

Firearms Discussion Paper - April 2007

Comments by Antique & Historical Arms Collectors Guild of Victoria Inc (the "Guild").

The Guild is most grateful for the opportunity to comment on the above discussion paper. The Guild's comments are below. References to paragraphs are to paragraphs of the Discussion Paper.

Obligation to Give Notice When a Handgun Target Shooter Receives Instructions.

Paragraph 24 *et seq.*

The proposal in paragraph 24 creates an offence of strict liability. There is no requirement for *mens rea*. Accordingly, for example, if the person receiving instruction should innocently have misremembered how many times he or she had previously received instruction he or she would have committed an offence punishable by 120 penalty units or two years imprisonment. While this approach is convenient to those prosecuting the offence it is not consistent with ordinary standards of justice which require the presence of a guilty mind. Accordingly, we submit that a requirement for "recklessness" or "intention to mislead" is more appropriate in the circumstances. After all, it is very easy, where up to nine occasions of receiving instruction are permitted by the Act (schedule 3 item 4), to forget, say, whether one had received instruction on seven previous occasions or eight.

We also mention that, as being a "prohibited person" is a matter of public record and that such records are available to the police, the determination of whether or not a person is or not prohibited is one best left to the police rather than either the person receiving the instruction or the person giving the instruction.

Notification to Clubs or Employers of Suspension or Cancellation of Licences.

Paragraph 30 *et seq.*

We assume this will also apply to firearm collector's clubs and support the proposal.

Use of Paintball Markers for Non-Recreational Purposes, Paragraph 33 *et seq.*

It seems bizarre that paintball markers are to be allowed for recreational purposes but not for non-recreational or artistic purposes. Bearing in mind that the recreational purposes which are allowed are the intentional shooting by paintball game players of one another, suggesting, that paintball guns are not significantly dangerous, it is surely over-management of such residual risk as there is to exclude by statute the possibility that any case for non-recreational use of paintball guns could be made.

We accept that the use of paintball guns other than to paintball gaming at an approved location might need to be justified, but we do not believe that it should be excluded without the possibility of being considered. There is no justification given for the proposed exclusion other than paragraph 37, which provides "initial consultation with stakeholders suggest that

the use of paintball markers of farming or other non recreational purposes occurs very rarely". We submit that even a rare requirement should not be cut off without the possibility of a case being made to justify the use of what is after all essentially a fairly harmless toy for some proper purpose which is not recreational. What exactly is the harm that this proposed amendment is designed to prevent?

Storage & "Effective Alarm" System Requirements. Paragraph 47 *et seq.*

The only support for the proposals under the above heading is the "Australian Institute of Criminology Report of 2006". ("Paragraph 54: In light of the Australian Institute of Criminology report, it is considered appropriate to clarify the storage standards that apply to ABC and D.... ".) However, we understand that in March 2007 the Australian Institute of Criminology released a further publication on firearms deaths in Australia (Borzycki & Mouzos 2007). We have seen a summary of this report although not the report itself, but we understand from the summary that only 47% of the total number of thefts was from owners who were compliant with firearm storage requirements. Note however that the report only deals with *successful* thefts of firearms, not the occasions where thefts were attempted but the security arrangements were *effective*.

However, according to 3 March 2007 report, stolen firearms represented only 0.06% of the total number of registered firearms in Australia and only 0.09% of firearms licence holders reported thefts. Far from suggesting that the existing requirements of firearms security are ineffective the report tends to suggest that in fact they are very effective indeed. The facts also indicate a *downward trend* in the number of firearms reported stolen to police.

The discussion under the "**Storage & "effective alarm" system requirements**" section neglects to mention that under schedule 4 item 3 (1) firearms held under any class of *collectors licence*, whether they are low risk antique handguns, or not, are also, by reason of schedule 4 item 3, required to be held in a strong room with barred windows, solid walls and steel lined doors etc and in a steel or similarly robust locked container. They are also subject to the additional security requirements in scheduled 2, item 5. Neglecting to mention this makes the final sentence of paragraph 52 below misleading by omission. That sentence reads "Therefore, it is considered appropriate for firearm collector licence holders to be subject to the same effective alarm requirements threshold as that which applies to other licence holders".

In light of the tenor of paragraph 52, the Guild submits that it should now also "be considered appropriate" to relieve collectors of this "strong room" requirement which similarly does not apply to other licence holders. In any event, the case for continuing to impose "strong room" requirements on the storage of antique handguns, which are admitted to be of lower risk than other firearms, is especially difficult to justify and is a serious disincentive to collection and preservation of early, obsolete handguns.

Paragraph 57 which deals with the cost of back to base alarm monitoring services contains the following concluding sentence: "the amount of these costs varies according to the provider of monitoring services that may amount to *as little as* around \$1 per day or \$365 per year" (Guild's italics). The Guild wishes to mention that for persons on a reduced income, such as retirees, who make up a significant portion of the Guild's membership, this is not a small sum of money and the burden of paying it should not be dismissed as insignificant.

We note from paragraph 58 that submissions are only sought on the three proposals lettered A to C. We regard this remarkably procrustean approach as most disappointing since as the discussion indicates, but does not fully expose, the legal position is very complex and profoundly inconsistent.

A simple example of this inconsistency is that a single, obsolete 1840s double-barrelled, muzzle loading percussion pistol held under an Antique Handgun Collectors Licence is subject to the full rigour of the security regime that applies to handgun collectors. This is, as mentioned above, includes the strong room, the safe and the disassembly or trigger lock.

This should be contrasted with the arrangements applicable to a single, modern 9 mm semiautomatic pistol of the type currently carried by the military and most police forces, which if held under a handgun license, not a collectors licence, is then subject only to a steel safe requirement but no requirement for a strong room, disassembly or trigger locks.

We submit that the legislative complexity surrounding storage, particular storage of collectors firearms, is now almost unmanageably complex, confusing and inconsistent and, in the case of collectors, discriminatory. The arguments in paragraph 52 of the discussion paper support a proper examination of the extent to which the requirements, for collectors have become excessively burdensome.

We are also concerned that the proposal assumes that burglar alarms are effective in preventing theft. The Firearms Discussion Paper offers no evidence at all to support this assumption nor do either of the reports. Accordingly, we submit that before any decision can be made in this matter the evidence is presented to all parties and examined. We also believe the police have a policy of not responding to ringing alarms. If this is correct, it seriously undercuts any value the proposal may be assumed to have.

Since none of the three proposals A to C in paragraph 58 relieve collectors of any obligations, and proposal B imposes extra obligations on collectors of longarms, we would, if we had no interest in the situation of our fellow firearm owners, elect for item C. However, we do not support any of them for the reasons above.

Safe Storage of Deceased Estate Firearms. Paragraph 65 et seq.

This proposal is much improved. However, in view of the negligible publicity, which heralds changes in firearm law, the effectiveness of the proposal, and also its fairness, depends entirely on it being given proper publicity to those who may become executors or administrators of estates. Of course, this could include anyone and, in the nature of things, most of them will have absolutely no idea of their obligations in that role. However, we are sure that the intention driving the proposal is not a desire to fill the prisons with elderly widows.

Accordingly, we suggest that that the proposal in paragraph 69 be adjusted so that before the obligation to notify arises

- a) the executive or administrator needs to be aware that a person has died,
- b) that the executor or administrator is officially empowered to act as the executor or administrator of that person's estate (i.e. has actually obtained a grant of probate or letters of administration), and

c) be aware that the deceased person died in possession of licensable firearms.

In addition, a precondition to prosecution for breach of the obligations should be that, having regard to the sophistication and experience of the executor or administrator and any publicity which may have been given to this change in law, that it is reasonable to believe that the particular executor or administrator was aware of his or her obligations to notify the Chief Commissioner.

We mention also that there may be several persons appointed as either executor or administrator and the legislation needs to take account of the fact that not all of them may have the same state of knowledge concerning the above matters.

Issue of Handgun Licences for Occupational Purposes Where Compensation was Paid for Surrender. Paragraph 84 *et seq.*

The expression "abusing the national handgun buyback scheme" used in paragraph 86 needs to be explained and justified. Many, indeed most, of the target shooting handgun licence holders who were forced to surrender their licences for target shooting under a buyback were forced to do so because arbitrarily participation requirements had been imposed on them by the new laws and they were not in a position to comply with them, particularly since the extent of those participation conditions expanded relative to the number of handguns held. Accordingly, such licence holders had no choice but to surrender the handguns and received compensation but were not allowed to reapply for a licence for five years, notwithstanding that during those five years their positions might change so that they were then able to comply with the participation conditions.

We fail to see how a request to be allowed a licence again, on the basis that participation conditions could now be met because of changed circumstances can properly be described as "abusing the national handgun buyback scheme". We submit that this proposal should be extended to include such persons, who include the writer. We must bear in mind that the compensation paid to them was essentially the purchase price of the firearms they were forced to sell, not a free gift from the Government. Also, of course, more than three years have past.

Access by Hunters to Crown Land. Paragraph 101 *et seq.*

We understand that where permissions are required hunters are unable to obtain the contact details of the relevant licensees from the authorities. In such circumstances would it be possible for the relevant authority themselves to pass written requests to the licensees on behalf of the hunters? This would not offend against State or Federal privacy laws, because the hunter would not need provided with the licensee's contact details.

Antique Handguns for Which Cartridge Ammunition is Commercially Available. Paragraph 121 *et seq.*

The Guild supports this change but hopes that the sharp distinction between pre-1900 handguns which do take currently available ammunition and genuinely obsolete pre-1900 handguns which do not, which this change restores, will inform appropriate changes to the security regime which currently applies to handguns held under the antique handgun collectors licence. This is overdue in any event.

As mentioned in our submission under "**Storage & "Effective Alarm" System Requirements**" above, the failure to take proper account of the "chalk and cheese" distinctions between genuinely obsolete antique handguns and those of more modern type seriously discourages collection of obsolete antique handguns and to a great extent also spoils the pleasure of having such a collection. There is especially no case subjecting these obsolete, antique handguns to a far more burdensome security regime than applies to modern target handguns.

Concerning paragraph 126 and the definition of "commercially available" ammunition, Justice may or may not be aware of a pamphlet agreed between the Police and the Guild, which lists ammunition which both agreed was not commercially available. This remains an important document because it is practical and indeed necessary for both police and collectors to operate on the basis of the same understandings. In fact, other state jurisdictions have also adopted it as it is indispensably useful and reliable guide. We will send you a copy and may also be able to attach a scanned copy to these submissions.

Attempts to settle a revised draft with the police became confused when a sergeant of police from another state observed that one or two examples of the obsolete, commercially unavailable ammunition listed might be available in the United States and then gave his opinion that this automatically meant that it should be considered as commercially available in Australia! This of course was a complete misconception, since unless such ammunition is actually imported into Australia commercially it is not commercially available in Australia. Importing ammunition these days is extremely restricted, as you will be aware, due to anti-terrorist concerns. Importation of non-commercial quantities or by persons who are not dealers are effectively impossible these days. However, if ammunition of a particular type is imported and offered for commercial sale, we would accept that it should be removed from the list.

Accordingly, we believe the detailed list is the way to go so far as the detail is concerned, and that the underlying test for "commercially available", should be a test of commercial availability in Australia, which is where this law applies, and not in other countries subject to other laws.

Single Licence Requirement for Firearms Collectors. Section 127 *et seq.*

The Guild is very pleased to see this, subject to reviewing the detail.

The Guild believes that the cost of combined licences should be the current cost of the highest class of licence in the combined group. This is the position in New South Wales, we understand.

However, the Guild remains confused about the continued inclusion in paragraphs 136, 137 and 138 of the last bullet point of each paragraph, viz "firearms that are not regulated by the act (such as single shot antique handguns)".

We cannot understand why one would need a firearms licence "to possess or carry, for the purpose of collecting" firearms which are not regulated by the Act. If there is some aspect of this we have missed we would much appreciate it if you would let us know and allow us to make supplemental submissions concerning it.

We remain deeply concerned by paragraph 139, which ignores the reasons why different classes of collectors licence were established. We refer you to our arguments above concerning the needs for different security conditions depending on the category of firearm collected.

Carriage & Use of Firearms Under a Collectors Licence. Paragraph 141 *et seq.*

This is a thoroughly sensible and practical proposal and appeals both to collectors and licensing services.

We would also like to mention that the position with regard to ***display permits for collectors*** (section 56 of the Act) is almost exactly analogous with section 58 of the Act (permits to use). The only distinction between the two sections is that in the case of display permits the firearms (or ammunition) subject to collectors licences are being displayed rather than fired.

It would greatly convenience both firearm collecting organisations and their members if the organisation itself was permitted to make application on behalf of its members for permission to display firearms and ammunition held under collectors licences (the display permits regime does not apply to antique handgun collectors licences) at specific events, in exactly the same way as is proposed in connection with section 58. This would assist greatly with the organisation of display nights and exhibitions, which are an important part of arms collecting. Currently, if members wish to display their collections they need to apply individually to the police for a display permit. While this right to apply for individual permits should remain, if the organisation itself was permitted to make applications on behalf of its members this would be of huge benefit to them and save the police having to deal with a myriad of individual applications for permits to display. We believe the police themselves will support this.

As mentioned above, the advantages and relevant factors are almost exactly analogous with those which apply to Section 58 permits to use.

Requirements for Six Months or More Club Membership. Paragraph 146 *et seq.*

The Guild is pleased to see and supports this proposal. It recognizes the very important distinctions between antique handguns held under the Antique Handgun Collectors Licence and more modern handguns. We hope that the corresponding security conditions will receive the same understanding treatment.

Prohibited Persons and Intervention Orders. Paragraph 156 *et seq.*

The reference in paragraph 163 to "finally" in the phrase "finally determined" should be replaced by "... determined by a Court". If the Court has made an order in a licence holder's favour it should be effective on being made, notwithstanding that there might be some possibility in the future of appeals etc. In the usual way, if there are such appeals and the order is reversed, the suspension may be reintroduced, but it should not be kept in effect, "just in case". Those not convicted after a court hearing should not be treated as guilty until all possible appeals against a finding of innocence had been exhausted. Of course, all of this can be subject to the order of the relevant Court.

Definition of "Prohibited Person". Paragraph 166 *et seq.*

Paragraph (d) of the definition of "prohibited person" in the act is currently limited to offences involving firearms. Firearms have always been treated specially because of their special propensity to do serious harm. The lists of weapons in the Control of Weapons Act 1990 are extremely broad and so this proposal to equate weapons under the Control of Weapons Act with firearms runs the risk of disproportionality.

An even greater problem with the proposal is that it is automatic: conviction under the Control of Weapons Act would automatically result in a prohibition against obtaining or retaining a firearms licence. The Court, making a conviction under the Control of Weapons Act, and in possession of the relevant facts and circumstances, would not then be able to decide whether or not the prohibition on holding a firearms licence is appropriate, instead, under this proposal, such a consequence would flow automatically from the conviction and *irrespective of the trial judge's view of the matter.*

Our submission is that because of this risk of disproportionality and the lack of absence of judicial discretion, the appropriate amendment would be to permit the Court hearing the offence under the Control of Weapons Act to choose whether in the circumstances to impose such an order, or not. The consequences of the making of such a tangential order can be very severe, such as loss of livelihood or destruction of a career in competitive target shooting. We submit that in principle, mandatory disqualification without judicial consideration of whether the particular facts warrant such an order is inappropriate and is bound to lead to injustices. We consider that the appropriate means of addressing the issues is to leave with the Court the discretion to make such an order, or not, as the Court thinks fit in the circumstances.

Written Submissions and Calling of Hearings by Chief Commissioner. Paragraph 169 *et seq.*

Paragraph 175 should also mention that propose amendments will not affect the right to appeal from the Firearms Appeal Committee to VCAT.

Requirement to Advise Chief Commissioner Upon Cessation of Genuine Reason to Use Firearms. Paragraph 179 *et seq.*

The words in paragraph 182: "Greater consistency and efficiency in ensuring that only persons with genuine reasons continue to hold firearm licences would be attained by a requirement that the licence holder advise Victoria police if any of the genuine reasons for which they were granted a firearms licence cease to exist" suggest, for example, that if a person is a member of more than one club, (in circumstances where membership of any one of them is a genuine reason to be granted a firearms licence), ceasing to be a member of any of those clubs while remaining a member of the others may be treated as a reason (as it is one of the genuine reasons for which the firearms licence was granted) to cancel the licence. We assume this is unintentional and we hope that the drafting of the relevant amendment does not fall into the same trap.

Of course, the same argument applies where the licence holder has other "genuine reasons", such as being a member of a club and having permission to shoot over land.

Clearly, it is only when there is no longer *any* genuine reason supporting the licence should it be pulled.

It also follows that the notification to the Chief Commissioner should occur upon the expiry of the last reason, not every time a person changes clubs, or obtains permission to hunt some where else.

No doubt the police would be grateful to be relieved of constant irrelevant notifications by a person who still retained one or more sufficient reasons. The list could be tidied up on renewal of the licence.

Validation of Service of Notices. Paragraph 190 *et seq.*

It is important not to lose sight of the fact that such a notice must actually be served on the person to whom it is addressed for it to be equitable to blame him or her for not complying with it. After all, non-compliance is a criminal offence! None of us should be exposed to the risk that an error by a third party in addressing or delivering a letter could put us in prison!

Of course, reasons why a notice sent by post may be said by a person not to have arrived include, of course, the fact that it was, in truth, not delivered! It would normally be impossible to prove that a notice has not arrived by post and so a person could be convicted of breaching the notice while entirely innocent of knowledge of its contents. The writer saw only a few days ago an example of this, where a letter from the Registry had been addressed to the wrong house number. It is surely undeniable that Australia Post quite frequently misdelivers letters.

It seems to us that this proposal prefers the convenience of the police to the need to ensure that the person who is bound by a notice actually receives it. At the very least therefore a notice should be sent by recorded delivery post, requiring the signature of the recipient to be obtained. If the recipient, who may of course not be the person to whom the notice is addressed, does not sign, or will not sign, then the onus of proving service should return to the police, who need then to serve to notice personally and not rely on the extremely shaky ground of deemed service.

In such a matter, especially one involving criminal liability, common fairness requires that the convenience of the police should take second place, not first place, and that the burden of proof should never be reversed, and particularly not when there is no realistic prospect of proving a negative.

False or Misleading Statements in Support of Applications. Paragraph 193 *et seq.*

The term “misleading statement” as used in the proposal is capable of applying to perfectly innocent errors, because it addresses the consequence of the statement, not the intention with which it is made.

At the risk of stating the obvious, many people who apply for firearms licences are not especially well educated and are frequently confused by the complex requirements. To prosecute somebody who has got in a bit of a muddle, or makes a mistake, is clearly not appropriate, whereas to prosecute somebody who intentionally misleads the police is another matter. If evidence is needed that the process of applying for a firearms licence is both complex and confusing, and riddled with opportunities for making innocent mistakes, we would be pleased to provide a selection of the current forms for readers to judge the matter for themselves, perhaps by having a go at completing one.

Accordingly, we are of the opinion that an ingredient of the proposed offence should be that the false or misleading statement should be made intentionally to mislead. In most cases in this context, intention to mislead is easily provable, such as where there has been forgery and the production of false documentation. This requirement for an intention to mislead to be proved is particularly necessary because of the considerable complexity of the process of applying for a licence and the difficulty of getting any help. The proportion of members of the community who are functionally illiterate is unfortunately high. Once again, the ease of obtaining convictions should not take precedence over justice and fair dealing.

Information Regarding Silencers, Prescribed Items & Manufactured Firearms or Parts. Paragraph 196 *et seq.*

It would be helpful to be told what items had been prescribed in order that we may judge whether or not searching and seizing is appropriate in any particular case - or is it perhaps the case that the power to prescribe items, searching for which is to be permitted under these new powers, is to be part of the amendment? If this is to be the case, we consider it needs to be debated since it is essential to know what sort of things other than silencers might be being searched for in order to decide whether such a search might be justified. Otherwise the power is unacceptably open-ended and might for example be extended beyond the context of firearms law.

Possession of Firearms Parts That Could be Used to Modify a Firearm to an Unauthorised Category. Paragraph 202 *et seq.*

The concept of "could reasonably be used to change the category of a firearm in the person's position ... to a category of firearm that the person is not authorised to possess, carry or use." is both excessively broad and unacceptably vague.

Firearms, being machines, are capable of being altered relatively easily by anybody who has tools and some materials. In order that this provision does not represent a Sword of Damocles hanging over anybody who has a heap of bits and pieces lying around but no intention of criminally converting a firearm to a different category (such as, for example, converting a semiautomatic firearm to a fully automatic firearm by replacement of a single part, *which we suspect is the underlying concern of this proposed amendment*) we suggest that the above words be changed to read "designed or intended to be used to modify a firearm to enhance its capabilities...."

We also mention that a number of handguns, especially pre-1900 obsolete antiques, have been offered with detachable stocks thus enabling them to be fired from the shoulder as a sort of makeshift rifle. We will be concerned if this amendment was applied to them because of course a pistol with detachable stock is essentially a rifle, albeit a poor one. As rifles are longarms they are subject to a lower, not higher, standard of control. Accordingly, our submission is that detachable stocks for handguns be expressly excluded from the relevant definition of "firearm part" as they decreased the concealability of any handgun to which they are fitted and have no other effect.

Recognition of Interstate Licences and Permits and Exemptions. Paragraph 223 *et seq.*

One wonders why an application for recognition is necessary, particularly in the case of licences issued by Australian states or territories, if the firearm is to be here only for a short period. An analogous temporary extension concept already exists in the context of out-of-state vehicle licences, which are recognized without the need for an application.

This firearms licence proposal seems burdensome to both the police and the interstate licence holder and tends to suggest that interstate licence requirements are somehow less rigorous than those of Victoria, even after unification.

Accordingly, would it not be both practical and appropriate to allow appropriately licensed interstate visitors to participate in legitimate shooting sports and historical display activities without the need first to apply to the Victoria Police for permission? It's not as if Licensing Services need the extra work, especially having just lost a large number of their staff!

Clarification of Imitation Firearms Exemptions. Paragraph 232 *et seq.*

This section relates to imitation longarms, which it is now proposed to regulate if they look real (as is currently done with pistols). This will be a hard blow to historic re-enactment groups who use "replica" (not reproduction) firearms. These totally inoperative replica firearms do generally look the part, (except upon close inspection) and are used for historic displays. They are also used for some degree of public education (the public can't legally handle real longarms).

Replica longarms are also used by members of re-enactment groups partaking in historic displays and re-enactments who do not wish to own, register, licence and store real longarms for whatever reason. These participants would look ridiculous if they were equipped with an obviously imitation arm required to be a bright colour etc. World War One & World War Two re-enactment groups in particular rely heavily upon the non regulation of replica longarms to be able to display realistic looking longarms and early machine guns etc for their public events and educational displays.

The Guild submits that any change in the law should recognize these legitimate uses of replicas by exempting them from control if owned by members of historic re-enactment groups, and similar organizations, including of course the RSL, for the purposes of participating in historical re-enactments and related activities. There should also be an exemption for theatrical and film use of realistic looking longarm "props".

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