

Statutory Review of the *Explosives Act 2003* NSW Police Force submission

OVERVIEW

The *Explosives Act 2003* regulates the control and handling of explosives and explosive precursors in New South Wales and provide for the regulation of certain other dangerous goods. Explosive precursors are chemicals and other materials that can be processed to make an explosive. The purpose of the Act is to protect people and property from the harm that may arise as a result of the illegal or unsafe use of explosives and explosive precursors and ensure that suitable people can safely handle them.

STATUTORY REVIEW

Section 38 of the Act requires that the Act be reviewed to determine whether its policy objectives remain valid and its terms remain appropriate for securing those objectives.

NSW POLICE FORCE RESPONSE TO THE SATUTORY REVIEW OF THE EXPLOSIVES ACT 2003 DISCUSSION PAPER

Overview

The NSW Police Force considers the policy objectives of the Act remain valid and its terms remain appropriate for securing those objectives; with the following recommendations to improve public safety by ensuring only the most fit and proper persons are granted a licence and therefore have access to and control of explosives.

The safe handling, control and regulation of explosives and precursors is a key component of ongoing public safety, good government and effective law enforcement, especially in an environment where Australia's current National Terrorism Threat Level is PROBABLE.

1) Is the object of the Explosives Act 2003 still valid? why or why not?

Yes. The safe handling, control and regulation of explosives and precursors is a key component of ongoing public safety, good government and effective law enforcement, especially in an environment where Australia's current National Terrorism Threat Level is PROBABLE.

2) Is the scope of the Act appropriate? Are there substances or activities which should be within the scope of the Act which are currently outside it?

The NSW Police Force has not identified any issues with scope of the Act in relation to the investigation of offences involving the manufacture or illicit sale of explosives.

3) Should the definition of 'supply' be moved from the Regulation to the Act?

The NSW Police Force does not oppose this.

4) Does the licensing framework enabled by the Act meet its objectives?

No comment.

5) Are there other matters which the report provided by the Commissioner of Police should include?

The NSW Police Force suggests that, in relation to the matters set out in section 13(1), there should be added:

“Whether the applicant is the subject of a weapons prohibition order within the meaning of the *Weapons Prohibition Act 1998*”

6) Do you support mandatory disqualifying offences for holding a licence or security clearance? Why?

The NSW Police Force supports the inclusion of mandatory disqualifying offences.

Disqualifying offences are a feature of the following licensing legislation administered, or contributed to, by the Security Licensing and Enforcement Directorate (SLED):

- *Security Industry Act 1997* (section 16(1) and clause 15 of the *Security Industry Regulation 2016*)
- *Firearms Act 1996* (section 11(5) and clause 5 of the *Firearms Regulation 2017*)
- *Commercial Agents and Private Inquiry Agents Act 2004* (section 7 and 13 and section 4 definitions) and
- *Weapons Prohibition Act 1998* (section 10 and clause 5 of the *Weapons Prohibition Regulation 2017*)

The relevant provisions are annexed to this submission.

The capacity to prescribe disqualifying offences:

- allows for clear boundaries of behaviour to be set down for the guidance and information of prospective applicants
- allows for the regulator to set standards about the character of applicants
- allows administrators to prescribe, from time to time, those offences that are identified as ones that routinely give rise to applications being declined on more general "fitness" or "public interest" grounds – which in turn provides greater procedural fairness to applicants.
- allows for a minimum period to be set for the reform of individuals to take place
- streamlines consideration of applications

- reduces the incident of applications for review to the NSW Civil and Administrative Tribunal
- can be linked to a statutory power for revocation/suspension of authority, which often requires quick action to be taken in the public interest.

To permit flexibility and to allow for the future inclusion of additional offences that might be identified as warranting mandatory disqualification, the NSW Police Force recommends that such offences should be prescribed under the regulations to the *Explosives Act 2003*.

In addition to offences, the NSW Police Force recommends that other disqualifying events should be prescribed in the regulations to the *Explosives Act*. Examples of this would be:

- the existence of apprehended violence orders
- firearms prohibition orders
- weapons prohibition orders and
- if a person has been scheduled under the *Mental Health Act 2007*.

The application of prescribed disqualifying offences has been in operation for nearly two decades. The range of prescribed offences has been expanded from time to time. The NSW Police Force has supported of “prescribed disqualifying offence” provisions being incorporated into other legislation.

7) *If you support mandatory disqualifying offences, what should those offences be? Should they be limited to offences involving violence or include work health safety offences?*

The objective of the *Explosives Act* is primarily the protection of the public.

In the public interest, persons who handle explosives should be fit and proper persons. The pillars of fitness are honesty, knowledge and integrity.

While offences involving terrorism and violence should obviously be disqualifying offences, the commission of other offences go to the fitness of persons to be authority holders under the *Explosives Act*.

Under the legislation in which SLED is involved, disqualifying offences include those involving assault and violence, affray, terrorism, riot, offences involving criminal groups, firearms offences, prohibited drugs and dishonesty (see **Annexure A**).

Similarly, the objective of the *Security Industry Act 1997*, the *Firearms Act 1996*, the *Commercial Agents and Private Inquiry Agents Act 2004* and the *Weapons Prohibition Act 1998* is the protection of the public.

Accordingly, all of the disqualifying offences prescribed by these Acts may be relevant to licensing under the *Explosives Act*.

In addition, offences that are particularly relevant to explosives handling (eg offences under the *Explosives Act*) could be included as disqualifying offences.

8) *Should mandatory disqualification only apply where the convictions have occurred within a certain period before application of the licence? What should that period be?*

The NSW Police Force considers that there should be fixed periods that apply to convictions for mandatory disqualifying offences. This introduces certainty into the legislative regime, while acknowledging the possibility of a person's reform over time.

Tribunals exercising review functions have held that the expiry of a disqualifying period does not itself indicate that a person is to be regarded as fit to hold an authority, and that positive evidence of reform is still required to be adduced by the applicant.

The legislation in which SLED is involved specify two disqualifying periods. In respect of prescribed offences resulting in convictions, the applicable period is 10 years.

In respect of offences found proven but where no conviction has been recorded, the applicable period is 5 years. The NSW Police Force considers that these would be appropriate periods to be applied under the *Explosives Act*.

9) *Are the internal and administrative review provisions of the act working to ensure oversight of licensing decisions?*

No comment

10) *Do the 2013 amendments strike the right balance between protecting the confidentiality of police information and providing an effective right of review?*

The NSW Police Force considers that the 2013 amendments strike the right balance and should not be changed.

Provisions similar to section 24A of the *Explosives Act*, which ensure the security of criminal or security intelligence reports and other confidential criminal information, are contained in other legislation in which SLED is involved. These provisions are:

- *Firearms Act 1996* – section 75(5) – introduced by the *Firearms Amendment (Public Safety) Act 2002*
- *Security Industry Act 1997* – section 29(3)-(5) – introduced by *Security Industry Amendment Act 2005*

- *Commercial Agents and Private Inquiry Agents Act* – section 20(2) – introduced by the *Criminal Organisations Legislation Amendment Act 2009*
- *Weapons Prohibition Act 1998* – section 35(3) – introduced by *Weapons and Firearms Legislation Amendment Act 2010*
- *Tattoo Parlours Act 2012* – section 27(4) – this provision was in place from commencement
- *Combat Sports Act 2013* – section 78 – this provision was in place from commencement.

As can be seen from the above, legislative protection from disclosure of confidential criminal information has been in operation in several Acts for 17 years. This regime of protection has operated satisfactorily during that period, as evidenced by the progressive expansion of the legislation that includes such protection.

The NSW Police Force obtains criminal and other sensitive security information from various sources. This includes complainants who have been the victims of crimes, persons who provide information to police on a confidential basis, crimestopper reports, and from interstate and Commonwealth law enforcement agencies.

If the confidentiality of such information cannot be protected, it may jeopardise the provision of such information to the NSW Police Force and adversely affect its operational capability.

11) *Do these offences appropriately support the Act's objective of ensuring the explosives and explosive precursors are handled safely?*

Yes

12) *Should executive liability apply to offences other than handling explosives or explosive precursors without a licence?*

No comment

13) *Talking into account the costs of compliance, are the maximum penalty levels for the offences under the Act sufficient to ensure compliance with its provisions?*

No comment

14) *Should the penalty levels be adjusted to take account of increases in CPI since they were last changed in 2003?*

No comment

15) *Should maximum penalty levels in the Act be increased to reflect the higher penalties available for similar offences in other NSW and interstate Acts? Why or why not?*

No comment

16) *Should the maximum penalties for the offences relating to inspectors which can be prosecuted under both the Act and WHS Act be the same*

No comment

17) *Do inspectors under the Explosives Act have sufficient power to ensure compliance with the Act?*

No comment

18) *Should inspectors under the Act have the extra-territorial information gathering powers as inspectors under the WHS act (section 155A)?*

No comment

19) *Where a regulator is considering or intending to bring a prosecution in relation to forfeited explosives, should the regulator be able to destroy some of the explosives as they can under the Drug Misuse and Trafficking Act 1985?*

The discussion paper mentions that where large volumes of explosives are seized they could be sampled and a portion of the explosives retained while the bulk is destroyed.

The NSW Police Force supports this approach in principle as would provide for the timely disposal of bulk explosives. Certain safeguards would need to be considered: see response to Question 20.

20) *If so, what safeguards should be in place? Do you have any concerns about such an approach?*

From an evidentiary perspective, the appropriate safeguards would need to ensure that, at a minimum, the testing is:

- Valid
- admissible in court
- sufficient to represent the entire sample given that the intention is to destroy the bulk and

- the bulk is not destroyed prematurely, resulting in failed prosecutions.

By way of example, the NSW Police Force Weapons and Ordnance Disposal Section (the WODU) is responsible for the destruction of the following types of explosives:

- flares
- fireworks
- gunpowder (black powder)
- smokeless propellant and
- ammunition and ammunition components (up to .50 calibre).

It is the responsibility of an investigator to ensure all necessary examinations, certifications and authorisations for destruction have been obtained prior to any explosives being conveyed to the WODU for destruction. Items must only be brought to WODU when they are no longer needed for any evidentiary purpose and can be disposed.

Once the ammunition is examined, an expert certificate pursuant to section 177 of the *Evidence Act 1995* is provided by a qualified examiner attached to the Forensic Ballistics Investigation Section. No sub-sample destruction procedures should be applicable to ammunition until the matter is finalised at court.

Any safeguards regarding the sampling and subsequent destruction of an exhibit prior to the conclusion of court proceedings must take into consideration that the explosives cannot be retrieved once they are submitted for disposal. Once explosives are sent for destruction, there are no further avenues of examination, identification or certification.

21) The act makes provisions for a number of other matters do you have any comments on these provisions of the Act?

No comment

The NSWPF thanks you for the opportunity to comment.

Inquiries may be directed to Cath Mackson, A/Director, Major Crimes & Firearms Team, Legislation and Policy Unit on 8263 8351 or mack1cat@police.nsw.gov.au

ANNEXURE A - Clause 15 Security Industry Regulation 2016

15 Offences and civil penalties that disqualify applicants

(1) Prescribed offences: section 16 (1) (a) and (b)

For the purposes of section 16 (1) (a) of the Act, the following offences are prescribed offences regardless of whether they are committed in New South Wales:

(a) Offences relating to firearms or weapons

An offence relating to the possession or use of a firearm, or any other weapon, committed under:

- (i) the law of any Australian jurisdiction, or*
- (ii) the law of any overseas jurisdiction (being an offence that, had it been committed in Australia, would be an offence under the law of an Australian jurisdiction),*

and being an offence that would (had the offence been committed under the law of an Australian jurisdiction) disqualify the person concerned from holding a licence under the [Firearms Act 1996](#).

(b) Offences relating to prohibited drugs etc

An offence in respect of a psychoactive substance, prohibited plant or prohibited drug within the meaning of the [Drug Misuse and Trafficking Act 1985](#), or a prescribed restricted substance within the meaning of the [Poisons and Therapeutic Goods Regulation 2008](#), committed under:

- (i) the law of any Australian jurisdiction, or*
- (ii) the law of any overseas jurisdiction (being an offence that, had it been committed in Australia, would be an offence under the law of an Australian jurisdiction).*

(c) Offences involving assault

An offence under the law of any Australian or overseas jurisdiction involving assault of any description, being an offence in respect of which the penalty imposed includes any term of imprisonment (whether or not suspended), an intensive correction order, a community correction order, a conditional release order, a good behaviour bond, a community service order or a penalty of \$200 or more.

(d) Offences involving fraud, dishonesty or stealing

An offence under the law of any Australian or overseas jurisdiction involving fraud, dishonesty or stealing, being an offence in respect of which the maximum penalty is (had the offence been committed under the law of an Australian jurisdiction) imprisonment for 3 months or more.

(e) Offences involving robbery

An offence under the law of any Australian or overseas jurisdiction involving robbery (whether armed or otherwise).

(f) Offences relating to industrial relations matters

In the case of an application for a master licence or for the renewal of a master licence only, an offence under the [Industrial Relations Act 1996](#) or under any similar law of any other Australian jurisdiction or the [Fair Work Act 2009](#) of the Commonwealth, but only if a total of at least 5 such offences have been committed by the applicant during any period of 2 years.

(g) Offences relating to riot

An offence under section 93B of the [Crimes Act 1900](#) or any similar offence under the law of another jurisdiction.

(h) Offences relating to affray

An offence under section 93C of the [Crimes Act 1900](#) or any similar offence under the law of another jurisdiction.

(i) Offences involving stalking or intimidation

An offence under the law of any Australian or overseas jurisdiction involving stalking or intimidation.

(j) Offences relating to reckless conduct causing death at workplace

An offence under section 31 of the [Work Health and Safety Act 2011](#) or any similar offence under the law of another jurisdiction.

(k) Offences relating to terrorism *An offence relating to terrorism, being:*

- (i) an offence under Part 6B of the [Crimes Act 1900](#) or against Part 5.3 of the Criminal Code set out in the Schedule to the [Criminal Code Act 1995](#) of the Commonwealth, or*
- (ii) an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be an offence referred to in subparagraph (i).*

(k) Offences involving organised criminal groups and recruitment *An offence under section 93T or 351A of the [Crimes Act 1900](#).*

(1A) Prescribed offences: section 16 (1) (b)

For the purposes of section 16 (1) (b) of the Act, the following offences are prescribed offences regardless of whether they are committed in New South Wales:

- (a) an offence referred to in subclause (1) (a), (b) or (d)–(l),*
- (b) an offence under the law of any Australian or overseas jurisdiction involving assault of any description, being an offence that, in the opinion of the Commissioner, is a serious assault offence.*

(2) Prescribed civil penalties: section 16 (1) (c)

For the purposes of section 16 (1) (c) of the Act, each relevant civil penalty is prescribed, but only in the case of an application for a master licence or for the renewal of a master licence and only if a total of at least 5 such penalties (whether of the same or a different kind) have been imposed during any period of 2 years.

(3) In this clause:

relevant civil penalty means each of the following:

- (a) a civil penalty imposed under section 357 of the [Industrial Relations Act 1996](#),
- (b) a pecuniary penalty imposed under section 224 of the [Australian Consumer Law](#) that relates to a contravention of section 18, 20, 21, 29, 31, 33, 34, 36 or 50 of that Law,
- (c) a pecuniary penalty imposed under section 546 of the [Fair Work Act 2009](#) of the Commonwealth that relates to a contravention of that Act.

Firearms Regulation 2017

(1) For the purposes of sections 11 (5) (b) and 29 (3) (b) of the Act, the following offences are prescribed:

(a) Offences relating to firearms or weapons

An offence relating to the possession or use of a firearm or any other weapon, or a firearm part or ammunition, committed under:

- (i) the law of any Australian jurisdiction, or
- (ii) the law of any overseas jurisdiction (being an offence that, had it been committed in Australia, would be an offence under the law of an Australian jurisdiction).

(b) Offences relating to prohibited drugs etc

An offence in respect of a prohibited plant or prohibited drug within the meaning of the [Drug Misuse and Trafficking Act 1985](#) or a prescribed restricted substance within the meaning of the [Poisons and Therapeutic Goods Regulation 2008](#), being an offence in respect of which the penalty imposed included any term of imprisonment (whether or not suspended), a community service order, a good behaviour bond or a penalty of \$2,200 or more, and committed under:

- (i) the law of any Australian jurisdiction, or
- (ii) the law of any overseas jurisdiction (being an offence that, had it been committed in Australia, would be an offence under the law of an Australian jurisdiction).

(c) Offences relating to public order or involving assaults against law enforcement officers

Any of the following:

- (i) an offence under Division 8A of Part 3 of the [Crimes Act 1900](#),
- (ii) an offence under Division 1 of Part 3A of the [Crimes Act 1900](#),
- (iii) an offence committed elsewhere than in New South Wales that, if

committed in New South Wales, would be an offence referred to in subparagraph (i) or (ii),

(iv) an offence of attempting to commit, threatening to commit or conspiring to commit an offence referred to in subparagraphs (i)–(iii).

(d) Offences involving violence

An offence committed under the law of any Australian or overseas jurisdiction, being: (i) an offence involving the infliction of actual bodily harm on a person in respect of which the penalty imposed included any term of imprisonment (whether or not suspended), a community service order, a good behaviour bond or a penalty of \$500 or more, or

(ii) an offence involving kidnapping or abduction, or

(iii) an offence involving stalking or intimidation, or

(iv) an offence of attempting to commit, threatening to commit or conspiring to commit an offence referred to in subparagraph (ii) or (iii).

(e) Offences of a sexual nature An offence of a sexual nature, being:

(i) an offence under Division 10, 10A or 10B of Part 3 of the [Crimes Act 1900](#), or

(ii) an offence under section 38, 38A, 111, 112 or 113 of the [Crimes Act 1900](#) that has been committed with intent to commit an offence referred to in subparagraph (i), or

(iii) an offence under Division 15 or 15A of Part 3 of the [Crimes Act 1900](#), or

(iv) an offence under section 11G of the [Summary Offences Act 1988](#), or

(v) an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be an offence referred to in subparagraphs (i)–(iv), or

(vi) any other offence that, at the time it was committed, would have been an offence referred to in subparagraphs (i)–(iv), or

(vii) an offence of attempting to commit, threatening to commit or conspiring to commit an offence referred to in subparagraphs (i)–(vi).

(f) Offences involving fraud, dishonesty or stealing

An offence under the law of any Australian or overseas jurisdiction involving fraud, dishonesty or stealing, being an offence in respect of which the penalty imposed included a term of imprisonment (whether or not suspended) for 3 months or more, a community service order for 100 hours or more of community service work, or a good behaviour bond.

(g) Offences involving robbery

An offence under the law of any Australian or overseas jurisdiction involving robbery (whether armed or otherwise).

(h) Offences relating to riot

An offence under section 93B of the [Crimes Act 1900](#) or any similar offence under:

(i) the law of any Australian jurisdiction, or

(ii) the law of any overseas jurisdiction (being an offence that, had it been committed in Australia, would be an offence under the law of an Australian jurisdiction).

(i) Offences relating to affray

An offence under section 93C of the [Crimes Act 1900](#) or any similar offence under:

- (i) the law of any Australian jurisdiction, or
- (ii) the law of any overseas jurisdiction (being an offence that, had it been committed in Australia, would be an offence under the law of an Australian jurisdiction).

(j) Offences relating to terrorism An offence relating to terrorism, being:

- (i) an offence under Part 6B of the [Crimes Act 1900](#) or against Part 5.3 of the [Criminal Code](#) set out in the Schedule to the [Criminal Code Act 1995](#) of the Commonwealth, or
- (ii) an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be an offence referred to in subparagraph (i).

(k) Offences involving organised criminal groups, consorting and recruitment An offence:

- (i) committed under section 93T, 93X or 351A of the [Crimes Act 1900](#), or
- (ii) committed elsewhere than in New South Wales that, if committed in New South Wales, would be an offence referred to in subparagraph (i).

(2) Persons subject to good behaviour bonds

For the purposes of sections 11 (5) (d) and 29 (3) (d) of the Act, the following offences are prescribed:

- (a) an offence referred to in subclause (1) (a), (c), (e) or (g)–(k),
- (b) an offence in respect of a prohibited plant or prohibited drug within the meaning of the [Drug Misuse and Trafficking Act 1985](#), or a prescribed restricted substance within the meaning of the [Poisons and Therapeutic Goods Regulation 2008](#), committed under:
 - (i) the law of any Australian jurisdiction, or
 - (ii) the law of any overseas jurisdiction (being an offence that, had it been committed in Australia, would be an offence under the law of an Australian jurisdiction),
- (c) an offence committed under the law of any Australian or overseas jurisdiction, being:
 - (i) an offence involving the infliction of actual bodily harm upon a person, or
 - (ii) an offence involving kidnapping or abduction, or
 - (iii) an offence involving stalking or intimidation, or
 - (iv) an offence of attempting to commit, threatening to commit or conspiring to commit an offence referred to in subparagraphs (i)–(iii),
- (d) an offence under the law of any Australian or overseas jurisdiction involving fraud, dishonesty or stealing.