



LEGISLATIVE COUNCIL

PORTFOLIO COMMITTEE NO. 5

# Provisions of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020

Report 57

April 2021

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Portfolio Committee No. 5 - Legal Affairs

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

Ordered to be printed 27 April 2021 according to Standing  
Order 231.

New South Wales Parliamentary Library cataloguing-in-publication data:

**New South Wales. Parliament. Legislative Council. Portfolio Committee No. 5 – Legal Affairs.**

Provisions of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 / Portfolio Committee No. 5 – Legal Affairs [Sydney, N.S.W.] : the Committee, 2021. 68 pages ; 30 cm. (Report no. 57 / Portfolio Committee No. 5 – Legal Affairs)

“April 2021”

Chair: Hon. Robert Borsak MLC.

ISBN 9781922543011

1. New South Wales. Parliament. Legislative Assembly— Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020.
2. Firearms and crime—New South Wales.
3. Firearms—Law and legislation—New South Wales.
4. Weapons—Law and legislation—New South Wales.
5. Firearms—Usage—New South Wales.
- I. Borsak, Robert.
- II. Title.
- III. Series: New South Wales. Parliament. Legislative Council. Portfolio Committee No. 5 – Legal Affairs. Report ; no. 57

363.33 (DDC22)

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## Terms of reference

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 27 April 2021<sup>1</sup>, and
- (d) on the report being tabled, a motion may be moved immediately for the first reading and printing of the bill.

The terms of reference were referred to the committee by the Legislative Council on 24 March 2020.<sup>2</sup>

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<sup>1</sup> The original reporting date was Tuesday 22 September 2020 (Minutes, Legislative Council, 24 March 2020, pp 850- 851). The reporting date was later extended to the first sitting day in 2021 (Minutes, Legislative Council, 26 August 2020, pp 1263-1264), then to Tuesday 27 April 2021 (Minutes, Legislative Council, 16 February 2021, p 1908).

<sup>2</sup> *Minutes*, NSW Legislative Council, Tuesday 24 March 2020. pp 850-851.

## Committee details

### Committee members

<b>The Hon Robert Borsak MLC</b>	Shooters, Fishers and Farmers Party	<i>Chair</i>
<b>Mr David Shoebridge MLC</b>	The Greens	<i>Deputy Chair</i>
<b>The Hon Rose Jackson MLC</b>	Australian Labor Party	
<b>The Hon Trevor Khan MLC*</b>	The Nationals	
<b>The Hon Natasha Maclaren-Jones MLC</b>	Liberal Party	
<b>The Hon Taylor Martin MLC**</b>	Liberal Party	
<b>The Hon Shaoquett Moselmane MLC***</b>	Australian Labor Party	

\* The Hon Trevor Khan MLC replaced the Hon Sam Farraway MLC as a member of the committee on 19 May 2020.

\*\* The Hon Taylor Martin MLC substituted for Hon Natalie Ward MLC from 14 October 2020 for the duration of the inquiry.

\*\*\* The Hon Mark Buttigieg MLC replaced the Hon Shaoquett Moselmane MLC as a member of the committee on 24 July 2020. The Hon Shaoquett Moselmane MLC then replaced the Hon Mark Buttigieg MLC as a member of the committee on 16 November 2020.

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## Chair's foreword

The citizens of New South Wales have a legitimate expectation for law and order, and to live in a peaceful society. We expect criminal activities, including organised crime and violent crime with weapons to be dealt with to the full extent of the law.

We also expect the common law rights of 'presumption of innocence' and 'the right to silence' to be upheld in legislation passed by the New South Wales Parliament.

The Firearms and Weapons and Legislation Amendment (Criminal Use) Bill 2020 proposes new offences and measures to curtail the unauthorised manufacture of illicit firearms and firearm parts, especially utilising new technologies.

However the Bill is very poorly written. It extinguishes citizens' privilege against self-incrimination and the common law 'right to silence' and 'presumption of innocence' as if these rights should not extend to licensed and lawful firearm owners. Prominent legal experts have given evidence to other Upper House committees highlighting the utmost importance that legislation, particularly delegated legislation, must be checked against internationally agreed human rights to prevent it being used to harm the interests of individuals.<sup>3</sup>

Lack of stakeholder consultation was also a major concern expressed in many written submissions and by witnesses at the hearings. Other concerns included: lack of safeguards and a defence against prosecution for firearm licence holders who make legitimate repairs, maintenance and adjustment to registered firearms; penalties that are disproportionate to the offence; and, the lack of protections for children from Firearms Prohibition Order searches.

The powers of police should not be unfettered as this bill proposes. Left unamended, this Bill if passed, could see all licensed firearm owners charged with a raft of new offences and face penalties that are disproportionate to the offence.

The bill has been thoroughly scrutinised during the inquiry. The written submissions and evidence given by witnesses during the hearings has been carefully considered. The committee makes 9 recommendations that are essential to ensure bill meets its objectives yet does not invoke any unintended consequences.

Finally, I thank committee members for their constructive contributions throughout the inquiry. I also thank all those individuals, clubs and associations, who made submissions. I especially thank the committee secretariat for their hard work throughout the duration of the inquiry.



Hon Robert Borsak MLC  
**Committee Chair**

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<sup>3</sup> See Evidence, Mr Andrew Chalk, Chair, Public Law Committee, The Law Society of New South Wales, Regulation Committee, Inquiry into making of delegated legislation in New South Wales, 27 July 2020, p 2; Evidence, Mr Michael McHugh, Senior Vice President, New South Wales Bar Association, Regulation Committee, Inquiry into making of delegated legislation in New South Wales, 27 July 2020, p 3



## Recommendations

### Recommendation 1

36

That the Legislative Council:

- proceed to debate the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020, but not pass the bill in its current form
- only pass the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 if substantially amended during the Committee of the Whole stage as detailed in recommendations 2 to 9.

### Recommendation 2

36

That the Legislative Council amend sections 51J and 25E of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to incorporate a similar defence for licensed firearms owners to that present in sections 37(3)(a) and 37(4)(a) in the South Australian *Firearms Act 2015*.

### Recommendation 3

37

That the Legislative Council amend sections 51J and 25E of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to:

- amend the *Firearms Act 1996* to define what minor repairs, routine maintenance and adjustments firearm licence holders and firearm permit holders are authorised to undertake to their registered firearms
- amend the *Weapons Prohibition Act 1998* to define what minor repairs, routine maintenance and adjustments prohibited weapons licence holders and prohibited weapon permit holders are authorised to undertake to their registered prohibited weapons.

### Recommendation 4

38

That the Legislative Council amend the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to create a discrete negligence-based offence with an appropriate and proportionate lower maximum penalty, consistent with the gradation of other criminal offences under New South Wales legislation.

### Recommendation 5

38

That the Legislative Council amend sections 51J and 25E of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to:

- tailor the unauthorised manufacture offences to cover the broad spectrum of offending covered by the proposed provisions
- ensure that the penalty thresholds for these offences are proportionate with other similar offences in New South Wales legislation.

**Recommendation 6****39**

That the Legislative Council amend sections 51K and 25F of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to provide that police are required to seek a court order when requiring the owner of a device to supply the password of any computer, phone or storage device seized by police suspected of containing evidence.

**Recommendation 7****39**

That the Legislative Council amend sections 51K and 25F of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to provide that owners may apply for the return of their seized property and goods in accordance with all of Part 17 of the *Law Enforcement Powers and Responsibilities Act 2002*.

**Recommendation 8****40**

That the Legislative Council amend section 74A(1) of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to provide that police are required to have 'reasonable suspicion' prior to searching any other persons on the premises, vehicle, vessel or aircraft of a person subject to an Firearms Prohibition Order.

**Recommendation 9****40**

That the Legislative Council amend the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to provide that police search powers for persons subject to a Firearms Prohibition Order be differentiated so that appropriate protections are provided to persons aged under 18 years.

## Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 24 March 2020.

The committee received 267 submissions and four supplementary submissions.

The committee also received 143 responses to five pro formas, based on pro forma campaigns arranged by Sporting Shooters Association of NSW and 73rd Regiment of Foot Inc.

The committee held two public hearings at Parliament House in Sydney on Wednesday 28 October 2020 and Thursday 10 December 2020.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.



## Chapter 1 Overview

This chapter outlines the background and purpose of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020, and provides an overview of its provisions, including any overlap and connections with existing legislation.

### Reference

- 1.1 The Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 (hereafter, the bill) was introduced in the Legislative Assembly on 26 February 2020 by the Hon David Elliott MP, Minister for Police and Emergency Services.<sup>4</sup>
- 1.2 On 24 March 2020, following a recommendation by the Selection of Bills Committee, the Legislative Council resolved to refer the provisions of the bill to Portfolio Committee No. 5 – Legal Affairs for inquiry and report.<sup>5</sup>

### Background and purpose of the bill

- 1.3 The primary object of the bill is to amend the *Firearms Act 1996* (the Act) by inserting two new sections:
- s 51J** a new offence of knowingly taking part in the unauthorised manufacture of firearms or firearms parts and to provide that the offence will include being in possession of certain matter ("firearm precursor") for the purposes of manufacturing a firearm or firearm part
- s 51K** confers seizure powers to police officers in relation to the new offence, including additional provisions for officers to seize and detain any firearm, firearm part or firearm precursor that the officer suspects on reasonable grounds may provide evidence of the commission of an offence under s 51J.<sup>6</sup>
- 1.4 A **firearm precursor** is defined in the bill as any object, device, substance, material or document used or capable of being used in the process of manufacturing a firearm or firearm part, including computer software or plans. A firearm precursor would also include incomplete components that may require further manufacturing to complete the firearm.<sup>7</sup>
- 1.5 Under the provisions of the bill, the maximum penalty for taking part in a manufacturing offence would be 20 years imprisonment. This is equal to the highest penalty currently listed in s 50A of the Act:
- (1) A person who manufactures a firearm is guilty of an offence under this subsection unless the person is authorised by a licence or permit to manufacture the firearm.
- Manufacture penalty – imprisonment for 10 years.

<sup>4</sup> *Notes and Proceedings*, NSW Legislative Assembly, 26 February 2020, p 1.

<sup>5</sup> *Minutes*, NSW Legislative Council, 24 March 2020, pp 850-851.

<sup>6</sup> Explanatory note, Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 (NSW).

<sup>7</sup> Hon David Elliott MP, Second reading speech: Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020, 26 February 2020.

- (2) A person who manufactures a pistol or prohibited firearm is guilty of an offence under this subsection unless the person is authorised by a licence or permit to manufacture the pistol or prohibited firearm.

Maximum penalty – imprisonment for 20 years.

**1.6** The bill also includes the following provisions concerning Firearms Prohibition Orders:

**s 73A** new section which mandates that Firearms Prohibition Orders are to be reviewed after the order has been in force for ten years

**s 74A** broadens the section to allow police officers to additionally search other persons present when searching the premises of a person subject to a Firearms Prohibition Order.

**1.7** Schedule 2 amends the *Weapons Prohibition Act 1998* to create a new offence of taking part in the unauthorised manufacture of prohibited weapons or parts of prohibited weapons, which is in addition to the existing offence (s 25A) of taking part in the unauthorised manufacture of firearms or firearms parts.

**1.8** Schedule 3 amends the *Firearms Regulation 2017* to recognise and enforce firearms prohibition order legislation from South Australia, Victoria and Tasmania.<sup>8</sup>

**1.9** In his second reading speech, Minister Elliott stated that the objectives of the bill are 'to strengthen the provisions relating to illegal manufacture of firearms or prohibited weapons and to clarify police powers when conducting firearms prohibition order searches'.<sup>9</sup>

**1.10** In particular, the Minister highlighted that there is a gap in the current legislation to effectively prosecute a manufacturing offence in instances where only parts of a firearm have been produced:

Under the existing "unauthorised manufacture of firearms" offence provisions, if police find an outlaw motorcycle gang clubhouse filled with machining equipment and materials, they may not be able to take action unless they could prove that a functioning firearm was the end result.<sup>10</sup>

**1.11** The Minister stated that the bill targets 'those who make the buying, selling and making of illegal firearms a main focus of their criminal business' and importantly, 'does not criminalise legitimate firearms owners'.<sup>11</sup> He further described the new offence as 'an integral initiative to respond to serious criminals who have the means and ingenuity to seek alternatives with which to produce a firearm'.<sup>12</sup>

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<sup>8</sup> Explanatory note, Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 (NSW).

<sup>9</sup> Hon David Elliott MP, Second reading speech: Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020, 26 February 2020.

<sup>10</sup> Hon David Elliott MP, Second reading speech: Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020, 26 February 2020.

<sup>11</sup> Hon David Elliott MP, Second reading speech: Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020, 26 February 2020.

<sup>12</sup> Hon David Elliott MP, Second reading speech: Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020, 26 February 2020.

- 1.12** Acting Deputy Commissioner Mark Walton, Deputy Commissioner of Investigations and Counter Terrorism at the NSW Police Force further warned of the 'real risk and problem of illicit firearms in the hands of criminals', which the NSW Police Force sees 'quite frequently'. He confirmed that there had been instances where firearms or weapons parts have been found on outlaw motorcycle gang members, which could potentially lead to the manufacture of illicit firearms.<sup>13</sup>
- 1.13** The NSW Police Force submission explained the genesis of the bill, noting that in light of the Lindt Café siege review, the Ministerial Council for Police and Emergency Management agreed in November 2015 to review the adequacy of legislation to respond to new technologies concerning the illegal manufacture of firearms. The Firearms and Weapons Policy Working Group (FWPWG) undertook the review and identified circumstances where no action could be taken under the existing offences in firearms legislation.<sup>14</sup>
- 1.14** In its document entitled '*Proposal for draft offences relating to illegal manufacture of firearms*', the FWPWG highlighted that it proposed 'to create a common provision to standardise illegal manufacturing offences by providing for the offence of 'take part in' illegal manufacture of firearms.'<sup>15</sup>
- 1.15** Key reasons put forward in support of the bill include the ability for prosecutors to bring forward a charge in the absence of a finished or functional firearm, the impact of emerging and advancing technologies, and the NSW Ombudsman's 2016 report into firearms prohibition orders. Each of these issues is examined below.

### **Absence of a finished or functional firearm**

- 1.16** As noted in the previous section, a key reason for the introduction of the bill is that a gap had been identified in the current legislation, which prevented prosecutors being able to bring a successful manufacturing charge, in the absence of a finished or functional firearm.
- 1.17** The FWPWG review 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 cases in the absence of an end product being a functioning firearm. This gap included:
- financing the illegal manufacture
  - providing premises used in the illegal manufacture process
  - participating in the illegal manufacture
  - assemblage of parts for the illegal manufacture

<sup>13</sup> Evidence, Acting Deputy Commissioner Mark Walton, Acting Deputy Commissioner, Investigations and Counter Terrorism, NSW Police Force, 28 October 2020, p 7.

<sup>14</sup> Submission 261, NSW Police Force, p 4.

<sup>15</sup> Firearms and Weapons Policy Working Group, *Proposal for draft offences relating to illegal manufacture of firearms* (December 2017), p 2.

- the acquisition, possession, use or supply of equipment, electronics (including digital blueprints or plans), components or materials.<sup>16</sup>

**1.18** The FWPWG highlighted that an illegal manufacture offence would not be 'contingent on the end-product being a functioning firearm or imitation firearm' and thus, there was 'no need to distinguish in legislation between a firearm and a prohibited firearm and any proofs of the offence do not include what type of firearm or imitation is expected to be manufactured'.<sup>17</sup>

**1.19** The NSW Police Force supported the bill as it would assist in prosecuting criminals for manufacturing a firearm in cases where no finished firearm or prohibited firearm is produced.<sup>18</sup> It advised that since 2003, 49 out of 96 charges for the unauthorised manufacture of a firearm or a prohibited firearm or pistol have not progressed.<sup>19</sup>

**1.20** Acting Deputy Commissioner Mark Walton, Deputy Commissioner of Investigations and Counter Terrorism at the NSW Police Force confirmed recent examples of manufacturing cases that could not be prosecuted due to the absence of a completed firearm:

...the weakness currently is the offence of manufacture requires proof that the whole firearm has been manufactured. So we have some recent cases where some quite dangerous weapons, even automatic weapons, have been manufactured and the prosecution has failed because those parts, the manufacture of those components was clearly with the intent to manufacture a firearm, could not meet the threshold of a whole firearm.<sup>20</sup>

**1.21** The NSW Police Force also noted that over the past twelve months, the Drug and Firearms Squad has detected further examples of the illegal manufacturing of firearms. While these matters had not yet gone to court, the NSW Police Force was concerned that some would likely not result in a successful prosecution as the firearms were unfinished or were only parts of a firearm. This included for example Strike Force Kileen, where extensive equipment used in the manufacture of firearm components, various crudely manufactured firearm components, ammunition at various stages of assembly and a computer hard drive that was being used to operate a 3D printer, were seized.<sup>21</sup>

### **Emerging and advancing technologies**

**1.22** Another key concern raised by the NSW Police Force is of the rapidly evolving nature of technology, particularly in relation to 3D printing, and indicated that the bill is attempting to proactively address the issue of technology being used as an enabler to manufacture firearms.<sup>22</sup> The NSW Police Force noted:

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<sup>16</sup> Submission 261, NSW Police Force, p 5.

<sup>17</sup> Firearms and Weapons Policy Working Group, *Proposal for draft offences relating to illegal manufacture of firearms* (December 2017), p 4.

<sup>18</sup> Submission 261, NSW Police Force, p 5.

<sup>19</sup> Answers to questions on notice, NSW Police Force, 26 November 2020, p 4.

<sup>20</sup> Evidence, Acting Deputy Commissioner Walton, 28 October 2020, p 5.

<sup>21</sup> Answers to questions on notice, NSW Police Force, p 5.

<sup>22</sup> Evidence, Acting Deputy Commissioner Walton, 28 October 2020, p 8.



The criminal space is ever-changing, and criminals and crime networks are highly responsive to new and emerging technologies, and, are oftentimes early adopters of new technology. The proposed manufacturing offence is a proactive policy response to this matter:<sup>23</sup>

- 1.23** The FWPWG described developing an offence that encompasses technology related matters as 'challenging' due to the high levels of accessibility and proliferation.<sup>24</sup> It noted that the broad nature of the offence (see more in Chapter 2) would be beneficial for covering new emerging firearms technology, including such items as fingerprint-proof polymers and electronic devices to capture electronic firing mechanisms.<sup>25</sup>
- 1.24** The FWPWG noted in its report however that criminalising actions such as downloading blueprints, templates, or instructions on firearms manufacturing could increase the risk of moving 'this behaviour' to the Dark Net (commonly also known as the Dark Web). It recommended that future legislative efforts should focus on both the surface web and the Dark Net.<sup>26</sup>
- 1.25** Section 51F of the Act currently covers offences relating to 3D printing machines, including the possession of digital blueprints for the manufacture of firearms. The proposed Section 51J broadens the offence to include, not just the person in possession of blueprints, software or plans, but also others who provide the finance or premises in which the process of manufacturing occurs.
- 1.26** Acting Deputy Commissioner Walton of the NSW Police Force explained that whilst certain people have always found the means and methods to manufacture firearms, technology and the internet had made this information more readily available and accessible:
- [The internet] has made experts of people that would have no capability to engage in a lot of criminal activity, including the risk of manufacturing firearms, particularly around that 3D printing element. But even with polymer 3D printed weapons, other parts that can be manufactured would be added to improve the reliability of those firearms.
- There has always been a capability from people with knowledge, intent and ability to create their own firearms. That threshold has lowered commensurate with the technological age of information.<sup>27</sup>
- 1.27** The NSW Police Force highlighted that the bill ensures that the 'future creativity of criminals in manufacturing firearms would be captured regardless of the materials, technology or equipment used to make a firearm'.<sup>28</sup>

<sup>23</sup> Answers to questions on notice, NSW Police Force, p 5.

<sup>24</sup> Firearms and Weapons Policy Working Group, *Proposal for draft offences relating to illegal manufacture of firearms* (December 2017), p 3.

<sup>25</sup> Firearms and Weapons Policy Working Group, *Proposal for draft offences relating to illegal manufacture of firearms* (December 2017), p 5.

<sup>26</sup> Firearms and Weapons Policy Working Group, *Proposal for draft offences relating to illegal manufacture of firearms* (December 2017), p 3.

<sup>27</sup> Evidence, Acting Deputy Commissioner Walton, 28 October 2020, p 7.

<sup>28</sup> Submission 261, NSW Police Force, p 6.

- 1.28** The Acting Deputy Commissioner further expressed concern that the volume and availability for polymer-based weapons was continually increasing. As an example, he cited a recent case before the courts where a counterterrorism target was found with thousands of files in relation to the creation of a 3D weapon.<sup>29</sup>

### **Firearms Prohibition Orders and the Ombudsman's report**

- 1.29** The bill also significantly amends and broadens police search powers under Firearms Prohibition Orders (FPOs).

- 1.30** FPOs are provided for under s 73 of the *Firearms Act* as follows:

- (1) The Commissioner may make a firearms prohibition order against a person if, in the opinion of the Commissioner, the person is not fit, in the public interest, to have possession of a firearm.
- (2) A firearms prohibition order takes effect when a police officer serves a copy of the order personally on the person against whom it is made.
- (3) The Commissioner may revoke a firearms prohibition order at any time for any or no stated reason.<sup>30</sup>

- 1.31** The NSW Police Force advised that since 2013, under s 74A of the *Firearms Act*, police officers have had the power to, without warrant, search a person subject to an FPO, their vehicle, and the premises that the person occupies, controls or manages. These searches are permitted as they are considered 'reasonably required' to determine if the subject of an FPO has committed a relevant offence relating to the possession of a firearm, firearm part or ammunition. The NSW Police Force also argued that FPOs have acted as an effective tool in reducing firearms-related violence and are a key element in suppression strategies used against outlaw motorcycle gangs and other criminal groups.<sup>31</sup>

- 1.32** In August 2016, the NSW Ombudsman produced a report entitled, 'Review of police use of the firearms prohibition order search powers' and made a number of recommendations including changes to legislation and internal procedures and practices that guide the way police use FPO search powers. Other measures were also proposed to ensure that police use FPO search powers fairly and reasonably, including that FPOs should automatically expire after five years.<sup>32</sup>

- 1.33** The NSW Police Force informed that the changes to procedure for FPO searches in the bill is to 'make the parameters of the search powers clear, in keeping with the Ombudsman's recommendations'.<sup>33</sup>

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<sup>29</sup> Evidence, Acting Deputy Commissioner Walton, 28 October 2020, p 8.

<sup>30</sup> *Firearms Act 1996*, s 73.

<sup>31</sup> Submission 261, NSW Police Force, p 12.

<sup>32</sup> Ombudsman of NSW, *Review of police use of the firearms prohibition order search powers* (August 2016), <https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/legislative-reviews/review-of-police-use-of-the-firearms-prohibition-order-search-powers-august-2016>.

<sup>33</sup> Submission 261, NSW Police Force, p 11.

## Chapter 2 Key issues

This chapter explores the key issues to emerge from the written and oral evidence. It commences by examining stakeholder concerns relating to the proposed offence of taking part in the unauthorised manufacture of firearms or firearm parts, including the broad operation of the offence and potential impacts on licensed firearms owners. The strict liability of the offence and the proportionality of the penalties are also examined.

The chapter then reviews proposed police powers to seize firearms, firearm parts and precursors, and examines whether this infringes on people's common law rights. The chapter considers the proposed legislative amendments relating to Firearms Prohibition Orders, including increased police search powers, lack of specific provisions relating to children and the options for review and appeal.

The chapter concludes by examining the lack of stakeholder engagement and consultation conducted prior to the introduction of the bill.

### Offence of taking part in unauthorised manufacture of firearms or firearm parts

- 2.1** The object of s 51J is to make it an offence for a person to take part in the manufacture of a firearm or firearm part, whilst knowing or ought to have known that this was not authorised by a licence or permit.<sup>34</sup>
- 2.2** The term 'takes part' includes the possession of a 'firearm precursor' for the purposes of manufacturing a firearm or firearm part. The offence would apply regardless of whether a firearm or firearm part is actually manufactured and double jeopardy provisions are included to ensure that a person is not liable to be convicted of both the new offence and another manufacturing offence under the *Firearms Act 1996* (the Act).
- 2.3** The relevant section of the bill is as follows:<sup>35</sup>

#### **s 51J – Offence of taking part in unauthorised manufacture of firearms or firearm parts**

- (1) A person who –
- (a) knowingly takes part in the manufacture of a firearm or firearm part, and
  - (b) knows, or ought reasonably to know, that the manufacture of the firearm or firearm part is not authorised by a licence or permit, is guilty of an offence.  
Maximum penalty—imprisonment for 20 years
- (2) For the purposes of this section, a person takes part in the manufacture of a firearm or firearm part if—
- (a) the person takes, or participates in, any step, or causes any step to be taken, in the process of that manufacture, or
  - (b) the person provides or arranges finance for any step in that process, or
  - (c) the person provides the premises in which any step in that process is taken, or suffers or permits any step in that process to be taken in premises of which the

<sup>34</sup> Explanatory note, Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020.

<sup>35</sup> Explanatory note, Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020.

- person is the owner, lessee or occupier or of which the person has the care, control or management, or
- (d) without limiting paragraph (a)—the person possesses a firearm precursor for the purposes of manufacturing a firearm or firearm part.
- (3) In this section and in section 51K—  
***firearm precursor*** means any object, device, substance, material or document used or capable of being used in the process of manufacturing a firearm or firearm part, including (but not limited to) the following—
- (a) moulds for making firearm parts,
- (b) milling, casting or rifling equipment,
- (c) digital blueprints within the meaning of section 51F,
- (d) computer software or plans.
- (4) This section applies in relation to a person regardless of whether a firearm or firearm part is actually manufactured.
- (5) This section does not apply in relation to a person who is acting in the course of the person's duties as a member (other than a police officer) of the Police Force.
- (6) A person who has been convicted of an offence under this section is not liable to be convicted—
- (a) of a manufacture offence, or
- (b) of a separate offence under this section, on the same, or substantially the same, facts as those relied on as evidence of commission of the offence in respect of which the person has been convicted.
- (7) A person who has been acquitted of an offence under this section is not liable to be convicted—
- (a) of a manufacture offence, or
- (b) of a separate offence under this section, on the same, or substantially the same, facts as those relied on as evidence of commission of the offence in respect of which the person has been acquitted.
- (8) A person who has been—
- (a) convicted of a manufacture offence, or
- (b) acquitted of a manufacture offence,
- is not liable to be convicted of an offence under this section on the same, or substantially the same, facts as those relied on as evidence of commission of the manufacture offence.
- (9) Subject to subsections (6) and (7), this section does not—
- (a) remove the liability of any person to be convicted of a manufacture offence, or
- (b) affect the punishment that may be imposed for a manufacture offence.
- (10) In subsections (6)–(9), manufacture offence means an offence under section 50A or 51F.<sup>36</sup>

**2.4** The committee received 267 submissions for this inquiry, with the vast majority from licenced firearms owners who were concerned that the broad wording of the new offence under s 51J would have negative unintended consequences for them. These concerns, along with concerns raised by legal representatives are discussed below.

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<sup>36</sup> Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020, s 51J.

## Broad operation of the offence

**2.5** Numerous inquiry participants expressed concern over the broad operation of this new offence, and in particular, that it may potentially capture lawful firearms licence holders who carry out minor repairs, maintenance or modifications to their authorised firearms.<sup>37</sup>

**2.6** For example, Mr Craig Golding, New South Wales Coordinator of the Shooters' Union Australia warned that many law-abiding people could be guilty of an offence under the bill's current provisions:

The proposed amendments to the *Firearms Act* fail to properly distinguish the lawful maintenance of a firearm by a licensed firearm owner from the unlawful criminal manufacture of a firearm. ... In its current form the bill potentially criminalises not only the law-abiding firearm owner but also every home handyman, engineering business, tradesperson or motor mechanic who has access to common household items such as lubricants, screws and springs.<sup>38</sup>

**2.7** The NSW Bar Association reflected that whilst the Minister's second reading speech indicated that the purpose behind the proposed offences was to permit prosecution of organised criminals who possess equipment and materials intended to be used in the manufacture of illegal firearms and prohibited offences, the proposed offences were much broader in scope. It noted that for example, young people could be liable to 20 years' imprisonment for experimenting with 3D printing of an object, such as a crossbow.<sup>39</sup>

**2.8** The Law Society of NSW representative, Ms Jane Sanders, highlighted the lack of specific provisions relating to criminal groups in the bill, in spite of the intended purpose:

I would suggest that there is nothing in this proposed provision that requires the manufacture to take place in the context of a criminal group. In the *Crimes Act 1900* there are criminal group traditions—take part in criminal group, organise criminal group et cetera—and I can see nothing in this proposed provision that requires it to be part of a sophisticated operation. I would be sceptical about whether police discretion on its own will be sufficient to ensure that the appropriate charges are laid.<sup>40</sup>

**2.9** To highlight this concern, the Law Society of NSW referred to the 2012 consorting laws<sup>41</sup> as an example of legislation that it considers to target groups other than who the legislation was originally intended for. Ms Sanders asserted that the consorting laws were meant to target gangs and organised crime networks, but the laws are now 'generally used to target young people, homeless people, Indigenous people and people with cognitive impairments'.<sup>42</sup>

<sup>37</sup> See for example, Submission 2, Name suppressed, p 1; Submission 3, Name suppressed, p 1; Submission 6, Mr Wayne Turner, p 1; Submission 14, Name suppressed, p 1; Submission 15, Name suppressed, p 1; Submission 17, Mr Robert Whiter, p 2; Submission 20, Cr Arthur Hall, p 1; Submission 66, Name suppressed, p 1; Submission 69, Mr Oskar Zimmerman, p 3; Submission 93, Name suppressed, p 1.

<sup>38</sup> Evidence, Mr Craig Golding, New South Wales State Coordinator, Shooters' Union Australia, 28 October 2020, p 36.

<sup>39</sup> Submission 263, NSW Bar Association, p 3.

<sup>40</sup> Evidence, Ms Jane Sanders, Representative, Law Society of NSW, 10 December 2020, pp 2-3.

<sup>41</sup> *Crimes Act 1900*, s 93X.

<sup>42</sup> Evidence, Ms Sanders, 10 December 2020, pp 2-3.

**2.10** In response to these concerns, the NSW Police Force reiterated that the intent of the Firearms bill is not to criminalise licensed firearm holders, but to 'improve public safety by targeting criminals and those who support them' and 'disrupting criminal use of firearms and weapons'.<sup>43</sup>

**2.11** Acting Deputy Commissioner of Investigations and Counter Terrorism at the NSW Police Force, Mark Walton, emphasised that the threshold for meeting the new offence would be high and thus legal firearms owners would not be a target:

To balance the fact that the offence potentially captures a broad-ranging group of people, the threshold to prove the offence is high in that two legal tests must be established: the accused must be a person who knowingly takes part in the manufacture of a firearm or firearm part; and knows, or ought reasonably to know, that the manufacture of the firearm or firearm part is not authorised by a licence or permit.

The two-element test means that persons authorised to manufacture under a licence or permit will not be captured and persons who contribute to manufacturing without the knowledge that they are taking part in an illegal activity will not be captured.<sup>44</sup>

**2.12** The Firearms and Weapons Policy Working Group (FWPWG) review, as discussed in Chapter 1, noted that the 'advantage' of a broad offence is that 'future creativity of criminals would be captured regardless of the materials used'.<sup>45</sup>

#### *Impacts on licensed firearms owners*

**2.13** However, inquiry participants told the committee that the 'loose' wording of the bill and the vagueness of existing regulations could lead to potential adverse impacts on them if the bill was passed in its current form.<sup>46</sup> One of the issues raised was that current firearm licence provisions are not explicit on what modifications or repairs owners can make to their own firearms.<sup>47</sup>

**2.14** Mr Douglas Shupe, Chairman of GameCon, explained that whilst his category A or B licence specifies that he can hunt or target shoot with his firearm, it does not spell out whether he is allowed to make modifications or carry out maintenance on it. Mr Shupe said that the lack of clear guidance meant licensed owners took it as 'all just sort of understood' and it was 'common practice' to make minor modifications to their firearms.<sup>48</sup>

**2.15** In addition, Mr Golding of the Shooters' Union of Australia confirmed that the majority of shooters in New South Wales hold a category A or B licence, which does not specify what modifications or maintenance are permitted on licensed firearms.<sup>49</sup>

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<sup>43</sup> Evidence, Acting Deputy Commissioner Mark Walton, Investigations and Counter Terrorism, NSW Police Force, 28 October 2020, p 2.

<sup>44</sup> Evidence, Acting Deputy Commissioner Walton, 28 October 2020, p 2.

<sup>45</sup> Firearms and Weapons Policy Working Group, *Proposal for draft offences relating to illegal manufacture of firearms* (December 2017), p 3.

<sup>46</sup> See for example, Submission 87, Name suppressed, p 1; Submission 142, Mr Roger Moore, p 1.

<sup>47</sup> See for example, Submission 110, Mr Steve Graham, p 1; Submission 123, Name suppressed, p 1; Submission 137, Name suppressed, p 1; Submission 143, Name suppressed, p 1.

<sup>48</sup> Evidence, Mr Douglas Shupe, Chairman, GameCon, 28 October 2020, p 37.

<sup>49</sup> Evidence, Mr Golding, 28 October 2020, p 38.

- 2.16** Mr Golding added that licenses that allow firearm repair and manufacture are generally limited to gunsmiths and club armourers only.<sup>50</sup>
- 2.17** However, Mr Lance Miller, President of the New South Wales branch of Sporting Shooters' Association of Australia (SSAA NSW), told the committee that cleaning and maintaining firearms were 'essential safety acts for all responsible, legal firearms users'.<sup>51</sup> He explained that the NSW Firearms Registry, which is part of the NSW Police Force, published a memorandum which dealt with the expectation of licence holders sighting and cleaning their firearms. Even so, Mr Miller argued that state regulations on the issue are still not clear.<sup>52</sup>
- 2.18** Experienced firearms owners told the committee that the introduction of the bill had caused them to question what firearm maintenance or repair was indeed permissible and expressed concern that what was standard practice now, could make them liable to a serious offence if the bill was passed in its current form. The Valleybrook Hunting Club felt that the bill in its present form 'is more suited to turn legal law abiding firearm owners and users into a new class of criminal than it is to deter criminal firearm manufacture in the state of New South Wales'.<sup>53</sup>
- 2.19** Mr Miller of SSAA NSW reflected that those items used in the maintenance and upkeep of legal firearms could be considered as illegal precursors and 'automatically' criminalise the firearms owner if the bill passed.<sup>54</sup>
- 2.20** The Goulburn and Districts branch of the SSAA also echoed this position:
- Legal firearms owners have no provision for owning things related to their registered firearms. The very items used for upkeep, cleaning and adjustment of their registered firearms, purchased legally from authorized dealers, could be the evidence used to jail them for up to 20 years.<sup>55</sup>
- 2.21** Mr Shupe of Gamecon was similarly concerned and remarked that the law should be clarified to specify what legal modifications and maintenance can be performed by licenced firearms owners:
- I just thought if I change the scope on my rifle, things like that, did a little bit of wood work on the stock, there was no problem. But, the way this was written, I started to think, wait a second, if you are going to all this trouble to explain what is illegal, why do you not explain what is not illegal?<sup>56</sup>
- 2.22** In addition, other stakeholders also raised the issue of the high cost, long waiting times and general lack of accessibility to licenced gunsmiths or dealers and how this acted as a major

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<sup>50</sup> Evidence, Mr Golding, 28 October 2020, p 38.

<sup>51</sup> Evidence, Mr Lance Miller, President, Sporting Shooters' Association of Australia (NSW), 10 December 2020, p 14.

<sup>52</sup> Evidence, Mr Miller, 10 December 2020, pp 15-17.

<sup>53</sup> Submission 226, Valleybrook Hunting Club, p 1.

<sup>54</sup> Evidence, Mr Miller, 10 December 2020, p 14.

<sup>55</sup> Submission 196, Sporting Shooters' Association of Australia Goulburn and Districts Branch, p 1.

<sup>56</sup> Evidence, Mr Shupe, 28 October 2020, p 37.

deterrent to have firearms professionally repaired or maintained.<sup>57</sup> The committee heard that the provisions of the bill would also have a disproportionate impact on people in rural and remote communities, who rely on firearms as 'tools of trade' and that gunsmiths are even less accessible to them.<sup>58</sup> SSAA NSW summarised:

Farmers and people in rural communities generally have a greater day to day need to use firearms. This combined with limited access to gunsmith services would almost certainly necessitate repairs being carried out by the owner of the firearm to ensure its availability.<sup>59</sup>

**2.23** In response to concerns regarding the responsibilities of licenced firearms owners, Acting Deputy Commissioner Walton of the NSW Police Force stated that its document *Firearms (Longarms) Users Guide: Rights, wrongs and responsibilities* clearly allows for the repair, maintenance, and in some cases, the modification of firearms as long as it is within the law.<sup>60</sup>

**2.24** Regarding firearms that are broken or in need of repair, the *Firearms (Longarms) Users Guide: Rights, wrongs and responsibilities* notes:

Every shooter has a duty of care to regularly maintain their firearm. If you are unsure of how to clean or maintain your firearm either refer to manufacturer's manual or ask a licensed firearms dealer or club armourer to assist you.

You can always take your firearm to a licensed dealer or a manufacturer to have it repaired.<sup>61</sup>

**2.25** The NSW Police Force again emphasised that the focus of the bill was on the illegal manufacture of firearms and not on general repairs, minor modifications or the day to day maintenance of a firearm. It also highlighted that the current Act lists when a particular modification to a firearm is lawful, depending on the circumstances.<sup>62</sup>

### ***Breadth of firearms precursors***

**2.26** Whilst the majority of stakeholders welcomed the intention of the bill to fight organised crime, many expressed alarm with the new concept of 'firearm precursors' and the broad range of ordinary items that are captured by the definition.<sup>63</sup>

<sup>57</sup> Evidence, Mr Shupe, 28 October 2020, p 37; Evidence, Mr Golding, 28 October 2020, p 39; Evidence, Mr Stephen Mainstone, Firearms lawyer, 10 December 2020, p 24; Evidence, Mr Don Barton, Firearms owner, 10 December 2020, p 40.

<sup>58</sup> Evidence, Mr Mainstone, 10 December 2020, p 24.

<sup>59</sup> Submission 228, Sporting Shooters' Association of Australia (NSW), p 7.

<sup>60</sup> Evidence, Acting Deputy Commissioner Walton, 28 October 2020, p 3.

<sup>61</sup> NSW Police Force, *Firearms (Longarms) Users Guide: Rights, wrongs and responsibilities* (September 2006), p 25, [https://www.police.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0014/133133/Firearms\\_Users\\_Guide.pdf](https://www.police.nsw.gov.au/__data/assets/pdf_file/0014/133133/Firearms_Users_Guide.pdf).

<sup>62</sup> Submission 261, NSW Police Force, p 8.

<sup>63</sup> See for example, Submission 5, Name suppressed, p 1; Submission 8, Name suppressed, p 1; Submission 12, Mr Andrew Hooke, p 1; Submission 15, Name suppressed, p 1; Submission 17, Mr Robert Whiter, p 2; Submission 20, Cr Arthur (Mark) Hall, p 1; Submission 27, Mr Simon Munslow, p 3 ... Submission 75, Antique Arms Collectors' Society of Australia, p 2; Submission 94, Macleay



**2.27** As discussed in chapter 1, a firearm precursor is defined in s 51J(3) as any object, device, substance, material or document used or capable of being used in the process of manufacturing a firearm or firearm part, including (but not limited to) the following:

- moulds for making firearm parts
- milling, casting or rifling equipment
- digital blueprints within the meaning of section 51F
- computer software or plans.

**2.28** The NSW Police Force elucidated that there was a gap in items which could not be defined as 'firearm parts' under the Act, and that these were now caught within the definition of firearm precursors.<sup>64</sup> Superintendent Anthony Bell, Commander of the NSW Firearms Registry, further explained:

The precursors cover what is not a firearm part or a firearm that is registered and manufactured officially. It is all of those other elements that go towards someone being able to manufacture it themselves. It is not just those blueprints. It is the equipment, the tools and the chemicals that are used. All of those ingredients come together to prove manufacture.<sup>65</sup>

**2.29** In objecting to the definition of this new term, many stakeholders stated that it includes everyday items commonly found in garages, workshops or kitchens. Mr Golding of the Shooters' Union Australia illustrated the broad range of groups and items potentially captured by the offence:

In its current form the bill potentially criminalises not only the law-abiding firearm owner but also every home handyman, engineering business, tradesperson or motor mechanic who has access to common household items or workshop machines such as lathes, drill presses, cordless drills or angle grinders, not to mention everyday items such as lubricants, screws and springs.<sup>66</sup>

**2.30** SSAA NSW explained that many of the tools used by competitive shooters to clean and maintain their firearms would now be considered as precursors under the bill:

To achieve this, the legal firearms owner and competitor will often own multiple barrels and their own cartridge chamber reamer, the purpose being to ensure consistency from barrel to barrel to match their hand-prepared ammunition. The barrels are chambered by a gunsmith and are registered. This is all legal.

If the competitor wants their own specific tolerance chamber reamer, rather than using the gunsmith's unknown tolerance and worn reamer, the competitor is considered to own a precursor.<sup>67</sup>

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Valley Regional Shooting Complex, p 1; Submission 96, Shoalhaven Hunting Club, p 2; Submission 170, Sporting Shooters' Association of Australia Sydney Branch Inc, p 1.

<sup>64</sup> Evidence, Acting Deputy Commissioner Walton, 28 October 2020, p 2.

<sup>65</sup> Evidence, Superintendent Anthony Bell, Commander, NSW Firearms Registry, 28 October 2020, p 9.

<sup>66</sup> Evidence, Mr Golding, 28 October 2020, p 36.

<sup>67</sup> Evidence, Mr Miller, 10 December 2020, p 14.

- 2.31** Another example of a type of precursor commonly found in the possession of licensed firearms shooters were manuals and books. The Shooting Academy Club noted that upon purchase of an authorised firearm, owners were given manuals on how to operate their firearms and often owned other books or publications about firearms:

Countless books have been written on theory of operation and the correct maintenance of firearms in the last 200 years. Many of these are today available in electronic format, or by simply searching the freely available online patent history of firearms. ... Under WH&S rules it is a legal requirement for manufacturers to provide information necessary for the safe operation, use and maintenance of products supplied to the market, and that includes firearms. Such information commonly explains the principles of operation and shows details of how to identify individual component parts and their correct assembly, which is essential for their safe operation, but under this proposed legislation could be made illegal...<sup>68</sup>

- 2.32** In response to the issue of the breadth of items defined as firearm precursors, the NSW Police Force argued that everyday items, such as hammers, drills, oils or screwdrivers, would only be considered as precursors if they were used for the illegal manufacture of a firearm or part and if the two-element test of 'guilty knowledge' in s 51J(1) was proved.<sup>69</sup>

- 2.33** Acting Deputy Commissioner Walton of the NSW Police Force asserted that the knowledge factor (discussed more in the section below) was crucial for a firearms precursor to be considered in a manufacturing offence, noting that everybody owns items that could be considered a firearms precursor:

There would always have to be evidence intelligence that links that potential precursor to the intent to manufacture a firearm. It would not reach the first threshold if it is an item that has other purposes. ... It just does not get to first base without those elements being satisfied. I suspect every one of us has got things that could be considered precursors in our garage. That does not mean that the police are incidentally going to start to investigate you without any other evidence intelligence connection to a suggestion that you are involved in the manufacture of firearms.<sup>70</sup>

### **Strict liability of the offence**

- 2.34** Under proposed s 51J(1) of the bill, it is an offence if a person:

- (a) knowingly takes part in the manufacture of a firearm or a firearm part, and
- (b) knows, or ought reasonably to know, that the manufacture of the firearm or firearm part is not authorised by a licence or permit.

- 2.35** Similarly, the proposed s 25E of the *Weapons Prohibition Act 1998* makes it an offence if a person knowingly takes part in the manufacture of a prohibited weapon or part of a prohibited weapon, and knows, or ought reasonably to know, that the manufacture of the proposed weapon or part is not authorised by a permit.

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<sup>68</sup> Submission 89, Shooting Academy Club Inc, p 2.

<sup>69</sup> Submission 261, NSW Police Force, p 9. See also, Evidence, Acting Deputy Commissioner Walton, 28 October 2020, p 2.

<sup>70</sup> Evidence, Acting Deputy Commissioner Walton, 28 October 2020, p 9.

*'Ought reasonably to know' and liability on basis of negligence*

- 2.36** The NSW Bar Association highlighted that these new offences not only capture persons who 'know' that the manufacture of a firearm or firearm part is not authorised, but extend liability to persons who 'ought reasonably to know' that the activity is not authorised. The NSW Bar Association argued that this was contrary to the Minister for Police and Emergency Services' second reading speech, where he seemed to suggest that only strict knowledge was required<sup>71</sup>:

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. This element relating to knowledge is an important one.<sup>72</sup>

- 2.37** The Minister drew comparisons to, and highlighted the importance of knowledge in s 24 of the *Drugs Misuse Trafficking Act 1985*, which provides that a person who manufactures, produces, or knowingly takes part in the manufacture or production of a prohibited drug, is guilty of an offence. The Minister explained:

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 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.<sup>73</sup>

- 2.38** However, the NSW Bar Association argued that this was not an appropriate comparison, as the *Drugs Misuse Trafficking Act* does not contain an 'ought to reasonably know' clause.<sup>74</sup>

- 2.39** Legal stakeholders therefore raised concerns that the 'ought reasonably to know' phrase in s 51J(1)(b) and s 25(1)(b) imposes liability on the basis of negligence as it does not require any actual knowledge by the person that the manufacture was illegal. The NSW Bar Association raised as an example, that even if someone genuinely believed that the manufacture of a firearm, firearm part, prohibited weapon or part of a prohibited weapon was authorised by a licence or permit, the person would still be guilty of the offence if a court was satisfied that a reasonable person in the position of that person would have known that the manufacture was prohibited.<sup>75</sup>

- 2.40** The Law Society of NSW echoed this concern and presented a scenario comparing an offence committed with full knowledge that the manufacture of a firearm or part was illegal, as being 'qualitatively quite different' to an offence where the accused 'ought to have known' of its illegality:

<sup>71</sup> Submission 263, New South Wales Bar Association, p 4.

<sup>72</sup> Hon David Elliott MP, Second reading speech: Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020, 26 February 2020.

<sup>73</sup> Hon David Elliott MP, Second reading speech: Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020, 26 February 2020.

<sup>74</sup> Submission 263, New South Wales Bar Association, pp 4-5.

<sup>75</sup> Submission 263, New South Wales Bar Association, p 4.

An accused person might not know the manufacture is unauthorised because they have not made any enquiries, or they may have made some limited enquiries, or they may have made extensive enquiries, or they may have been actively misled by the principal manufacturer that the manufacture is in fact authorised. The accused may have a genuine belief that the manufacture is authorised or may simply not have turned their mind to the issue.

Liability in each of those situations will depend upon the court's view as to whether in the particular circumstances of the case the accused ought reasonably to have known.<sup>76</sup>

**2.41** The NSW Bar Association cautioned against the 'creation of criminal offences with severe maximum penalties where a fault element of negligence is sufficient for liability'. It referred to existing criminal law, which treats the subjectively culpable and negligent infliction of harm separately, with very different maximum penalties.<sup>77</sup>

**2.42** For example, the maximum penalty for negligently causing grievous bodily harm is two years and significantly lower than the maximum for intentional infliction of grievous bodily harm (25 years) and reckless infliction of grievous bodily harm (10 years).<sup>78</sup> Mr Stephen Odgers, Co-Chair of the Criminal Law Committee, explained:

That is the norm in criminal law that where you have a potential liability based on an objective fault element, it will be a different offence with a different lower maximum penalty. ... Because the premise is—basic criminal law 101—that the maximum penalty is appropriate for the worst case of that kind of offence and the premise is that if you were [liable] turns simply on failure to meet an objective standard, then the worst case would not justify that maximum penalty.<sup>79</sup>

**2.43** The NSW Bar Association further raised the issue of how the bill, in its current form, will affect the nuances in sentencing. Mr Odgers explained that because the offences attracted a maximum penalty of 20 years, the charges will generally have to be trialled by a jury and the sentencing judge would not know the basis upon which the jury convicted – whether the person knew that the manufacturing of the firearm or part was illegal, or genuinely did not know, but ought to have known it was. Mr Odgers said:

The jury might take the view that this person honestly believed that they were entitled to do what they did and that it was not prohibited or whatever but they failed to meet the objective test. But a sentencing judge will not know that ...

... You only have the verdict of guilty or not guilty, so the judge is then the one who is determining the facts. Some people say, "Well, that is not a problem", but it might be incongruous that you have a situation where a jury convicted on one basis and the judge does not know, and the judge then convicts sentences for a much more serious basis of liability because the judge makes that finding which that jury did not.<sup>80</sup>

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<sup>76</sup> Answers to questions on notice, Law Society of NSW, 18 January 2021.

<sup>77</sup> Submission 263, New South Wales Bar Association, p 5.

<sup>78</sup> Submission 263, New South Wales Bar Association, p 5.

<sup>79</sup> Evidence, Mr Stephen Odgers, Co-Chair, Criminal Law Committee, NSW Bar Association, 28 October 2020, p 31.

<sup>80</sup> Evidence, Mr Odgers, 28 October 2020, p 31.

- 2.44 The Law Society of NSW also noted that as the bill provides no guidance for the Crown in terms of charge selection, the provisions may be applied inconsistently. It recommended that to avoid this, the existing sections of the Act and *Weapons Prohibition Act 1998* regarding unauthorised manufacture of firearms and prohibited weapons, and possession of digital blueprints for manufacture, be amended to include 'knowingly take part' offences with an appropriate spectrum of maximum penalties.<sup>81</sup>
- 2.45 The NSW Police Force defended the inclusion of the 'ought to have known' clause and the introduction of a strict liability or 'negligence' fault element because 'there is an absolute test in firearms manufacturing in that either a person is licensed or not' and this merely 'requires a baseline enquiry to establish this fact'.<sup>82</sup>
- 2.46 Superintendent Bell, Commander of the NSW Firearms Registry also emphasised that in his experience, the majority of licensed firearms holders in the state understood their obligations and complied with the law, suggesting that they would continue to do so under the new legislation.<sup>83</sup>

***Comparison to South Australian Firearms Act 2015***

- 2.47 The NSW Police Force acknowledged that the new provisions in the bill, relating to the illegal manufacture of firearms offence, were similar to those found in s 37 of the South Australian *Firearms Act 2015*<sup>84</sup> which reads as follows:

**s 37 – Manufacture of firearms, firearm parts or sound moderators**

- (1) Subject to this section, a person is guilty of an offence if the person manufactures a firearm, firearm part or sound moderator.
- (2) If a person manufactures a firearm, firearm part or sound moderator in contravention of subsection (1), the following persons are each guilty of an offence:
  - (a) a person who knowingly took, or participated in, a step, or caused a step to be taken, in the process of manufacture of the firearm, firearm part or sound moderator;
  - (b) a person who knowingly provided or arranged finance for a step in the process of manufacture of the firearm, firearm part or sound moderator;
  - (c) a person who knowingly provided the premises in which a step in the process of manufacture of the firearm, firearm part or sound moderator was taken, or allowed a step in the process of manufacture of the firearm, firearm part, or sound moderator to be taken in premises of which the person was an owner, lessee or occupier or of which the person had care, control or management.
- (3) Subsection (1) does not apply to—
  - (a) the manufacture by a person of a firearm or firearm part in accordance with a licence held by the person; or
  - (b) the manufacture by a person of a sound moderator with the written approval of the Registrar, provided the person complies with any limitations or conditions prescribed by the regulations or imposed by the Registrar.

<sup>81</sup> Submission 100, Law Society of NSW, pp 1-2.

<sup>82</sup> Answers to questions on notice, NSW Police Force, 26 November 2020, p 7.

<sup>83</sup> Evidence, Superintendent Bell, 28 October 2020, p 10.

<sup>84</sup> Submission 261, NSW Police Force, p 5.

- (4) It is a defence to a charge of an offence under subsection (1) or (2) to prove that, in the case of a firearm part—
  - (a) the firearm part was for a firearm registered in the name of the person who manufactured the firearm part; or
  - (b) —
    - (i) the firearm part was for a firearm registered in the name of a company of which the person who manufactured the firearm part was an officer or employee; and
    - (ii) the officer or employee was the holder of a licence authorising possession of the firearm; and
    - (iii) the firearm part was manufactured by the officer or employee in the course of his or her duties as an officer or employee of the company.
- (5) The maximum penalty for an offence under this section is as follows:
  - (a) in the case of a firearm or firearm part—
    - (i) if the firearm is a prescribed firearm or the firearm part is a firearm part for a prescribed firearm—\$75 000 or imprisonment for 15 years;
    - (ii) if the firearm is a category C, D or H firearm or the firearm part is a firearm part for a category C, D or H firearm—\$50 000 or imprisonment for 10 years;
    - (iii) if the firearm or firearm part is any other kind of firearm or firearm part—\$35 000 or imprisonment for 7 years;
  - (b) in the case of a sound moderator—\$35 000 or imprisonment for 7 years.
- (6) A person may, at the discretion of the prosecutor, be prosecuted for a summary offence except where the firearm is a prescribed firearm or the firearm part is a firearm part for a prescribed firearm, but on conviction of a summary offence under this section the maximum penalty is \$10 000 or imprisonment for 2 years.
- (7) For the purposes of this section, a licensed dealer who assembles, from separate, prefabricated parts, a firearm that is designed to be so assembled, or that is designed to be disassembled for the purpose of transport or storage, will not be taken to have manufactured the firearm.

**2.48** However, unlike the New South Wales bill, the South Australian Act makes specific exemptions for licensed firearms owners – s 37(3)(a) provides that the offence under s 37(1) does not apply to the manufacture by a person of a firearm or firearm part in accordance with a licence held by the person and s 37(4)(a) sets out defences, including in cases where the firearm part was manufactured by the licenced owner of that firearm.

**2.49** Similarly, the Firearms and Weapons Policy Working Group recognised that unintended consequences from the manufacturing offence could lead jurisdictions 'to develop similar defences where appropriate'.<sup>85</sup>

**2.50** Another difference with the bill is that the South Australian Act has scaled the maximum penalty for offences, depending on the type of firearm or firearm part that was manufactured (s 37(5)).

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<sup>85</sup> Firearms and Weapons Policy Working Group, *Proposal for draft offences relating to illegal manufacture of firearms* (December 2017), p 5.

**2.51** Many inquiry participants, including the NSW Firearms Dealers Association<sup>86</sup> and SSAA NSW,<sup>87</sup> expressed their support for a similar exemption for licensed firearms holders to be incorporated into the bill. Highlighting that legal firearms owners are already proven to be law-abiding by the many requirements attached to their licence, SSAA NSW strongly advocated for an exemption by stating:

We know that legal firearms owners are law-abiding because they have been vetted by the police, they complete regular safety training and they comply legally with all required participation in their sport. We ask that legal firearms owners are written into the bill and that their legal and legitimate activities are recognised as such to avoid any inadvertent or misdirected targeting. At the very minimum, we would point the committee to sections 37(3)(a) and 37(4)(a) of the *South Australian Firearms Act 2015*.<sup>88</sup>

**2.52** Mr Don Barton, former legal practitioner and firearms owner, also described the South Australian provisions to be a 'sensible measure to make things abundantly clear as far as law-abiding firearms owners are concerned'.<sup>89</sup>

**2.53** Individual stakeholders also advocated that it was 'imperative' to have an exemption for licensed firearms owners, in order that they are able to maintain firearms that they legally possess.<sup>90</sup>

**2.54** A number of inquiry participants also raised that in the absence of a specific defence for licensed firearm owners, those who own antique firearms and conduct any routine maintenance or repairs may face unintended consequences. Antique firearms and associated miscellaneous antiques are not required to be registered under section 6A(2) of the Act.<sup>91</sup> The Antique Arms Collectors' Society of Australia and others highlighted that, unlike the Act, the bill did not distinguish between firearms and antique firearms even though the latter are unable to be fired<sup>92</sup> and expressed concern that the maintenance or repair of antique firearms could become a 'nefarious operation'.<sup>93</sup>

**2.55** The Antique Arms Collectors' Society proposed that the bill should make it clear that it does not extend to collectors of antique arms or firearms that do not require registration.<sup>94</sup> Further to this issue, an individual submission author Mr Brenton Bliss noted that at times, it is necessary to manufacture a broken part of an antique firearm in order to maintain the firearm in a serviceable condition.<sup>95</sup>

<sup>86</sup> Evidence, Mr Paul Britton, President, NSW Firearms Dealers Association, 28 October 2020, pp 44 and 46.

<sup>87</sup> Evidence, Mr Miller, 10 December 2020, p 14. See also, Evidence, Mr Jai Rowell, CEO and Executive Director, Sporting Shooters' Association of Australia (NSW), 10 December 2020, p 15.

<sup>88</sup> Evidence, Mr Miller, 10 December 2020, p 14.

<sup>89</sup> Evidence, Mr Barton, 10 December 2020, p 43.

<sup>90</sup> Submission 107, Mr Brian Bigelow, p 2; Submission 215, SUNS Shooting Club, p 3; Submission 216, Firearm Owners United, p 1; Submission 229, GameCon, p 2; Submission 235, Name suppressed, p 1; Submission 260, Name suppressed, p 2.

<sup>91</sup> *Firearms Act 1996*, s 6A(2).

<sup>92</sup> Submission 75, Antique Arms Collectors' Society of Australia, pp 1-2.

<sup>93</sup> Submission 195, Name suppressed, p 1. See also, Submission 32, Mr David Garland, p 1, Submission 109, Shooters' Union of Australia, p 7, Submission 251, Mr Brenton Bliss, p 1.

<sup>94</sup> Submission 75, Antique Arms Collectors' Society of Australia, p 2.

<sup>95</sup> Submission 251, Mr Brenton Bliss, p 1.

- 2.56** In contrast, the Australian Gun Safety Alliance was of the opinion that the provisions in the New South Wales bill seemed to be clearer when referring to the type of licence required to legally manufacture or modify a firearm or firearm part. The Australian Gun Safety Alliance expressed concern that the wording of the South Australian Act seemed to enable a person to manufacture parts for their registered firearm and suggested that 'the manufacture of a firearm or firearm part for a particular firearm should only be done by experienced, professional, authorised, and licensed operators'.<sup>96</sup>
- 2.57** The NSW Police Force acknowledged that the bill's provisions 'were influenced by, but did not exactly mirror the South Australian legislation' and that the bill had been 'adapted to suit the NSW licensing scheme and NSW legislative drafting conventions'.<sup>97</sup>
- 2.58** The NSW Police Force defended the exclusion of any exemptions for licensed firearms holders as they could be used by organised crime as a means of manufacturing firearms:

More broadly the NSW Police Force would not want to pursue a blanket exemption to the proposed offence in clause 51J of the Bill for all licence holders as it may create a pathway for organised crime to stand up 'clean skins' as individual licence holders and facilitate manufacture of firearms by them.<sup>98</sup>

### **Proportionality of the penalty**

- 2.59** Under the proposed s 51J(1), the maximum penalty for taking part in the unauthorised manufacture of a firearm or a firearm part is imprisonment for 20 years. Schedule 1[10] of the bill also provides that the new offence is to be prosecuted on indictment only.<sup>99</sup>
- 2.60** Some inquiry participants considered that this penalty was disproportionate to the crime as well as to other similar offences.

### ***Maximum penalty of 20 years***

- 2.61** Stakeholders, particularly the legal representatives, considered that the 20 years penalty was disproportionate to the crime<sup>100</sup> and cautioned against a blanket maximum penalty being imposed on people charged with the illegal manufacture of a firearm or firearm part. As discussed earlier in this chapter, the NSW Bar Association did not support the creation of criminal offences with severe maximum penalties where a fault element of negligence was sufficient for liability, noting that these should be the exception, rather than the rule. It said:

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

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<sup>96</sup> Answers to questions on notice, Australian Gun Safety Alliance, 20 November 2020, p 2.

<sup>97</sup> Answers to questions on notice, NSW Police Force, 26 November 2020, p 2.

<sup>98</sup> Answers to questions on notice, NSW Police Force, p 2.

<sup>99</sup> Explanatory note, Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 (NSW).

<sup>100</sup> Submission 100, Law Society of NSW, p 1; Evidence, Mr Mainstone, 10 December 2020, p 22.



one offence-making provision as an alternative to guilty knowledge. This would mean the same severe maximum penalty would apply.<sup>101</sup>

**2.62** The NSW Bar Association and Law Society of NSW advocated for the creation of a negligence-based offence with an appropriate and proportionate maximum penalty, consistent with the gradation of other criminal offences under state and federal law.<sup>102</sup> Ms Jane Sanders, representative of the Law Society of NSW considered it 'more appropriate to separate out offences and prescribe lower maximum penalties for those less serious circumstances'.<sup>103</sup>

**2.63** Noting that both the *Firearms Act* and *Weapons Prohibition Act* already provide defences for the offence of possession of digital blueprints for manufacture, the Law Society of NSW advocated for similar defences be incorporated for the new illegal manufacture offence and that these defences should be uniform for comparable offences under the Acts.<sup>104</sup>

### ***Inconsistent with penalties under other legislation***

**2.64** Some inquiry participants argued that the high maximum penalty, proposed under s 51J of the Act and s 25E of the *Weapons Prohibition Act 1998*, is inconsistent with other similar penalties. The NSW Bar Association and the Law Society of NSW highlighted the discrepancies between a potential 20 years' imprisonment for taking part in the illegal manufacture of a firearm or firearm part (regardless of whether a firearm or part is actually manufactured), whereas a person who manufactures a full firearm without licence or permit would only be liable to 10 years' imprisonment and 14 years for illegally manufacturing a prohibited weapon.<sup>105</sup>

**2.65** Mr Odgers, Co-Chair of the NSW Bar Association's Criminal Law Committee contended: 'We cannot see any justification for a blanket 20 years for taking part in manufacture when, if you are charged with actual manufacture, there is a differentiation of the type you have just referred to'.<sup>106</sup>

**2.66** The Law Society for NSW advocated that offences should be tailored to cover the broad spectrum of offending outlined in the proposed provisions.<sup>107</sup> For example, it suggested that possession of a precursor should be a separate and less serious offence in both Acts, with a lower maximum penalty.<sup>108</sup>

**2.67** In response to these concerns, the NSW Police Force stated that the penalty thresholds assigned to unauthorised manufacturing had been considered against the following existing penalties for other offences in the Act and had been scaled according to the seriousness and the level of organised criminality involved in the offence:

- s 7 penalty for unauthorised possession of a pistol or prohibited firearm (14 years)

<sup>101</sup> Submission 263, New South Wales Bar Association, p 5.

<sup>102</sup> Submission 263, New South Wales Bar Association, p 5; Submission 100, Law Society of NSW, p 2.

<sup>103</sup> Evidence, Ms Sanders, 10 December 2020, p 3.

<sup>104</sup> Submission 100, Law Society of NSW, p 2.

<sup>105</sup> Submission 263, NSW Bar Association, p 5; Submission 100, Law Society of NSW, p 1.

<sup>106</sup> Evidence, Mr Odgers, 28 October 2020, p 29.

<sup>107</sup> Submission 100, Law Society of NSW, p 1. See also, Evidence, Mr Mainstone, 10 December 2020, p 23.

<sup>108</sup> Submission 100, Law Society of NSW, pp 1-2.

- s 7A penalty for unauthorised possession of a firearm (5 years)
- s 50A(1) penalty for unauthorised manufacture of firearms (10 years)
- s 50A(2) penalty for unauthorised manufacture of a pistol or prohibited firearm (20 years).<sup>109</sup>

**2.68** In its report, the FWPWG did not recommend the scaling of penalties relating to the illegal manufacture offence as:

- the prosecution would not have to determine what category of firearm the accused was manufacturing, particularly if there was no finished product seized
- firearm parts can be designed and manufactured to be interchangeable between various weapons and firearms, which may 'cross-over' between the 'scaled' categories'. This means that the defence could seek a lower penalty on the basis of the lowest category of compatible firearm.<sup>110</sup>

**2.69** The NSW Police Force defended the 20 years' maximum penalty as 'reasonable' and 'not disproportionate', given that it would be considered in circumstances where the manufacture was undertaken by a complex and organised criminal network. The NSW Police Force maintained that the provisions of the bill were justified and proportionate in targeting serious criminals:

There must be substantial evidence to meet the two-element test prescribed in the offence, which would mean that the basic unauthorised manufacture offence (section 50A) would be the likely charge to be laid where a firearm was identified. Reliance would be put on proposed section 51J in circumstances where a firearm cannot be identified (and firearm components / precursors were present), or where there were multiple actors involved in the activity. The latter suggests that the illegal manufacturing activity is organised, complex, sophisticated and networked.<sup>111</sup>

## **Power to seize firearms, firearm parts and firearm precursors**

**2.70** Section 51K of the bill provides police officers with the power to seize firearms, firearm parts and firearm precursors as per the offence in s 51J:

- (1) A police officer may seize and detain any firearm, firearm part or firearm precursor (including a computer or data storage device on which a firearm precursor is held or contained) that the officer suspects on reasonable grounds may provide evidence of the commission of an offence under section 51J.
- (2) In exercising a power under subsection (1), a police officer may direct any person whom the police officer believes on reasonable grounds to be in charge of or otherwise responsible for the thing that has been seized to provide assistance or information (including a password or code) that may reasonably be required by the

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<sup>109</sup> Answers to questions on notice, NSW Police Force, p 3.

<sup>110</sup> Firearms and Weapons Policy Working Group, *Proposal for draft offences relating to illegal manufacture of firearms* (December 2017), p 6.

<sup>111</sup> Answers to questions on notice, NSW Police Force, p 3.

police officer to enable the officer to access any information held or contained in the thing that has been seized.

- (3) A person must not—
- (a) without reasonable excuse, fail to comply with a direction under subsection (2), or
  - (b) in purported compliance with a direction under subsection (2), provide any information knowing that it is false or misleading in a material respect.
- (4) Division 1 of Part 17 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to anything seized under this section as if it had been seized under that Act.

### **Infringement of common law rights?**

- 2.71** Some stakeholders argued that the requirement to cooperate with police under s 51K(3)(a) or risk being penalised, was an infringement of their common law rights against self-incrimination (where a person should not be compelled to answer questions or produce information that may incriminate them) and the right to silence. For example, Mr Lance Miller, President of SSAA NSW, asserted:

The bill also requires firearms owners to provide assistance or information, removing the right to silence, as further contained in that international covenant. No citizen should be coerced or threatened by a penalty to relinquish their right to silence, nor be compelled to self-incriminate. This is a fundamental right for all citizens and should not be removed.<sup>112</sup>

- 2.72** The NSW Parliament's Legislation Review Committee also expressed concern about the bill's potential to undermine the right against self-incrimination and the right to silence. Whilst acknowledging that the intention of the bill was to help suppress the manufacture of illegal firearms in New South Wales 'with attendant benefits to the community', the Legislation Review Committee simultaneously warned:

The power to demand information on pain of penalty may impact on the privilege against self-incrimination. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her.<sup>113</sup>

- 2.73** The Legislation Review Committee concluded its review by referring the 'power to Parliament to consider whether [the bill's] impact on the privilege against self-incrimination is reasonable in the circumstances.'<sup>114</sup>

- 2.74** The Law Society of NSW objected to these particular provisions and had initially recommended that ss 51K(2) and (3) be removed from the bill, arguing, 'The power to demand information or

<sup>112</sup> Evidence, Mr Miller, 10 December 2020, p 13.

<sup>113</sup> Legislation Review Committee, Legislation Review Digest, 24 March 2020, p ix.

<sup>114</sup> Legislation Review Committee, Legislation Review Digest, 24 March 2020, p ix.

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.<sup>115</sup>

- 2.75** Its representative, Ms Sanders, later proposed that rather than deleting those subsections, additional safeguards could be written in to ensure the protection of a person's right to silence and against self-incrimination, highlighting that police could demand information or passwords without a warrant. She noted that a similar power exists at the Commonwealth level but emphasised the need for balance in New South Wales, particularly as devices that could be seized, such as smartphones, contain large quantities of personal information:

The counterargument of course is: exactly because there is so much information on our mobile phones and that if police are given the password they can instantly have access to every bit of information about our life, which in pre-smart phone days they would have had to get a number of warrants and use them very extensive enquiries together that kind of information. So, obviously there has got to be a balance.<sup>116</sup>

- 2.76** Mr Stephen Mainstone, a firearms lawyer and retired NSW police officer and prosecutor, echoed this position and recommended that additional safeguards be put in place 'to at least allow a person to be able to seek legal advice before they are simply charged with an offence to be in breach simply by exercising that right.'<sup>117</sup>

- 2.77** Conversely, Mr Odgers of the NSW Bar Association expressed the view that under s 51K(3)(a), a person would not be giving up their common law rights nor committing an offence, if they had a 'reasonable excuse', such as legal professional privilege, and thus did not comply with a direction from the police. Mr Odgers believed that the 'reasonable excuse' provision acted as a sufficient safeguard for individuals:

Statutory provisions are generally, unless they are explicit—unless they are clear that they are overriding basic civil liberties and common-law protections, it will be read in a way consistent with that. I would have thought reasonable excuse would extend that.<sup>118</sup>

- 2.78** The Law Society of NSW was less convinced by the 'reasonable excuse' safeguard, stating it is 'not entirely beyond dispute'<sup>119</sup> and questioned how it would play out in real life scenarios. Mr Richard Leary, from the Law Society said: '... from a practical point of view, a person confronted with a demand that they hand over a password or whatever is not necessarily in a position where they are aware of any privileges that they might have to decline to proceed with the demand'.<sup>120</sup>

- 2.79** Another issue identified by firearms lawyer, Mr Mainstone, was whether the legislation should specify that a high ranking police officer issue or review directions, rather than a police officer of any rank. Reflecting on his own experiences as a former police officer he noted that police officers could have different views regarding what constitutes to be 'on reasonable grounds':

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<sup>115</sup> Submission 100, Law Society of NSW, p 2.

<sup>116</sup> Evidence, Ms Sanders, 10 December 2020, p 6.

<sup>117</sup> Evidence, Mr Mainstone, 10 December 2020, p 26.

<sup>118</sup> Evidence, Mr Odgers, 28 October 2020, p 34.

<sup>119</sup> Evidence, Mr Richard Leary, Representative, Law Society of NSW, 10 December 2020, p 6.

<sup>120</sup> Evidence, Mr Leary, 10 December 2020, p 6.

... before there is any seizure or any further action in relation to that, it should be something that is dealt with by a more senior police officer, perhaps of the rank of inspector or above, because ... having previously been a police officer myself, but I know at times that there are situations where more junior police officers have made what I believe to be quick decisions on the ground.<sup>121</sup>

**2.80** The NSW Police Force expressed their position by explaining that the proposed powers in s 51K(2) was a 'key component to help police keep pace with technological advances used by criminals'. It said that in the modern technological age, it was important for police to have appropriate powers to access information on electronic devices that had been seized in connection with a suspected illegal manufacturing of firearms offence.<sup>122</sup>

**2.81** The NSW Police Force noted that the proposed 'access' powers recognised that criminals use encryption or security features to hide evidence relating to illicit activities and defended the provision as 'necessary' as criminals use passwords, access codes, login credentials and other encryption or security to secure devices or computers which hold information.<sup>123</sup>

**2.82** The NSW Police Force further indicated that whilst information had traditionally been produced in hard copy, criminals were now more likely to store this on a computer, tablet or smartphone. It stated that whilst the police force did have some capability to bypass encryption on seized devices, there could still be delays with specialist units getting access to the device. It claimed that in order for any investigations not to be hindered or delayed, the explicit power to require an owner or person to disclose passwords or codes to access equipment was necessary. The NSW Police Force felt that the proposed powers were adequate to address the issue as it provided police with an option to immediately facilitate law enforcement access to devices that may contain evidence of the manufacture of firearms.<sup>124</sup>

**2.83** In relation to the type of information that might be demanded by police, Superintendent Bell, Commander of the NSW Firearms Registry, responded:

It could be something locked. A key—access. I guess the key element there is the thing that we are seizing as part of hoping to prove that there is a criminal enterprise involvement in firearms manufacture. Generally these days it is a password and being able to access. It could also be files, records, keys and access to documentation evidence that is there, that provides evidence that they are knowingly, actively involved in this criminal enterprise.<sup>125</sup>

**2.84** The NSW Police Force drew attention to the 'reasonable' provisions within the bill and emphasised how it would relate to following proposed powers:

- 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,

<sup>121</sup> Evidence, Mr Mainstone, 10 December 2020, pp 27-28.

<sup>122</sup> Submission 261, NSW Police Force, p 11.

<sup>123</sup> Submission 261, NSW Police Force, p 11.

<sup>124</sup> Submission 261, NSW Police Force, p 11.

<sup>125</sup> Evidence, Superintendent Bell, 28 October 2020, pp 16-17.

- 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, and
- 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.<sup>126</sup>

## Amendments relating to Firearms Prohibition Orders

**2.85** There are a number of significant amendments in the bill which relate to the Firearms Prohibition Orders (FPOs) powers. The NSW Police Force explained that in line with the NSW Ombudsman's recommendations, the bill clarified the procedures for FPO searches to 'make the parameters of the search powers clear'.<sup>127</sup>

**2.86** However some stakeholders expressed concern about how the bill significantly broadens the scope of police search powers, particularly in relation to searching other persons and their property on the premises of a person subject to an FPO and, as a flow on effect, the lack of specific provisions relating to children.

### Expansion of police search powers

**2.87** The parameters of police search powers are found in schedule 1[6] of the bill, which provides that the powers of a police officer under s 74A of the principal Act, including any search powers, may be exercised only if reasonably required to determine whether a person who is the subject of a FPO has committed an offence arising out of the order, but only if the person has been given an opportunity to surrender all firearms, firearm parts or ammunition lawfully in the person's possession.<sup>128</sup> The proposed amendments read as follows:

#### **s 74A Powers of police to search for firearms in connection with firearms prohibition order**

(1) The powers of a police officer under this section—

- (a) may only be exercised if reasonably required to determine whether a person who is subject to a firearms prohibition order has committed an offence under section 74, and
- (b) may be exercised immediately following the service of a firearms prohibition order on a person but only if the person has been given an opportunity to surrender all firearms, firearm parts or ammunition lawfully in the person's possession.

**2.88** Mr Glenn Kable, a firearms lawyer, made the observation that s 74A(1) provides for police powers to be exercised if 'reasonably required' to determine whether a person subject to a FPO

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<sup>126</sup> Submission 261, NSW Police Force, p 12.

<sup>127</sup> Submission 261, NSW Police Force, p 13.

<sup>128</sup> Explanatory note, Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 (NSW).

has committed an offence, which he described as a 'very low bar' for police to overcome to conduct a search. Mr Kable compared the requirement to relevant sections in the *Law Enforcement Police Powers and Responsibilities Act 2002* (LEPRA) that required a police officer to suspect on 'reasonable grounds' to conduct a search without a warrant.<sup>129</sup> Mr Kable suggested that the LEPRA requirement was a higher threshold for accountability and ensuring compliance:

... it really puts a burden on the police to make sure that if there have been searches in the past and nothing has come of those searches they haven't got any grounds unless there is some sort of intelligence report or something else that they can rely on—just to make them think before they conduct another search. As I said, it is not a high bar for the police to get over, but at least it is something more than what is proposed in the amendment.<sup>130</sup>

- 2.89** The NSW Bar Association expressed that s 74A(1) should be clarified to specify 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'.<sup>131</sup>

***Searching other persons present on the premises***

- 2.90** Schedule 1[7] further amends s 74A of the principal Act to authorise a police officer to search persons who are present on the premises occupied by, or under the control or management of the person subject to an FPO and to search any vehicle, vessel or aircraft situated on those premises.<sup>132</sup>

(2A) A police officer who enters premises under subsection (2) may also conduct a search—

- (a) of any other person who the officer reasonably suspects is in possession of a firearm, firearm part or ammunition and who is present on those premises, or
- (b) of any other vehicle, vessel or aircraft situated on those premises, for any firearms, firearm parts or ammunition

- 2.91** Schedule 1[8] also inserts a new s 74AA that authorises a police officer to seize and detain any firearm, firearm part or ammunition found in conducting a search that the officer suspects on reasonable grounds may provide evidence of an offence relating to an FPO.<sup>133</sup>

**s 74AA Power to seize firearms, firearm parts and ammunition**

A police officer may seize and detain any firearm, firearm part or ammunition found in conducting a search under section 74A that the officer suspects on reasonable grounds may provide evidence of the commission of an offence under section 74.

- 2.92** Some stakeholders viewed that extending these police powers to allow searches of additional persons and vehicles was problematic and could lead to increased arbitrary searches. The Law

<sup>129</sup> Evidence, Mr Kable, 10 December 2020, p 31.

<sup>130</sup> Evidence, Mr Kable, 10 December 2020, p 33.

<sup>131</sup> Submission 263, NSW Bar Association, p 7.

<sup>132</sup> Explanatory note, Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 (NSW).

<sup>133</sup> Explanatory note, Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 (NSW).

Society of NSW highlighted that over its two year review, the NSW Ombudsman found that only 2 per cent of FPO searches resulted in police finding firearms, firearm parts and ammunition.<sup>134</sup> In light of this statistic, the Law Society of NSW stated that this amendment 'further erodes judicial oversight and increases the risk of arbitrary or unreasonable searches taking place.'<sup>135</sup>

**2.93** The Law Society of NSW also stated that while it was not opposed to the inclusion of s 74A(2A), it believed that searches should only be conducted if police reasonably suspected that a person was in 'unlawful' possession of a firearm or firearm part. It noted: "This would prohibit police from conducting oppressive searches on people who are lawfully entitled to be in possession of firearms."<sup>136</sup>

**2.94** Whilst acknowledging the intention of these amendments to prevent concealment or the disposal of evidence, the Legislation Review Committee also indicated that these provisions could increase the risk of arbitrary searches.<sup>137</sup>

**2.95** The NSW Police Force submitted that the relevant section was directly related to the NSW Ombudsman's report, which recommended:

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.<sup>138</sup>

**2.96** The Ombudsman's report had also identified that the lack of an 'ancillary power' to search persons 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'.<sup>139</sup>

**2.97** The NSW Police Force defended the amendments as giving 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'.<sup>140</sup>

**2.98** Citing a recent example of firearms being found on the premises, Acting Deputy Commissioner Walton supported the legislative changes:

The people that we are doing these searches on, the premises that we are doing these searches on, are people that are actively colluding in relation to their criminal conduct

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<sup>134</sup> See also, Ombudsman of NSW, *Review of police use of the firearms prohibition order search powers* (August 2016), p 34 (<https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/legislative-reviews/review-of-police-use-of-the-firearms-prohibition-order-search-powers-august-2016>).

<sup>135</sup> Submission 100, Law Society of NSW, p 2.

<sup>136</sup> Answers to questions on notice, Law Society of NSW, p 1.

<sup>137</sup> Legislation Review Committee, *Legislation Review Digest*, 24 March 2020, p ix.

<sup>138</sup> Submission 261, NSW Police Force, p 14.

<sup>139</sup> Submission 261, NSW Police Force, p 14.

<sup>140</sup> Submission 261, NSW Police Force, p 14.



and the possession of firearms. I must say, these prohibition orders certainly do give police some significant powers but quite frequently—in fact, even yesterday during the execution of a search on a relatively new order a Glock pistol and two magazines were located on the premise during that search. We understand that this is a serious power to address a serious risk to the safety of the community.<sup>141</sup>

### *Children and Firearms Prohibition Orders*

**2.99** Under the current legislation, children under the age of 18 years are prohibited from holding a firearms licence. However, children aged between 12 and 18 years may hold a firearms permit, which allows them to use firearms under supervision and receive instruction in the safe use of firearms or compete in approved target shooting events.<sup>142</sup> Furthermore, the current legislation does not specifically exempt children from being subject to a FPO or Weapon Prohibition Order (WPO). The Law Society of NSW advocated that FPOs and WPOs should not be made in relation to children, as the orders exposed children to 'extensive infringements of their civil liberties', particularly due to the extensive personal and property search powers provided for in the legislation. It argued that these searches may also impact other family members or people in the household.<sup>143</sup>

**2.100** The Law Society of NSW recommended that searches of children should be prohibited, if the only reason they were being searched was because they were present when another person subject to an FPO was being searched.<sup>144</sup> Ms Sanders, the Law Society representative, explained that children were vulnerable and required additional protections to what was afforded to adults:

That, in other contexts when it comes to police powers, children have special protections, such as when it comes to questioning or being in custody at the police station for investigation. When it comes to strip searches, there are entitlements to support persons and the like. The powers in the FPO do not differentiate between adults and children, and it does leave children more vulnerable, and also their entire family is more liable to be impacted.<sup>145</sup>

**2.101** In addition, the Law Society of NSW identified that if an FPO is made against a child, there are fewer options available to them to appeal. Under s 75(1)(a) of the Act, children are unable to appeal an FPO because they are 'disqualified persons' under the Act and firearms licences cannot be issued to them. Once they turn 18 and if the FPO is still in force, they may no longer be a disqualified person but by then the time limit for seeking review and appeal would have passed.<sup>146</sup> Ms Sanders emphasised that children should be given the same procedural fairness that adults receive.<sup>147</sup>

**2.102** The Law Society of NSW also recommended that there be judicial oversight when FPOs are made against children, recommending they be issued in the Children's Court.<sup>148</sup>

<sup>141</sup> Evidence, Acting Deputy Commissioner Walton, 28 October 2020, p 13.

<sup>142</sup> *Firearms Act 1996*, s 32.

<sup>143</sup> Submission 100, Law Society of NSW, p 3. See also, Evidence, Ms Sanders, 10 December 2020, p 4.

<sup>144</sup> Submission 100, Law Society of NSW, p 3.

<sup>145</sup> Evidence, Ms Sanders, 10 December 2020, p 4.

<sup>146</sup> Evidence, Ms Sanders, 10 December 2020, p 5.

<sup>147</sup> Evidence, Ms Sanders, 10 December 2020, p 5.

<sup>148</sup> Evidence, Ms Sanders, 10 December 2020, pp 9 and 10.

- 2.103** Some stakeholders raised the issue of how children of people subject to FPOs might be impacted by police searches. Mr Glenn Kable, a firearms lawyer, recommended that in light of the potential negative and long lasting impacts, there should be a higher bar for police to search children of persons subject to FPOs.<sup>149</sup> The Law Society of NSW position was that the legislation provided that police must have a reasonable suspicion that an individual, regardless of their age, was in the possession of a firearm, firearm part or ammunition, and this was a higher requirement than simply 'their dad has got an FPO against them'.<sup>150</sup>

### **Review of Firearms Prohibition Orders**

- 2.104** As discussed in chapter 1, in 2016 the NSW Ombudsman conducted a review of police use of FPO search powers. One of its recommendations was for FPOs to expire five years after they had been served. The Ombudsman observed that as FPOs never expire under the current legislation, FPO search powers could potentially be exercised over a person's lifetime unless the NSW Police Commissioner revoked the FPO. It recommended that after the five year expiry, and should the circumstances warrant it, the NSW Police Commissioner could issue a fresh FPO, reducing the risk of the powers having an unreasonable impact on individuals.<sup>151</sup>
- 2.105** However, schedule 1[4] in the bill requires the Commissioner of Police to review a FPO after the order has been in force for 10 years, instead of the five years recommended by the Ombudsman, and that the review be completed within six months.<sup>152</sup>

#### **s 73A Review of firearms prohibition orders**

- (1) The Commissioner is to review a firearms prohibition order after the order has been in force for 10 years.
  - (2) The review must be completed within the period of 6 months of that 10-year period.
  - (3) In the case of a firearms prohibition order in force immediately before the commencement of this section and that has been in force for more than 10 years, the review is to be completed within 12 months of that commencement.
  - (4) For avoidance of doubt, a firearms prohibition order that is subject to review remains in force unless it is revoked by the Commissioner under section 73.
- 2.106** Many inquiry stakeholders, including the NSW Bar Association, Law Society of NSW, SSAA NSW and firearms lawyers,<sup>153</sup> opposed the 10 year proposal and urged that the bill adopt the five year review period as per the Ombudsman's recommendation. The Law Society of NSW

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<sup>149</sup> Evidence, Mr Kable, 10 December 2020, p 32.

<sup>150</sup> Evidence, Ms Sanders, 10 December 2020, p 7.

<sup>151</sup> Ombudsman of NSW, *Review of police use of the firearms prohibition order search powers* (August 2016), pp 8-9.

<sup>152</sup> Explanatory note, Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 (NSW).

<sup>153</sup> Submission 263, NSW Bar Association, p 7; Submission 100, Law Society of NSW, p 2; Submission 228, Sporting Shooters' Association of Australia (NSW), p 14; Submission 74, Mr Glenn Kable, p 2;

highlighted that the bill did not include any provisions for FPOs to 'expire', as per the Ombudsman's recommendation, only that FPOs be reviewed.<sup>154</sup>

- 2.107** Mr Golding, State Coordinator of the Shooters' Union Australia expressed concern that the 10 year period 'firmly "stacks the deck" against anyone falsely issued such an order'.<sup>155</sup>
- 2.108** In contrast, the Australian Gun Safety Alliance supported the notion that all FPOs be reviewed after a ten year period.<sup>156</sup>
- 2.109** Further concerns were raised about the power attributed to the NSW Police Commissioner and the subjective method in which FPOs were issued. Mr Glenn Kable, firearms lawyer, explained that the Police Commissioner had full discretion when determining whether to impose an FPO. Mr Kable suggested that in lieu of a guidelines of when an FPO should be issued, the time period for FPO reviews should be shorter than the ten years proposed in the bill. However if there were guidelines imposed on the subjective criteria of the Police Commissioner, Mr Kable contended that the 10 years would 'seem appropriate'.<sup>157</sup>
- 2.110** Mr Kable also raised the point that individuals subject to a FPO will not be notified that their FPO was being reviewed and thus, would not be given the opportunity 'to show their current situation, how they had addressed their past behaviour and how they had moved forward with their lives'.<sup>158</sup> Any improvements in behaviour or record may not be taken into consideration as part of the review.
- 2.111** In response to questioning as to why the NSW Ombudsman's recommended five-year expiry had not been adopted, Acting Deputy Commissioner Walton of the NSW Police Force said: 'As we considered the practical elements and our review of the orders that we had, 10 years was considered to be a more appropriate length of term for the review to then be enacted'.<sup>159</sup>
- 2.112** Superintendent Bell, Commander of the NSW Firearms Registry, echoed this position and argued that 'good crooks do not become good people overnight':

The argument is, there is 10 years to travel to Damascus and be a good person rather than five, because we know—it is similar with bail: someone is on bail; once the bail is not applicable they go and do something wrong again. That was the whole idea with the 10 years.<sup>160</sup>

- 2.113** In addition, Superintendent Bell told the committee that if the bill is passed, 1,400 reviews will need to be completed within the first 12 months. Noting that the amendments stipulate that reviews need to be completed within six months, the NSW Firearms Registry was asked whether it had the capacity to be able to complete all of the reviews. Superintendent Bell's response was that the issue of resourcing had been raised with the NSW Police Force,<sup>161</sup> who separately

<sup>154</sup> Submission 100, Law Society of NSW, p 2.

<sup>155</sup> Evidence, Mr Golding, 28 October 2020, p 36.

<sup>156</sup> Submission 184, Australian Gun Safety Alliance, p 3.

<sup>157</sup> Evidence, Mr Kable, 10 December 2020, p 30.

<sup>158</sup> Evidence, Mr Kable, 10 December 2020, p 35.

<sup>159</sup> Evidence, Acting Deputy Commissioner Walton, 28 October 2020, p 13.

<sup>160</sup> Evidence, Superintendent Bell, 28 October 2020, p 14s.

<sup>161</sup> Evidence, Superintendent Bell, 28 October 2020, p 20.

confirmed that the NSW Police Force will ensure that this function is appropriately resourced.<sup>162</sup> Superintendent Bell further stated that 'FPOs are all issued by the Firearms Registry by one person in the State.'<sup>163</sup>

### *Right to appeal*

- 2.114** Some inquiry participants raised concerns regarding the limited scope for appealing FPOs. The right to appeal an FPO is found in s 75(1)(f) of the Act, where a person may apply to the NSW Civil and Administrative Tribunal (NCAT) for an administrative review under the *Administrative Decisions Review Act 1997*.
- 2.115** However, exceptions are listed in subsections 1A and 1B of s 75:
- (1A) Despite subsection (1), a person may not apply for a review of a firearms prohibition order made against the person if the person would be required under section 11 (5) or 29 (3) to be refused a licence or permit (a disqualified person) had the person not been subject to a firearms prohibition order.
  - (1B) However, the decision to make a firearms prohibition order against a disqualified person is taken to be an administratively reviewable decision for the purposes of section 53 (Internal reviews) of the Administrative Decisions Review Act 1997 and that section applies, with such modifications as are necessary, in relation to the decision to make such an order.
- 2.116** Disqualified persons (as listed in s 11(5) and s 29(3) of the Act) include children under the age of 18, those convicted in New South Wales or elsewhere with an offence within 10 years of the application being made, those subject to an apprehended violence order or interim apprehended violence order within 10 years of the application being made, those subject to a good behaviour bond, community correction order, conditional release order, FPO, or a registrable person under the *Child Protection (Offenders Registration) Act 2000*.
- 2.117** Mr Glenn Kable, a firearms lawyer, explained how the bill coupled with recent case law narrowed what avenues were available for people to appeal decisions. As an example, people who are served a FPO, and are not disqualified persons, have 28 days to apply for an internal review. Mr Kable explained that in the recent case of *Holdsworth v Commissioner of Police, NSW Police*<sup>164</sup>, there had been an application to seek leave of the tribunal to allow a review of the imposition of the FPO, which had occurred 36 years ago. However the ruling determined that since the 28 day period had passed, there was very limited scope to getting an independent review for the imposition of an FPO.<sup>165</sup>
- 2.118** Mr Kable further raised the point that even if Mr Holdsworth had been 'an angel' or 'the model citizen' for the past three decades, he still would have had no way of seeking an independent challenge to the order<sup>166</sup> and that as FPOs do not expire, any recipient in an FPO matter would

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<sup>162</sup> Answers to questions on notice, NSW Police Force, p 8.

<sup>163</sup> Evidence, Superintendent Bell, 28 October 2020, p 14.

<sup>164</sup> *Holdsworth v Commissioner of Police, NSW Police Force* [2019] NSWCATAD 42.

<sup>165</sup> Evidence, Mr Kable, 10 December 2020, p 30.

<sup>166</sup> Submission 74, Mr Glenn Kable, p 2.

be subject to the same broad search powers regardless of not coming to police attention for decades.<sup>167</sup>

- 2.119** Therefore, Mr Kable elucidated that the scope to appeal reviews were firstly limited to those people who were not 'disqualified persons', and that internal reviews must be applied for within 28 days of a decision and if not, there was very limited scope for an appeal being reviewed either internally or by NCAT under s 75:

In other words, if there were mandatory grounds to refuse a licence under clause 5 of the 2017 Firearms Regulations, then there is no pathway to an independent review within that 28 day period, and now the Holdsworth decision shuts down seeking an independent review at any time down the track.

Basically there is very limited scope of getting an independent review of firearms prohibitions orders which have been imposed on anybody. Really the only scope would be if somebody is not mandatorily disqualified. Then they may seek the independent review and a review by the tribunal after that.<sup>168</sup>

- 2.120** Mr Kable also discussed how s 75 of the Act only allowed for an independent NCAT review of an order made by the NSW Police Commissioner, and excluded situations where the Commissioner had made a decision to not revoke an old FPO.<sup>169</sup> Mr Kable summarised:

Essentially then, if a request to the Commissioner to lift an FPO is rejected, there is no pathway to have that decision reviewed. In effect, there is provision to have an internal review and an independent review by a tribunal on the making of the order, which is what that decision was saying. There is a provision in the Act to make a request to the Commissioner to lift an order. If the Commissioner refuses that request, there is no further pathway to a review of that decision.<sup>170</sup>

- 2.121** Mr Mainstone, a firearms lawyer, also echoed the difficulty involved in appealing an FPO before NCAT and that the alternative was only through an internal review by the police. He said:

The reality of this is there is little to no chance of successfully appealing an FPO in the Tribunal and the only practical way of having it removed is by way of writing directly to the officer who made the Order to seek their consideration of revoking it. If the officer refuses to revoke the Order, it remains in place in perpetuity.<sup>171</sup>

- 2.122** The committee was also told of the high expenses and lengthy delays people experienced when applying for a review<sup>172</sup> and of administrative errors causing further frustration and difficulty.<sup>173</sup>

<sup>167</sup> Submission 74, Mr Glenn Kable, p 2

<sup>168</sup> Evidence, Mr Kable, 10 December 2020, p 30.

<sup>169</sup> *Taylor v Commissioner of Police, NSW Police* [2006] NSWADT 219.

<sup>170</sup> Evidence, Mr Kable, 10 December 2020, p 30.

<sup>171</sup> Answers to question on notice, Mr Stephen Mainstone, Firearms lawyer, 18 January 2021, p 1.

<sup>172</sup> Submission 41, Name suppressed, p 1; Submission 60, Mr Cory Callcott, p 1; Submission 69, Mr Oskar Zimmerman, p 4.

<sup>173</sup> Submission 229, GameCon, p 4.

- 2.123** However, Mr Mainstone told the committee that once NCAT made a ruling in favour of an applicant for their licence to be reinstated or issued, the NSW Firearms Registry would issue or reinstate a licence 'fairly quickly'.<sup>174</sup>
- 2.124** In light of these issues pertaining to timely procedural fairness for licensed and registered firearms owners, some inquiry participants including SSAA NSW advocated for the establishment of an independent statutory body or a Firearms Commissioner.<sup>175</sup>
- 2.125** The NSW Police Force was of the opinion that the low numbers of successful appeals meant that they were 'getting it right' with FPOs targeting criminal entities and individuals. Acting Deputy Commissioner Walton told the committee:

We have our own process to determine where the orders should be issued. Around 18 per cent of applications are declined by those authorised to review the orders, so there is a reasonable quality assurance process there. Again, in my mind we are getting it right. There have been 49 (out of 6000) matters since 2013 that have gone to the NSW Civil and Administrative Tribunal [NCAT] appealing the Commissioner's decision.<sup>176</sup>

## Stakeholder engagement

- 2.126** A number of inquiry participants, particularly licensed firearm owners, were concerned and disappointed with the lack of stakeholder engagement in developing the bill. Key firearms associations, including the Shooters' Union of Australia, GameCon, National Firearms Dealers Association, Federation of Hunting Clubs and the New South Wales branch of the Sporting Shooters' Association of Australia, informed that they had not been consulted prior to the introduction of the bill.
- 2.127** Mr Craig Golding, New South Wales State Coordinator of the Shooters' Union Australia highlighted the missed opportunity for any meaningful input:
- But there needs to be more input from industry and individuals in general, stakeholders, not pursue those stakeholders and think they still have a grasp on firearm owners in New South Wales. It needs to be meaningful input. Sadly, we are not seeing that and despite the efforts of people to try to get that happen we are still not seeing it.<sup>177</sup>
- 2.128** Mr John Howden, Secretary of the Federation of Hunting Clubs and Secretary-Treasurer of the NSW Firearms Dealers Association echoed this sentiment, stating, 'I think we could have given some valuable insight and experience to the drafting of the bill had we been consulted.'<sup>178</sup>
- 2.129** Mr Paul Britton, President of the NSW Firearms Dealers Association, acknowledged that notwithstanding his association's good working relationship with the NSW Firearms Registry, the dissolution of a legislative working group which had been made up of multiple organisations and the NSW Firearms Registry was disappointing. The group had been set up to meet and

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<sup>174</sup> Evidence, Mr Mainstone, 10 December 2020, p 24.

<sup>175</sup> Submission 228a, Sporting Shooters Association of Australia (NSW), p 1.

<sup>176</sup> Evidence, Acting Deputy Commissioner Walton, 28 October 2020, p 13.

<sup>177</sup> Evidence, Mr Golding, 28 October 2020, p 43.

<sup>178</sup> Evidence, Mr John Howden, Secretary, Federation of Hunting Clubs and Secretary-Treasurer, NSW Firearms Dealers Association, 28 October 2020, p 47.

discuss solutions and make recommendations, but communication and consultation had ceased approximately two years ago.<sup>179</sup> SSAA NSW acknowledged that these groups had not been of 'sufficient capacity to really put those issues on the table in front of government or its agencies at a meaningful level'.<sup>180</sup>

- 2.130** In response to these concerns, Superintendent Anthony Bell, Commander of the NSW Firearms Registry noted that certain key stakeholders, such as the prosecution and investigative branches, had been consulted on the bill, and they had highlighted a 'gap' in current legislation, allowing criminal groups and entities to slip through the cracks:

Those involved and that have links with those groups—also the prosecutions branch and other jurisdictions, those involved at all stages, the investigators, those that compile the briefs, those that take it to court, those that defend the matters in court or prosecute the matters in court, I should say—all of those people have identified there is a clear loophole. There is a clear gap. It is allowing organised criminal groups to get away with the fact that they have these precursors.<sup>181</sup>

- 2.131** While consultation with firearm licence holder groups may not have occurred prior to the introduction of the bill, Superintendent Bell confirmed that consultation with licenced firearms holders, stakeholder groups and peak associations regarding their views of the 'potential impacts' of the bill had begun and was ongoing.<sup>182</sup> He acknowledged that the NSW Firearms Registry had previously operated a number of consultative committees, but a review was being undertaken in order to form 'enhanced consultation groups that are more strategic and feed into a higher group or firearms board of key stakeholders'.<sup>183</sup>

## Committee comment

- 2.132** The committee notes that the NSW Government's intention with this legislation is to target serious organised crime and ensure firearms and other weapons do not end up in the wrong hands. The committee supports and commends initiatives that target organised crime and makes the community a safer place.
- 2.133** However, while the intentions behind this bill are positive, in practice it is poorly drafted and contains many flaws. Almost all inquiry participants were unsupportive of the bill in its current form. Many legitimate concerns were brought forward by firearms associations and the law-abiding firearms owners who they represent, about potentially becoming the unintentional targets of the bill due to the strict liability and broad-ranging nature of the illegal manufacture offence.
- 2.134** In addition, legal experts echoed these serious concerns regarding the breadth of the offences in the bill, about the penalties that are significantly disproportionate to similar offences in other New South Wales legislation and the incremental expansion of significant police powers under firearms prohibition orders.

<sup>179</sup> Evidence, Mr Britton, 28 October 2020, p 46.

<sup>180</sup> Evidence, Mr Rowell, 10 December 2020, p 19.

<sup>181</sup> Evidence, Superintendent Bell, 28 October 2020, p 22.

<sup>182</sup> Evidence, Superintendent Bell, 28 October 2020, p 21.

<sup>183</sup> Evidence, Superintendent Bell, 28 October 2020, pp 21-22.

- 2.135** In light of these significant issues raised by inquiry participants, the committee recommends that the bill should not be passed in its current form and that the Legislative Council only pass the bill if it is substantially amended during the Committee of the Whole stage, as detailed in recommendations 2 to 9.

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**Recommendation 1**

That the Legislative Council:

- proceed to debate the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020, but not pass the bill in its current form
  - only pass the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 if substantially amended during the Committee of the Whole stage as detailed in recommendations 2 to 9.
- 

***Broad operation and strict liability of the offence***

- 2.136** The committee has carefully considered the evidence it received in relation to the exemption clause for licensed firearms owners in the South Australian *Firearms Act 2015*. We have been persuaded that inserting a similar exemption for licenced firearms owners in the bill would rectify a number of the concerns presented by firearms associations and individuals, including the broad operation of the offence and the breadth of firearms precursors captured by the current wording in s 51J(3). It would also be in line with the intentions of the bill - to target organised crime, rather than law-abiding individual firearms owners.
- 2.137** Therefore the committee urges the Legislative Council to amend the relevant sections of the bill to incorporate a similar defence for licensed firearms owners to that present in sections 37(3)(a) and 37(4)(a) in the South Australian *Firearms Act 2015*.
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**Recommendation 2**

That the Legislative Council amend sections 51J and 25E of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to incorporate a similar defence for licensed firearms owners to that present in sections 37(3)(a) and 37(4)(a) in the South Australian *Firearms Act 2015*.

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- 2.138** The committee acknowledges the frustrations and confusion felt by licensed firearms owners, who are unclear on what specific repairs, maintenance or adjustments can be made to their registered and legal firearms. Considering the current absence of a defence for innocent firearms owners, the committee believes it is necessary to clarify these requirements and thus recommends that the Legislative Council amends the relevant sections of the bill to define what minor repairs, routine maintenance and adjustments firearm licence holders and firearm permit holders are authorised to undertake to their registered firearms. A similar amendment to the *Weapons Prohibition Act 1998* is also recommended.



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### Recommendation 3

That the Legislative Council amend sections 51J and 25E of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to:

- amend the *Firearms Act 1996* to define what minor repairs, routine maintenance and adjustments firearm licence holders and firearm permit holders are authorised to undertake to their registered firearms
  - amend the *Weapons Prohibition Act 1998* to define what minor repairs, routine maintenance and adjustments prohibited weapons licence holders and prohibited weapon permit holders are authorised to undertake to their registered prohibited weapons.
- 

- 2.139** The committee acknowledges that in some instances, such as with antique firearms, it may become necessary to replace a minor part so that the firearm is maintained in a serviceable condition. This is a matter that should be clarified for any firearms that are not required to be registered. This should be limited to situations where there is a need – both legal and reasonable – to replace a firearm part and there is no risk of harm to the owner or others.

#### *Proportionality of the penalty*

- 2.140** The committee is further of the opinion that, compared to other penalties in similar legislation and those contained within the principal Act itself, the maximum penalty of 20 years' imprisonment is disproportionate and inconsistent. It is concerning that a person could be sentenced for the maximum penalty merely because they 'ought to have known' that the manufacture of a firearm or firearm part was not authorised by licence or permit. In light of this, the committee recommends that the bill be amended to create a discrete negligence-based offence with an appropriate and proportionate lower maximum penalty, consistent with the gradation of other criminal offences under New South Wales legislation.
- 2.141** In addition to this, the committee is persuaded by inquiry participants who advocate for a similar provision to s 37(5) of the South Australian *Firearms Act 2015* to be included in the bill. This would ensure there is a gradation of offences and sentences relating to the unauthorised manufacture of a firearm or firearm part. In doing so, the broad operation of the offence and the issue of disproportionate penalties could be further addressed. As noted by the Law Society of New South Wales, the current provisions purport that a person could be guilty of the offence if they are in possession of a 'weapon precursor', which covers everything from a thumb cuff to a missile. The inexplicable discrepancies also extend to the penalties, where a person could be sentenced to a maximum of five years' imprisonment for actual firearms parts possession, but up to 20 years for the possession of a picture of how to make one.
- 2.142** We believe that such changes are still aligned with the intention of the New South Wales bill, which is not to target innocent or less culpable firearms owners, but serious criminal organisations. Therefore the committee recommends that sections 51J and 25E of the bill be amended to tailor the unauthorised manufacture offences to cover the broad spectrum of offending covered by the proposed provisions and ensure that the penalty thresholds for these offences are proportionate with other similar offences in New South Wales legislation.

**Recommendation 4**

That the Legislative Council amend the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to create a discrete negligence-based offence with an appropriate and proportionate lower maximum penalty, consistent with the gradation of other criminal offences under New South Wales legislation.

**Recommendation 5**

That the Legislative Council amend sections 51J and 25E of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to:

- tailor the unauthorised manufacture offences to cover the broad spectrum of offending covered by the proposed provisions
  - ensure that the penalty thresholds for these offences are proportionate with other similar offences in New South Wales legislation.
- 

***Power to seize firearms, firearm parts and firearm precursors***

- 2.143** The committee recognises that whilst information may have traditionally been stored or saved in hard copy, much of the information or data now is stored in our smartphones or computers. The committee understands that the NSW Police Force in some circumstances may require timely and secure access to information to disrupt criminal activity.
- 2.144** However, considering the wealth of information that is now stored or accessible on our smartphones, the committee is cautious about affording power to a police officer of any rank to demand a password or code to any object on the premises that he or she believes 'may be reasonably required' to gain access to information.
- 2.145** The committee is concerned about the bill's potential negative impact on the common law right against self-incrimination and the right to silence. Based on the evidence we received, the committee is not convinced that the 'reasonable grounds' included in the bill constitutes a sufficient safeguard against potential abuse or arbitrary use of this power and calls for additional and significant safeguards to be included in the bill. The committee therefore recommends that the Legislative Council amend sections 51K and 25F of the bill to provide that police are required to seek a court order when requiring the owner of a device to supply the password of any computer, phone or storage device seized by police suspected of containing evidence.
- 2.146** Furthermore, the committee notes that the bill specifies that only Division 1 of Part 17 in LEPR applies to anything seized under sections 51K(4) and 25F(4). This means that licensed firearms owners can only apply for the return of seized dangerous articles and implements, and not for the return of seized computers, devices or other goods, as allowed under Division 2 of Part 17 of LEPR. As a matter of fairness, the committee believes that owners should be able to apply for the return of their items such as computers, phones and other property, when appropriate. Therefore we recommend that the Legislative Council further amend sections 51K and 25F to provide that owners may apply for the return of their seized property and goods in accordance with the provisions of all of Part 17, and not just Division 1, of LEPR.

**Recommendation 6**

That the Legislative Council amend sections 51K and 25F of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to provide that police are required to seek a court order when requiring the owner of a device to supply the password of any computer, phone or storage device seized by police suspected of containing evidence.

**Recommendation 7**

That the Legislative Council amend sections 51K and 25F of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to provide that owners may apply for the return of their seized property and goods in accordance with all of Part 17 of the *Law Enforcement Powers and Responsibilities Act 2002*.

***Firearms Prohibition Orders***

- 2.147** The committee notes the bill's provision that Firearms Prohibition Orders (FPOs) be reviewed every ten years. This is twice the length of what the NSW Ombudsman recommended – that FPOs expire after five years, and for the NSW Police Commissioner to issue a new FPO for those whose circumstances require it. The committee recognises the evidence received from the NSW Police Force and NSW Firearms Registry that ten years is a more appropriate length of term for the review to be enacted.
- 2.148** The committee heard that as FPOs do not currently expire, individuals with an FPO could be subject to extensive and at times, arbitrary, searches of their person and premises at any given time by police, for an indefinite period. The committee also understands that the existing options to review FPOs are limited and subject to a number of mitigating factors. Considering that the NSW Ombudsman only found that 2 per cent of all FPO searches resulted in police finding a firearm, firearm part or ammunition over its two year review, the committee is concerned that the extensive powers related to FPOs could be subject to abuse or at least, increased arbitrary use.
- 2.149** The committee recognises the impact that such intrusive searches can have on those people present on the premises, particularly children. As the bill considerably expands the search powers of police, including the power to search other persons on the premises, we highlight that such searches should only be done when the officer has reasonable suspicion that a person on the premises may be in possession of a firearm, firearm part or ammunition. The committee considers that a higher threshold than 'reasonably required' is needed in section 74A(1) for searching other persons on the same premises as someone with an FPO, to provide another layer of accountability for the police. We therefore recommend that s 74A(1) be amended to provide that police are required to have 'reasonable suspicion' before searching any other persons on the premises, vehicle, vessel or aircraft of a person subject to an FPO. Another reason we support this change is that the concept of "reasonable suspicion" is well understood in the law, especially in regards to the police search powers. There is a very real danger of causing confusion, uncertainty and multiple legal challenges by introducing the concept of "reasonably required" as the primary basis for a search as proposed in the initial draft of the bill.

**Recommendation 8**

That the Legislative Council amend section 74A(1) of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to provide that police are required to have 'reasonable suspicion' prior to searching any other persons on the premises, vehicle, vessel or aircraft of a person subject to an Firearms Prohibition Order.

**Recommendation 9**

That the Legislative Council amend the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to provide that police search powers for persons subject to a Firearms Prohibition Order be differentiated so that appropriate protections are provided to persons aged under 18 years.

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***The darknet***

- 2.150** On a separate related matter, the committee agrees with the Firearms and Weapons Policy Working Group that it is important to focus future legislative efforts on the continuing emergence of new technologies, including information accessed on the darknet on how to illegally manufacture firearms or firearm parts. In its paper from March 2021, the Australian Institute of Criminology noted that recent studies have also observed a 'small but notable illicit [small and light weapons] trade on the darknet'.<sup>184</sup> The institute identified that the illicit trade in illegal firearms and weapons is a 'global issue that threatens the rule of law, police operations and the safety of civilian populations' and that firearms and other weapons bought on the darknet have been used to commit acts of terrorism and targeted violence.
- 2.151** The committee is of the opinion that if the bill is indeed meant to future-proof firearms legislation against the emergence of new technologies, it is necessary to address the issue of illegal firearms trade on the darknet, including information on how to manufacture firearms and firearms parts. The committee calls on the NSW Government to ensure that, in implementing this legislation, the NSW Police Force pays close attention to the darknet and ensures that its officers have the necessary tools and training to combat this emerging threat.

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<sup>184</sup> Australian Institute of Criminology, 'Trends and issues in crime and criminal justice', No. 622, March 2021

## Appendix 1 Submissions

<b>No.</b>	<b>Author</b>
1	Mr Gavan Willis
2	Name suppressed
3	Name suppressed
4	Name suppressed
5	Name suppressed
6	Mr Wayne Turner
7	Name suppressed
8	Name suppressed
9	Name suppressed
10	Name suppressed
11	Name suppressed
12	Mr Andrew Hooke
13	Name suppressed
14	Name suppressed
15	Name suppressed
16	Mr Nathan Watson
17	Mr Robert Whiter
18	Name suppressed
19	Name suppressed
20	Cr Arthur (Mark) Hall
21	Preservation of Life - Community Protection Research Group
22	Name suppressed
23	Mr Peter Sinclair
24	Mr Daniel Lewkovitz
25	Name suppressed
26	Mr Dallyn Birrell
27	Mr Simon Munslow
27a	Mr Simon Munslow
28	Mr Cameron Chessor
29	Confidential
30	Name suppressed

<b>No.</b>	<b>Author</b>
31	Name suppressed
32	Mr David Anthony (Tony) Garland
33	Name suppressed
34	Mr Shaun Norrington
35	Mr David Vice
36	Name suppressed
37	Name suppressed
38	Mr Aden Perry
39	Mr Paul Nealon
40	Name suppressed
41	Name suppressed
42	Name suppressed
43	Mr Marko Jonjic
44	Mr Simon Ward
45	Name suppressed
46	Name suppressed
47	Mr Paul Betteridge
48	Name suppressed
49	Mr Mason Binge
50	Name suppressed
51	Mr Chris Collum
52	Mr Luke Cuddy
53	Name suppressed
54	Name suppressed
55	Mr Michael Robinson
56	Name suppressed
57	Name suppressed
58	Name suppressed
59	Name suppressed
60	Mr Cory Callcott
61	Mr Rhys Johnston
62	Mr Andrew White
63	Mr Kardean Pittard
64	Name suppressed
65	Confidential

<b>No.</b>	<b>Author</b>
66	Name suppressed
67	Mr John Leslie
68	Illawarra Regional Shooting Association Inc
69	Mr Oskar Zimmerman
70	Name suppressed
71	Name suppressed
72	Name suppressed
73	Name suppressed
74	Mr Glenn Kable
75	Antique Arms Collectors' Society of Australia
76	Mr Lewis Clarke
77	Name suppressed
78	Mr Andrew Reid
79	Mr Sean Ambrose
79a	Mr Sean Ambrose
80	Name suppressed
81	Name suppressed
82	Name suppressed
83	Name suppressed
84	Name suppressed
85	Confidential
86	Name suppressed
87	Name suppressed
88	Mr Evan Parry
89	Shooting Academy Club Inc.
90	Name suppressed
91	Name suppressed
92	Mr Peter Cunningham
93	Name suppressed
94	Macleay Valley Regional Shooting Complex
95	Mr Barry Wooton
96	Shoalhaven Hunting Club Inc
97	Mr Roger Earle
98	Mr Sean Ryan
99	Mr Michael Burrell

<b>No.</b>	<b>Author</b>
100	The Law Society of New South Wales
101	Mr Mark Mays
102	Name suppressed
103	Name suppressed
104	Name suppressed
105	Name suppressed
106	Name suppressed
107	Mr Brian Bigelow
108	Name suppressed
109	Shooters Union Australia Ltd
110	Mr Steve Graham
111	Mr Chris Joleski
112	Name suppressed
113	Name suppressed
114	Mr Michael Steele
115	Name suppressed
116	Mr Jegayn Ford
117	Mr Joseph Barry
118	Name suppressed
119	Name suppressed
120	Mr Damien Armstrong
121	Name suppressed
122	Mr Grant Brazier
123	Name suppressed
124	Name suppressed
125	Confidential
126	Name suppressed
127	Mr James Orrock
128	Name suppressed
129	Name suppressed
130	Mr Henry James Anderson
131	Name suppressed
132	Mr Matthew Walker
133	Name suppressed
134	Mr Neil Hitchenor



<b>No.</b>	<b>Author</b>
135	Mr Robert Purvis
136	Mr Paul Harris
137	Name suppressed
138	Mr Cory Herbert
139	Name suppressed
140	Name suppressed
141	Mr Harrison Law
142	Mr Roger Moore
143	Name suppressed
144	Mr Dion Travaglini
145	Name suppressed
146	Confidential
147	Name suppressed
148	Name suppressed
149	Confidential
150	Name suppressed
151	Name suppressed
152	Name suppressed
153	Name suppressed
154	Mr Aaron Millard
155	Name suppressed
156	Sporting Shooters Association of Australia (SSAA) Orange
157	Name suppressed
158	Mr Martin Lillie
159	Name suppressed
160	Name suppressed
161	Name suppressed
162	Name suppressed
163	Mr Rick Wallder
164	Mr Joseph O'Connor
165	Mr Jegayn Ford
166	Mr Adam Dyle
167	Name suppressed
168	Mr Hans Leroy
169	Mr Mark Warton

<b>No.</b>	<b>Author</b>
170	Sporting Shooters' Association of Australia Sydney Branch Inc.
171	Confidential
172	73rd Regiment of Foot Inc
173	Mr Robert Walker
174	Name suppressed
175	Mr Anthony Schmidt
176	Mr Angus Jones
177	Name suppressed
178	Name suppressed
179	Name suppressed
180	Mr John Johnston
181	Name suppressed
182	Name suppressed
183	Name suppressed
184	Australian Gun Safety Alliance
185	Confidential
186	Mr William Irvine
187	Name suppressed
188	Mr Kyle Boddan
189	Confidential
190	Confidential
191	Mr George Dickson
192	Name suppressed
193	Name suppressed
194	Name suppressed
195	Name suppressed
196	Sporting Shooters Association of Australia (SSAA) Goulburn & Districts Branch
197	Mr Kenneth Scott
198	Mr Lewis Clarke
199	Name suppressed
200	Name suppressed
201	Name suppressed
202	Name suppressed
203	Confidential
204	Name suppressed

<b>No.</b>	<b>Author</b>
205	Confidential
206	Confidential
207	Confidential
208	Southern Riverina Hunting Club
209	Name suppressed
210	Mr Xavier Filgate
211	Name suppressed
212	Name suppressed
213	Mr Paul McCarter
214	Mr Peter Whelan
215	SUNS Shooting Club Inc
216	Firearm Owners United
217	Mr Robert G. Bonham
218	Nepean Hunters Club Inc.
219	Liberal Democrats, New South Wales Branch
220	Name suppressed
221	Name suppressed
222	Name suppressed
223	Name suppressed
224	Federation of Hunting Clubs
225	NSW Firearms Dealers Association
226	Valleybrook Hunting Club
227	Mrs Jessica Coombes
228	Sporting Shooters Association of Australia (NSW) Inc.
228a	Sporting Shooters Association of Australia (NSW) Inc.
229	GameCon
230	Name suppressed
231	Mr Nicolas Craddock
232	Newcastle District Hunting Club
233	Confidential
234	Confidential
235	Name suppressed
236	Name suppressed
237	Name suppressed
238	Mr Mitch Newbery

<b>No.</b>	<b>Author</b>
239	Name suppressed
240	Name suppressed
241	Confidential
242	Mr Michael Hardes
243	Name suppressed
244	Name suppressed
245	Name suppressed
246	Name suppressed
247	Mr Ryan Fitzroy
248	Clarence Valley Hunting Club
249	Name suppressed
250	Mr Roy Williams
251	Mr Brenton Bliss
252	Name suppressed
253	Mr Neil Radford
254	Name suppressed
255	Name suppressed
256	Name suppressed
257	Mr William Michael Crockford
258	Mr Stephen Larsson
258a	Mr Stephen Larsson
259	Mr B Burdett
260	Name suppressed
261	NSW Police Force
262	New South Wales Corps of Marines Inc
263	New South Wales Bar Association
264	Lithgow Fire Arms Factory Museum
265	St. George Hunters & Anglers Association Inc
266	Confidential
267	NSW Farmers

## Appendix 2 Witnesses at hearings

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
<b>Wednesday 28 October 2020 Macquarie Room Parliament House, Sydney</b>	Acting Deputy Commissioner Mark Walton APM	A/Deputy Commissioner, Investigations and Counter Terrorism, NSW Police
	Superintendent Anthony Bell	Commander, NSW Firearms Registry
	Mr Stephen Bendle	Convenor, Australian Gun Safety Alliance
	Mr Stephen Odgers SC	Co-Chair, Criminal Law Committee, NSW Bar Association
	Mr Douglas Shupe	Chairman, GameCon
	Mr Craig Golding	NSW State Co-ordinator, Shooters' Union Australia
	Mr John Howden	Secretary, Federation of Hunting Clubs and Secretary/Treasurer, NSW Firearms Dealers Association
	Mr Grant Layland	Treasurer, Federation of Hunting Clubs
Mr Paul Britton	President, NSW Firearms Dealers Association	
<b>Thursday 10 December 2020 Macquarie Room Parliament House, Sydney</b>	Witness A ( <i>In-camera</i> )	
	Ms Jane Sanders	Representative, Law Society of New South Wales
	Mr Richard Leary	Representative, Law Society of New South Wales
	Mr Lance Miller	President, Sporting Shooters' Association of Australia (NSW)
	Mr Jai Rowell	Chief Executive Officer and Executive Director, Sporting Shooters' Association of Australia (NSW)
	Mr Stephen Mainstone	Firearms lawyer
	Mr Glenn Kable	Firearms lawyer
Mr Don Barton	Firearms owner	

## Appendix 3 Minutes

### Minutes no. 19

Tuesday 7 April 2020

Portfolio Committee No. 5 - Legal Affairs  
via teleconference at 2.38 pm

#### 1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Donnelly (substituting for Mr Moselmane)

Mr Farraway

Ms Jackson

Mrs Maclaren-Jones

Mrs Ward

#### 2. Previous minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 18 be confirmed.

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

##### 3.1 Terms of reference

The committee noted the following terms of reference referred by the House on 24 March 2020:

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.

##### 3.2 Proposed timeline

Resolved, on the motion of Mr Donnelly: That the committee adopt the following timeline for the administration of the inquiry:

- Submissions close: 14 August 2020
- Hearings (one hearing date): to be held after 15 September 2020
- Reporting date: that the Chair seek an extension from the House to a date to be determined by the committee at a further meeting, but that the reporting date be no sooner than the 22 October 2020.

##### 3.3 Stakeholder list

Resolved, on the motion of Mrs Maclaren-Jones: That the secretariat email members with a list of stakeholders to be invited to make written submissions, and that members have two days from the email being circulated to nominate additional stakeholders.

##### 3.4 Advertising

The committee noted that all inquiries are advertised via Twitter, Facebook, stakeholder letters and a media release distributed to all media outlets in New South Wales.

#### 4. Budget Estimates 2019-2020 further hearings

##### 4.1 Extension to post hearing responses due date

Resolved, on the motion of Mr Shoebridge: That, due to the social disruption caused by COVID-19, the committee:

- grant an extension for the return of answers to questions on notice and supplementary questions to the witnesses who appeared at the Budget Estimates hearings for the Police and Emergency Services portfolios to 5.00 pm, Wednesday 22 April 2020, and
- upon their requests, grant an up to two-week extension for the return to answers to questions on notice and supplementary questions to any witnesses who appeared at the Budget Estimates 2019-20 further hearings.

#### 5. Adjournment

The committee adjourned at 2.43 pm, *sine die*.

Sharon Ohnesorge  
Committee Clerk

#### Minutes no. 26

Thursday 16 July 2020

Portfolio Committee No. 5 - Legal Affairs

WebEx videoconference at 10.10 am

#### 1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair (from 10.25 am)*

Mr Buttigieg (*substituting for Mr Moselmann for the duration of the inquiry*) (*from 10.14 am*)

Ms Jackson

Mr Khan

Mrs Maclaren-Jones

Mr Martin (*substituting for Mrs Ward for the duration of the inquiry*)

#### 2. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes nos. 23, 24 and 25 be confirmed.

#### 3. Correspondence

The committee noted the following items of correspondence:

##### **Received:**

- 7 May 2020 – Letter from stakeholder to committee, regarding the provisions of the Firearms and Weapons Legislation (Criminal Use) Bill 2020
- 19 June 2020 – Letter from Hon Natasha Maclaren-Jones MLC, to secretariat, advising that the Hon Taylor Martin MLC will be substituting for the Hon Natalie Ward MLC for the duration of the inquiry into the Rural Fires Amendment Bill 2020
- 2 July 2020 – Email from Ms Liza Booth, Principal Policy Lawyer, The Law Society of NSW, to secretariat, requesting an extension to provide a submission
- 6 July 2020 – Email and attachment from Mr Michael Holton, President, Volunteer Firefighters, to Chair, advising they have not had time to provide a submission to the inquiry and attaching a copy of a media release on the topic
- 13 July 2020 – Email from Ms Michelle Kerr, Assistant to Ms Celeste Barber, advising that Ms Barber has agreed to have her submission made public and that she is unable to attend the virtual public hearing

- 13 July 2020 – Email from Ms Michelle Kerr, Assistant to Ms Celeste Barber, providing the reasons for declining the invitation to appear at the virtual public hearing
- 14 July 2020 – Email from Hon Mark Buttigieg MLC, to secretariat, advising that he will be substituting for Hon Shaoquett Moselmane MLC for the duration of the inquiry into the Rural Fires Amendment Bill 2020.

***Sent:***

- 9 July 2020 – Letter from Chair, to Ms Celeste Barber, asking that she re-consider her request for her submission to be kept confidential and inviting her to the public virtual hearing.

Resolved, on the motion of Mr Khan: That the committee keep the correspondence dated 7 May 2020, confidential, as per the request of the author as it contains identifying and/or sensitive information.

#### **4. Inquiry into the provisions of the Firearms and Weapons Legislation (Criminal Use) Bill 2020**

##### **4.1 Contacting stakeholders on the stakeholder list**

The committee noted that the secretariat has been unable to contact the following registered hunting organisations on the stakeholder list to invite them to make a submission to the inquiry:

- Australian Deer Association Sapphire Coast/Monaro Branch
- Australian Deer & Game Hunters Club Incorporated
- Cessnock District Hunting Club Inc
- Hawkesbury Hunting Club Inc
- South West Slopes Sporting Field Archers Inc
- Adventure & Safari Industry Association Inc
- Australian Conservation Hunting Council Inc
- Australian Guides Fishing & Hunting Association
- Blue Mountains Bowhunters Club
- Diana Hunting Club
- Eurobodalla Archery Club Inc
- Gloucester Rifle Club Inc
- Hunting Archers of Inverell
- Kempsey Rifle Club Inc
- Lake Illawarra Hunters Club
- Maitland Hunting Club
- NSW K-9 Hunting Association Inc
- Orange Rifle Club Inc
- Orara Bazzas Hunting Club
- Rifle & Reel Club Inc
- Snowy Mountains Conservation Hunters Inc
- South Coast Hunters Club
- Ventura Hunting Club
- Vermin Solutions Hunting Club Inc
- Wentworth Rifle Club Inc

##### **4.2 Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1, 6, 12, 16, 17, 20, 21, 23, 26-28, 32, 34, 35, 38, 39, 43, 44, 47, 49, 51, 52, 55, 60-63, 67-69, 74-76.

##### **4.3 Partially confidential submissions**

The committee noted that the following submissions were partially published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 2-5, 7-11, 13-15, 18, 19, 22, 25, 30, 31, 33, 36, 37, 40-42, 45, 46, 48, 50, 53, 54, 56-59, 64, 66, 70-73.



Resolved, on the motion of Mrs Maclaren-Jones: That the committee keep the following information confidential, as per the request of the author: names and/or identifying and sensitive information in submissions nos. 2-5, 7-11, 13-15, 18, 19, 22, 25, 30, 31, 33, 36, 37, 40-42, 45, 46, 48, 50, 53, 54, 56-59, 64, 66, 70-73.

#### **4.4 Confidential submissions**

Resolved, on the motion of Mrs Maclaren-Jones: That the committee keep submission nos. 29 and 65 confidential, as per the request of the author.

#### **4.5 Hearing date**

Resolved, on the motion of Mrs Maclaren-Jones: That the committee hold a hearing in late September/October 2020, the date of which is to be determined by the Chair after consultation with members regarding their availability.

#### **4.6 Extension to reporting date**

Resolved, on the motion of Mrs Maclaren-Jones: That the Chair seek an extension to the reporting date from the House to the first sitting day in 2021.

### **5. Inquiry into the Rural Fires Amendment (NSW RFS and Brigades Donations Fund) Bill 2020**

#### **5.1 Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1, 2, 3 and 5.

#### **5.2 Confidential submission**

The committee noted the request from Ms Celeste Barber, author of submission no. 4, that her submission be kept confidential. As agreed via email the Chair wrote to Ms Barber seeking agreement that her submission be published and Ms Barber agreed. The submission was published by the committee clerk under the authorisation of the resolution appointing the committee.

#### **5.3 Report deliberative**

The committee previously resolved to hold the report deliberative at 9.00 am, Thursday 30 July 2020. The committee decided that this meeting will be held virtually.

#### **5.4 Virtual hearing proceedings**

The Chair briefed members on the proceedings of the day.

#### **5.5 Allocation of questioning**

The committee confirmed that the allocation of questions at today's hearing be determined by the Chair.

#### **5.6 Public virtual hearing**

The committee proceeded to take evidence in public via videoconferencing.

The witnesses were admitted.

The Chair made an opening statement regarding the virtual proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Brian McDonough, President, Rural Fire Service Association
- Mr Brian Williams, Senior Vice President, Volunteer Fire Fighters Association.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Dr Derwent Coshott, The University of Sydney Law School
- Dr Ian Murray, Member of the Law Council's Charities and Not-For-Profit Committee and Associate Professor & Deputy Head of School, Research, University of Western Australia
- Mr David Castle, Member of the Law Society Business Law Committee.

The evidence concluded and the witnesses withdrew.

The following witness was admitted, sworn and examined:

- Mr Stephen O'Malley, Executive Director, Finance and Executive Services, NSW Rural Fire Service.

The evidence concluded and the witness withdrew.

The virtual hearing concluded at 1.40 pm.

**6. Questions to the Trustees of the RFS Donations Trust**

Resolved, on the motion of Mr Buttigieg: That the committee write to the Trustees of the NSW Rural Fire Service and Brigades Donation Fund with a list of questions requesting a response by Wednesday 22 July 2020, and that the Chair's proposed questions be circulated to members with additional questions due by 3.00 pm Friday 17 July 2020.

**7. Next meeting**

The meeting adjourned at 1.45 pm, until Thursday 30 July 2020, 9.00 am, via WebEx videoconference (report deliberative).

Sarah Dunn

**Committee Clerk**

**Minutes no. 30**

Wednesday 28 October 2020

Portfolio Committee No. 5 - Legal Affairs

Macquarie Room, Parliament House, Sydney

**1. Members present**

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair (left at 12.43 pm)*

Mr Amato (*substituting for Mrs Maclaren-Jones, via videoconference*)

Mr Buttigieg

Ms Jackson

Mr Khan

Mr Martin (*substituting for Mrs Ward for the duration of the inquiry*)

**2. Draft minutes**

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 29 be confirmed.

**3. Correspondence**

The committee noted the following items of correspondence:

***Received:***

- 15 October 2020 – Letter from the Hon Natasha Maclaren-Jones MLC, Government Whip, to secretariat, advising that the Hon Taylor Martin MLC will be substituting for the Hon Natalie Ward MLC for the duration of the Firearms Bill inquiry
- 15 October 2020 – Letter from the Hon Natasha Maclaren-Jones MLC, Government Whip, to secretariat, advising that the Hon Lou Amato MLC will be substituting for the Hon Natasha Maclaren-Jones MLC for the hearing on 28 October
- 15 October 2020 – Email from Ms Rachel Geare, Senior Policy Lawyer, Policy and Practice, to the secretariat, expressing witness unavailability for the hearing on 28 October but willingness to appear at the December hearing

- 15 October 2020 – Email from Mr Glenn Kable, Firearms lawyer, to the secretariat, expressing unavailability for the hearing on 28 October but willingness to appear at the December hearing
- 16 October 2020 – Email from Mr Jai Rowell, CEO and Executive Director, Sporting Shooters' Association of Australia (NSW), to the secretariat, expressing witness unavailability for the hearing on 28 October but willingness to appear at the December hearing
- 16 October 2020 – Email from Mr Rommel Varghese, Deputy Chief of Staff and Senior Policy Advisor, Office of Minister for Police and Emergency Services, advising that the Minister has declined invitation to appear as a witness at the hearing on 28 October 2020.

**Sent:**

- 12 October 2020 – Letter from Chair, to the Hon. David Elliott MP, Minister for Police and Emergency Services, inviting him to attend as a witness for the hearing on 28 October 2020.

**4. Inquiry into the provisions of the Firearms and Weapons Legislation (Criminal Use) Bill 2020****4.1 Public submission**

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of submission no. 27a.

**4.2 Pro formas**

The committee noted that it has received five different types of pro formas.

Resolved, on the motion of Mr Khan: That a sample of each pro forma be published on the inquiry website, including the number of responses to each pro forma, and that all pro forma responses be kept confidential.

**4.3 Public hearing**

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Acting Deputy Commissioner Mark Walton APM, A/Deputy Commissioner, Investigations and Counter Terrorism, NSW Police
- Superintendent Anthony Bell, Commander, NSW Firearms Registry.

The Chair tendered the following documents:

- Table from 'Illicit Firearms in Australia', Australian Criminal Intelligence Commission
- Table from 'NSW Criminal Court Statistics April 2011 to March 2020', BOCSAR
- South Australian *Firearms Act 2015*.

The evidence concluded and the witnesses withdrew.

The following witness was admitted, sworn and examined via videoconference:

- Mr Stephen Bendle, Convenor, Australian Gun Safety Alliance.

The evidence concluded and the witness withdrew.

The following witness was admitted, sworn and examined:

- Mr Stephen Odgers SC, Co-Chair, Criminal Law Committee, NSW Bar Association.

The evidence concluded and the witness withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Douglas Shupe, Chairman, GameCon
- Mr Craig Golding, NSW State Co-ordinator, Shooters' Union Australia.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr John Howden, Secretary, Federation of Hunting Clubs and Secretary/Treasurer, NSW Firearms Dealers Association
- Mr Grant Layland, Treasurer, Federation of Hunting Clubs
- Mr Paul Britton, President, NSW Firearms Dealers Association/

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 3.04 pm.

Resolved, on the motion of Mr Buttigieg: That the committee accept and publish the following documents tendered during the public hearing:

- Table from 'Illicit Firearms in Australia', Australian Criminal Intelligence Commission
- Table from 'NSW Criminal Court Statistics April 2011 to March 2020', BOCSAR
- South Australian *Firearms Act 2015*.

#### 5. **Next meeting**

The meeting adjourned at 3.08 pm, until Thursday 10 December 2020 (second hearing for the Firearms Bill inquiry).

Helen Hong

**Committee Clerk**

### **Minutes no. 33**

Thursday 10 December 2020

Portfolio Committee No. 5 - Legal Affairs

Macquarie Room, Parliament House, Sydney at 9.11 am.

#### 1. **Members present**

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair* (from 9.48 am to 12.38 pm)

Ms Jackson

Mr Khan

Mr Martin

Mrs Maclaren-Jones

Mr Moselmane

#### 2. **Draft minutes**

Resolved, on the motion of Mr Khan: That draft minutes nos 30 and 32 be confirmed.

#### 3. **Correspondence**

The committee noted the following items of correspondence:

##### ***Received:***

- 17 November 2020 – Letter from the Aboriginal Legal Service regarding the Inquiry into the Drug Supply Prohibition Order Pilot Scheme Bill 2020
- 20 November 2020 – Letter from the President of the NSW Bar Association to the Attorney General regarding the Inquiry into the Drug Supply Prohibition Order Pilot Scheme Bill 2020, for the committee's information.

#### 4. Committee membership

The committee noted that on 17 November 2020 the President informed the House that Mr Moselmane was nominated as a member of Portfolio Committee No. 5 – Legal Affairs in place of Mr Buttigieg.

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

##### 5.1 Confidential submission

Resolved, on the motion of Mr Martin: That the committee keep submission no. 266 confidential as per the recommendation of the secretariat, as it contains identifying and sensitive information and adverse mention.

##### 5.2 Disclosure by Mr Moselmane

Mr Moselmane disclosed that he has a firearms licence.

##### 5.3 *In camera* witness

The committee noted that it previously agreed via email that Witness A:

- give *in camera* evidence at the hearing on 10 December, and
- for a support person be present in the hearing room.

##### 5.4 Answers to questions on notice and supplementary questions

The committee noted that the following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice from Mr Stephen Bendle, Convenor, Australian Gun Safety Alliance, received 20 November 2020
- answers to questions on notice and supplementary questions from Mr Randall Stewart, Senior Policy and Project Officer, Officer of the Commissioner, NSW Police Force, received 26 November 2020.

##### 5.5 Letter to the Chair of the Firearms and Weapons Policy Working Group

Resolved, on the motion of Ms Jackson: That on behalf of the committee, the Chair write to the Chair of the Firearms and Weapons Policy Working Group, requesting a copy of the report referred to in the NSW Police Force's answers to supplementary questions, dated 28 November 2020.

##### 5.6 Clarification of transcript from 28 October 2020

Resolved, on the motion of Mr Khan: That the committee agree to the Chair clarifying in the transcript a statement he made during the public hearing on 28 October 2020.

##### 5.7 Timeframes for answers to questions on notice

Resolved, on the motion of Mr Khan: That the committee request a response to any questions taken on notice and supplementary questions from the public hearing on 10 December 2020 by Monday, 18 January 2021.

##### 5.8 *In camera* hearing

The committee proceeded to take evidence *in camera*.

Persons present other than the committee: Mr Sam Griffith, Ms Taylah Cauchi, Ms Helen Hong, the witness' support person and Hansard reporters.

The Chair made an opening statement regarding a range of matters.

The following witness was sworn and examined:

- Witness A.

Witness A tendered the following documents:

- Various photographs.

The evidence concluded and the witness withdrew.

The *in camera* hearing concluded at 10.02 am.

Resolved, on the motion of Ms Jackson: That the committee accept and keep confidential the following documents tendered by Witness A during the *in camera* hearing:

- Various photographs.

### **5.9 Public hearing**

The committee proceeded to take evidence in public.

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Ms Jane Sanders, Representative, Law Society of New South Wales
- Mr Richard Leary, Representative, Law Society of New South Wales.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Lance Miller, President, Sporting Shooters' Association of Australia (NSW)
- Mr Jai Rowell, Chief Executive Officer and Executive Director, Sporting Shooters' Association of Australia (NSW).

The evidence concluded and the witnesses withdrew.

The following witness was admitted, sworn and examined:

- Mr Stephen Mainstone, Firearms lawyer.

Resolved, on the motion of Mr Shoebridge: That the committee request a response from Mr Stephen Mainstone to any questions taken on notice and supplementary questions by Monday, 25 January 2021.

The evidence concluded and the witness withdrew.

The following witness was admitted, sworn and examined:

- Mr Glenn Kable, Firearms lawyer.

The evidence concluded and the witness withdrew.

The following witness was admitted, sworn and examined:

- Mr Don Barton, Firearms owner.

The evidence concluded and the witness withdrew.

The public hearing concluded at 2.59 pm.

### **5.10 Consideration of *in camera* evidence**

Resolved, on the motion of Mr Moselmane: That the committee keep the entirety of Witness A's *in camera* evidence confidential.

## **6. Next meeting**

The meeting adjourned at 3.04 pm, until 9.30 am, Thursday 11 February 2021, McKell Room (report deliberative for the Firearms Bill inquiry).

Helen Hong  
**Committee Clerk**

**Minutes no. 34**

Tuesday 2 February 2021

Portfolio Committee No. 5 - Legal Affairs

Room 1254, Parliament House, Sydney at 1.01 pm

**1. Members present**Mr Borsak, *Chair*Mr Shoebridge, *Deputy Chair*

Ms Jackson

Mr Khan

Mr Martin (*substituting for Mrs Maclaren-Jones via Webex*)

Mr Moselmane

Mrs Ward

**2. Draft minutes**

Resolved, on the motion of Mr Khan: That draft minutes no. 33 be confirmed.

**3. Inquiry into Budget Estimates 2020-2021 – procedural resolutions**

The committee noted the Budget Estimates timetable for 2020-2021 agreed to by the House, with hearings commencing at 9.30 am and concluding by 8.30 pm, for Portfolio Committee No. 5:

<b>Date</b>	<b>Portfolio</b>
Friday 26 February 2021	Families, Communities and Disability Services (Ward)
Tuesday 2 March 2021	Attorney General and Prevention of Domestic Violence (Speakman)
Friday 5 March 2021	Sport, Multiculturalism, Seniors and Veterans (Lee)
Tuesday 9 March 2021	Counter Terrorism and Corrections (Roberts)
Friday 12 March 2021	Police and Emergency Services (Elliott)

**3.1 Allocation of question time and total hearing time**

Resolved, on the motion of Mr Moselmane: That

- the Families, Communities and Disability Services portfolios be examined from 9.30 am to 12.30 pm and from 2.00 pm to 5.00 pm, with an additional 15 minutes reserved for Government questions.
- the Attorney General and Prevention of Domestic Violence portfolios be examined from 9.30 am to 12.30 pm and from 2.00 pm to 5.00 pm, with an additional 15 minutes reserved for Government questions.
- the Sport, Multiculturalism, Seniors and Veterans portfolios be examined from 9.30 am to 12.30 pm and from 2.00 pm to 5.00 pm, with an additional 15 minutes reserved for Government questions.
- the Counter Terrorism and Corrections portfolios be examined from 9.30 am to 12.30 pm and from 2.00 pm to 5.00 pm, with an additional 15 minutes reserved for Government questions.
- the Police and Emergency Services portfolios be examined from 9.30 am to 12.30 pm and from 2.00 pm to 5.00 pm with an additional 15 minutes reserved for Government questions.

### 3.2 Order for examination of portfolios

Mr Shoebridge moved: That:

- the Sport, Multiculturalism, Seniors and Veterans portfolios be examined concurrently
- the Counter Terrorism and Corrections portfolios be examined concurrently.

Question put.

The committee divided.

Ayes: Mr Borsak, Ms Jackson, Mr Moselmane, Mr Shoebridge.

Noes: Mr Khan, Mr Martin, Mrs Ward.

Question resolved in the affirmative.

### 3.3 Witness requests

Resolved, on the motion of Mr Shoebridge: That the committee nominate witnesses to be invited by 12 pm, Thursday 4 February 2021.

### 3.4 Witness appearance time

Resolved, on the motion of Mr Khan: That in correspondence to the Ministers, the committee advise that:

- Ministers will be invited to appear from 9.30 am until 12.30 pm,
- Departmental staff will be invited to appear from 9.30 am until 5.15 pm.

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

### 4.1 Extension of reporting date

Resolved, on the motion of Mr Moselmane: That:

- the Chair seek an extension to the reporting date from the House to Tuesday 27 April 2021,
- that the report deliberative be rescheduled to Thursday 22 April 2021,
- prior to the sittings of the House, the Chair write to the Whips and inform them of the above resolution.

## 5. Adjournment

The committee adjourned at 1.18 pm, until Friday 26 February 2021, Jubilee Room, at 9.15 am (Families, Communities and Disability Services hearing).

Emma Rogerson  
Committee Clerk

### Minutes no. 37

Friday 5 March 2021

Portfolio Committee No. 5 - Legal Affairs

Macquarie Room, Parliament House, Sydney, at 9.17 am

### 1. Members present

Mr Borsak, *Chair* (until 10.12 am, and from 10.50 am)

Mr Shoebridge, *Deputy Chair* (until 9.21am, and from 10.57 am until 12.30 pm)

Mr Khan



Ms Jackson (from 9.21 am)  
 Mrs Maclaren-Jones (until 10.43 am, and from 2.00 pm)  
 Mr Moselmane  
 Mrs Ward (until 12.30 pm, and from 2.38 pm)

## 2. Correspondence

The committee noted the following items of correspondence:

### *Received*

- 4 March 2021 - Email from Ms Ellie Stamatelatos, Office of Minister Lee to secretariat, requesting the early departure of Mr Simon Draper, Chief Executive Officer, Infrastructure NSW from the Sport, Multiculturalism, Seniors and Veterans hearing on 5 March 2021.

## 3. Provisions of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020

### 3.1 Evidence from Witness A

Resolved, on the motion of Mr Khan: That the evidence from Witness A remain confidential as per the committee resolution of 10 December 2020.

## 4. Inquiry into Budget Estimates 2020-2021 – initial hearings

### 4.1 Order for examination of portfolios

The committee noted that it had previously resolved that the portfolios of Sport, Multiculturalism, Seniors and Veterans be examined concurrently by Opposition and Crossbench members only, from 9.30 am to 12.30 pm, and from 2.00 pm to 5.00 pm, with an additional 15 minutes reserved for Government questions for each of the morning and afternoon sessions.

### 4.2 Election of Acting Deputy Chair for the duration of the hearing

Resolved, on the motion of Mr Shoebridge: That, in the absence of the Deputy Chair, Ms Jackson be elected as Acting Deputy Chair for the duration of the hearing on 5 March 2021, at any time when the Deputy Chair is not present.

### 4.3 Public hearing: Sport, Multiculturalism, Seniors and Veterans

Minister, departmental witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters. The Chair noted that members of Parliament swear an oath to their office, and therefore do not need to be sworn prior to giving evidence before a committee.

The Hon Dr Geoff Lee MP, Acting Minister for Sport, Multiculturalism, Seniors and Veterans, was admitted.

The Chair also reminded Mr Michael Coutts-Trotter, that he did not need to be sworn, as he had been sworn at another Budget Estimates hearing for the same committee.

The following witnesses were sworn:

- Ms Caroline Mackaness, Director, Office of Veterans Affairs
- Mr Joseph La Posta, Chief Executive Officer, Multicultural NSW
- Ms Karen Jones, Chief Executive Officer, Office of Sport
- Mr Simon Draper, Chief Executive Officer, Infrastructure NSW
- Ms Kerrie Mather, Chief Executive Officer, Venues NSW

The Chair declared the proposed expenditure for the portfolios of Sport, Multiculturalism, Seniors and Veterans open for examination.

The Minister and departmental witnesses were examined by the committee.

Minister Lee tendered the following document:

- Joint Statement Indian Community in NSW stands united for harmony

The Minister and Mr Draper withdrew at 12.30 pm.

The public hearing continued.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 3.45 pm.

The public and media withdrew.

#### **4.4 Tendered documents**

Resolved, on the motion of Mrs Ward: That the committee accept and publish the following documents tendered during the Sport, Multiculturalism, Seniors and Veterans hearing held on Friday 5 March 2021:

- Joint Statement Indian Community in NSW stands united for harmony, tendered by Hon Geoff Lee MP, Minister for Sport, Multiculturalism, Seniors and Veterans.

#### **5. Adjournment**

The committee adjourned at 3.45 pm, until 9.15 am, Tuesday 9 March 2021, Macquarie Room, Budget Estimates hearing — Counter Terrorism and Corrections.

Vanessa OLoan and Rhia Victorino

**Committee Clerks**

#### **Draft Minutes no. 40**

Thursday 22 April 2021

Portfolio Committee No. 5 - Legal Affairs

Room 1043, Parliament House, Sydney at 11.04 am.

#### **1. Members present**

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Fang (substituting for Mr Khan)

Ms Jackson

Mr Martin

Mr Primrose (substituting for Mr Moselmane)

#### **2. Apologies**

Mrs Maclaren-Jones

#### **3. Draft minutes**

Resolved, on the motion of Ms Jackson: That draft minutes nos 35 to 39 be confirmed.

#### **4. Correspondence**

The committee noted the following items of correspondence:

***Sent:***

- 17 December 2020 – Letter from the Chair to Mr Daniel Mossop, Chair, Firearms and Weapons Policy Working Group, requesting a copy of the report reviewing the illegal manufacture offence
- 8 March 2021 – Email from the secretariat, to Witness A, advising that the committee reiterates its decision to not publish his *in camera* evidence
- 10 March 2021 – Letter from the Chair, to Witness A, providing clarification on the issues pertaining to his *in camera* evidence
- 12 March 2021 – Letter from the Chair, to the lawyer for Witness A, responding to statements emailed to the secretariat.

**Received:**

- 20 January 2021 – Letter from Witness A, to the committee, requesting that the committee consider publishing his *in camera* evidence
- 20 January 2021 – Email from Mr Daniel Mossop, Chair, Firearms and Weapons Policy Working Group, to the secretariat, enclosing a copy of the report entitled '*Proposal for draft offense relating to illegal manufacture of firearms*'
- 27 January 2021 – Email from Mr Jai Rowell, CEO and Executive Director, Sporting Shooters' Association of Australia (NSW), to the committee, requesting that a clarification be made to the transcript of the evidence given at the hearing on 10 December 2020
- 10 March 2021 – Email from Witness A, to the secretariat, responding to request for information about *in camera* evidence
- 11 March 2021 – Email from the lawyer for Witness A, to the secretariat, requesting clarification on certain issues with Witness A's confidential evidence.

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

**5.1 Public submissions**

The committee noted that submission nos 258a and 267 were published by the committee clerk under the authorisation of the resolution appointing the committee.

**5.2 Answers to questions on notice and supplementary questions**

The committee noted that the following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice from Mr Glenn Kable, Firearm lawyer, received 7 January 2021
- answers to questions on notice from the Law Society of New South Wales, received 18 January 2021
- answers to questions on notice from Mr Stephen Mainstone, Firearms lawyer, received 18 January 2021.

**5.3 Clarification of evidence**

Resolved, on the motion of Ms Jackson: That the committee authorise:

- the publication of correspondence from Mr Jai Rowell, Chief Executive Officer and Executive Director, Sporting Shooters' Association of Australia (NSW), dated 27 January 2021, and
- the addition of a footnote to the evidence of Mr Lance Miller noting the requested clarification.

**5.4 Consideration of Chair's draft report**

The Chair submitted his draft report, entitled '*Provisions of the Firearms and Weapons Legislation (Criminal Use) Bill 2020*' which, having been previously circulated, was taken as being read.

Resolved, on the motion of Mr Fang: That paragraph 2.132 be amended to omit 'The committee wishes to highlight that it supports' and insert instead 'The committee supports'.

Mr Martin moved: That paragraph 2.133 be amended by omitting 'However, while the intentions behind this bill are positive, in practice it is poorly drafted and contains many flaws. Almost all inquiry participants were unsupportive of the bill in its current form. Many' and inserting instead 'The committee notes'.

Question put and negatived.

Mr Martin moved: That paragraph 2.134 be omitted and the following new paragraph be inserted instead:

'In addition, legal experts shared concerns regarding the breadth of the offences in the bill, about the proportionality of penalties compared to similar offences in other New South Wales legislation and the expansion of significant police powers under firearms prohibition orders.'

Question put and negatived.

Mr Martin moved: That paragraph 2.135 be amended by omitting 'significant' before 'issues raised'.

Question put and negatived.

Mr Martin moved that paragraph 2.136 be amended by omitting 'have been persuaded that inserting a similar exemption for licenced firearms owners in the bill would rectify a number of the concerns presented by firearms associations and individuals, including the broad operation of the offence and the breadth of firearms precursors captured by the current wording in s 51J(3). It would also be in line with the intentions of the bill - to target organised crime, rather than law-abiding individual firearms owners', and inserting instead 'are concerned that any blanket exemption to the proposed offence in clause 51J of the bill could create loopholes within the legislation'.

Question put and negatived.

Mr Martin moved: That paragraph 2.137 and Recommendation 2 be omitted.

Question put and negatived.

Mr Shoebridge moved: That:

- a) paragraph 2.138 be omitted and the following new paragraph be inserted instead:

'The committees notes that there may be benefit in defining what minor repairs, routine maintenance and adjustments firearm licence holders and firearm permit holders are authorised to undertake to their registered firearms. This is a matter that may be well considered in the course of debate of the bill.'

- b) Recommendation 3 be omitted.

Question put.

The committee divided.

Ayes: Mr Shoebridge

Noes: Mr Borsak, Mr Fang, Ms Jackson, Mr Martin, Mr Primrose.

Question resolved in the negative.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.139 be amended by:

- a) omitting 'manufacture or' before 'replace a minor part'
- b) omitting 'In limited situations where there is a need – both legal and reasonable – to manufacture a firearm part and there is no risk of harm to the owner or others, the committee agrees that the bill should be amended to allow the manufacture of minor non-regulated firearm parts for a registered firearm or one that is not required to be registered', and inserting instead 'This is a matter that should be clarified for any firearms that are not required to be registered. This should be limited to situations where there is a need – both legal and reasonable – to replace a firearm part and there is no risk of harm to the owner or others'.

Resolved, on the motion of Mr Shoebridge: That Recommendation 4 be omitted: 'That the Legislative Council amend the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to allow the manufacture of minor non-regulated firearms parts for a registered firearm or for a firearm that is not required to be registered.'

Mr Martin moved: That paragraphs 2.141 and 2.142 and Recommendation 6 be omitted.

Question put and negatived.

Mr Martin moved: That paragraph 2.143 be amended by inserting at the end: 'and the proposed provisions will ensure any investigations are not hindered or delayed'.

Question put and negatived.

Mr Martin moved: That paragraphs 2.144 to 2.146 and Recommendations 7 and 8 be omitted.

Question put and negatived.

Mr Fang moved: That paragraphs 2.147 and 2.148 be omitted.

Question put and negatived.

Mr Martin moved: That paragraph 2.147 be amended by:

- a) omitting 'Taking into consideration the NSW Ombudsman's measured findings and recommendations from its 2016 report, the committee does not agree with the bill's provision' and inserting instead 'The committee notes the bill's provision'
- b) inserting at the end: 'The committee recognises the evidence received from the NSW Police Force and NSW Firearms Registry that ten years is a more appropriate length of term for the review to be enacted.'

Question put.

The committee divided.

Ayes: Mr Fang, Ms Jackson, Mr Martin, Mr Primrose

Noes: Mr Borsak, Mr Shoebridge.

Question resolved in the affirmative.

Mr Shoebridge moved: That:

- a) paragraph 2.149 be omitted: 'Similarly, the committee considers that, as is consistent with the National Firearms Agreement, the Legislative Council should introduce an amendment which changes the exclusion period from 10 to five years for people with expired Apprehended Violence Orders and who are eligible to apply for a firearms licence or permit.'
- b) Recommendation 10 be omitted: 'That the Legislative Council amend the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to change the exclusion period to five years for people with expired Apprehended Violence Orders and who are eligible to apply for a firearms licence or permit, consistent with paragraph 38a(ii) of the National Firearms Agreement.'

Question put.

The committee divided.

Ayes: Mr Fang, Ms Jackson, Mr Martin, Mr Primrose, Mr Shoebridge

Noes: Mr Borsak.

Question resolved in the affirmative.

Mr Fang moved: That Recommendation 9 be omitted: 'That the Legislative Council amend section 73A of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to provide that Firearms Prohibition Orders expire after five years as recommended by the NSW Ombudsman.'

Question put.

The committee divided.

Ayes: Mr Fang, Ms Jackson, Mr Martin, Mr Primrose

Noes: Mr Borsak, Mr Shoebridge.

Question resolved in the affirmative.

Resolved, on the motion of Mr Fang: That paragraph 2.150 be amended by:

- a) omitting 'also' before 'recognises the impact'
- b) omitting 'strongly' before 'considers that a higher threshold'.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.150 be amended by:

- a) omitting ', if not sufficient,' before 'suspicion that a person'
- b) inserting at the end: 'Another reason we support this change is that the concept of "reasonable suspicion" is well understood in the law, especially in regards to the police search powers. There is a very real danger of causing confusion, uncertainty and multiple legal challenges by introducing the concept of "reasonably required" as the primary basis for a search as proposed in the initial draft of the bill.'

Mr Martin moved: That paragraph 2.150 be omitted and the following new paragraph be inserted instead:

'The committee recognises the impact that searches can have on children present on the premises. The committee supports amendments to provide that police search powers for persons subject to a Firearms Prohibition Order be differentiated so that appropriate protections are provided to persons aged under 18 years.'

Question put and negatived.

Mr Martin moved: That:

- a) paragraph 2.151 be omitted: 'Particularly in relation to children, the committee wholeheartedly supports additional statutory protections for them against the broad-ranging and intrusive FPO powers. We recommend that the bill be amended to require police to make an application to the Children's Court for an order to undertake a search of a person under 18 years who is the subject of a FPO and for the Children's Court to make such an order only if satisfied that the order is reasonably necessary.'
- b) Recommendation 12 be omitted:

'That the Legislative Council amend the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to provide that:

- police are required to make an application to the Children's Court for an order to undertake a search of a person under 18 years who is the subject of a Firearms Prohibition Order
- the Children's Court may make such an order only if satisfied that the order is reasonably necessary.'

Question put.

The committee divided.

Ayes: Mr Fang, Ms Jackson, Mr Martin, Mr Primrose

Noes: Mr Borsak, Mr Shoebridge.

Question resolved in the affirmative.

Mr Martin moved: That Recommendation 11 be omitted.

Question put and negatived.

Mr Shoebridge moved: That:

- a) paragraph 2.152 be omitted: 'Finally it is clear to the committee, in the process of reviewing all of the evidence presented to it, that there is the potential for arbitrary abuse of power by the NSW Police Force under the current provisions and clear gaps in the protection of licensed firearms owners who do their utmost to be lawful citizens. We recommend the appointment of an Oversight Commissioner, independent of the NSW Police Force or the NSW Government, to monitor and oversee the arrangements or disputes related to licensing of firearms and monitoring or even reviewing FPOs.'
- b) Recommendation 14 be omitted: 'That the Legislative Council amend the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 during the Committee of the Whole stage to appoint an independent Oversight Commissioner.'

Question put.

The committee divided.

Ayes: Mr Fang, Ms Jackson, Mr Martin, Mr Primrose, Mr Shoebridge

Noes: Mr Borsak.

Question resolved in the affirmative.

Mr Martin moved: That Recommendation 13 be omitted.

Question put and negated.

Mr Martin moved: That paragraph 2.153 be omitted: 'The committee also notes the frustrations of key firearms associations and organisations who were not consulted on the provisions of the bill prior to its introduction. The committee is of the opinion that meaningful consultation with diverse stakeholder groups may have averted the inclusion of a number of the contentious matters included in the bill.'

Question put.

The committee divided.

Ayes: Mr Fang, Ms Jackson, Mr Martin, Mr Primrose, Mr Shoebridge

Noes: Mr Borsak.

Question resolved in the affirmative.

Mr Shoebridge moved: That paragraph 2.154 be omitted: 'The committee recognises and commends the previous efforts of the NSW Firearms Registry in establishing working groups with key firearms associations to conduct discussions, and that it is in the process of forming similar 'enhanced consultation groups'. We look forward to the establishment of this new consultative working group and for it to include key firearms stakeholders.'

Question put.

The committee divided.

Ayes: Mr Fang, Ms Jackson, Mr Martin, Mr Primrose, Mr Shoebridge

Noes: Mr Borsak.

Question resolved in the affirmative.

Mr Fang moved: That paragraphs 2.153 to 2.156 be omitted.

Question put and negated.

Resolved, on the motion of Ms Jackson: That:

- The draft report, as amended, be the report of the committee and that the committee present the report to the House;

- The transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- The secretariat is tabling the report at 10.00 am Tuesday, 27 April 2021;
- The Chair to advise the secretariat and members if they intend to hold a press conference, and if so, the date and time.

**6. Adjournment**

The committee adjourned at 11.56 am, *sine die*.

Helen Hong  
**Committee Clerk**





