

**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**  
**WRITTEN QUESTIONS**

Mr Sievers to the Minister for Police, Fire and Emergency Services:

**Re: Inquiry into the Firearms Legislation Amendment Bill 2019 (Serial 106)**

**Clause 4 – Definitions**

1.
  - a. Why has ‘criminal intelligence’ been given a different definition to that in the Serious Crimes Control Act?
  - b. Given the differing definitions, why does the Bill attempt to apply the scheme in s 73 of the Serious Crimes Control Act to the NTCAT using the terminology of that Act rather than that proposed in the Bill?

**Clause 6 – Part 8A Inserted**

2.
  - a. What would be the effect on the operation of the Bill of replacing the term “silencer” in proposed section 49C(b) with the term “sound suppressor”?
3.
  - a. Please clarify whether a prohibition order can be made in relation to a person who has previously been the subject of an order which has expired, been revoked, or been set aside by the NTCAT.
  - b. What would be the effect on the operation of the Bill of including a provision similar to s 112D(4) in the *Firearms Act 1996* (Vic) but also incorporating words to the effect ‘or been set aside by the NTCAT’?
4.
  - a. What procedures are there, if any, for serving firearm prohibition orders if the person cannot be found or takes steps to avoid service?
  - b. What would be the effect on the operation of the Bill of including a provision identifying alternative arrangements for service if the firearm prohibition order cannot be personally served?
5.
  - a. What is the rationale for cancelling the licence of a body corporate based on an FPO being placed on one of its officers?

- b. What recourse would the body corporate have to challenge the order made?
  - c. Would the cancellation remain valid if they expelled the member in question?
  - d. Does this proposed section relate to approvals, for example, approvals for firearms clubs etc under Part 8, s 49?
  - e. What types of licences, permits, or certificates of registration might a body corporate hold under this Act?
- 6.
- a. What does the phrase “reasonably required to determine whether a person ... possesses or is using a firearm...” mean? For example, may a police officer search a person subject to a FPO each time they see them to determine whether they have a firearm?
  - b. Why is there no explicit requirement for police to have reasonable grounds for suspicion before allowing them to exercise the powers set out in subsections (1) and (2) of proposed s 49U?
- 7.
- a. What safeguards, if any, are there in the Bill to prevent these powers being used inappropriately?
  - b. What would be the effect on the operation of the Bill of including 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?
- 8.
- a. Why was not the offence under proposed s 49S included as the grounds under which such a search may be conducted?
  - b. What would be the effect on the operation of the Bill of amending proposed s 49W to provide for police to enter and search the premises where a person with a FPO resides in order to determine whether there is a firearm or firearm related item on the premises?
- 9.
- a. Why doesn't proposed section 49ZA limit the firearms to which it applies to those surrendered or seized under Part 8? In the absence of such a provision, what limits are there on the Police Commissioner or the Commissioner's delegate disposing of any firearm in the NT other than those specified in (1) in accordance with (2)?
  - b. What would be the effect on the operation of the Bill of amending proposed s 49ZA(1) 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?

10.

- a. Under what conditions is the Commissioner likely to direct the owner of a firearm or firearm related item to sell or otherwise dispose of the firearm or related item (proposed s 49ZA(2)(a))?
- b. What is the rationale for giving the Commissioner the power in subsection (2)(c) to dispose of the firearm or firearm related item in the manner which they determine?
- c. What would be the effect on the Bill to place a restriction on (2)(c), such as “if (a) and (b) is not practicable”?

### **Appeal Provisions**

11.

- a. What is the rationale for requiring appeals relating to FPOs to go through NTCAT rather than the Firearms Appeal Tribunal?

### **Delegation of Commissioner’s powers – not amended in the Bill**

12.

- a. Can the Commissioner delegate the Commissioner’s powers under the Bill, in particular the power to make an FPO, to a police officer or public sector employee in accordance with s 5 of the Act?
- b. Why is such a broad power of delegation required?

### **ANSWERS:**

#### **Clause 4 – Definitions**

1.

- a. This is an unintended consequence of drafting. Early drafts included the definition of criminal intelligence verbatim from the *Serious Crime Control Act 2009*. This was amended in later drafts to the current wording.
- b. 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*).

## Clause 6 – Part 8A Inserted

2.

- a. 'Silencer' is already a defined term in section 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.

3.

- a. Yes, if there are sufficient grounds. Nothing in the Bill would prohibit a new order from being issued.
- b. 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.

4.

- a. 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 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 circumstances are of such seriousness and urgency as to require and justify immediate search and entry without the authority of a court order or warrant.

- b. 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.

5.

- a. 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.

NTPOL would support an amendment to this provision 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.

Unlike a firearms corporate licence, a firearms museum licence, a firearms club licence, and a paintball operator licence, a firearms dealer licence does not have a 'representative'. Instead, the applicant for a firearms dealer licence must remain the person primarily responsible for the control and management of the firearms dealing business. 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.

- b. Under the current provisions, there would be no recourse for the body corporate itself. The officer (or representative) who was issued the firearm prohibition order would have the ability to challenge the order.
- c. Under the current provision, the cancellation would remain valid. There would be nothing to prohibit the body corporate from then seeking a new licence without the person to whom the firearm prohibition order relates.

On considering the Scrutiny Committee's question, NTPOL propose the amendment outlined above at 5(a). This amendment would achieve the primary aim of the firearm prohibition orders (to immediately remove access to firearms and firearm related items) while providing a faster and more streamlined ability for a body corporate to recommence their usual activities.

- d. No, an approval such one under section 49 relates to approval of a firearm premises, not to the actual licence.
- e. Per section 10(7), the following types of licences may be granted to someone other than an individual (ie a body corporate): firearms dealer

licence, firearm museum licence, firearms club licence, firearms corporate licence, or a paintball operator licence.

6.

- a. "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.

- b. To include a provision requiring reasonable grounds for suspicion would undermine the intent of the search provisions and set the standard for the exercise of the powers at a threshold which is too narrow. Although the threshold for the exercise of this power is broader than any others currently available to police, the use of this power is restricted to situations where a reviewable assessment has taken place and a determination has been made that an individual ought to be subject to an FPO. The reviewable assessment is whether or not to issue an FPO. The officer of the specific rank who is delegated the power to issue FPOs reviews the information presented by the members. If the decision is made to issue the FPO, that decision is reviewable. To limit this power to reasonable grounds for suspicion is a very real concern for NT Police.
- c. The NSW Ombudsman's final report<sup>1</sup> notes that NSW Police have utilised this threshold successfully where officers formed the view that a search was reasonably required, but there was not sufficient evidence to meet a reasonable belief or reasonable suspicion threshold. In these situations, NSW Police were empowered to use their search powers in relation to firearm prohibition orders in circumstances where there was insufficient grounds for a search warrant to be granted. The NSW Ombudsman recognised that this lower threshold was the intention of the Parliament and found that the

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<sup>1</sup> NSW Ombudsman, *Review of police use of the firearms prohibition order search powers. Section 74A of the Firearms Act 1996* (August 2016).

power had been a useful tool to enable police to search in some circumstance where they previously could not.

Section 74A of the *Firearms Act 1996* (NSW) ('the NSW Act') states that the power to search a person "may be exercised as reasonably required for the purposes of determining whether a person who is subject to a firearms prohibition order has committed an offence under section 74 (1), (2) or (3)". The NSW Ombudsman recommended that the search power under section 74A of the NSW Act be clarified to make it clear that a police officer can only exercise the search powers under s74A **if** a search is reasonably required for the purpose of detecting the relevant offences. With the benefit of its detailed and extensive review on the use of police powers, the NSW Ombudsman specifically stated that they were not suggesting a change to the threshold test.

Section 112R of the Victorian Act was subsequently drafted to include the test "if the exercise of the power is reasonably required to determine..." (emphasis added). The Bill has similarly reflected the NSW Ombudsman's recommendation by including the condition that the search powers under sections 49U and 49W can only be used if the exercise of the power is reasonably required to determine whether a person to whom a firearm prohibition order relates has acquired, possesses or is using a firearm or firearm related item in contravention of the order.

7.

- a. 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.



- b. 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.

8.

- a. On considering the question by the Scrutiny Committee, 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.
- b. This proposal would achieve the intention of the power. NTPOL 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.

9.

- a. 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.

- b. The intention of the Bill is that section 49ZA will only apply to firearms and firearm related items seized or surrendered under Part 8A. The proposed amendment would achieve greater clarity in the application of section 49ZA and would be supported by NTPOL.

10.

- a. 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 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).

- b. The intent of section 49ZA(2)(c) is to provide the Commissioner with the necessary flexibility to avoid firearms and firearm related items being returned to criminals and criminal entities. 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.

- c. 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 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.

## **Appeal Provisions**

11.

- a. 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 provision 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 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.

#### **Delegation of Commissioner's powers – not amended in the Bill**

12.

- a. Technically, yes. The only powers and duties under the *Firearms Act 1997* that are restricted by rank are at sections 10(8A), 33(3A) and 40A(1). These powers cannot be delegated and remain the exclusive powers and duties of the Commissioner. All other powers under the Act are able to be delegated as the Commissioner sees fit.

Although this technically would 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.

- b. 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.