



**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

**Economic Policy Scrutiny Committee**

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**Inquiry into the Firearms  
Legislation Amendment Bill 2019**

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**November 2019**



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## Chair's Preface

This report details the Committee's findings regarding the examination of the Firearms Legislation Amendment Bill 2019. The purpose of the Bill is to amend the *Firearms Act 1997* to provide for a new firearm prohibition order scheme that will enable the Commissioner of Police to make an order prohibiting an individual from acquiring, having possession of, or using any firearm or firearm related item. Although the Act provides a number of mechanisms to prevent firearm related crime, police currently have no capacity to take prompt action in circumstances where immediate intervention is required to deal with dynamic unfolding situations.

Firearm Prohibition Orders (FPOs) are currently in force in Victoria, New South Wales (NSW), South Australia and Tasmania. The provisions in the Bill are largely modelled on the equivalent provisions in the Victorian *Firearms Act 1996* as this is considered to be the most contemporary legislation.

The Committee received four submissions to its inquiry two of which raised concerns about the expansive powers provided to police and the associated infringement of human rights. The Committee acknowledges these concerns but notes that there are precedents for such infringements, particularly in relation to preventing criminal conduct that threatens public safety. Particular concern was expressed regarding the search powers provided to police. These powers can be exercised, without warrant or consent, if police deem the exercise of the power is "reasonably required" to determine whether a person with a firearms protection order is contravening the order. The Law Society considered the threshold of "reasonably required" to be a lower threshold than the well-established principle of "reasonable grounds" and commented that similar legislation in NSW and Victoria has resulted in inappropriate use of these powers. The Committee acknowledges these concerns but considers there to be sufficient safeguards against inappropriate use of the powers, noting that the Bill provides for the Ombudsman to review the exercise of police powers within two years after commencement and that NT Police will be implementing mandatory training on FPOs for relevant officers.

The Committee has recommended six amendments five of which are technical in nature and seek to ensure the Bill is unambiguous and drafted in a sufficiently clear and precise manner. Recommendation 7 proposes an amendment to provide that the Police Commissioner's powers in relation to firearm protection orders can only be delegated to a police officer at the level of superintendent or higher. Although the Committee considers it may be necessary to allow some infringement of human rights, it notes that as the Bill makes rights and liberties dependent on administrative power, it is essential to ensure that the power is sufficiently defined and subject to appropriate review.

On behalf of the Committee I would like to thank those who made submissions. The Committee also acknowledges the NT Police Force for the high quality and comprehensive nature of the advice they provided. I also thank my fellow Committee members for their bipartisan commitment to the legislative review process.



**Mr Tony Sievers MLA**  
**Chair**

## Committee Members

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	<b>Party:</b>	Territory Labor
	<b>Committee Membership</b>	
	Standing:	House, Public Accounts
	Sessional:	Economic Policy Scrutiny
	Chair:	Economic Policy Scrutiny
	<b>Kate Worden MLA</b> Member for Sanderson	
	<b>Party:</b>	Territory Labor
	Parliamentary Position	Government Whip
	<b>Committee Membership</b>	
	Standing:	Public Accounts, Standing Orders and Members' Interests
Sessional:	Economic Policy Scrutiny Social Policy Scrutiny	
	<b>Lia Finocchiaro MLA</b> Member for Spillett	
	<b>Party:</b>	Country Liberals
	Parliamentary Position:	Deputy Leader of the Opposition
	<b>Committee Membership</b>	
	Standing:	Privileges
Sessional:	Economic Policy Scrutiny Social Policy Scrutiny	
	<b>Lawrence Costa MLA</b> Member for Arafura	
	<b>Party:</b>	Territory Labor
	<b>Committee Membership</b>	
	Standing:	Public Accounts
	Sessional:	Economic Policy Scrutiny
	<b>Jeff Collins MLA</b> Member for Fong Lim	
	<b>Party:</b>	Independent
	<b>Committee Membership</b>	
	Sessional:	Economic Policy Scrutiny
From 21 October 2019, the Member for Daly, Mr Gary Higgins MLA, substituted for the Member for Spillett, Mrs Lia Finocchiaro MLA.		

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## **Acknowledgements**

The Committee acknowledges the individuals and organisations that provided written submissions and the Northern Territory Police Force for its advice.

## **Acronyms and Abbreviations**

ALRC	Australian Law Reform Commission
CLA	Civil Liberties Australia
FPO	Firearm Prohibition Order
NSW	New South Wales
NTCAT	Northern Territory Civil and Administrative Tribunal
NTPOL	Northern Territory Police Force

## Terms of Reference

### Sessional Order 13

#### *Establishment of Scrutiny Committees*

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints the following scrutiny committees:
  - (a) The Social Policy Scrutiny Committee
  - (b) The Economic Policy Scrutiny Committee
- (3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.
- (4) The functions of the scrutiny committees shall be to inquire and report on:
  - (a) any matter within its subject area referred to it:
    - (i) by the Assembly;
    - (ii) by a Minister; or
    - (iii) on its own motion.
  - (b) any bill referred to it by the Assembly;
  - (c) in relation to any bill referred by the Assembly:
    - (i) whether the Assembly should pass the bill;
    - (ii) whether the Assembly should amend the bill;
    - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
      - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
      - (B) is consistent with principles of natural justice; and
      - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
      - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and
      - (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
      - (F) provides appropriate protection against self-incrimination; and
      - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

- (H) does not confer immunity from proceeding or prosecution without adequate justification; and
  - (I) provides for the compulsory acquisition of property only with fair compensation; and
  - (J) has sufficient regard to Aboriginal tradition; and
  - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
  - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
  - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

## Recommendations

### Recommendation 1

The Committee recommends that the Legislative Assembly pass the Firearms Legislation Amendment Bill 2019 with the proposed amendments set out in recommendations 2-7.

### Recommendation 2

The Committee recommends that the definition of criminal intelligence in clause 4 be amended to align with the definition in the *Serious Crime Control Act 2009* either by including an identical definition in clause 4 or by reference to the definition of criminal intelligence in section 6 of the *Serious Crime Control Act 2009*.

### Recommendation 3

The Committee recommends that clause 49E be amended to insert an additional subsection with words to the effect 'A firearm prohibition order may be made that applies to an individual to whom a previous firearm prohibition order applied that has expired, been revoked or set aside by the Northern Territory Civil and Administrative Tribunal'.

### Recommendation 4

The Committee recommends that proposed section 49K(2) be amended to provide that:

- If a licence, permit or certificate of registration under the Act is held by a body corporate, other than a firearms dealer, and the officer of the body corporate who holds the body corporate's licence is a person to whom a firearm prohibition order relates, the licence, permit or certificate is suspended by the making of the order and the suspension takes effect once the order has been served on the person.
- In order to lift the suspension the body corporate must, within 14 days of being advised by police of the suspension of the licence, advise the Commissioner of a new representative to be the body corporate licence holder. If the Commissioner is satisfied that the nominated representative is a fit and proper person to be the representative licence holder, the suspension may be lifted and the licence may continue to operate.
- If a licence, permit or certificate of registration under this Act is held by a firearms dealer to which a firearm prohibition order relates, the licence, permit or certificate is cancelled by the making of the order and the cancellation takes effect on the order being served on the person.

### Recommendation 5

The Committee recommends that proposed section 49W be amended to include a search of the premises where a person subject to a firearm prohibition order resides if reasonably required to determine whether there is a firearm or firearm related item on the premises.

**Recommendation 6**

The Committee recommends that proposed section 49ZA be amended to clearly indicate that the Commissioner's power under proposed s 49ZA(2) only relates to firearms or firearm related items that have been surrendered or seized under Part 8.

**Recommendation 7**

The Committee recommends that the Bill be amended to provide that the Police Commissioner's power in relation to firearm prohibition orders can only be delegated to a police officer at the level of superintendent or higher.

# 1 Introduction

## Introduction of the Bill

1.1 The Firearms Legislation Amendment Bill 2019 (the Bill) was introduced into the Legislative Assembly by the Minister for Police, Fire and Emergency Services the Hon Nicole Manison MLA, on Wednesday 18 September 2019. The Assembly subsequently referred the Bill to the Economic Policy Scrutiny Committee for inquiry and report by Tuesday 26 November 2019.<sup>1</sup>

## Conduct of the Inquiry

- 1.2 On 20 September 2019 the Committee called for submissions by 8 October 2019. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter feed and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.
- 1.3 As noted in Appendix 1, the Committee received four submissions to its inquiry. The Committee held a public briefing with the Northern Territory Police Force on 24 September 2019.

## Outcome of Committee's Consideration

- 1.4 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:
- (i) whether the Assembly should pass the bill;
  - (ii) whether the Assembly should amend the bill;
  - (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
  - (iv) whether the bill has sufficient regard to the institution of Parliament.
- 1.5 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with proposed amendments as set out in recommendations 2-7.

### Recommendation 1

**The Committee recommends that the Legislative Assembly pass the Firearms Legislation Amendment Bill 2019 with the proposed amendments set out in recommendations 2-7.**

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<sup>1</sup> Hon Nicole Manison MLA, Minister for Police, Fire and Emergency Services, *Draft - Daily Hansard – Day 2 – Wednesday 18 September 2019*, p. 3, <http://hdl.handle.net/10070/754522>.

## **Report Structure**

- 1.6 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.7 Chapter 3 considers the main issues raised in evidence received.

## 2 Overview of the Bill

### Background to the Bill

- 2.1 In presenting the Bill to the Assembly, the Minister for Police, Fire and Emergency Services, the Hon Nicole Manison MLA commented on the problems posed to community safety, particularly in the context of serious and organised crime, noting that:

Northern Territory-based outlaw motorcycle gang members and associates currently have a combined total number of convictions in excess of 1897. Outlaw motorcycle gang members have also demonstrated a propensity to acquire firearms in the Northern Territory and traffic firearms across jurisdictional borders.<sup>2</sup>

- 2.2 Although the *Firearms Act 1997* provides a number of mechanisms to prevent firearm-related crime it does not provide the ability to take immediate action when necessary. As noted by Minister Manison:

the current inability to take immediate action on both licensed firearm owners and those believed to be in possession of unlawful firearms is an ongoing concern for the Northern Territory Police Force. The current process for revocation of licences, particularly when based on criminal intelligence holdings, is a lengthy process that cannot be facilitated outside of business hours. It is completely unsuitable for the dynamic unfolding situations which require immediate intervention. Criminal intelligence holdings are often provided to police internally or through partner agencies at short notice.<sup>3</sup>

- 2.3 The Bill aims to rectify this by enabling the Commissioner of Police to make an order prohibiting an individual from acquiring, having possession of, or using any firearm or firearm-related item.
- 2.4 Firearm Prohibition Orders (FPOs) are currently in force in Victoria, New South Wales (NSW), South Australia and Tasmania. The provisions in the Bill are largely modelled on the equivalent provisions in the Victorian *Firearms Act 1996* as this is considered to be the most contemporary legislation and was ‘drafted with the benefit of the New South Wales Ombudsman’s report entitled “Review of Police use of the Firearm Prohibition Order Search Powers”’.<sup>4</sup>

### Purpose of the Bill

- 2.5 As noted in the Explanatory Statement, the purpose of the Bill is to ‘introduce firearm prohibition orders, increase maximum penalties for certain offences and expand the scope of disqualifying offences’.<sup>5</sup>

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<sup>2</sup> Hon Nicole Manison MLA, Minister for Police, Fire and Emergency Services, *Draft - Daily Hansard – Day 2 – Wednesday 18 September 2019*, p. 4, <http://hdl.handle.net/10070/754522>

<sup>3</sup> Hon Nicole Manison MLA, *Draft Daily Hansard – Day 2 - Wednesday 18 September 2019*, p. 4, <http://hdl.handle.net/10070/754522>.

<sup>4</sup> Hon Nicole Manison MLA, *Draft Daily Hansard – Day 2 - Wednesday 18 September 2019*, p. 3, <http://hdl.handle.net/10070/754522>.

<sup>5</sup> Explanatory Statement, *Firearms Legislation Amendment Bill 2019 (Serial 106)*, p. 1, <https://parliament.nt.gov.au/committees/EPSC/106-2019>.

### 3 Examination of the Bill

#### Introduction

- 3.1 Of the four submissions received by the Committee, three supported the Bill with amendments while one considered it should not be passed. The Alannah and Madeline Foundation supported the Bill but suggested a minor amendment. The Foundation also raised a number of other issues that relate to areas in which the *Firearms Act 1997* (NT) does not comply with the National Firearms Agreement but which are not being addressed by this Bill. Civil Liberties Australia (CLA) does not support the Bill and considers it should be re-drafted. The Law Society generally supports the Bill but identifies a number of areas for amendment. The NT Firearms Council generally supports the Bill but recommends two amendments.

#### Issues raised in relation to the Bill's impact on human rights

- 3.2 Both CLA and the Law Society NT raised concerns at the expansive powers provided to police under the Bill and the associated infringement of human rights. The Statement of Compatibility with Human Rights acknowledges that the Bill engages a substantial number of rights but justifies any infringements on the basis that they are necessary in order for FPOs to be effectively implemented and to safeguard public safety by enabling police to effectively deal with 'dynamic unfolding situations'.<sup>6</sup>
- 3.3 Civil Liberties Australia commented that the Bill effectively gives powers to police that should be reserved for the judiciary, noting that the Bill enables these powers to be exercised based on criminal intelligence or criminal information rather than on evidence. This was considered to be aggravated by the "unintelligibility" of the Bill's definition of criminal intelligence. The concerns raised regarding the definition are justified and are discussed under clause 4 below.
- 3.4 The Law Society NT commented that the rule of law 'generally requires that the use of executive powers should be subject to meaningful parliamentary and judicial oversight, including regarding powers to enter private premises, to seize property and to copy and seize information'.<sup>7</sup> In particular they noted the importance of ensuring that the powers granted to police do not encroach on the 'rights of people who are not subject to the orders contemplated by the Bill'.<sup>8</sup> These concerns have relevance for proposed sections 49U, 49V, 49W and 49X which are discussed below.
- 3.5 The Committee acknowledges these concerns and notes that similar issues have been raised in relation to equivalent FPO legislation in NSW and Victoria, both through the NSW Ombudsman's Report and the *Inquiry into Firearms Prohibition*

<sup>6</sup> Statement of Compatibility with Human Rights, *Firearms Legislation Amendment Bill 2019 (Serial 106)*, p. 2, <https://parliament.nt.gov.au/committees/EPSC/106-2019>

<sup>7</sup> Submission 3 – Law Society NT, p. 2.

<sup>8</sup> Submission 3 – Law Society NT, p. 2.

*Legislation* currently being held by the Legislative Council Legal and Social Issues Committee of the Victorian Parliament.<sup>9</sup>

## **Clause 4 – Section 3 amended (Interpretation) – Definition of criminal intelligence**

3.6 As identified by CLA, there is a significant problem in the way criminal intelligence is defined in the Bill.<sup>10</sup> The *Serious Crime Control Act 2009* provides a detailed definition of “criminal intelligence” in section 6 and defines “classified information” as ‘information the Commissioner classifies as criminal intelligence’. The Bill defines “criminal intelligence” as ‘information the Commissioner classifies as criminal intelligence under the *Serious Crime Control Act 2009*’. Consequently, “criminal intelligence” would have a different meaning under the two different Acts, and what is referred to as “criminal intelligence” under the *Firearms Act 1997* would be referred to as “classified information” under the *Serious Crime Control Act 2009*. This has particular repercussions for the interpretation of proposed section 49N which addresses how the Northern Territory Civil and Administrative Tribunal (NTCAT) must deal with classified information. For example, because the definition of “classified information” mirrors that of “criminal intelligence”, it would be logically impossible for NTCAT to consider classified information to not be criminal intelligence under proposed s 49N(2) and (3).

3.7 The Committee sought clarification from the Northern Territory Police Force (NTPOL) as to why the definition for “criminal intelligence” differs from that contained in the *Serious Crimes Control Act 2009*, and why the Bill attempts to apply the scheme in section 73 of the *Serious Crimes Control Act 2009* to the NTCAT using the terminology of that Act rather than that proposed in the Bill. NTPOL advised that the variation in the definition of criminal intelligence was an unintended consequence of drafting. In response to the Committee’s query regarding the application of the scheme in s 73 to NTCAT, NTPOL advised that:

The intention of the Bill was for the definition of criminal intelligence to align with the definition in the *Serious Crime Control Act 2009*. This is why the Bill applies the scheme from s73 of the *Serious Crime Control Act 2009* to NTCAT appeals. We agree with the Scrutiny Committee that an interpretation issue is created by the current definition. Noting the interpretation issue, it would be appropriate for the definition in the Bill to be amended to align with the *Serious Crime Control Act 2009* definition (either by including an identical definition or by defining criminal intelligence by reference to section 6 of the *Serious Crime Control Act 2009*).<sup>11</sup>

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<sup>9</sup> NSW Ombudsman, *Review of police use of the firearms prohibition order search powers: Section 74A of the Firearms Act 1996*, 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>; Legislative Council Legal and Social Issues Committee (Victoria), *Inquiry into Firearms Prohibition Legislation*, <https://www.parliament.vic.gov.au/lsc-lc/inquiry/972>

<sup>10</sup> Submission 2 – Civil Liberties Australia (CLA), pp. 2-3.

<sup>11</sup> Northern Territory Police Force, *Responses to Written Questions*, pp. 3-4, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>.

### **Committee's Comments**

- 3.8 The Committee is satisfied with the Department's response and has made a recommendation accordingly.

#### **Recommendation 2**

**The Committee recommends that the definition of criminal intelligence in clause 4 be amended to align with the definition in the *Serious Crime Control Act 2009* either by including an identical definition in clause 4 or by reference to the definition of criminal intelligence in section 6 of the *Serious Crime Control Act 2009*.**

### **Clause 6 – proposed section 49C – Meaning of firearm related item**

- 3.9 Proposed s 49C clarifies what is meant by “firearm related items”, with this including ammunition; a silencer; an item that is designed as, or reasonably capable of forming, part of a firearm; and any other item prescribed by regulation. The Alannah and Madeline Foundation commented that the term “sound suppressor” is more commonly used by the firearms community than the word “silencer”, and noted that ‘sound suppressors can take many forms and that the term may be more all-encompassing’. They expressed concerns that use of the word silencer may result in technical gun advocates seeking to circumvent the clause, as nothing completely “silences” a firearm, and recommended that proposed s 49C(b) be amended to replace the word “silencer” with the term “sound suppressor”.
- 3.10 The Committee sought clarification from NTPOL regarding the effect on the operation of the Bill of replacing “silencer” with “sound suppressor” and was advised that:
- a. 'Silencer' is already a defined term in s 3 of the Firearms Act 1997 (the Act). While there may be two different terms used by members of the firearms community, the legal definition of silencer adequately covers a device known as a 'sound suppressor':
 

**silencer** means:

    - (a) a device capable of being used to suppress the noise of the discharge of a firearm; and
    - (b) a device mentioned in paragraph (a) that, for the time being, does not suppress the noise of the discharge of a firearm because of the absence or defect of a part of the device but would, if the part were replaced, renewed or repaired, suppress the noise of the discharge of a firearm.

For consistency, the Act should refer to the one defined term.<sup>12</sup>

### **Committee's Comments**

- 3.11 The Committee is satisfied with the Department's advice.

<sup>12</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 4, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>.

## Clause 6 – proposed section 49E – Firearm prohibition order

3.12 Proposed section 49E provides for the making of an FPO, however, it does not clearly indicate whether an FPO can be made in relation to a person who has previously been the subject of an order which has expired, been revoked, or set aside by the NTCAT. Although this is generally likely to be the case, legal advice provided to the Committee stated that:

by clause 49H orders are made for specific periods and by clause 49M more than one application can be made to NTCAT at various stages over the specified period of the prohibition order to review the prohibition decision. That might suggest that the removal of a person's rights in this regard has a maximum duration.<sup>13</sup>

3.13 Equivalent legislation in Victoria provides greater clarity, with s 112D(4) of the *Firearms Act 1996 (Vic)* providing that 'A firearm prohibition order may be made that applies to an individual to whom a previous firearm prohibition order applied that has expired or been revoked'. However, as noted by the Committee's legal counsel, this still results in uncertainty regarding whether a fresh order can be made in circumstances where the original order has been set aside by the Tribunal.<sup>14</sup>

3.14 The Committee sought clarification from NTPOL on the effect on the operation of the Bill of including a provision similar to s 112D(4) in the *Firearms Act 1996 (Vic)* but with the addition of words to cover instances where an order has been set aside by the Tribunal and was advised that:

The effect of the proposal would remove any uncertainty surrounding the ability to issue a new order. Including a provision akin to s112D(4) of the *Firearms Act 1996 (Vic)* ('the Victorian Act') stating that an order may be issued to an individual to whom a previous firearm prohibition order applied that has expired, been revoked or set aside by NTCAT would clarify this ability.<sup>15</sup>

### **Committee's Comments**

3.15 The Committee is satisfied with the Department's advice and has made a recommendation accordingly.

### **Recommendation 3**

**The Committee recommends that clause 49E be amended to insert an additional subsection with words to the effect 'A firearm prohibition order may be made that applies to an individual to whom a previous firearm prohibition order applied that has expired, been revoked or set aside by the Northern Territory Civil and Administrative Tribunal'.**

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<sup>13</sup> Professor Ned Aughterson, Legal Advice to the Economic Policy Scrutiny Committee, *Inquiry into the Firearms Legislation Amendment Bill 2019*, 8 October 2019, p. 4.

<sup>14</sup> Professor Ned Aughterson, Legal Advice to the Economic Policy Scrutiny Committee, *Inquiry into the Firearms Legislation Amendment Bill 2019*, 8 October 2019, p. 4.

<sup>15</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 4, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>.

## Clause 6 – proposed section 49F – Considerations in making firearm prohibition order

3.16 Proposed s 49F provides for the Commissioner to make an FPO if satisfied that it is in the public interest to do so and sets out five factors that the Commissioner may consider when making the determination.

3.17 The factor provided at proposed s 49F(c) ‘because of the people with whom the person associates’, was considered by the Law Society NT to be problematic because it:

infringes on the ability of an individual to freely associate – the Commissioner can make an order simply based on association, and not on the actions of the individual subject to the order.<sup>16</sup>

3.18 The Statement of Compatibility with Human Rights acknowledges that proposed section 49F(c) infringes on the right to freedom of association but considers this justified as:

the scope of the right is primarily concerned with protecting freedom of association to pursue lawful interests in formal groups, and its scope does not extend to restrictions on associations between private individuals. The scheme is intended to target criminal groups. Northern Territory Police are particularly concerned with firearm possession and use amongst organised crime groups and persons considered a risk in the counter-terrorism context.

3.19 The Australian Law Reform Commission (ALRC) Issues Paper 46, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, provides some support for this interpretation and cites the following justifications that have been provided through the High Court for restricting freedom of association where there is potential for criminal conduct that may result in threats to public safety or interest.

4.22 Preventing people from ‘getting together to hatch crimes’ has long been considered one justification for restrictions on freedom of association.<sup>25</sup> Chief Justice of the High Court, Robert French, has said that:

Laws directed at inchoate criminality have a long history, dating back to England in the Middle Ages, which is traceable in large part through vagrancy laws. An early example was a statute enacted in 1562 which deemed a person found in the company of gypsies, over the course of a month, to be a felon.<sup>26</sup>

4.23 The High Court has recognised a ‘public interest’ in restricting the activities, or potential activities, of criminal associations and criminal organisations.<sup>28</sup> In *South Australia v Totani* (2011),<sup>29</sup> French CJ explained that legislative encroachments on freedom of association are not uncommon where the legislature aimed to prevent crime. The *Serious and Organised Crime (Control) Act 2008* (SA)

does not introduce novel or unique concepts into the law in so far as it is directed to the prevention of criminal conduct by providing for restrictions on the freedom of association of persons connected with organisations which are or have been engaged in serious criminal activity.<sup>17</sup>

<sup>16</sup> Submission 3 – Law Society NT, p. 1.

<sup>17</sup> Australian Law Reform Commission (ALRC), IP 46, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, pp. 37-38, <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-ip-46/>.

- 3.20 The Law Society NT also commented on the absence of a definition for “public interest”, noting that interpretations of “public interest” can be contentious, as demonstrated in a recent court case in Victoria where Judge Hampel found an ‘FPO was not issued lawfully as it was not in the *public interest* to issue a FPO to the applicant’.<sup>18</sup> The subject of the FPO had a significant criminal record and was a past President and life member of the Rebels motorcycle club.
- 3.21 The question of whether the “public interest” should be defined in legislation has been considered by both the Law Institute of Victoria and the ALRC. Both have argued against a definition due to the breadth of the concept and the need for the decision maker to be able to respond ‘to the facts and circumstances of every case’.<sup>19</sup> The ALRC Discussion Paper 80, *Serious Invasions of Privacy in the Digital Era*, suggested that although “public interest” should not be defined, it may be useful for legislation to include a non-exhaustive list of public interest matters ‘to provide the parties and the court with useful guidance, making the cause of action more certain and predictable in scope’ and potentially reducing litigation.<sup>20</sup>

### **Committee’s Comments**

- 3.22 The Committee acknowledges the concerns expressed by the Law Society NT but considers that the infringement on freedom of association in proposed s 49F(c) is justified given that the intention of the proposed section is to reduce risk to the public. It further notes the strong precedents for infringing on this right in relation to the prevention of criminal conduct.
- 3.23 The Committee is satisfied with the evidence indicating that a definition of the “public interest” is not warranted but notes that it may be useful to give some consideration in the future to the merits of providing guidance within the legislation regarding the types of matters relevant to this concept.

## **Clause 6 – proposed section 49J – Service of order**

- 3.24 This section provides that an FPO must be personally served by a police officer but does not clarify what is to happen if the person cannot be immediately found or takes steps to avoid service. Personal service is also required in NSW and Victoria.
- 3.25 The Committee sought clarification from NTPOL regarding how service of an FPO is managed if personal service is not possible and was advised that:

There are no specific procedures for police to follow to serve a firearm prohibition order on a person who is actively avoiding police. The purpose of a firearms

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<sup>18</sup> Submission 3 – Law Society NT, p. 2; Legislative Council, Legal and Social Issues Committee, Victoria, *Inquiry into Firearms Prohibition Legislation*, 2 September 2019, pp. 17-18, <https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Firearms/transcripts/3.FP-FINAL-WALKER.pdf>

<sup>19</sup> Legislative Council, Legal and Social Issues Committee, Victoria, *Inquiry into Firearms Prohibition Legislation*, 2 September 2019, p. 17; ALRC, Discussion Paper, (DP 80), *Serious Invasions of Privacy in the Digital Era*, pp. 115-118, <https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-dp-80/>.

<sup>20</sup> ALRC, Discussion Paper 80, *Serious Invasions of Privacy in the Digital Era*, p. 115, <https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-dp-80/>.

prohibition order is not only to prohibit a person from having access to a firearm or firearm related item, but also to allow police sufficient powers to enforce the order. If police are unable to locate the person on whom they wish to serve a firearm prohibition order, they will be unable to use the associated powers such as search and seizure. In the event that a target is actively avoiding police, police would be deploying their usual methods and training for locating a person of interest, such as information flagging mechanisms and alerts.

In the event that police are unable to find the person to issue them with a firearm prohibition order but have intelligence indicating the location of a firearm that they believe will be used for imminent violence, police have an existing power under section 97 that may justify entry and seizure. Section 97 provides for a power to search in emergencies where the circumstance[s] are of such seriousness and urgency as to require and justify immediate search and entry without the authority of a court order or warrant.<sup>21</sup>

- 3.26 The Committee sought additional clarification regarding the effect on the operation of the Bill of including a provision setting out alternative arrangements for service if the FPO cannot be personally served and was advised that:

Allowing for service by a means other than personal service raises issues of fairness. NTPOL are cognisant of the fact that firearm prohibition orders enliven significant search powers. They are unlike other powers usually available to police. These powers are necessary to achieve the reduction of firearm related violence. The powers are ultimately a preventative power rather than a power focused on detection of firearm related offending. It is therefore necessary that any person who becomes subject to a firearm prohibition order is served personally to ensure that they are sufficiently informed of the new powers that will apply to them for the term of the order. Police do not consider service of orders by any method other than personal service, for example service by way of post, to be appropriate when considered with regard to the nature of the powers that will apply.<sup>22</sup>

### **Committee's Comments**

- 3.27 The Committee is satisfied with the Department's advice.

## **Clause 6 – proposed section 49K – Cancellation of licences and permits**

- 3.28 Proposed section 49K(2) provides for the cancellation of any licences, permits or certificates of registration held by a body corporate under the *Firearms Act 1997*. The Law Society has noted that this section would, for example, result in a pistol club having its whole licence cancelled in the event of one of its officers being the subject of an FPO. As highlighted by the Law Society: 'It's also not clear, in that circumstance, whether the club would have standing to challenge the order made or they would have to expel the member in question and then re-apply for their licence'.<sup>23</sup>

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<sup>21</sup> Northern Territory Police Force, *Responses to Written Questions*, pp. 4-5, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>22</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 5, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>23</sup> Submission 3 – Law Society NT, p. 1.

- 3.29 The Committee sought clarification from NTPOL regarding the rationale for cancelling the licence of a body corporate based on an FPO being placed on one of its officers and was advised that:

The rationale for cancelling the licence held by a body corporate was to remove access to firearms and firearm related items. On considering the question from the Scrutiny Committee, NTPOL considers that it may be more appropriate if the licence was only cancelled when a firearm prohibition order was issued for the representative of the holder of the licence (other than a firearms dealers licence, see below). A licence issued to a body corporate requires one individual person to be the representative of the holder of the licence. That representative must be a fit and proper person. If the individual ceases to be the representative for the body corporate, the body corporate must advise the Commissioner of the change of representative within 14 days.

In the event that a representative of a body corporate licence holder is issued with a firearm prohibition order, it would be inappropriate for that person to have continued access to firearms through the body corporate's licence. NTPOL notes that the main objective of the issuing of firearm prohibition orders is to maintain public safety by immediately removing access to firearms and firearm related items for certain people.

A person who is issued a firearm prohibition order would not satisfy the requirement that a representative be a fit and proper person. A licence held by a body corporate cannot function without a properly appointed representative.<sup>24</sup>

- 3.30 NTPOL further advised that they would support an amendment which provided that:

in the event that a representative is issued with a firearm prohibition order, the licence held by the body corporate is suspended. The provision could further state that on being informed of the suspension by police, the body corporate will have 14 days in which to advise the Commissioner of the new representative for the licence holder. If the licence holder complies with that requirement, the suspension can be lifted and the licence can continue to operate. If the body corporate fails to nominate a new representative within 14 days, the licence will be cancelled. The body corporate would then need to apply for a new licence.<sup>25</sup>

- 3.31 This amendment would not apply to a firearms dealer licence as the applicant for such a licence must be the person primarily responsible for the firearms dealer business. As NTPOL explained:

Because a firearms dealer licence remains effectively tied to the original applicant, there is no ability to transfer a firearms dealer licence. In the event that an applicant for a firearms dealer licence is issued with a firearm prohibition order, the firearms dealer licence must be cancelled.<sup>26</sup>

### **Committee's Comments**

- 3.32 The Committee is satisfied with the response from NTPOL and has made a recommendation in line with their advice.

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<sup>24</sup> Northern Territory Police Force, *Responses to Written Questions*, pp. 5-6, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>25</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 6, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>26</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 6, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

#### Recommendation 4

The Committee recommends that proposed section 49K(2) be amended to provide that:

- If a licence, permit or certificate of registration under the Act is held by a body corporate, other than a firearms dealer, and the officer of the body corporate who holds the body corporate's licence is a person to whom a firearm prohibition order relates, the licence, permit or certificate is suspended by the making of the order and the suspension takes effect once the order has been served on the person.
- In order to lift the suspension the body corporate must, within 14 days of being advised by police of the suspension of the licence, advise the Commissioner of a new representative to be the body corporate licence holder. If the Commissioner is satisfied that the nominated representative is a fit and proper person to be the representative licence holder, the suspension may be lifted and the licence may continue to operate.
- If a licence, permit or certificate of registration under this Act is held by a firearms dealer to which a firearm prohibition order relates, the licence, permit or certificate is cancelled by the making of the order and the cancellation takes effect on the order being served on the person.

#### Clause 6 – proposed section 49U – Search of person to whom firearm prohibition or relates without warrant or consent

3.33 Proposed s 49U enables police, without a warrant or consent, to exercise powers under s 49U(2) and (3) if the exercise of the power is reasonably required to determine whether a person with an FPO is contravening the order. Subsection (2) relates to searching the person or things in the person's possession while subsection (3) relates to detaining the person being searched and seizure of any firearm or firearm related item found on or in the person's possession.

3.34 The Law Society commented that the threshold of "reasonably required" for conducting the search is 'a lower threshold than the well-established principle of reasonable grounds'.<sup>27</sup> In addition, they note that similar legislation in NSW and Victoria has resulted in police using the legislation inappropriately to initiate searches for reasons other than a belief that a person subject to an FPO was breaching that FPO. As a remedy for this they recommend 'including in the Bill a provision for an avenue of appeal to the court regarding the validity of searches, on the basis of whether the search was unreasonable or an abuse of power'.<sup>28</sup>

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<sup>27</sup> Submission 3 – Law Society NT, p. 1.

<sup>28</sup> Submission 3 – Law Society NT, p. 3.

*The “reasonably required” threshold*

3.35 In order to understand the basis for police power to search a person subject to an FPO without warrant or consent, the Committee sought clarification from NTPOL regarding the precise meaning of the term “reasonably required” and was advised that:

“Reasonably required” is a threshold which must be met prior to police exercising powers under sections 49U and 49W. At law, the highest threshold is actual knowledge, followed by ‘reasonable grounds’ and then ‘reasonable suspicion’. Reasonably required is a lower threshold than these other thresholds. However, some basis for the exercise of the power is still required to meet the threshold. The test is an objective one and can be paraphrased as: would an ordinary person in the same position as the searching police officer have also formed the view that the search was required to determine if the person subject to the firearm prohibition order has acquired, possesses or is using a firearm or firearm related item in contravention of the order.

The fact that the person is subject to a firearm prohibition order is not, in itself, a sufficient basis to undertake a search. The reasonably required threshold may be met through the receipt of intelligence about the person, information obtained during the course of an investigation or by police observations of the person. These factors would not necessarily meet the suspicion on reasonable grounds threshold, yet would meet the reasonably required threshold.<sup>29</sup>

3.36 NTPOL further advised that both NSW and Victoria use the “reasonably required” threshold in relation to searches of persons issued with an FPO and that the *Review of police use of the firearms prohibition order search powers. Section 74A of the Firearms Act 1996* undertaken by the NSW Ombudsman in August 2016 found that ‘the power had been a useful tool to enable police to search in some circumstances where they previously could not’.<sup>30</sup>

3.37 Although the NSW Ombudsman’s Review did not suggest a change to the threshold test they did recommend that the search powers under s 74A be clarified to make it clear that a police officer can only exercise these powers **if** a search is reasonably required for the purpose of detecting the relevant offences.<sup>31</sup> However, it is noteworthy that the NSW Ombudsman Review also found that the fact that a person was subject to an FPO was viewed by police as sufficient basis for a search in 14% of all search events, suggesting that not all police officers adequately understood the meaning of “reasonably required”.<sup>32</sup>

3.38 Proposed section 49U is modelled on the equivalent Victorian legislation which has been drafted to include the test “**if** the exercise of the power is reasonably required

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<sup>29</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 7, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>30</sup> Northern Territory Police Force, *Responses to Written Questions*, pp. 7- 8, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>31</sup> NSW Ombudsman, *Review of police use of the firearms prohibition order search powers: Section 74A of the Firearms Act 1996*, August 2016, p. 72, <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>32</sup> NSW Ombudsman, *Review of police use of the firearms prohibition order search powers: Section 74A of the Firearms Act 1996*, August 2016, p. 71, <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>

to determine...” (emphasis added), consequently the legislation is quite clear in its intent. However, the finding from the NSW Ombudsman’s Review, that 14% of search events were based purely on the person being subject to an FPO suggests that it is important to ensure that police working in this area adequately understand the meaning of “reasonably required”.

- 3.39 The Committee sought clarification from NTPOL regarding existing or proposed safeguards to prevent abuse of these powers, and whether training will be implemented to ensure that the powers are used appropriately, and was advised that:

The primary safeguard against the inappropriate use of police powers is oversight and review by the Ombudsman’s office. NTPOL consider this to be the best safeguard for ensuring these powers are used appropriately. The NT Ombudsman is an independent body well placed to adequately review the use of police powers. Additionally, this Bill has been drafted with consideration of the fulsome review conducted by the NSW Ombudsman and the recommendations made in their final report. The NSW Ombudsman’s final report found that incorrect use of powers was generally attributed to a misunderstanding of the powers rather than a blatant disregard for the limits of the powers. This misuse of powers can be adequately addressed by appropriate training of officers and a strong policy framework, both of which were recommendations made by the NSW Ombudsman’s report.

To that end, mandatory command training will be delivered to all frontline officers and on a needs basis to detectives. This training will cover both the legislation and the internal instruction on how FPOs operate and the associated powers. It will include specific training on the ‘reasonably required’ threshold.

### **Committee’s Comments**

- 3.40 The Committee is satisfied with the advice provided by NTPOL regarding the rationale for using a threshold of “reasonably required” to determine when a search under proposed s 49U is appropriate. Although the NSW experience indicates that there is potential for inappropriate use of this power, the Committee considers that this can be addressed through appropriate training. In addition, proposed section 49ZB requires that, within 2 years after commencement, a review be undertaken by the Ombudsman to assess the exercise of powers conferred on police officers. This will provide an opportunity to address any issues that have arisen.

### *Provision for an avenue of appeal to the court*

- 3.41 The Committee sought clarification from NTPOL regarding the effect on the operation of the Bill of including a provision for an avenue of appeal to the court and was advised that:

NTPOL notes that a court will exclude evidence that was obtained unlawfully from use in a criminal hearing. Any evidence found during an inappropriate use of police search powers would likely be held inadmissible under section 138 of the Evidence (National Uniform Legislation) Act 2011. If the material evidence (such as a firearm found during a search under section 49W) was held inadmissible, police would be unable to prove in a court of law that the person subject to the firearm prohibition order had committed the alleged breach. The consequences of inappropriate use of police powers on subsequent criminal charges is an additional safeguard to avoid police using their powers unlawfully. The courts possess the ability to exclude unlawfully obtained evidence and there is no requirement to legislate this provision.

NTPOL also note the provisions under Part VIIA Division 3 of the Police Administration Act 1978. An aggrieved person could potentially commence an action if the conduct reached the threshold of a tort claim against police.<sup>33</sup>

### **Committee's Comments**

3.42 The Committee is satisfied with NTPOL's advice regarding the Law Society's proposal for an avenue of appeal to the court and does not consider a recommendation to be warranted.

## **Clause 6 – proposed sections 49V – Search of an associate without warrant or consent and 49X - Search of person at premises, vehicles, aircraft or vessels without warrant or consent**

3.43 Proposed s 49V applies to the associates of a person with an FPO while proposed s 49X applies to any person who is present at a premises, or in a vehicle, aircraft or vessel being searched under proposed s 49W. These proposed sections provide Police with similar powers to those in proposed s 49U, however, the threshold for using the powers is higher; instead of the search being “reasonably required” the police must have “reasonable grounds” to believe that the associate or person is committing or about to commit an offence against the Act. In contrast to proposed s 49U, an associate cannot be strip searched.

3.44 The Law Society considers these sections ‘to be a dangerous expansion of police powers as it expands the power to search ... to people who may be innocently associating with someone the subject of a firearm order’.<sup>34</sup> They note the importance of balancing the powers provided to police to ensure they are not encroaching on the rights of people who are not subject to the orders contemplated by the Bill’.<sup>35</sup>

### **Committee's Comments**

3.45 The Committee notes that while the powers are substantial the threshold for using them is higher than for a person who is the subject of an FPO. Consequently, the Committee is of the view that the powers are warranted, noting also that the review required in proposed s 49ZB will provide a means of assessing whether these powers are being used appropriately.

## **Clause 6 – proposed section 49W - Search of premises, vehicles, aircraft or vessels without warrant or consent**

3.46 Proposed section 49W provides for a police officer to search premises, vehicles, aircraft or vessels to determine whether a person with an FPO has ‘acquired, possesses or is using a firearm or firearm related item in contravention of the order’. However, as noted by the Committee’s legal counsel:

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<sup>33</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 9, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>34</sup> Submission 3 – Law Society, p. 1

<sup>35</sup> Submission 3 – Law Society, p. 2

it does not extend to determining whether an offence under clause 49S has arisen: the offence of residing at premises where there are firearms. From an evidential perspective, that begs the question of what happens where a firearm is found on the premises that might warrant a prosecution under clause 49S, but where the weapon was not 'acquired, possessed or used' by the prohibited person.<sup>36</sup>

- 3.47 The Committee sought clarification from NTPOL as to why the offence under proposed s 49S was not included in proposed s 49W as grounds under which such a search may be conducted and was advised that:

police note that there is a potential loophole in the scope of the power under section 49W. The intention of the power is for police to determine whether a breach of the firearm prohibition order is occurring. The Scrutiny Committee have correctly identified that a suspected breach of section 49S would fall outside the scope of section 49W as currently drafted.<sup>37</sup>

- 3.48 NT Police further advised that they would:

support an amendment to the Bill that extended the power at s49W to include a search of the premises where a person subject to a firearm prohibition order resides if reasonably required to determine whether there is a firearm or firearm related item on the premises.<sup>38</sup>

### **Committee's Comments**

- 3.49 The Committee is satisfied with the Department's advice and has made a recommendation accordingly.

### **Recommendation 5**

**The Committee recommends that proposed section 49W be amended to include a search of the premises where a person subject to a firearm prohibition order resides if reasonably required to determine whether there is a firearm or firearm related item on the premises.**

## **Clause 6 – proposed section 49ZA – Sale, disposal or return of firearms or firearm related items surrendered or seized under this Part**

### *Wording of proposed s 49ZA*

- 3.50 Proposed section 49ZA provides for the sale, disposal or return of firearms or firearm related items that are: not required as evidence under proposed s 49Z(2); have not been forfeited to the Territory under proposed s 49Z(3); or have not been declared subject to forfeiture under proposed s 49Z(4).

<sup>36</sup> Professor Ned Aughterson, Legal Advice to the Economic Policy Scrutiny Committee, *Inquiry into the Firearms Legislation Amendment Bill 2019*, 8 October 2019, p. 4.

<sup>37</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 9, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>38</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 9, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

- 3.51 Although the heading of proposed section 49ZA refers to the sale, disposal or return of firearms surrendered or seized 'under this Part' there is no reference to 'this Part' in the body of the section. As a consequence, the section could be interpreted as applying to any firearm in the NT that has not been subject to forfeiture or is no longer required as evidence.
- 3.52 The Committee sought clarification from NTPOL regarding the wording of this section and was advised that:
- The intention of section 49ZA is that it is to be limited to firearms and items seized or surrendered under Part 8A. Section 49ZA is not intended to apply to any other firearms or firearm related items. In earlier versions of the draft Bill, section 49Z and 49ZA were one section. An unintended consequence of the section being split into two sections is that section 49ZA does not have a reference to 'this Part' in the body of the section. We note the reference to 'this Part' was included in the title of section 49ZA and the explanatory memorandum confirms that section 49ZA is to apply to firearms and items seized or surrendered under Part 8A.<sup>39</sup>
- 3.53 The Department further advised that they would support an amendment to achieve greater clarity in the application of proposed section 49ZA.<sup>40</sup>

### **Committee's Comments**

- 3.54 The Committee is satisfied with the advice from NTPOL and has recommended that proposed section 49ZA be reworded to ensure the intent is clear.

#### **Recommendation 6**

**The Committee recommends that proposed section 49ZA be amended to clearly indicate that the Commissioner's power under proposed s 49ZA(2) only relates to firearms or firearm related items that have been surrendered or seized under Part 8.**

#### *Intent of proposed s 49ZA*

- 3.55 The NT Firearms Council commented that the effect of proposed s 49ZA(2)(c) is to extinguish a person's ownership without any form of compensation or recourse. They recommended that proposed section 49ZA(2)(c) be amended to require the Commissioner to 'make reasonable attempts to comply with subsections 49ZA(2)(a) & (b) prior to exercising his or her powers under subsection (c)'.<sup>41</sup>
- 3.56 The Committee sought clarification from NTPOL as to the rationale for including different options for the sale, disposal or return of firearms as set out in ss (2). In relation to ss (2)(a) and (b) NTPOL advised that:

The Commissioner is likely to direct an owner of a firearm or firearm related item to sell or otherwise dispose of the firearm or firearm related item in the situation where a lawful owner of a firearm or firearm related item is served with a firearm

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<sup>39</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 9, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>40</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 10, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>41</sup> Submission 4 – NT Firearms Council Inc, p. 2.

prohibition order. In such a situation, the owner was legally entitled to own the firearm or item up until the order was served. Once the order is in force, the owner would no longer be able to legally possess the firearm or item. As a matter of fairness, the owner of a legally owned firearm or item should be entitled to sell the firearm or item so that they can recoup the financial value of the firearm or item. The Commissioner would therefore direct the owner to sell or otherwise dispose of the firearm or item under s49ZA(2)(a). The owner would be allowed to sell or dispose of the firearm or item but they could not physically be in possession of it. Any such transaction would be conducted at arm's length, generally through a firearms dealer.

The above can be distinguished from a situation where a seized or surrendered firearm is identified as being stolen and the lawful owner is identified, or where a firearm seized as the result of a search of a premises under s49W is determined to be lawfully owned by another occupant of the premises and was not acquired, possessed or used in contravention of a firearm prohibition order. In these situations, the lawful owner would still be lawfully entitled to possess their firearm or item. The Commissioner would therefore direct the owner to take possession of the firearm or item under s49ZA(2)(b).<sup>42</sup>

- 3.57 In relation to ss (2)(c), NTPOL advised that the intent of this subsection is to provide the Commissioner with the flexibility to avoid firearms and firearm related items being returned to criminals and criminal entities, noting that:

There is a demonstrated nexus between the people involved in criminal entities. It is foreseeable and not unreasonable to anticipate that the main targets of firearm prohibition orders, namely person involved with criminal entities, may try to claim rightful possession of firearms that are seized or surrendered in an attempt to return the seized or surrendered firearm or item to circulation between the associates of the criminal entity. Where such concerns are held about the anticipated circulation of a firearm or firearm related item between associates of a criminal entity, discretion is required so that the Commissioner can effectively remove the firearm or item from circulation by disposing of it. Mindful that it is impossible to legislate for every possible situation where the return of a firearm or item may perpetuate firearm related violence, the Bill has therefore provided discretion to the Commissioner for the disposal of firearms and firearm related items.

Section 49ZA(2)(c) was drafted following extensive consideration on how to best balance fairness to legitimate owners and ensure sufficient flexibility to achieve the intent of the Bill and remove firearms and firearm related items from those who are deemed to be not fit to possess them.<sup>43</sup>

- 3.58 The Committee sought clarification from NTPOL as to how the operation of the Bill would be affected by amending proposed s 49ZA(2) in line with the recommendation proposed by NT Firearms Council and was advised that:

The proposal would undermine the intention of the discretion. As stated above, the Commissioner might elect to dispose of a firearm because they are satisfied in that particular situation that the return of the firearm is likely to perpetuate firearm related violence. The Commissioner might have reasons to suspect that the owner would likely sell the firearm to another criminal associate if directed by police under s49ZA(2)(a). Selling the firearm to another criminal associate (who was not subject to a firearm prohibition order) would effectively keep the firearm

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<sup>42</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 10, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>43</sup> Northern Territory Police Force, *Responses to Written Questions*, pp. 10-11, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

within the possession of the criminal entity. This would not achieve the intention of the scheme to reduce firearm related violence within our communities.

In such a situation, it is not the case that giving a written direction under (a) or (b) would not be practicable. Rather, complying with (a) or (b) would be contrary to the intention of the discretion.<sup>44</sup>

### **Committee's Comments**

3.59 The Committee notes that the overall intention of the Bill is to reduce firearm related violence within the community and considers that the discretion provided to the Commissioner by ss(2)(c) is warranted.

### **Delegation of Commissioner's powers**

3.60 The Bill does not amend s 5 of the *Firearms Act 1997* which sets out delegation powers. Under the Act, the Commissioner may delegate any of their powers and functions under the Act to a police officer or a public sector employee, except in specific circumstances under sections 10(8A), 33(3A) or 40A(1) none of which relate to FPOs.

3.61 Under the Victorian *Firearms Act 1996* powers in relation to FPOs can only be delegated to police officers at superintendent level or above and executive level public servants (s 112F). This level of delegation helps to ensure that the right balance is achieved between providing police with the operational capacity to act promptly while also ensuring sufficient oversight of powers in relation to FPOs. This viewpoint was affirmed during recent public hearings for a Victorian parliamentary inquiry into FPO legislation, with Ms Walker from the Law Institute of Victoria noting that:

I think it should always be the higher rank who are making decisions to make these orders, as delegated by the commissioner if they are representing the commissioner. I do not think that it should be at a detective level. I do not think it should be a sergeant level at all.<sup>45</sup>

3.62 The Committee sought clarification from NTPOL as to why such a broad power of delegation has been deemed appropriate in relation to FPOs and was advised that while s 5 would technically:

allow the Commissioner to delegate a power to a low ranking police officer or public sector employee, in practice this has not happened and will not happen. Because this flexibility has worked for other powers under this Act, NTPOL believes that the broad ability to delegate is equally appropriate for Part 8A.

The intention of NTPOL is that the power to issue firearm prohibition orders will be delegated to the rank of Superintendent. This will be formalised by instrument and promulgated.

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<sup>44</sup> Northern Territory Police Force, *Responses to Written Questions*, p. 11, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>45</sup> Legislative Council, Legal and Social Issues Committee, Victoria, Inquiry into Firearms Prohibition Legislation, 2 September 2019, p. 21, <https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Firearms/transcripts/3.FP-FINAL-WALKER.pdf>

The broadness of this power allows for flexibility in the future. In the future, NTPOL might seek to create a specialised position and the flexibility on rank may assist with creating this position. For this reason, NTPOL submit that the ability to delegate remains at the Commissioner's discretion.<sup>46</sup>

### **Committee's Comments**

- 3.63 The Committee does not consider the arguments put forward by NTPOL to provide sufficient justification for allowing powers of delegation in relation to FPOs to remain as currently specified in s 5 of the Act.
- 3.64 The Committee notes that the Bill introduces legislation that allows significant infringements of human rights. Although it accepts the necessity of these infringements in order to reduce the risk of firearm related violence, and ensure public safety, it notes that as the Bill makes rights and liberties dependent on administrative power, it is essential to ensure that the power is sufficiently defined and subject to appropriate review.<sup>47</sup>

### **Recommendation 7**

**The Committee recommends that the Bill be amended to provide that the Police Commissioner's power in relation to firearm prohibition orders can only be delegated to a police officer at the level of superintendent or higher.**

### **Appeal Provisions**

- 3.65 Under the current Act, appeals are dealt with through the Firearms Appeal Tribunal (FAT) (sections 50 to 54C). Under the Bill, a person served with an FPO will not be able to appeal through the FAT but must apply to the NTCAT for the order to be reviewed (proposed s 49L). Appeals not related to FPOs will continue to go through the FAT. The NT Firearms Council recommended that the Bill be amended 'to refer any appeal under Section 49 to the Firearms Appeal Tribunal as established under Section 50 of the Firearms Act'.<sup>48</sup> They commented that:

The FAT is a specialist body which deals solely with reviewing actions by the Commissioner under the Firearms Act. It is chaired by the Chief Judge of the Local Court and two members. One of these is a representative of the Commissioner (usually a senior Police Officer) and another drawn from the Executive of the NT Firearms Council. This body has considered complex appeals over a long period of time and is proven to provide strict and stringent outcomes in its application of the legislation. With members appointed for a period of 3 years, the tenure ensures consistent review of decisions through experience and from intimate working knowledge of the legislation.<sup>49</sup>

- 3.66 NT Firearms Council expressed concerns that having appeals go through NTCAT would result in 'inconstant (sic) determinations by persons not familiar with existing

<sup>46</sup> Northern Territory Police Force, *Responses to Written Questions*, pp. 12-13, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

<sup>47</sup> Economic Policy Scrutiny Committee, Terms of Reference, 4(c)(iii)(A) and (C).

<sup>48</sup> Submission 4 – NT Firearms Council Inc., p. 3.

<sup>49</sup> Submission 4 – NT Firearms Council Inc., p. 3.

firearms matters due processes' noting that NTCAT is made up of 30 odd members who do not have expertise in firearms appeals.<sup>50</sup>

3.67 The issue of whether a jurisdiction's civil and administrative tribunal was the appropriate body to review FPOs has also been raised in relation to the Victorian legislation, with the Law Institute of Victoria expressing the view that such tribunals:

are constituted by very experienced judges of the Supreme and County courts and other lawyers who are delegated in the tribunal. There are sufficient restrictions within the Act [Victoria] for these reviews to remain in the public interest when you are talking about police information or police integrity.<sup>51</sup>

3.68 The Committee sought clarification from NTPOL regarding the rationale for requiring appeals to go through NTCAT rather than through the FAT and was advised that:

The procedures for the Firearms Tribunal are set out at Schedule 7 of the Act. There are no provisions applicable to confidential information, especially information falling within the ambit of criminal intelligence. There are no provisions for closed court proceedings. There are no provisions about maintaining confidentiality.

Instead, Schedule 7 states that proceedings of the Tribunal must be conducted with as little formality and technicality, and with as much expedition, as a proper consideration of the matter before the Tribunal permits. A Tribunal that is mandated to be conducted with as little formality and technicality as permissible is an inappropriate forum for the ventilation of matters involving criminal intelligence holdings.

Criminal intelligence holdings are confidential information gathered by police intelligence, particularly in respect of terrorism activities, drug enforcement operations and organised crime. Criminal intelligence holdings are often obtained via criminal informants on a basis that their identity and information remains confidential. The resulting effects of criminal intelligence holdings being ventilated in any public forum are of serious concern for police.

The primary concern for police is that any information ventilated publicly has the potential to identify confidential informants. This is both a potentially dangerous situation for informants and would significantly decrease the likelihood that any informant (both existing and future) would provide any further assistance to police. Without ongoing assistance from informants, the ability of police to effectively and successfully detect and investigate serious crimes would be significantly reduced. Another concern is that ventilation of intelligence in a public forum will alert criminals and suspects that they are being monitored by police and potentially the extent of police knowledge. This is especially dangerous for law enforcement gathering information on potential terrorist activities. Exposure of the information known to police would likely result in criminals changing tactics and plans, effectively rendering the information gathered void. It is for those reasons that criminal intelligence holdings must remain confidential during all stages of a firearm prohibition being issued, served, reviewed and enforced.

NTCAT on the other hand has specific legislated powers about the manner in which confidential information can be presented and used. These provisions are vital safeguards in ensuring confidential criminal intelligence remains confidential.

Unlike other matters handled by the Firearms Tribunal, specific firearms knowledge is not required in order to assess the appropriateness of a firearm

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<sup>50</sup> Submission 4 – NT Firearms Council Inc., p. 3.

<sup>51</sup> Legislative Council, Legal and Social Issues Committee, (Victoria), *Inquiry into Firearms Prohibition Legislation*, 2 September 2019, p. 19, <https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Firearms/transcripts/3.FP-FINAL-WALKER.pdf>

prohibition order. Whether an order should stand or be set aside is ultimately a question about crime and violence prevention. NTCAT is well placed to assess such orders.<sup>52</sup>

**Committee's Comments**

3.69 The Committee is satisfied with the Department's response.

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<sup>52</sup> Northern Territory Police Force, *Responses to Written Questions*, pp. 11-12, <https://parliament.nt.gov.au/committees/EPSC/106-2019#TP>

## Appendix 1: Submissions Received

### Submissions Received

1. Alannah & Madeline Foundation
2. Civil Liberties Australia
3. Law Society NT
4. NT Firearms Council Inc.

### Note

Copies of submissions are available at: <https://parliament.nt.gov.au/committees/EPSC/106-2019>.

## **Appendix 2: Public Briefing**

**Public Briefing – 24 September 2019**

### ***Northern Territory Police Force***

- Commander Tony Fuller APM, Territory Support
- Commander Martin Dole, Crime Command
- Superintendent Shaun Gill, APM Territory Support Services
- Ms Isabel Roper, Law Reform Legal Officer
- Senior Sergeant Drew Slape, Firearms Policy Unit

### **Note**

Copies of hearing transcripts and tabled papers are available at:  
<https://parliament.nt.gov.au/committees/EPSC/106-2019>.

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