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LEGISLATIVE COUNCIL
LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into Firearms Prohibition Legislation

Melbourne—Monday, 2 September 2019

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WITNESS

Ms Melinda Walker, Co-Chair of Criminal Law Section, Law Institute of Victoria.

The CHAIR: Good afternoon. Thank you very much for coming to this hearing. We really appreciate it and are really looking forward to getting your feedback and your thoughts as part of this Inquiry.

Ms WALKER: Good afternoon, all.

The CHAIR: We have had a few apologies, but just to explain that the Committee is hearing evidence today in relation to the Inquiry into Firearms Prohibition Legislation. All evidence taken at this hearing is protected by parliamentary privilege, so anything you say here today will be protected. However, any comment that you make outside this hearing may not be protected. Any deliberately false evidence or misleading of the Committee may be considered a contempt of Parliament. As you can see, all evidence is being recorded. We will provide you with a proof transcript of that over the next few days, and ultimately the transcript will be posted up on the Committee's website. If you wanted to start with a few thoughts, then we will open it up to the Committee.

Ms WALKER: Thank you, and thank you again for inviting the Law Institute of Victoria to contribute to this Inquiry. I would first like to acknowledge the traditional owners of the land on which we are meeting today, the Wurundjeri people of the Kulin nation, and I would like to pay my respects to their elders past, present and emerging and any elders from other communities that may be present today.

I was given a number of questions that you may be interested in. I am using that as a guide, if I may, and I understand that there is scope for written submissions to be made. These are still being prepared, so there may be some questions that you have which I will take on notice. I will have those inquiries made and put into the submissions when they are done.

One of the first questions that was posed to me was how would the Law Institute determine public interest as it is articulated in the statute. It is not in the statute at the moment, and we say that it should not be. The term 'public interest' derives its content from the subject matter and the scope and purpose of the enactment in which it appears. It is a broad concept that is flexible enough to respond to the facts and circumstances of every case, giving the decision-maker—the commissioner or a reviewer—the ability to have regard to a wider variety of factors in choosing whether to exercise a discretion adversely to an individual.

Just to pause there, the Australian Law Reform Commission undertook an inquiry into serious invasions of privacy in the digital era, and their report is ALRC Report 123, from June 2014. Albeit that it was in the context of whether or not freedom of expression was being interfered with—with publication and media publication—there is an interesting recommendation by them, and I will just quote:

> 9.36 The ALRC recommends that the Act include a non-exhaustive list of public interest matters that a court may consider when considering whether an invasion of the plaintiff's privacy was justified, because it was in the public interest. The list would not be exhaustive, but may provide the parties and the court with useful guidance, making the cause of action more certain and predictable in scope …

So obviously public interest can take a number of different forms when it is being considered for different circumstances, and that can include: the dissemination of private information; the exclusion of evidence on the grounds of public interest immunity, which this Act has; the administration of justice and fair hearing; public interest in the proper administration of government; public health and safety; to ensure open justice; the freedom of expression; the freedom of the media, particularly to responsibly investigate and report matters of public concern and importance; national security; and probably the most important that we are talking about today, being the prevention of and detection of crime and fraud.

The decision of Her Honour Judge Hampel, and I am assuming that this is what has sparked this Inquiry—

The CHAIR: It has certainly been a catalyst, yes.

Ms WALKER: The decision of Judge Hampel sets out an approach guided by statements of principle in determining what is in the public interest under section 112E of the Act. Her Honour drew from the Court of Appeal and the High Court of Australia and assessed nine main principles as relevant to that determination. Her Honour also considered the purposes and consequences of the Act and the making of an order in citing the purpose of the Act, which can be found in section 1(a):

> that the possession, carriage, use, acquisition and disposal of firearms are conditional on the need to ensure public safety and peace …

Her Honour referred to the pre-existing restrictions as being inadequate and gives rise to consideration of the making of the order. In the second-reading speech, the Minister, Ms Neville, referred to the powers being complementary:

> for Victoria Police to proactively and quickly disrupt serious criminal activity associated with the illicit use of firearms.

Her Honour determined that the public interest test can only be satisfied if one of the four considerations contained in 112E (a) through (d) are present and are causally connected to the public interest. Her Honour further determined that the consequences not only of the prohibition order itself and the penalties for offences under the Act but the consequences of restrictions on freedom of movement association and exposure to searches without warrant or consent are also relevant—and that includes subjecting people to no greater restriction on their movement, association or exposure to searches than is reasonably necessary to give efficacy to protecting the public.

So the question for the tribunal, as Her Honour deemed, was: would the making of an FPO abate the risk to public safety by the prohibitions set out in the Act? Now, whether that was the correct approach is a matter for an appellate court if a review of her decision is initiated by the Commissioner. Otherwise it is not sought to undertake a critical analysis of her findings, necessarily, except to say that the Law Institute agrees with the approach that was taken by Her Honour to define the public interest in the context of making an FPO.

The next question that we were asked was: does the FPO scheme strike an effective balance between the individual rights, public safety and effective policing? The Bill was partially incompatible with the right of privacy and the right of children to such protection as is his or her best interest, but it was nevertheless considered necessary to protect the community from the risk of harm associated with firearm-related offending. The Minister acknowledged a number of rights that were directly affected by this legislation, including that the decision of the Commissioner to make an FPO affects the right to the protection against arbitrary interferences with privacy and that the right is further limited by the potential for a review to be heard on information subject to Crown privilege, and they are the PII claims. The Act prevents full disclosure to individuals seeking to challenge a decision made pursuant to 112E and the restrictions on full reasons being published—closed hearings, ex parte, limiting the ability of cross examination of certain witnesses and precluding the stay of an order pending a review. Obviously the Minister gave consideration to the charter and considered that a human right may be subjected under only to such reasonable limits as can be demonstrably justified.

So a person subject to an FPO has a merits review to VCAT, with respect to the making of an FPO, and a judicial review of that decision. The further rights that are affected, being the right of freedom of association and a right to privacy, and the limitation of these rights are said to be justified given the limitations of the then-current powers of the Act to protect the community from firearm-related offending. The rights of review and the merits of the order are the further justification for the limit of that right to the freedom of association. That was the balancing act that the Minister had considered—and rightly so.

The right to privacy: it was acknowledged that this right is interfered with due to a person being subjected to discretionary search powers which may result in infrequent and intrusive searches. And I have just heard the statistics that you were provided from Victoria Police.

The CHAIR: Yes.

Ms WALKER: As to what that says—whether or not there is a limited amount of offences related to firearms—one could say that the Act and the powers are working if it is certainly deterring people from carrying firearms in public places or in their homes. There is a range of measures which have been

implemented into this Act, which oversee the use of those powers, and periodic review and oversight. I am not privy to those reviews or those oversights, so I am sure that that is something that the Committee, hopefully, will have access to.

The rights of third persons not subject to FPOs is also interfered with and not considered to constitute an arbitrary or unlawful interference. I think one of the oversights of that was specifically placed into the Act to ensure, because that is a fairly significant right that is being impinged on a third person.

The right to protection of children, although it is acknowledged that the Act only affects a small cohort of children between the ages of 14 and 18, the Minister held it to be both essential and appropriate to provide these powers to police.

The right to freedom of movement and the right to property are all affected by provisions of the Act when an FPO is made against an individual. The scheme, from the LIV's perspective, strikes an effective balance.

The effect upon the individual's rights, the powers extended to police—powers which were sought by them as being powers needed to work effectively—promote public safety. Our position is that any further tightening of the test, increase in powers or restrictions on reviews would exceed what is reasonably necessary to achieve public safety and peace and would be dangerously oppressive.

'Will VCAT's finding in relation to Websdale affect the operation of the FPO scheme, and how?'. I think that remains to be seen. I am not sure if I can answer that question appropriately as to whether or not an appeal is being sought or considered. This decision certainly does not bind any other president or vice-president where a review of this type would come before it. It may be that the commissioner does seek a review from an appellate court to get some understanding or ruling as to what public interest in these circumstances really means.

'Is the right to review an FPO adequate?'. Yes. The LIV say yes, and the LIV say that VCAT is the appropriate jurisdiction for that review. Every other state in Australia uses their civil and administrative equivalent for a tribunal to review an administrative decision—that is why they were set up and that is what they do. They 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 for these reviews to remain in the public interest when you are talking about police information or police integrity. I think that is my 15 minutes.

Ms GARRETT: That was comprehensive.

The CHAIR: Yes, thank you.

Ms WALKER: I hope I am not just telling you something you know.

Ms GARRETT: You are obviously a very good lawyer.

Ms WALKER: Thank you.

The CHAIR: No, that was really fulsome and very helpful for us. It is interesting. The Law Institute of Victoria seems quite satisfied that the balance is right. Given those statistics that we heard—that there have been 223 orders made, under those orders there have been 205 searches, from these searches there have been 139 charges that have come out of those, and only 12 of those have been firearm charges. I suppose I was somewhat not troubled but surprised, because the objective was to really address firearms offences, that we had charged these people with so many other offences other than firearms.

Ms WALKER: I am actually encouraged by the fact that there are not as many, because I know that there was a lot of criticism as to how many orders had been made since the amendment to the Act to include the FPOs. The New South Wales Ombudsman review was specifically in relation to those searches and most specifically about those third individuals, or third parties, who were being caught up in that. The Minister appears to have considered that when she has introduced the Bill, in putting in those other oversights through IBAC the review halfway through an order and also the review process through VCAT. So there are some protections there to see how it is going, and obviously there are other states who have had it for far longer than what we have, and most of ours have been designed. Queensland are currently in the process; a Bill has been

introduced in May of this year. I am not sure where it is at at the moment, but it also loosely mirrors all of the other states as well.

The CHAIR: Right.

Ms WALKER: As to whether or not there are 12 firearms offences, one would like to say that it is working. As to 139 other charges, I do not think you can get around that really. I do not think you can get around it. But look, 205 searches in almost 12 months does not seem to be too excessive.

The CHAIR: Not alarming.

Ms WALKER: It is not alarming.

The CHAIR: No.

Ms WALKER: It is expected. I would have expected more.

The CHAIR: Yes. One of the improvements that the police were suggesting would be that—I suppose, using the analogy of a sex offender list—those on those orders must report any change of address. Do you think that that would be helpful in ensuring the operation of this legislation?

Ms WALKER: I suppose it would certainly assist police to make sure that they know where these people are, and how otherwise do they search their houses or ensure that they are complying with the order? The operation of the order really sounds to me that if you are found on a premises from which you are prohibited, you are committing an offence, rather than—

The CHAIR: Yes. So they probably know where they are not going to find you.

Ms WALKER: Yes. And if they do find you there, then you are committing an offence. I suppose it does frustrate the order a bit if the police cannot locate the person. However, those inquiries can be made through other avenues should the police be concerned. Most of the people who, I would suspect, are subject to these orders are also members of associations. It is really what the Act was targeting—organised crime associations or any terrorist-related organisations—so the cohort would be fairly confined, I would have thought.

The CHAIR: Yes, exactly. Thank you.

Dr KIEU: Thank you for coming in and giving a very comprehensive answer to all the questions that have been forwarded to you prior.

Ms WALKER: Thank you.

Dr KIEU: I have a question on the previous witness. The police were concerned, as we are, on the lack of sharing of information and the recognition and collaboration or otherwise between different jurisdictions across the borders. It is particularly very concerning because it could be organised crime, it could be extremists, it could be terrorists or it could be some other people that create harm for the general public associated with that. What would be the view of the law institute on this? What would you recommend, or is there anything that could be done in different jurisdictions, given that has been going on for a long time now?

Ms WALKER: I think guidance could be taken from the Royal Commission into Family Violence where there was specifically that issue in relation to information sharing between jurisdictions and also the effects or otherwise of orders crossing over into other jurisdictions. From the reading here I cannot see that an FPO, similar to a family violence order, would be cross-jurisdictional, so I do not know if the commission would seek to look into something similar to that. But in relation to information sharing, there was a huge problem with the lack of information, the different systems that were being used by different jurisdictions: who is sharing the information, and what information do you want to share? I mean, you do not want to extend this or elevate an FPO to some kind of a control order. I think that if the police were that concerned about somebody, then they might want to look at some form of a control order rather than an FPO. I would have a bit of a look at the Royal Commission into Family Violence and the problems with information sharing, which might I add are still happening now.

Dr KIEU: Yes. Just further on that, across the jurisdictions—for example, in New South Wales the scheme has been in operation for a few years now. There was a view that the New South Wales scheme is providing a lower bar for issuing an FPO. Do you think that is the case?

Ms WALKER: I did think about that because it was about whether you were a fit and proper person and it was in the interest. Victoria have got those four criteria that we look at in terms of the individual's prior convictions and associations. In New South Wales specifically it is:

> … if, in the opinion of the Commissioner, the person is not fit, in the public interest, to have possession …

It is a much wider gamut, and there are a lot more orders in New South Wales, though, than in Victoria and it may be because it is quite broad.

Mr O'DONOHUE: Thanks very much for your evidence today and coming in and giving the law institute's perspective and for that detailed sort of introduction, which has been very helpful. I just had one question, Ms Walker: do you think the 10-year time frame is an appropriate time frame for the issuing of an FPO?

Ms WALKER: I think it could probably be achieved in under 10 years—maybe even five years. I think five years is quite extensive for a child when you are looking at that distinction. Obviously the five years was brought in because it can be imposed from the age of 14 and then the child attains the age of 18, which we consider to be an adult under the law for prosecution at least. But the law institute would say that five years would be sufficient, and probably two to three years on a child would be sufficient.

Mr O'DONOHUE: The other question I had is: the delegation in the legislation is for a superintendent and above to be able to issue an FPO. Do you think that strikes the right balance between giving police the operational capacity to issue an FPO when things are moving quickly, as is intended by the Act, whilst being at sufficiently senior rank to give that, I suppose, oversight given the significant powers that flow from an FPO?

Ms WALKER: 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.

Mr O'DONOHUE: Do you think superintendent is appropriate? From the material we received from Victoria Police, which I just cannot put my hands on straightaway, I think the majority of the FPOs have been issued by a superintendent, from memory; a couple by assistant commissioners.

The CHAIR: Yes.

Mr O'DONOHUE: Thank you, Chair. Yes, 104 by superintendents, 99 by acting superintendents, 13 by acting commanders, five by assistant commissioners and two by acting assistant commissioners.

Ms WALKER: Do I think that anybody under those ranks should be permitted to be delegated that power?

Mr O'DONOHUE: Do you think anyone under or anyone above? Should it be at a higher rank? I suppose, do you think that is the appropriate—

Ms WALKER: I think that is the appropriate rank, absolutely. I would not go under that at all.

Mr O'DONOHUE: Would you go higher or do you think that is—

Ms WALKER: I do not think it would be operative. I do not think that that is—I cannot think of the word now.

Mr O'DONOHUE: 'Operative' is a—

The CHAIR: Good enough.

Ms GARRETT: This is a bit lay person-y. I am legally trained too, so it is probably going to make my law professors squirm that I am going to ask it in this way.

The CHAIR: They are going to reassess the marks they gave you.

Ms GARRETT: Most people would go, 'How did this guy—if this guy doesn't fit the thing'—and I know we have had all these orders and everything, but this is the one that has come to the fore, so this guy—

Ms WALKER: If not this guy—

Ms GARRETT: If he doesn't fit the thing, there is something going not right.

The CHAIR: But is it more that he fits the thing—using those technical terms—but that the thing is too restrictive?

Ms GARRETT: Yes. Something, in my mind, has gone a bit wrong here that we have got a bloke who has had all of these issues able to successfully—and I am not having a crack at Hampel's judgement, a considered judgement; we are all working in a framework here, and we are all trying to get the balance right—but something has happened here which does not look quite right, so do you think there needs to be—

And I suppose my other point is that this is about guns. I get that we have to balance everybody's liberties, but this is not a man and his association issues or whatever; this is he will have access to guns. We are not in America, it is not a universal right; it is not a bill of rights issue. There is not much good that comes from guns really, except for people in the country. This is very long winded; I do apologise. If someone said, 'Okay, we're not happy with this', what would you need to tighten? What would you tighten? You may say, 'I don't want to answer that because I've got my view on it', but—

Ms WALKER: Yes. I do not think they should be tightened. Because we do believe in a charter of rights, because we do have an understanding of what we should all be privileged to—

Can I start with your first question actually, and then I will get to the last one? When you look at Mr Websdale and you say, 'If not him, who else?', I mean this Act is designed for either persons in outlaw motorcycle gangs, organised crime or terrorist associations, but there is a framework—there are considerations—and I think that in order for, certainly our state, not to fall into a trap of oppressive restrictions on persons simply by association, then there does need to be a considered assessment of that person, of the circumstances and whether or not this is the person that needs to have an FPO. There might be somebody else within that organised motorcycle gang that does. Why not then put one on every single member if you are going to go down that path?

The CHAIR: Yes.

Ms GARRETT: Indeed, why not? This is the question, isn't it? I do not know.

Ms WALKER: Well, the answer to that is that not all gun crimes are committed by organised motorcycle gangs. Some of the most recent gun-related crime has been completely organised crime absent.

Ms GARRETT: But where did they get the guns from?

Ms WALKER: Well, that is a good question. I think the police would probably be able to answer that a lot better than me, because they come from all places, I suspect. I think that we are really fortunate in Australia that we have such strict gun control. We do not have the incidents that America had two days ago, I think—or yesterday—

Ms GARRETT: Again.

Ms WALKER: and that says a lot. If we are talking about in order to maintain that privilege that we have in terms of our human rights, and coupled with the privilege to be safe as well by having very strict gun control, then I think that you need to have that balance between the two, and I think that this scheme does balance all of those different considerations.

I have forgotten the last part of your question now.

Ms GARRETT: I have too.

The CHAIR: Using my industrial design expertise rather than any legal expertise, I think it was looking at—

Websdale, you would think, met all of the conditions in the public interest given his criminal history, his behaviour as an individual, the people with whom he associates—he ticked pretty much all the boxes—but what was found was that the conditions of the FPO were considered too restrictive and that the restrictions were probably overreaching the public interest. But you would be of the opinion that in actual fact the restrictions that are imposed by those orders are reasonable?

Ms WALKER: Are they reasonable?

The CHAIR: Yes.

Ms WALKER: Well, I think in the scheme of things they are reasonable. They do not actually go as far as the sex offender register, but they are equally protecting different interests. The sex offenders registration is set up for a very specific reason, because of the ducking and weaving—if I could put it as bluntly as that. In terms of firearms, firearms can come and go, they can be brought into the state under cover—people can get access to them—so I think that if we have a very strict and very constrained control in terms of border control, in terms of detection—

Police have got significant powers in relation to FPOs, and from those numbers that you are giving me it sounds like it is working.

The CHAIR: I guess what seems to be in question or what has arisen in the VCAT decision is the breadth of the restrictions of the FPO on the rights of an individual.

Ms WALKER: Yes. And as I said, if we are permitted to enjoy those rights, then those rights have to be very seriously scrutinised if they are to be interfered with.

The CHAIR: Thanks. Sorry, I did not mean to look at the clock!

Ms WALKER: That means I go home early too.

The CHAIR: Ms Walker, thank you so much. That was really interesting, and it was really great to hear LIV's position. My understanding is that LIV will be submitting a submission.

Ms WALKER: Yes, as I understand it. I have been advised by the policy lawyers that they will be. I think it will be assisted by the transcript.

The CHAIR: Yes, great. Thank you.

Ms WALKER: Thank you for inviting us.

The CHAIR: I appreciate it. Thank you very much, Melinda.

Committee adjourned.