

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

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NSW POLICE FORCE

Submission

Legislative Council Portfolio Committee No.5 -
Legal Affairs

Inquiry into the Provisions of the *Firearms and Weapons
Legislation Amendment (Criminal Use) Bill 2020*

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1. Introduction and context

1.1 Purpose of this submission

This submission responds to an invitation from the Legislative Council's Portfolio Committee No. 5 - Legal Affairs to provide input into the inquiry into the provisions of the *Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020* (the Bill).

This submission:

- Outlines the strategic context and national agenda leading to the Bill including the recommendations from the Ombudsman, and
- Responds to key issues identified in Parliamentary consideration to date (including the Legislative Assembly debate on 26 February 2020, and the Legislation Review Digest No.11/57)
- Provides additional information about matters relevant to the Bill.

1.2 The Inquiry terms of reference:

The Terms of Reference for the "Inquiry into the provisions of the *Inquiry into the provisions of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020* are that:

- (a) the provisions of the *Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020* be referred to Portfolio Committee No. 5 – Legal Affairs for inquiry and report,
- (b) the bill be referred to the committee upon receipt of the message on the bill from the Legislative Assembly,
- (c) that the committee report by Tuesday 22 September 2020, and
- (d) on the report being tabled, a motion may be moved immediately for the first reading and printing of the bill.

1.3 Overview of the Bill

The Bill makes amendments to the *Firearms Act 1996* (the Act) to provide for a 'taking part in the illegal manufacturing of firearms' offence; and to codify current practices and improve the implementation of Firearms Prohibition Orders (FPO) following a report by the NSW Ombudsman.

Key outcomes that will be achieved by the Bill include:

1. Implementing the findings from the review of illegal manufacturing offences undertaken by the national Firearms and Weapons Policy Working Group (FWPWG) on behalf of the

Ministerial Council on Police and Emergency Management (MCPPEM) to create a ‘take part in’ illegal manufacturing offence.

2. Including provisions for seizure and forfeiture powers when police suspect a ‘take part in’ manufacture offence has been committed and providing powers to demand, in relation to the offence for the access, possession, publication or dissemination of firearms ‘technology’, passwords or methods to bypass encryption.
3. Duplicating the amendments in the *Weapons Prohibition Act* to create the offence of take part in illegal manufacture of all prohibited weapons listed in Schedule 1 of that Act.
4. Implementing the legislative recommendations of the August 2016 Ombudsman’s report titled “Review of Police Use of the Firearms Prohibition Orders Search Powers”, (except for recommendation fifteen relating to a further review of the search powers as oversight of police activity is now taken by the LECC).
5. Modifying one recommendation from the 2016 Ombudsman’s report so that an FPO is reviewed by the NSWPF ten years after the date it is served and continues unless it is revoked following this review.
6. Making it clear that the Regulations may provide for mutual recognition of interstate and New Zealand FPOs, and consequentially amend the Regulations to recognise FPOs in South Australia, Victoria and Tasmania.

1.4 Context to the Bill

1.4.1 Review of legislation relating to illegal manufacture of firearms

As an outcome of the Lindt Café Siege review, in November 2015 the (now) MCPPEM agreed to review the adequacy of legislation to respond to new technologies concerning the illegal manufacture of firearms.

The review was carried out by the Firearms and Weapons Policy Working Group. The Firearms and Weapons Policy Working Group identified circumstances where no action could be taken under the existing offences in firearms legislation, for example, where Outlawed Motorcycle Club Group (OMCG) premises contained handgun grip moulds.

Currently, all jurisdictions have offences relating to the manufacture of firearms without a licence or permit.

In NSW, Section 50A of the *Firearms Act 1996* (the Act) provides an offence for the unauthorised manufacture of firearms. The maximum penalty is imprisonment for 10 years unless the firearm is a pistol or prohibited firearm, then it is 20 years. This provision ensures that only dealers, armourers or other local manufacturers are licensed and authorised to manufacture firearms.



NSW also has offences relating to 3D printing machines (Section 51F of the Act), which covers the possession of digital blueprints for the manufacture of firearms. This new offence complements the existing offence.

The review, endorsed by MCPem, identified a gap where people who knowingly participate in, or support, the manufacture of firearms cannot be dealt with under the existing offence provisions, particularly in the absence of an end product being a functioning firearm. This gap includes:

- a) financing the illegal manufacture,
- b) providing premises used in the illegal manufacture process,
- c) participating in the illegal manufacture,
- d) assemblage of parts for the illegal manufacture,
- e) the acquisition, possession, use or supply of equipment, electronics (including digital blueprints or plans) components or materials.

In October 2018, MCPem endorsed a “nationally consistent offence regime for the illegal manufacture of firearms to strengthen the response to illegal firearms in the community, as resolved by Ministers following the Martin Place Siege”¹.

The new provisions in the Bill relating to the illegal manufacture of firearms ensure that the offence regime can be used against a person who is knowingly involved in the illegal manufacture of firearms or firearm parts in NSW, not just those who physically assemble the firearms. Also, no final finished firearm (or prohibited firearm) is required to prove the offence. This overcomes existing issues with the offence that require prosecutors to prove that the end-product is a functioning firearm or imitation firearm. Prosecutors would also not be required to prove that a particular type of firearm is expected to be manufactured.

The amendments adopt an approach similar to section 25 of the *NSW Drug Misuse and Trafficking Act 1985* regarding the supply of, or knowingly taking part in the supply of a prohibited drug. The amendments are also similar to provisions in South Australia firearms legislation².

¹ Communique, Ministerial Council for Police and Emergency Management, 26 October 2018. Accessible online at: <https://www.homeaffairs.gov.au/how-to-engage-us-subsite/files/mcpem-communique-20181026.pdf>

² Section 37—Manufacture of firearms, firearm parts or sound moderators. A person is guilty of an offence if the person manufactures a firearm, firearm part or sound moderator and if the person... (a) knowingly took, or participated in, a step, or caused a step to be taken, in the process of manufacture; (b) a person who knowingly provided or arranged finance for a step in the process of manufacture; (c) a person who knowingly provided the premises in which a step, or allowed a step, in the process of manufacture was taken. Exemptions apply. Maximum penalty in the case of a prescribed firearm or firearm part, \$75 000 or imprisonment for 15 years; if the firearm is a category C, D or H firearm, \$50 000 or imprisonment for 10 years; if the firearm or firearm part is any other kind of firearm or firearm part—\$35 000 or imprisonment for 7 years

Under the proposed approach in the Bill, future creativity of criminals in manufacturing firearms would be captured regardless of the materials, technology or equipment used to make a firearm. This was considered vital by the Firearms and Weapons Policy Working Group – that the offence should future proof emerging technologies as much as possible.

The penalties for taking part in a manufacturing offence will be consistent with the highest penalty currently applying for the offence of unauthorised manufacture of firearms in section 50A, which includes a maximum penalty of 20 years imprisonment in respect of prohibited firearms or pistols.

1.4.2 NSW Ombudsman's review of police use of the firearms prohibition order search powers

With regard to FPOs, section 74A of the Act empowers police to search people who have been served an FPO for firearms. The amendments in the Bill will clarify and reinforce these powers. They do not represent any significant policy shift, expansion or retraction of the power.

Section 74B of the Act required the NSW Ombudsman to keep under scrutiny the exercise of powers conferred on police officers under that section, two years after the section commenced. The Ombudsman completed this review and provided a final report in August 2016.

The Ombudsman's Report found that, when conducting searches under the FPO powers, the NSW Police Force (NSWPF) has largely targeted the cohort Parliament intended, namely serious criminals. The Ombudsman notes that "the evidence does not indicate that police have generally exercised the FPO search powers in a manner that was oppressive or abusive"³. Consistent with this, searches at night were found to be not unreasonable or unjustified.

The Report recommended changes to legislation and internal procedures and practices for the NSWPF. This Bill will complete the legislative response to these recommendations. The policy and practice recommendations to the NSWPF have already been implemented.

The recommendations do not substantially change any of the police search powers and, in the main, provide clarity to provisions where Ombudsman indicated there may have been confusion.

In the passage of time since the release of the report, police practices have improved and the FPO search powers continue to be used appropriately.

³ The Ombudsman's Report, page 104

2. New offence of “take part in the unauthorised manufacture of firearms”

2.1. Introduction

The provisions contained in the *Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020* relating to the illegal manufacture of firearms are balanced provisions targeting serious criminal activity.

The new offence proposed by the Bill for “taking part in unauthorised manufacture of firearms or firearm parts” will apply to persons who knowingly taking part in a step in the process of illegal manufacture. This includes financing, providing premises, participating in the manufacture, assembling parts or the acquisition, and possession, use or supply of firearms or prohibited weapon precursors.

The offence will not apply to firearms dealers or armourers or those commercial enterprises that are permitted to manufacture firearms or prohibited weapons under existing legislation. The offence would apply regardless of whether a completed or functioning firearm or prohibited weapon was identified by police.

The Bill will strengthen provisions relating to illegal manufacture of firearms and prohibited weapons. They support the legitimate firearms regime and are not intended to affect compliant licenced firearms owners. These provisions are appropriate and reasonable in the circumstances.

2.2. Issues raised in Parliamentary consideration

2.2.1. Concern about unintended capture of licence holders maintaining, repairing or modifying their lawful firearm

Summary of issue

All members who spoke in the Legislative Assembly debate highlighted that the Government’s intent of the new ‘take part in’ illegal manufacture of firearms is to target criminals and not lawful firearms licence holders.

However, some speakers raised the potential for an unintended capture of a firearms licence holder who carry out minor repairs, maintenance or modifications to authorised firearms. Examples include:

- replacing the stock on their firearm,
- replacing a bolt handle with a larger bolt handle,
- reducing the barrel length from 26 inches to 24 inches,
- fitting a new aftermarket grip or stock to the rifle,

- reducing the length of the stock by reducing the length of pull,
- removing a recoil pad or inserting a recall pad onto a firearm,
- changing from a right-hand to left-hand stock or rifle stock to allow a left handed person to use a right-handed gun, and
- adjusting the comb depending on the type of clay target shooting being done, down the line, sporting or skeet.

[NSWPF position](#)

Modifications and repairs to lawful firearms must be done safely and by trained technical experts and should be undertaken by licenced firearms dealers.

However, the focus of the new offence in this Bill is the illegal manufacture of firearms and not on repairs, minor modifications or day to day maintenance of a firearm to ensure it is safe to use.

The new offences included in the Bill are designed to ensure that serious or organised criminals such as members of an OMCG cannot manufacture their own guns or prohibited weapons.

Under the current Act, whether a particular modification to a firearm is lawful depends on the circumstances. For example, unauthorised shortening a firearm is an offence under section 62 of the Act. Clause 152 of the Firearms Regulation sets out specific circumstances when a firearm is considered to be 'shortened'. The effect of this means that reducing a barrel length may technically be legal if the modification does not meet the defined circumstances deemed to be 'shortening' in the Regulation.

This Bill does not change the application of these existing provisions.

2.2.2. Firearms precursors

[Summary of issue](#)

Some members in the Legislative Assembly debate raised that the definition of "firearm precursor" could include benign substances such as oil.

[NSWPF position](#)

Under the Bill, a person will only be guilty of an offence under proposed section 51J (1) if both the elements in 51J (1)(a) and (b) are satisfied. Firstly, the person must knowingly take part in the manufacture of a firearm or firearm part. Second, the person must know, or ought reasonably to know, that the manufacture of the firearm or firearm part is not authorised by a firearms dealer licence or permit.

As such possession of a 'firearm precursor' will only contribute to a 'take part in the illegal manufacture offence' if the precursors are part of the process of an illegal manufacture and the person was knowingly taking part in unauthorised manufacture.

Further, the Bill does not propose that mere possession of a firearm precursor is an offence in itself. The provisions in section 51J (2) (d) make it clear that possession of a firearm precursor is considered “taking part in the manufacture of a firearm or firearm part” only if the precursor is possessed for the purpose of manufacturing a firearm or firearm part.

The Bill’s approach to ‘firearms precursors’ is similar to the treatment of drug precursors under section 24A of the *Drug Misuse and Trafficking Act 1985*, which states that it is an offence to possess a precursor intended to be used in the manufacture or production of a prohibited drug.

It is vital to include precursors and other components which are not defined firearms parts to ensure that the existing loopholes can be closed.

These loopholes include when police find an OMCG building containing equipment and materials that clearly are contributing to making a firearm, but none are actual firearms parts or functioning firearms.

Under section 4 of the Act, a firearms part is strictly defined: ***firearm part*** means a barrel, breech, pistol slide, frame, receiver, cylinder, trigger mechanism, operating mechanism or magazine designed as, or reasonably capable of forming, part of a firearm.

However, there are components which may be used to manufacture a firearm which do not meet this definition of a firearm part. These include:

- incomplete Major Component Parts such as metal forging, casting or milled item which is the precursor to a major component part which is not reasonably able to be used for any other purpose or partially complete ones
- the stock or grip, grip plates or other parts of the furniture
- technology such as downloaded blueprints, templates or instructions on firearms manufacturing
- equipment or materials such as moulds such as those for handgun grips or barrels, fingerprint proof polymers or plastics used in 3D printing, metal lathes and rifling equipment

Under the Bill, these components can be considered firearms precursors and therefore can be captured under the ‘take part in offence’ if they were possessed for the purpose of unauthorised manufacture.

Those everyday items such as hammers and drills, oils or screwdrivers would only be included as precursors for illegal manufacture in the context of the offence and if all other elements of the offence existed.



2.2.3. Firearms dealers and legitimate businesses

Summary of issue

Some members in the Legislative Assembly debate raised that legitimate firearms dealers or other businesses may be captured under the new offence.

NSWPF position

The offences in this Bill are focused on targeting the unauthorised manufacture of firearms.

Under section 8 of the Act a firearms dealer licence includes authority to manufacture, convert, acquire, supply, repair, maintain or test, any firearm to which the licence applies, and to possess, manufacture, acquire or supply ammunition for those firearms. A club armourer licence and a theatrical armourer licence authorises the licensee to possess, manufacture, convert, acquire, supply, repair, maintain or test firearms (and blank cartridges for those firearms for theatrical armourer).

These businesses limit their manufacture to making firearms from parts which are imported or accounted for and which have serial numbers and are registered once completed.

Therefore, these businesses will clearly not be captured under the provisions when they are acting within the limits of their authorisation.

However, if a firearm dealer acts outside of their authorisation and is involved in the illegal manufacture of firearms in any way, the new offences could apply to any actions that they are conducting outside of their authorisation.

The overwhelming majority of NSW firearms dealers and their employees act within the authority of their firearm dealers licence and will be unaffected by the introduction of the new offence

The proposed offence will also not apply to people or businesses who legitimately have no knowledge that they are taking part in the manufacture of firearms. Proposed 51J (1) provides for two elements of 'guilty knowledge' that are required for an offence to be committed. Firstly, the person must know that they are taking part in the manufacture of firearms. Secondly, they must know the manufacture is unlawful.

In practice, this means that if a business makes components (for example steel rods that can be used for making a barrel) and this was then found in an OMCG premise – the onus would be on the police to prove that the business knowingly took part in illegal manufacture.

2.2.4. Police directions for assistance to access seized devices

Summary of issue

The Legislation Review Committee's review of the Bill considered the proposed offence under section 51K of the *Firearms Act 1996* for a person to fail to comply with a direction to provide assistance or information to a police officer that would enable the officer to access information held or contained in the thing.

In particular, the Committee noted the potential for this provision to impact on the privilege against self-incrimination.

NSWPF position

In the modern, technological age it is important to provide police appropriate powers to access information on electronic devices that they have seized in connection with a suspected illegal manufacturing of firearms offence. The proposed power in section 51K (2) to direct a person to provide assistance or information will assist a police officer who has seized a device under s51K (1) to access information that may be protected by a password or access code. This is a key component to help police keep pace with technological advances used by criminals every day.

The proposed 'access' powers recognise that encryption or security features are used by criminals to hide evidence relating to illicit activities. This provision is necessary because criminals use passwords, access codes, login credentials or other encryption or security to secure devices or computers which hold information. This information may be critical to the investigation of the offence of taking part in the illegal manufacture of firearms.

In times past information may have been held in hard copy or printed off versions of plans or instructions. These are now much more likely to be on a computer, tablet or smart phone.

While police have some capability to bypass encryption on seized devices, there may be some delay with specialist units having to first get access to the device. Without an explicit power to require an owner or person with knowledge of an electronic device to disclose passwords or codes to access electronic equipment, the NSW Police Force may be hindered or delayed in their investigation.

For example, the seized device might include evidence of correspondence concerning the planning for the firearms manufacture or evidence that identifies other people involved in the manufacturing or distribution of illegal firearms. Access to this information could be critical for police to fully investigate the criminal activity that is occurring.

The proposed powers address this by providing an option for police to facilitate immediate law enforcement access to devices that may contain evidence of the manufacture of firearms.

The proposed offence for failing to comply with this requirement without reasonable excuse will ensure that legal action can be taken in respect of persons who thwart police investigations by failing to facilitate police access to the device in question.

Other matters relating to the proposed powers include:

- The new power will be exercised in the context of the lawful execution of search and investigative processes.
- The legislation does not permit law enforcement officers to use these powers to obtain information that does not directly relate to the express purposes in the Act.
- The powers can only be used as reasonably necessary to investigate the illegal manufacturing of firearms offence. Law enforcement will still be required to complete all other investigative steps in identifying any evidence.
- The offence being investigated, that requires such a power, is a serious offence. It carries a degree of severity that warrants clear and effective investigative powers by law enforcement officers.

3. Amendments relating to Firearms Prohibition Orders

3.1. Introduction

The second part of the Bill relates to Firearms Prohibition Order search powers.

In 2013, the Government enhanced police powers to conduct searches concerning persons who were subject to a Firearms Prohibition Order. These amendments – set out in the *Firearms and Criminal Groups Legislation Amendment Act 2013* – were introduced as part of a range of reforms that enhanced the ability of police to respond to and prevent serious crime, including firearm crime.

Since 2013, police have had the power, without warrant, to search an FPO subject's person, vehicle and premises that the person occupies, controls or manages. These searches are permitted as reasonably required to determine if the FPO subject has committed a relevant offence relating to the possession of a firearm, firearm part or ammunition.

FPOs are an effective tool in reducing firearms related violence. They prevent firearms coming into the possession of individuals who may later use them for criminal activity

FPOs have proven a key element in suppression strategies used against outlaw motorcycle gangs (OMCGs) and other organised criminal groups. Their imposition can allow for heightened scrutiny of those engaged in criminal enterprise and, if breached, they provide for serious penalties.

Since their introduction, the effective use of FPOs with the ability to undertake the searches more efficiently have increased the positive results in removing illegal firearms from the community.

In August 2016, the Ombudsman's Report: *"Review of Police Use of FPO Search Powers"* proposed legislative recommendations to how the police administer and serve FPOs. These provisions include:

- a) Making it clear that it is lawful to conduct a search immediately following the service of an FPO (but only after an FPO subject has been provided an opportunity to immediately surrender all lawfully held firearms);
- b) Empowering police executing a search to search any other person found in the premises whom police reasonably suspect to possess a firearm, part or ammunition;
- c) Extending the powers to search a 'premises' to also enable police to search vehicles, vessels or aircraft situated on the premises;
- d) Providing that an FPO issued is reviewed by the NSWPF ten years after the date it is served; and
- e) Making it clear that the legislative safeguards that relate to personal searches are applied.

The Bill clarifies procedures for FPO searches to make the parameters of the search powers clear, in keeping with the Ombudsman's recommendations.

3.2. Issues raised in Parliamentary consideration

3.2.1. The inclusion of searching other persons present on the premises.

Summary of issue

The Legislation Review Committee's review of the Bill noted that proposed section 74A (2A) will extend a police officer's power to search additional persons during a premises search under s74A (2) (b). Specifically, it will provide police with the power search persons who are not an FPO subject if they are present on the premises and police reasonably suspect as possessing a firearm or firearm part.

In particular, the Committee noted that this could increase the risk of arbitrary searches taking place. The Committee also acknowledged "the intention behind the amendments is to prevent concealment or disposal of evidence, assisting to remove illegal firearms from the community. Further, searches are subject to reasonableness requirements."

NSWPF position

The amendments in proposed section 74A (2A) are directly related to Recommendation 6 from the Ombudsman's Report:

“The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to section 74A of the Firearms Act 1996 to include a provision that empowers police executing a search under section 74A(2)(b) of the Act to search any person found in or on the premises whom police reasonably suspect has a firearm, firearm part or ammunition in their possession.”

The discussion in the Ombudsman’s report identified that the lack of an ‘ancillary power’ to search person’s on a premises *“may present a difficulty for police if a person, who is not the subject of an FPO, hides a firearm, firearm part or ammunition on their person in an effort to prevent police from finding the item at the premises.”*⁴

The Ombudsman later concluded that: *“Police require sufficient powers to support the execution of an FPO search in a manner that enables the identification of firearms, firearm parts and ammunition that may be on the premises. We consider that this balance is best achieved by giving police the same powers to search other people present at the premises as they would have when executing a search warrant.”*⁵

The amendments give effect to the position recommended by the Ombudsman and will clarify an issue open to interpretation that the searches can be undertaken of persons on a premises that are suspected to have firearms in their possession.

4. Additional matters in the Bill

4.1. Mirroring provisions in the Weapons Prohibition Act 1998

The *Weapons Prohibition Act 1998* mirrors in many respects the *Firearms Act 1996*.

Amendments to the *Weapons Prohibition Act 1998* will introduce an equivalent ‘take part in offence’ for the illegal manufacture of prohibited weapons.

Where a prohibited weapon can be used illegally in the same manner as a firearm, it is logical to make the same provisions apply.

Except where the current provisions differ between the two acts, the amendments in Schedule Two of the Bill are generally identical to those described above for firearms with the same rationale, to provide for the ‘take part in’ offence of illegal manufacturing of prohibited weapons.

⁴ Page 77: https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0016/37132/Review-of-police-use-of-firearms-prohibition-order-search-powers.pdf

⁵ Page 78: https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0016/37132/Review-of-police-use-of-firearms-prohibition-order-search-powers.pdf



4.2. Mutual recognition of FPOs

FPO legislation is in place in NSW, South Australia, Victoria and Tasmania. However, as NSW was the first jurisdiction to implement them, there is currently no provision in the *NSW Firearms Act 1996* that provides for mutual recognition of interstate or New Zealand FPOs.

The amendments will provide for the mutual recognition of another jurisdictions FPO.

The effect is that if a person has an FPO in their jurisdiction, the provisions under the NSW Act will apply to that person, in NSW, as if it is an NSW FPO.

The *Firearms Regulation 2017* will be amended to ensure that the mutual recognition of FPOs of Victoria, South Australia and Tasmania.

5. Conclusion

NSW legislation needs to be responsive to illegal firearms and those who make the buying, selling and making of illegal firearms a main focus of their criminal business.

The amendments included in the *Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020* are important amendments to ensure that NSW accords to a nationally supported approach to illegal manufacture of firearms and that those laws are future proofed against new technologies, equipment or methods.

This Bill does not criminalise legitimate firearms licence and permit holders and is a critical step in keeping the community safe from illegal firearms and those who manufacture, possess and use them.

The Bill also implements recommendations made by the NSW Ombudsman following the Ombudsman's report into firearms prohibition order search powers.

The measures included in this Bill will support the NSWPF in meeting the objective of deterring people from engaging in illicit firearms activity or firearms-related crime. Any concerns about the regime should be measured against the target cohort – users and suppliers of illegal firearms - and not the wider population of NSW.