately, the answer to this contention must rest on the construction of the Act. However the difficulty of the task is evidenced by the bewildering diversity of judicial opinion expressed generally on the subject of guilty knowledge over the past century.*"[1]

The interpretation of draft subsection 51(J)(1) may be unclear because of its interaction with some of the definitional provisions in draft subsection 51J(2). There are several possible interpretations for the provisions available. The first interpretation would be one which requires for example, in respect of someone who arranges finance for a step, that the person has some form of actual knowledge that the finance is being provided for the unlawful purpose of manufacturing a firearm or part. There is however, an alternative interpretation available that it would be unnecessary to prove knowledge of the unlawful purpose and that the requirement of knowledge merely requires knowledge of the provision of the finance.

Statutory interpretation principles applied in criminal law would suggest that actual knowledge of an overall criminal purpose would be required.[2] It is however notable that draft subsection 51J(2) (d) which refers to possession of various objects, specifies that the possession must be "for the purposes of manufacturing a firearm or firearm part." This phrase is not included in subsection 51J(2)(a), (b) and (c) which then invites a question as to whether subsection 51J(2) (d) is to read in some way differently to the other provisions.

It is submitted that as a matter of policy, it is undesirable for ambiguity to be created in statutes, particularly those which impose sentences which are substantial. If this provision is considered to be appropriate for enactment it is suggested that it be amended to clearly indicate that actual knowledge and purpose are required for each of the defined acts which constitute taking part.

Section 51J as currently drafted requires, in addition to a person "taking part", that the person *"knows or ought reasonably to know, that the manufacture of the firearms or firearm part is not authorised by a licence*." It is unclear whether what a person "*ought reasonably to know*"would be determined by a Court as a subjective or objective knowledge test. A subjective test would require that a person's education, intellect and other personal factors be taken into account. An objective standard however, would not require such factors to be given the same consideration.

It is unclear what level of knowledge average members of the public in New South Wales\ have in relation to the authorities conferred by another person's firearms licence or permit. It is suggested that there would be little if any knowledge possessed by most people about such matters.

1 Wilson J, in Ke Kaw Teh v R (1985) 157 CLR 523 at paragraph 5 of his judgment

2 See Gibbs CJ, in Ke Kaw Teh v R at paragraph 4 of his judgment referring to an excerpt from Sherras v De Rutzen

In criminal cases where proof of an offence requires proof of actual knowledge on the part of an accused, it is common for prosecutors to rely upon inferences from available facts to prove knowledge on the part of the accused. Examples can be found in decisions such as ***R v Ruiz Avila***.[3] In that matter the accused did not agree to be interviewed. It was alleged that he had rented a unit in Wollongong which was to be used for drug trafficking by others. One charge was as to knowingly taking part in the supply of ecstasy. In the New South Wales Court of Criminal Appeal, *Hidden J*, stated that;

"It is quite another thing to say that the lessee of premises might be fixed with the knowledge required to establish the charge against the appellant on the basis only of his or her awareness of the likelihood that there is a prohibited drug in the premises. In my view, nothing less than actual knowledge of the presence of the drug, in this case the tablets, could be sufficient. Of course, if the appellant's knowledge of the presence of the tablets were proved, it would not be necessary to prove that he knew that they contained the drug ecstasy. Knowledge, or even belief, on his part that they contained a prohibited drug would be sufficient "…."[4]

He went on to indicate that;
"Accordingly, his Honour's direction that the appellant's guilt of the second count might be founded upon proof that he was "aware that there was a real or significant chance that his rental premises were being used for the storage of a prohibited drug…" was erroneous."[5]

A useful comparison can be made between the ***Ruiz-Avila*** matter and an hypothetical prosecution under the draft subsection 51J. If it is assumed that an accused rented industrial premises which other people used to manufacture firearms, one might ask what level of knowledge would be sufficient to constitute an offence? Certainly proof that the accused had witnessed a firearm being produced there would be sufficient. However, it would be reasonable to suggest that an average member of the public in New South Wales would have a great deal of difficulty in accurately identifying many of the component parts of firearms. An example, in support of this proposition can be found in the case of ***Masterson***.[6]

In ***Masterson*** one of the matters in dispute was whether a piece of metal constituted a firearm receiver. The District Court decision relating to Mr Masterson's appeal appears not to be published. It would appear that Mr Masterson's convictions in the Local Court were quashed on appeal to the District Court. There had been a difference of opinion between experts as to whether a metal article constituted a firearm receiver part or not. This case supports the proposition that a lay person is poorly equipped to know whether something is a firearm part when even experts disagree about such issues.

Draft subsection 51J(3) purports to define things which constitute firearm precursors. The term "firearm precursor" is apt to be misleading. The Drug Misuse and Trafficking Act 1985 NSW) creates an offence relating to possession of substances referred to as precursors.[7] The approach of making the possession of certain substances criminal, was clearly to prevent drug traffickers from obtaining chemicals which are required to produce prohibited drugs.

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3 R v Ruiz-Avila [2003] NSWCCA 264
4 Hidden J at paragraph 14
5 Hidden J at paragraph 15
6 Masterson v Commissioner of Police [2017] NSWCATAD 17
7 Section 24A

The listed chemicals are necessary for the creation of certain prohibited drugs. They are specified in regulations made under the Drug Misuse and Trafficking Act.[8]

The reason why the use of such terminology is inappropriate in the context of the Firearms Act 1996 (NSW) is because it creates the false impression that there is some kind of predetermined link between some of the listed articles and the activity of manufacturing firearms. There is no predetermined link. Milling and casting equipment has a wide range of industrial and hobby uses which in no way lead to the manufacture of firearms . The draft provision does not seek to limit by definition the objects, devices, substances or documents which may be capable of being used to manufacture firearms or parts. This is unlike the provisions relating to chemical precursors for drug manufacture.

One could sensibly ask what useful purpose is served by a definitional section which does not seek to accurately proscribe the articles or objects which are to be the subject of a criminal offence but nevertheless refers to specific matters. The unrestricted scope of the definition coupled with listed items is apt to create the impression that there is something about all of those listed items which connects them to firearm manufacture. Milling and casting equipment have other uses.

Section 51K

The draft section 51K appears to apply generally to seizures in public places and public or private premises, though it may be mainly intended to be used in relation to premises. Although the draft subsections dealing with section 74A apply only to persons against whom a firearms prohibition order has been made, section 51K does not appear to be restricted to such persons. If enacted therefore, it would be available to be used by police at any time when they might otherwise be lawfully in attendance at premises or lawfully conducting a search in a public place.

The draft provision in substance is more like a search and seizure law than merely a law giving a power of seizure. As a matter of public policy it is probably undesirable for police to be empowered to seize any type of electronic device , from any person, whether in a public place, private residence or other premises without some administrative oversight being applied.

The Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) regulates various search activities by police. It contains various provisions which provide oversight for law enforcement activities. Section 60 of that Act provides for the issue of search warrants. The Regulations made under that Act set out a form of application for a search warrant[9].

The form requires that the offences which are the subject of the search are listed and that reasonable grounds for the suspicion are provided. The warrants may be issued by a Deputy Registrar of the Local Court. One benefit of a warrant process is that there is a detailed record available which can be accessed by persons such as the Ombudsman when a review is conducted into the efficacy of legislation. Also there is a basic level of oversight provided by the requirement for the warrant to be issued by an issuing officer who is an employee of an external entity.

If the draft section 51K in the Bill is to be enacted it should contain a requirement that seizures made on any premises are subject to the issue of a warrant under the regime of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) and the provision should probably indicate that it is a search provision. There should also be provisions enacted which regulate any

8 Drug Misuse and Trafficking Regulation 2011, Schedule 1

9 Law Enforcement (Powers and Responsibilities) Regulation 2016 Schedule 1

dealings with seized property. The Law Enforcement (Powers and Responsibilities) Act has for example a provision which deals with limiting the retention period for motor vehicles.[10]

Members of the public use their electronic devices widely for business and private activities and it would be unreasonable for their devices to be detained for excessive periods where no evidence of the commission of an offence has been found. The same observation would also probably apply to tools or other equipment used for business purposes. Retention for an excessive period might result in financial loss. .

The observations made in relation to draft sections 51J and 51K would also apply to sections 25E and 25F in relation to the Weapons Prohibition Act,..

10 Law Enforcement (Powers and Responsibilities) Act 2002 , section 204