Submission No 263

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

Organisation: New South Wales Bar Association

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SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 (NSW)

13 August 2020

Promoting the administration of justice

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the Courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,380 barristers who principally practice in NSW. Currently, 511 of our members report practicing in Criminal Law. We also include amongst our members judges, academics, and retired practitioners and judges.

Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's Criminal Law Committee. If you would like any further information regarding this submission, please contact the Association's Director of Policy and Public Affairs, Elizabeth Pearson, via

1. The New South Wales Bar Association (**the Association**) thanks the Legislative Council's Portfolio Committee No 5 – Legal Affairs for the opportunity to make a submission to the inquiry into the provisions of the Firearms and Weapons Legislation (Criminal Use) Bill 2020 (**the Bill**). This submission:

   a. outlines the Association's concerns regarding the terms of, and sentences for, the new firearms offences proposed in the Bill; and

   b. recommends the removal of Firearms Prevention Order search powers through the repeal of section 74A of the *Firearms Act 1996* (NSW) and the introduction of a statutory requirement for quinquennial reviews of all Firearms Prevention Orders.

Proposed new offences

2. The proposal in the Bill to insert a new section 51J into the *Firearms Act 1996* (NSW) would create an offence of "taking part in unauthorised manufacture of firearms or firearms parts", while the proposed new section 25E in the *Weapons Prohibition Act 1998* (NSW) would create an offence of "taking part in unauthorised manufacture of prohibited weapons or weapons parts".

3. The Association has a number of concerns with these proposed offences. First, the Association is concerned at the potential broad operation of the new offences. Second, the Association opposes the adoption of a strict liability or "negligence" fault element. Third, the Association opposes a blanket maximum penalty of 20 years' imprisonment.

4. While the Bill's Second Reading Speech[1] indicates that the purpose behind these proposed offences is to permit prosecution of organised criminals (such as outlaw motorcycle gangs) who possess equipment and materials intended to be used to manufacture illegal firearms and prohibited weapons, the proposed offences are much broader in scope.

5. They would, for example, make a young person experimenting with 3D printing of an object for the purposes of manufacturing a firearm part or "prohibited weapon"[2] part (such as a part of a crossbow) liable to imprisonment for 20 years if he or she "ought reasonably to know" that manufacture of that firearm part or prohibited weapon part was "not authorised by a licence or permit" (and regardless of whether that firearm part or prohibited weapon part was actually manufactured by the young person).

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1 New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 February 2000, 1 (Mr David Elliott, Minister for Police and Emergency Services).

2 A "prohibited weapon" is defined very broadly in Schedule 1 of the *Weapons Prohibition Act 1998* (NSW) and includes "a crossbow (or any similar device) consisting of a bow fitted transversely on a stock that has a groove or barrel designed to direct an arrow or bolt", "a slingshot (being a device consisting of an elasticised band secured to the forks of a "Y" shaped frame), other than a home-made slingshot for use by a child in the course of play", "a blow-gun or blow-pipe that is capable of projecting a dart, or any other device that consists of a pipe or tube through which missiles in the form of a dart are capable of being projected by the exhaled breath of the user or by any other means other than an explosive", "Kung fu sticks or 'nunchaku', or any other similar article consisting of 2 or more sticks or bars made of any material that are joined together by any means that allows the sticks or bars to swing independently of each other, but not including any such article that is produced and identified as a children's toy", and so on.

6. Section 51J(1)(b) of the *Firearms Act 1996* (NSW) makes it an offence where a person who knowingly takes part in the manufacture of a firearm or firearm part "knows" that the manufacture of the firearm or firearm part "is not authorised by a licence or permit". Section 25E(1)(b) of the *Weapons Prohibition Act 1998* (NSW) operates in the same way in respect of "a prohibited weapon or part of a prohibited weapon". However, both provisions extend liability for the offence (with a maximum penalty of 20 years' imprisonment) to a person who "ought reasonably to know" that the manufacture was not authorised. This is contrary to the following proposition expressed in the Second Reading Speech:[3]

> 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**, and that the process they are taking part in is for the manufacture of firearms [emphasis added]. This element relating to knowledge is an important one. It is important to ensure that businesses that are under a genuine belief that they are participating in a lawful manufacturing process are not inadvertently committing a criminal offence.

7. Thus, both offences may be established by negligence on the part of the person who takes part in the manufacture. Even if the person genuinely believes that the manufacture of the firearm or firearm part, or the prohibited weapon or part of a prohibited weapon, is authorised by a licence or permit, the person will still be guilty of the offence if a court is satisfied that a reasonable person in the position of that person would have known that the manufacture was not so authorized.

8. This may be contrasted with section 24(1) of the *Drugs Misuse and Trafficking Act 1985* (NSW), which provides as follows:

> A person who manufactures or produces, or who knowingly takes part in the manufacture or production of, a prohibited drug is guilty of an offence.

9. Where the amount of prohibited drug is not less than a commercial quantity, the applicable maximum penalty is 20 years' imprisonment. In *Siafakas v R*,[4] the NSW Court of Criminal Appeal accepted that, for a person to be guilty of this offence, the person had to *know* that he or she was manufacturing a prohibited drug (that is, know that he or she was manufacturing a drug that was prohibited under NSW law) or at least *know* that he was manufacturing a specific drug (that happened to be specified as a prohibited drug under NSW law). It would not be sufficient to establish the offence that the person was manufacturing a drug that happened to be a prohibited drug even if the person ought reasonably to have known that he or she was manufacturing a drug that was prohibited under NSW law.

10. The Second Reading Speech stated as follows: [5]

> Mere possession of "household items" or hardware found in anyone's garage is not intended to be an offence. However, if these items are knowingly used for the purposes of illegal manufacture

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3 New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 February 2000, 2 (Mr David Elliott, Minister for Police and Emergency Services).

4 [2016] NSWCCA 100.

5 Ibid.

they could form part of the broader "take part in" offence. This is similar to existing provisions for drug paraphernalia. A meth lab may have buckets and plastic hoses that in themselves are innocent and may be possessed but added together with all the other items needed to make drugs could result in "knowingly take part in" the manufacture of a prohibited drug offence.

11. However, as explained, a person who takes part in the manufacture of a prohibited drug will not be guilty of an offence unless the person knew that drug intended to be manufactured was prohibited.

12. The Association cautions against the creation of criminal offences with severe maximum penalties where a fault element of negligence is sufficient for liability. While manslaughter is an exception to that proposition, it is justified because the taking of a human life is so serious that imposing liability on the basis of negligence may be justified. Although there are strict liability offences with substantial penalties within the criminal law, such as dangerous driving occasioning grievous bodily harm, these are the exception, rather than the rule. The Association is not persuaded that it is appropriate to adopt such a basis for liability in the present context. The Second Reading Speech does not explain why such a basis for liability is justified or should be adopted for reasons of public policy.

13. Even if it were considered appropriate to impose criminal liability on the basis of negligence in circumstances of the manufacture of firearms or firearm parts, or prohibited weapons or prohibited weapon parts, it would be inappropriate to do so in one offence-making provision as an alternative to guilty knowledge. This would mean the same severe maximum penalty would apply. In addition, a sentencing court would not be aware of the basis on which the jury determined the offence was made out. A jury may only be satisfied that a defendant was negligent, while the sentencing court may sentence on the basis the defendant possessed actual knowledge. If a negligence-based offence is to be created, it must be a discrete offence with an appropriate and proportionate lower maximum penalty, consistent with the gradation of other criminal offences under NSW and federal law.

14. For example, the maximum penalty for negligent manslaughter (25 years) is lower than the maximum penalty for murder (life imprisonment). The maximum penalty for negligently causing grievous bodily harm (two years) is lower than the maximum penalties for intentional infliction of grievous bodily harm (25 years) and reckless infliction of grievous bodily harm (10 years). Thus, the existing criminal law treats the subjectively culpable and negligent infliction of harm separately, with very different applicable maximum penalties.

15. There is an additional reason why the Association opposes a blanket maximum penalty of 20 years' imprisonment for the offences created by section 51J of the *Firearms Act 1996* (NSW) and section 25E of the *Weapons Prohibition Act 1998* (NSW). It is incongruous that a person who *takes part in the manufacture of* a firearm or firearm part that is not authorised by a licence or permit would be liable to imprisonment for 20 years pursuant to proposed section 51J of the *Firearms Act 1996* (NSW), while a person who *manufactures* a firearm that is not authorised by a licence or permit is only liable to a maximum penalty of 10 years under the existing section 50A of the *Firearms Act*

1996 (NSW), unless the firearm is "a pistol or prohibited firearm". It is incongruous that a person who *takes part in the manufacture of* a prohibited weapon or part of a prohibited weapon that is not authorised by a licence or permit would be liable to imprisonment for 20 years pursuant to proposed section 25E of the *Weapons Prohibition Act 1998* (NSW), while a person who *manufactures* a prohibited weapon that is not authorised by a licence or permit is only liable to a maximum penalty of 14 years' imprisonment under the existing section 25A of the *Weapons Prohibition Act 1998* (NSW), unless the prohibited weapon is "a military-style weapon".

Amendments to legislation relating to Firearms Prohibition Orders

16. In 2013 the Association expressed its opposition to the then proposed section 74A of the *Firearms Act 1996* (NSW) because it gave extraordinarily broad search powers to the police, with no substantial constraints on the powers conferred. However, section 74A of the *Firearms Act 1996* (NSW) was subsequently enacted, providing police with unfettered search powers under Firearms Prohibition Orders (**FPOs**).

17. A review of police use of FPOs was undertaken by the NSW Ombudsman in 2015 and 2016.[6] In August 2016, the Ombudsman's Report noted the following:[7]

- the Ombudsman was able to identify and scrutinise 2,571 FPO searches conducted in the first 22 months that the powers were in operation;
- the FPO searches included searches of people, cars, boats, houses, restaurants, garages and backyards;
- the searches were conducted during 1,343 separate interactions with police, called "search events";
- there were 1,486 person searches, 912 vehicle searches and 173 premises searched;
- 634 persons were searched of which 227 were not subject to an FPO;
- in 32 searches, an FPO subject was not present at the time of the search;
- 13 of those 32 non-FPO subjects were searched because police mistakenly thought the person was the subject of an FPO;
- in the first 22 months of the review period, police found only 25 firearms, 19 quantities of ammunition and 9 firearm parts; and
- these were found during 29 FPO search events, which constitute only two percent of the total search events.

18. It is concerning that in the first 22 months of the review, only two percent of searches resulted in police finding firearms, ammunition or a firearm part. In the Second Reading Speech it has been

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[6] Review of police use of firearms prohibition order search powers, *Issues Paper: Section 74A of the Firearms Act 1996* (July 2015); Review of police use of the firearms prohibition order search powers: Section 74A of the *Firearms Act 1996* (August 2016).

[7] Review of police use of the firearms prohibition order search powers: Section 74A of the *Firearms Act 1996* (August 2016) 30-31.

suggested that FPO searches suppress firearm possession and the circulation of firearms. However, the fact that in 98 percent of search events no firearms, firearm parts or ammunition were found suggests that the balance of public interest does not support the continued availability of FPO searches.

19. While the proposed amendments largely reflect the recommendations made by the Ombudsman, the Association maintains its opposition to section 74A of the *Firearms Act 1996* (NSW).

20. If section 74A of the *Firearms Act 1996* (NSW) is to be retained, the Association supports the proposed amendment to section 74A(1) to make it clear that a police officer can only exercise the search powers under that section **if** a search is reasonably required for the purposes of detecting an offence under section 74 as recommended by the Ombudsman following the review in 2016 (Recommendation 3). This will make it clear that the fact that a person is subject to an FPO is not, of itself, a sufficient ground to decide to search the person under the FPO search powers.

21. The insertion of the proposed section 74AA in relation to the seizure and detention of any firearm, firearm part or ammunition found in conducting a search under section 74A is in accordance with Recommendation 14 following the Ombudsman's review in 2016. The Association does not oppose this amendment.

22. Further, if section 74A is to be retained, it should be noted that proposed section 73A provides for a review of an FPO after the order has been in force for 10 years. The Ombudsman recommended that an FPO should expire five years from the date it is served (Recommendation 8). The Association opposes a review only after 10 years.

23. The Report also noted in 2016 that:[8]

> …due to the way the NSW Police Force recorded FPO premises searches in the first 10 months of the review period…we were unable to obtain accurate information about premises searches that were conducted during that time…

24. It is concerning that NSW police were conferred unfettered search powers and were unable to keep accurate records of searches without warrants. Since the Ombudsman's report was given almost four years ago, the question arises whether there should be another independent and objective evaluation of FPO search powers. The Report proposed that the *Firearms Act 1996* (NSW) should be amended to require such an evaluation every five years (Recommendation 15). The Association supports that recommendation.

Conclusion

25. The Association thanks the Committee for the opportunity to comment on the Bill. Should you have any questions regarding this letter, please contact the Association's Director of Policy and Public Affairs, Ms Elizabeth Pearson, at first instance on or at

[8] Review of police use of the firearms prohibition order search powers: Section 74A of the *Firearms Act 1996* (August 2016) 110.