Supplementary Submission No 27a

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

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FIREARMS LAWYER

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Dear Ms Crawford

8 October 2020

NSW FIREARMS REGISTRY PROCEDURES

Last year your office conducted a mini audit into aspects of the NSW Firearms Registry. However, the Registry has failed to implement a system that ensures to citizens, fairness, equity and transparency.

I stress that I am not writing to you to complain about the *Firearms Act 1996*, but rather, as an Administrative Lawyer, to report its non-compliance with basic principles of Administrative law, such as:

- The failure to afford procedural fairness.
- The failure to provide reasons for decision
- Failure to accept, and apply the guidance of decisions from the NSW Administrative Decisions Tribunal
- Deciding not to process certain applications without consideration of individual circumstance under circumstances where this does not amount to a decision to which the Act applies, and thus denies NCAT appeal rights.
- Breaches of state obligations in respect to the Human Rights and Equal Opportunity Act.

This situation does not reflect well on the state of NSW- and is particularly odious given that the Registry falls within the Justice portfolio.

Let me give you some examples. Note, some of the material under each heading may overlap with that in others.

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POLICE DECISION MAKING GUIDELINES, titled *'Decision Making Guidelines' (2019)* ('the Guidelines').

I shall refer to this first, because the Guidelines receive repeated reference in this letter.

In 2019 the NSW Firearms Registry produced its first *Decision Making Guidelines*.

The guidelines make no mention of Natural Justice / Procedural Fairness, miss certain key cases that presumably are not liked by management and document a flawed decision-making model.

Cases cited in the document also leave out some significant cases that inject an element of balance and fairness into the decision-making model, for example:

Uzelac v Commissioner of Police, NSW Police Force [2003] NSWADT 226 in Uzelac, Deputy President Hennessey (a former NSW Chief Magistrate) held that not all storage matters warrant removal of a licence and developed a test outlining matters that need to be considered in order to determine whether an individual should be granted a licence after transgressing storage laws.

These criteria are as follows:

- the reason for failing to store the firearm safely;
- the length of time the firearm was not stored safely;
- the potential real danger posed by failure to store the firearm safely;
- the person's previous conduct in relation to storage of firearms and any related matter;
- the person's understanding of the importance of safe storage and the likelihood that firearms will not be stored safely in the future; and
- the reason the person has a firearms licence, keeping in mind that firearms possession and use is a privilege that is conditional on the overriding need to ensure public safety.

Webb v Commissioner of Police, NSW Police Force [2004] NSWADT 110 In Webb, Montgomery DP, when considering the question of risk to public safety, found that *"In determining this issue it is my view that it is necessary to adopt a balanced view of the risk, bearing in mind all the relevant circumstances. Only real and appreciable risk needs to be c*onsidered. Minimal, fanciful or theoretical risk can be excluded from consideration".

Martin v Commissioner of Police, New South Wales Police Force (2017) NSWCATAD 97, (64-66)

This decision found that the question of risk is not to be viewed as requiring an almost impossible burden to be discharged by the applicant in proving a near-absolute negative, but rather, for a decision to be reached, in a nuanced way, taking account of all the circumstances, including attitudes, character and prior conduct, with an overriding focus on public safety

Without consideration of these cases, staff are left with an extreme view of case law that does not fully or indeed fairly reflect the state of the firearms law in NSW.

A further problem is that the Guidelines do not deal with how to balance the evidence. Thus, a reference for example in a COPS database may involve an unsubstantiated comment that is little more than intelligence that a Police Officer may in future find relevant. It should not necessarily be considered as necessarily correct.

Registry staff however seem not to make this discrimination, and the Guidelines would suggest that they are not trained in respect to how to 'balance' competing evidence.

APPLICATION OF LAW

Most agencies take considerable guidance from NCAT. The Firearms Registry, consistent with the omission of the above cases, choses to apply the *Ward v Commissioner of Police* (2000) NSW ADT 28 'virtually no risk' to the community standard, which is applied in a somewhat bovine fashion, and ignore subsequent decisions by Deputy President Hennessy that clarify his approach. This policy, which appears deliberate, puts the Registry seriously at odds with NCAT in its matters.

Given the legalistic approach of the Tribunal in its hearing of firearms matters, the high cost of appeals this poses a significant and real access and equity, as well as consistency problem.

See *AML v Commissioner of Police, New South Wales Police Force* [2013] NSWADT 5] in 2013 that:

"the Ward decision itself had set aside the Commissioner's decision to revoke a firearms licence because her Honour was satisfied that despite the fact that he had assaulted his partner, he was a fit and proper person to have a firearms licence. "The 'virtually no risk' comment was made in the context of the 'fit and proper person' test. It should not be understood as a judicial gloss on the plain meaning of that test, or of the reasonable cause test. The relevant tests are set out in the Firearms Act and comments in cases should not be substituted for those tests" (at [7]).

Other cases have pointed out that the question of risk is not to be viewed as requiring an applicant to discharge an almost impossible burden of proving a near-absolute negative, but in a nuanced way, taking account of all the circumstances, including attitudes, character and prior conduct, with an overriding focus on public safety: *Martin v Commissioner of Police, New South Wales Police Force* [2017] NSWCATAD 97, [64] – [66].

Thus, in *Webb v Commissioner of Police, New South Wales Police Service* [2004] NSWADT 110, [32], Montgomery JM, when considering the question of public safety, commented:

"In determining this issue, it is my view that it is necessary to adopt a balanced view of the risk, bearing in mind all the relevant circumstances. Only real and appreciable risk needs to be considered. Minimal, fanciful or theoretical risk can be excluded from consideration". Risk to the public includes, of course, risk to the applicant himself: Kavalieratos v Commissioner of Police, New South Wales Police Force [2014] NSWCATAD 117.

NATURAL JUSTICE / PROCEDURAL FAIRNESS

There are other concerns that could hardly be oversight. The Guidelines make no mention of Procedural Fairness / Natural Justice.

A further problem is that often, where a primary decision is made, if further reasons are furnished, other reasons are often cited for the decision. This is also the case when one compares a primary decision to a second-tier decision, leaving the hapless citizen with the expense of an appeal to NCAT, which few have the means to entertain.

There is nothing in the *Firearms Act 1996* that would exclude Natural Justice from firearms decisions, and whilst Firearms Ownership is a Privilege and not a right, this does not mean that a citizen is not entitled to a certain level of treatment by the bureaucracy. Indeed, in (*Kioa v West,* 1985) 159 CLR 550 (High Court) Justice Mason found that Natural Justice (another word for Procedural Fairness') could only be excluded by a clear manifestation of Parliamentary intention (at 584).

There is no such manifestation in gun laws anywhere in Australia, and all other Registries afford procedural fairness without apparent difficulty.

Procedural fairness in this context is not difficult to achieve, for example, I recently considered a matter where the VICPOL Registry wrote to a client drawing his attention to a certain Police report, advising of his possible non-disclosure of relevant criminal history and advising that the matters in the report many make him unsuitable to hold a licence and inviting him to make a written submission by a deadline.

If conducted properly it is beneficial to Registries because they make correct decisions at the first instance, reducing the incidence of second tier reviews.

This would also make the job of decision makers more interesting, enhancing staff satisfaction.

REASONS FOR DECISION

The Registry hardly ever provides reasons for decision, and when provided, reasons are not adequate.

I have been advised by a Registry staffer that a decision had been made within the Registry not to provide reasons because s49 of the *Administrative Decisions Review Act 1997* provided for reasons being capable of being requested, it meant that no reasons needed to be provided at the first instance! A rather novel concept!

Furthermore, if a decision maker refers in material provided to a COPS database entry in a decision, there is simply a bland reference to the entry. The entry is usually not provided, nor is the reasoning evident in material provided, leaving it to the hapless client to request the COPS entries under GIPAA where they are likely to find themselves denied the relevant information on perceived 'operational grounds' or see it provided in a form that is so redacted as to be useless.

INTERNAL APPROACH TO DECISION MAKING

Recent comments by Superintendent Bell, the head of the Firearms Registry to the effect that when he started there, some staff did not understand the 'Fit and Proper Person' test left me questioning not only training, but whether staff are of sufficient ability to be making the type of nuanced decision making that this type of decision making requires.

Nothing has changed under Superintendent Bell's management that have led to fairer, or more open, or accurate, decision making. (With the exception of consistency in refusal). As a culture seems to now have developed post Edwards of rejecting any decision that is anywhere 'close to the line'.

This approach may manifest a desire to protect the Commissioner and Force from the embarrassment of another Edwards matter, however, it fails to recognise that Edwards was a failure in decision making, that involved not only one flawed decision, but multiple, as Edwards held not only a Firearms Licence but also a Prohibited Weapons' permit.

This type of difficulty is not solved by simply adopting the approach of saying no, as this is likely to make work uninteresting to staff and create a lazy culture that may lead to error.

I lack experience with the NSW state Government's clerical core competencies, and so shall reference a model with which I am familiar- that of the Commonwealth.

While exceptions exist, I would not have expected to consistently find the core skills required for qualitative decision making of this nature, at a level lower than APS 5, (and then only with heavy supervision). More complex matters involving medical or psychiatric material or a 'nuanced approach' would attract skill sets found at APS 6 or EL 1 level.

I understand that most decision making at the Registry is being handled at a substantially lower level. The decision is to use the vernacular 'above their pay grade', and forcing the decision to their level is only asking for trouble.

I understand that civilian managers at the NSW Registry have been replaced by Police Managers, I believe of the rank of Inspector. What were once line ball decisions that could be decided in favour of the individual upon the basis of reasonable consideration of evidence and reasoning, have been replaced by decisions where if the decision maker can idly speculate that someone poses a risk, the decision is to find against the individual.

The Guidelines contain a decision-making flow chart (at page 29) that staff are expected to follow. It also does not address procedural fairness.

The decision-making flow chart is also somewhat curious in its operation. Step 1 of the procedure 'obtain all relevant information relevant / required make a decision' cannot be achieved until one has commenced step 2 – the consideration process, because it is only when you have considered if you have enough information to make a correct and proper decision, that you may realise that you do not have. There therefore needs to be a feedback loop inserted in between step 1 and step 2 at the point 'have you conducted a thorough deliberation considering all relevant matters, with an added step inserted to the process requiring that questions be 'put' to the subject of the decision, thereby affording them procedural fairness.

One would expect that in making a decision in respect to a reasonably complex matter, a person would move backward and forward several times between step one and two.

The 'decision making' process appears to be geared to the competency of low-level staff- read the application, examine available data bases for information involving mental illness, attempted suicide, frequent offending or frequent traffic infringements, and then deny the application.

The approach could cynically- and probably with accuracy, be viewed as having been created to see any claim that may raise any issue that could potentially lead to embarrassment to Police coming under scrutiny being rejected, and to hell with customer service!

REFUSAL TO PROCESS CERTAIN TYPES OF DECISION

Like most legislation, the *Firearms Act 1996* lists certain decisions as being reviewable.

Two years ago, the Registry stopped processing applications where an applicant had answered a question about whether they had ever had a licence refused, cancelled or suspended. These applicants now sit in legal limbo, because the decision not to process such applications does not constitute a reviewable decision within the meaning of the Act.

This means that if you were subject to a suspension because of a vindictive Apprehended Violence Order twenty years ago, you cannot have an application for a firearms licence processed, despite there being no apparent reason a licence to be refusal!

The only remedy to the hapless citizen in such a situation is to apply to the Supreme Court for a Writ of Mandamus. This is quite absurd and hardly fair. Particularly seeing as a refusal to process in such a situation may actually involve a human rights violation, as many reasons for suspension are mental health related.

MENTAL HEALTH

The firearms registry is tending to overreact to any mention of mental health, as few people who commit crimes with firearms are mentally ill. See Pirelli G, Wechsler H & Cramer R ‘’*The Behavioural science of Firearms: A mental Health Perspective on Guns, Suicide and Violence’’*, Oxford Uni Press, 2018. Richard Harding author of *‘Firearms and Violence in Australian Life’* (1981) Univ WA Press concluded that suicide and mental health represented the weakest argument for gun control, and agreed with earlier research by Newton & Zimring (1967) on the subject, that concluded:

‘whatever arguments might be made for the limitation or regulation of the private ownership of firearms, suicide patterns do not constitute one of them’ (p119).

(largely for reasons of weapon substitution)

Even the NSW statistician remarked in an interview with a Fairfax journalist that the 1996 Firearms Laws had not had a significant effect.

In other words, there are other factors that are more important.

There is excessive reliance upon requiring mental health assessments. These are difficult to obtain in a Covid environment, and even when one can get an assessment, the outcome is often odd.

For example, the Registry refuse to disclose to the Doctor or client information in their possession, so the Doctor does not know all of the matters upon which he should comment.

- Where a Doctor has found someone not to have mental health problem a Registry staffer may discount the report (as they did in respect to one of my clients), on the basis that the

- The third situation involves mental health generally. If someone has mental health difficulties, it would appear pious to have government policies that encourage people to seek assistance at the earliest possible opportunity rather than a system that automatically penalises and thus discourages people from doing so.

Registry policy would serve to subvert the Commonwealth Government Veterans' Affairs white card, which is issued to all ADF personnel who have had operational service, and to encourage them to seek psychological help at the earliest opportunity.

A Wagga psychiatrist summed up the foolishness of the Registry approach some years ago during a drought:

'Farmers around here are dying like flies and the damned fool Firearms Registry has policies that discourage farmers from seeking help. It is hard enough to get a man to see a Psychiatrist in the first place without the law actively discouraging them from doing so. A few counselling sessions and a handful of pills would be all it would take to make most feel that life was not without hope'.

His words resonated with me as it appears obvious that the current approach is neither efficient nor effective as shooters fear being 'persecuting shooters to the grave' if they report a mental health difficulty, and the approach scares people away from seeking early intervention, being diagnosed and appropriately treated.

A further issue here is that if someone manifests issues and they are in a gun club, clubs are very careful, and encourage appropriate people to seek help. Clubs also make reports in appropriate circumstances to the Firearms Registry, as was evident in the evidence presented in the Edwards inquest.

The approach of the Registry at present is inconsistent with the National Firearms Agreement which provides:

- *mental or physical fitness - reliable evidence of a mental or physical condition which would render the applicant unsuitable for owning, possessing or using a firearm.*
- *that in regard to the latter point, a balance needs to be struck between the rights of the individual to privacy and fair treatment, and the responsibility of authorities, on behalf of the community, to prevent danger to the individual and the wider community.*

The legislation then goes on to impose a requirement that a person have a genuine reason, and in respect to high power firearms, a special need for requiring them, it also requires that a person be a 'Fit and Proper Person' and that there be no 'Public Interest' reason for not granting them a licence.

In determining that an Applicant is a 'Fit and Proper Person' and there are no psychiatrist, was not the treating psychiatrist, when there was no treating psychiatrist because the fellow did not need one!

In many instances the need for a report is commissioned by the Registry because a relative, friend, or person in the community who is malicious, or who may just not like guns, as is the case with some nurses makes a report to the Registry.

Other states deal with low level notifications by requiring assessment by a person's GP. This is a much cheaper, and quicker means of triaging low-level notifications.

Certain classes of applicant are entitled to a fee discount. It seems common practice, if someone has a Veterans' Card of any description, for a mental health assessment to be requested by the Registry.

This does two things.:

- It creates the unfair situation where someone who may be seeking to take advantage of a $30 fee waiver, incurs a $1,600-2,000 cost related to a psych assessment performed when they have shown no objective sign of mental health problems.

- The approach tends to regard servicemen per se as a problem class of people.

'public interest' grounds for rejecting the applicant, mental health is not an absolute bar to firearms ownership.

Interestingly, it is clear from the instructive case of *AML v Commissioner of Police NSW.* (2013) NSWADT 5 (10 January 2013) that not every attempt at suicide will justify loss of a firearms licence.

'Not every suicide attempt will justify the revocation of the person's firearms licence. The Tribunal must assess the likelihood of attempted suicide or self-harm again, and if that happens, the likelihood that a Firearm will be used.

The Tribunal did not accept the Commissioners submission that before the reasonable cause test or the public interest test can be satisfied a person needs to enjoy a lengthy period of stability following treatment'.

The extreme approach adopted by the Registry would appear to contravene existent Human Rights obligations.

DELEGATED LEGISLATION

A final matter that needs considering, lest the issue be repeated, that when the *Firearms Regulation 2017* was issued for comment, very little time was afforded for comments to be provided, and, surprisingly, comments were not made publicly available.

I request that your agency perform a further audit in respect to the Firearms Registry investigating the matters detailed above.

If I can assist further, I am happy to elaborate upon the above.

Yours sincerely,

Simon Munslow