Study M-301 July 23, 2015

Memorandum 2015-37

Deadly Weapons: Minor Clean-Up Issues

The Commission's recommendation on *Nonsubstantive Reorganization of Deadly Weapon Statutes*[1] includes a list of "Minor Clean-up Issues for Possible Future Legislative Attention." See 38 Cal. L. Revision Comm'n Reports 217, 265-80 (2009). In enacting that recommendation, the Legislature authorized the Commission to study the clean-up items included in the list.[2]

Several items on the clean-up list have already been addressed by Commission-recommended reforms.[3] This memorandum discusses several other items from the list.

This memorandum also discusses a few minor issues that weren't noted on the clean-up list. Such issues can be addressed under the Commission's general authority to "correct technical or minor substantive defects."[4]

Except as otherwise indicated, all statutory references in this memorandum are to the Penal Code.

CLEAN-UP ITEM #5: REFERENCE TO "PERSON, PARENT, OR GUARDIAN" IN SECTION 22815

Section 22815 governs the purchase and possession of tear gas by a minor who is 16 or older. Subdivision (a) authorizes the minor to purchase and possess tear gas when accompanied by a parent or guardian or with the written consent of a parent or guardian. Subdivision (b) authorizes a person to sell or furnish tear

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. 2010 Cal. Stat. ch. 711, § 7.

3. See *Deadly Weapons: Minor Clean-Up Issues*, 43 Cal. L. Revision Comm'n Reports 63 (2013); 2014 Cal. Stat. ch. 103.

4. Gov't Code § 8298.

gas to the minor, if the minor is accompanied by a parent or guardian, or has the written consent of a parent or guardian.

Subdivision (c) is slightly inconsistent with those two subdivisions, in that it adds a reference to a "person" other than a parent or guardian:

> Any civil liability of a minor arising out of the minor's use of tear gas or a tear gas weapon other than for self-defense is imposed upon the *person*, parent, or guardian who signed the statement of consent specified in subdivision (b). That *person*, parent, or guardian shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in the use of the tear gas or a tear gas weapon.

(Emphasis added.) The clean-up list asks whether the references to "person, parent, or guardian" now found in Section 12403.8(c) should be replaced with "parent, guardian, or other person." The staff has also noted another possible problem with the section, which was not mentioned on the clean-up list. Both of those issues are discussed below.

Reference to "Person"

The provisions on purchase, sale, and possession of tear gas refer to a minor's "parent or guardian." By contrast, the provision on liability for injuries resulting from a minor's use of tear gas refers to the "*person*, parent, or guardian" who signed a written consent. Who is that person?

The staff did not find any legislative history explaining the reference to a "person" in that provision. However, the staff does see a logical explanation for that reference.

The provision may have been drafted to extend liability to someone who *purports* to be a minor's parent or guardian, in order to procure tear gas for the minor. It would make sense to hold such a person liable for any harms that result from the minor's use of tear gas, to the same extent as a parent who authorizes the minor's possession of tear gas; and it would be odd to exonerate a person from such liability solely on the grounds that they fraudulently posed as a parent or guardian.

That meaning could be made clearer, if the provision were revised as follows:

> Any civil liability of a minor arising out of the minor's use of tear gas or a tear gas weapon other than for self-defense is imposed upon the ~~person,~~ parent, ~~or~~ guardian, or other person who signed the statement of consent specified in subdivision (b). That ~~person,~~

parent, ~~or~~ guardian, or other person shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in the use of the tear gas or a tear gas weapon.

Should such a change be included in a tentative recommendation?

Civil Liability of Person Who "Accompanies" Minor

The staff noticed another peculiarity about the liability rule stated in subdivision (c). It only extends to a person who signs a written consent. There is no liability under that provision for a parent or guardian who *accompanies* a minor when the minor purchases tear gas.

That does not make policy sense. The reason for holding a parent or guardian liable for a minor's use of tear gas is that the parent or guardian enables the minor to possess the tear gas. But for the parent or guardian's action, the minor would not have been able to injure anyone with tear gas.

That is true regardless of whether the parent or guardian enables the possession of tear gas by providing a written consent or by accompanying the minor to the store when the tear gas is purchased. In either case, the result is the same. The parent or guardian has taken an action that proximately caused the injury. The staff sees no policy reason to limit liability to cases where the parent or guardian provides a written consent.

There might be a practical reason to draw a distinction between the two cases. It is probably easier to prove a parent or guardian's involvement when that involvement is evidenced by a signed writing. However, any difficulty of proof would not seem to justify excusing an "accompanying" parent or guardian from substantive liability. Moreover, it seems likely that a gun dealer would keep some kind of record when selling tear gas to a minor, so as to avoid prosecution for violation of the general prohibition on such sales.

If the Commission is interested in extending liability to a parent who accompanies a minor to obtain tear gas, subdivision (c) could be revised as follows:

> Any civil liability of a minor arising out of the minor's use of tear gas or a tear gas weapon other than for self-defense is imposed upon the person, parent, or guardian who ~~signed the~~ authorized the provision of tear gas to a minor by signing a statement of consent or accompanying the minor, as specified in subdivision (b). That person, parent, or guardian shall be jointly and severally liable with the minor for any damages proximately resulting from the

negligent or wrongful act or omission of the minor in the use of the tear gas or a tear gas weapon.

Should such a change be included in a tentative recommendation?

CLEAN-UP ITEM #18: DEFINITION OF "IMITATION FIREARM" IN SECTION 20155

Section 20155 provides:

> 20155. Any manufacturer, importer, or distributor of imitation firearms that fails to comply with any applicable federal law or regulation governing the marking of a toy, look-alike, or imitation firearm, as defined by federal law or regulation, is guilty of a misdemeanor.

That section's reference to "a toy, look-alike, or imitation firearm" parallels the list of devices that are regulated by Section 5001 of Title 15 of the United States Code (and associated regulations).[5] Section 5001 makes it unlawful "for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce, as provided in subsection (b) of this section."[6] The term "look-alike firearm" is defined in the federal statute;[7] the terms "toy" and "imitation firearm" are not.

That all seems fairly straightforward, but it is complicated by the fact that "imitation firearm" is a defined term in the Penal Code.[8] That definition of "imitation firearm" is materially different from the federal definition of "look-alike firearm." The federal definition of "look-alike firearm" excludes BB guns and certain types of replicas; the California definition of "imitation firearm" does not.

That terminological overlap could potentially be confusing. Such confusion could be avoided by revising the section to use only the federal terminology, thus:

> 20155. Any manufacturer, importer, or distributor of ~~imitation~~ toy, look-alike, or imitation firearms that fails to comply with any applicable federal law or regulation governing the marking of a toy, look-alike, or imitation firearm~~, as defined by federal law or regulation,~~ is guilty of a misdemeanor. The definition of "imitation firearm" provided in Section 16700 does not apply to this section.

5. 15 C.F.R. §§ 272.1-272.5.
6. 15 U.S.C. § 5001(a).
7. 15 U.S.C. § 5001(c).
8. See Section 16700.

That would not seem to have any effect on the substance of the provision. It would still only apply to those devices that are regulated by federal law. **Should such a change be included in a tentative recommendation?**

CLEAN-UP ITEM #27: "APPLIED ORALLY" V. "ADMINISTERED ORALLY"

Sections 31610-31670 govern firearm safety certificate requirements. The Legislature mandated firearm safety certificates to ensure that persons who obtain firearms have a basic familiarity with the safe handling and storage of those firearms. In order to obtain a firearm safety certificate, an applicant must pass a written objective test. Section 31640(a) provides that this test will be available in English and Spanish.

Section 31640(b) allows for the oral administration of the test in the event that an applicant is unable to read English or Spanish. Section 31640(b) contains an odd inconsistency in phrasing. It states "If the person taking the test is unable to read, the examination shall be *administered orally*. If the person taking the test is unable to read English or Spanish, the test may be *applied orally* by a translator.

The staff did not find any evidence that "administered orally" and "applied orally" were intended to have different meanings. To avoid any confusion on that point, the staff recommends that Section 31640(b) be revised to standardize the terminology:

> (b) If the person taking the test is unable to read, the examination shall be administered orally. If the person taking the test is unable to read English or Spanish, the test may be ~~applied~~ administered orally by a translator.

Should such a change be included in a tentative recommendation?

CLEAN-UP ITEM #28: "FAMILY VIOLENCE INCIDENT" V. "DOMESTIC VIOLENCE INCIDENT"

Terminology

Sections 18250-18500 provide for the seizure of a firearm or other deadly weapon at the scene of domestic violence. With one exception, those provisions use the defined term "domestic violence."[9] However, there is one provision, Section 18405(b) that uses the term "family violence:"

9. Section 16490 ("domestic violence" defined).

> 18405. (a) If a petition is filed under Section 18400, the law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address, by registered mail, return receipt requested, that the person has 30 days from the date of receipt of the notice to respond to the court clerk to confirm the person's desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon.
>
> (b) For purposes of this section, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the *family violence* incident.
>
> (c) In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements.

(Emphasis added.)

The staff did not find any evidence that the use of "family violence" in Section 18405 was intended to mean something other than "domestic violence." The term "family violence" is not defined. There is only one other Penal Code section that uses the term, and it does so in reference to the name of a governmental program, the "Family Violence Prevention Program" in the Office of Emergency Services.[10]

It appears that the use of the term "family violence" in Section 18405 was a drafting inconsistency, rather than an attempt to draw a substantive distinction between domestic violence and family violence.

To avoid any confusion on that point, Section 18405(b) could be revised as follows:

> (b) For purposes of this section, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the ~~family~~ domestic violence incident.

Should such a change be included in a tentative recommendation?

Procedural Gap

In examining Section 18405, the staff noticed an apparent gap in the statutory procedure. Section 18405 provides for notice to the owner of a weapon that is

10. See Section 13823.4

seized at a domestic violence incident, if a petition for forfeiture of the weapon is filed. The notice must be sent to the owner's last known address. Under Section 18405(b), the last known address is presumed to be the "address provided to the law enforcement officer by that person at the time of the family violence incident." But there is nothing in the statutory scheme that provides an opportunity for the owner of the weapon to give an address to the law enforcement officer.

In order to avoid any confusion on this issue, it might be helpful to revise Section 18255 to require a record of the weapon owner's name and mailing address. It might also be helpful to revise the section for greater consistency in referring to a weapon other than a firearm. For example:

> 18255. (a) Upon taking custody of a firearm or other deadly weapon pursuant to this division, the officer shall give the owner or person who possessed the firearm or other deadly weapon a receipt.
>
> (b) The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm.
>
> (c) The receipt shall indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery as required by this division, and the date after which the owner or possessor can recover the firearm or other deadly weapon.
>
> (d) The receipt shall include the name and mailing address of the owner or person who possessed the firearm or other deadly weapon.

Should such a revision be included in a tentative recommendation?

CLEAN-UP ITEM #32: "GUN SHOW PRODUCER LICENSE" V. "PRODUCER'S CERTIFICATE OF ELIGIBILITY"

Sections 27200-27245 regulate gun shows and events. Section 27200(a) requires that a person possess a valid "certificate of eligibility" from the Department of Justice before producing, promoting, sponsoring, operating, or organizing a gun show or event. For the most part, Sections 27200-27245 are consistent in using the term "certificate of eligibility" to refer to that document.

However, Section 27245 twice refers to a "gun show producer license:"

> 27245. (a) A willful failure by a gun show producer to comply with any of the requirements of this article, except for the posting of required signs, shall be a misdemeanor punishable by a fine not to exceed two thousand dollars ($2,000), and shall render the

> producer ineligible for a *gun show producer license* for one year from the date of the conviction.
>
> (b) A willful failure of a gun show producer to post signs as required by this article shall be a misdemeanor punishable by a fine not to exceed one thousand dollars ($1,000) for the first offense and not to exceed two thousand dollars ($2,000) for the second or subsequent offense, and with respect to the second or subsequent offense, shall render the producer ineligible for a *gun show producer license* for one year from the date of the conviction.
>
> (c) Multiple violations charged pursuant to subdivision (a) arising from more than one gun show or event shall be grounds for suspension of a producer's certificate of eligibility pending adjudication of the violations.

(Emphasis added.)

The term "gun show producer license" is not used in any other code provision. However, there is good reason to believe that the term was intended to mean the same thing as "certificate of eligibility.

For example, the term "gun show producer" is defined to mean "a person who has been issued a certificate of eligibility by the Department of Justice pursuant to Section 27200."

In addition, Section 27200(e) provides:

> The Department of Justice shall recover the full costs of administering the certificate of eligibility program by fees assessed applicants who apply for certificates. A licensed gun show producer shall be assessed an annual fee of eighty-five dollars ($85) by the department.

Furthermore, Section 27245 itself, which twice refers to a "gun show producer license" (in subdivisions (a) and (b)), later refers to a "certificate of eligibility" in a parallel context:

> (c) Multiple violations charged pursuant to subdivision (a) arising from more than one gun show or event shall be grounds for suspension of a producer's certificate of eligibility pending adjudication of the violations.

The staff could find no other plausible meaning for the term "gun show producer license."

In order to avoid confusion, Section 27245 could be revised to refer to a certificate of eligibility, thus:

> 27245. (a) A willful failure by a gun show producer to comply with any of the requirements of this article, except for the posting

of required signs, shall be a misdemeanor punishable by a fine not to exceed two thousand dollars ($2,000), and shall render the producer ineligible for a ~~gun show producer license~~ certificate of eligibility for one year from the date of the conviction.

(b) A willful failure of a gun show producer to post signs as required by this article shall be a misdemeanor punishable by a fine not to exceed one thousand dollars ($1,000) for the first offense and not to exceed two thousand dollars ($2,000) for the second or subsequent offense, and with respect to the second or subsequent offense, shall render the producer ineligible for a ~~gun show producer license~~ certificate of eligibility for one year from the date of the conviction.

(c) Multiple violations charged pursuant to subdivision (a) arising from more than one gun show or event shall be grounds for suspension of a producer's certificate of eligibility pending adjudication of the violations.

Should such a revision be included in a tentative recommendation?

CLEAN-UP ITEM #53: REPETITIVE DRAFTING IN SECTION 31700

Section 31700 provides a list of persons who are exempt from the firearm safety certificate requirement. Section 31700(b)(2) provides that in certain situations, a secured creditor may be exempt from this requirement. However, that paragraph appears to be garbled, with a drafting repetition. It reads as follows:

> A secured creditor or an agent or employee thereof when the firearms are possessed as collateral for, or as a result of, *or an agent or employee thereof when the firearms are possessed as collateral for, or as a result of,* a default under a security agreement under the Commercial Code.

(Emphasis added.)

The staff recommends revising Section 31700(b)(2) as follows:

> A secured creditor or an agent or employee thereof when the firearms are possessed as collateral for, or as a result of, ~~or an agent or employee thereof when the firearms are possessed as collateral for, or as a result of,~~ a default under a security agreement under the Commercial Code.

Should such a change be included in a tentative recommendation?

CLEAN-UP ITEM #58: INCORRECT CROSS REFERENCE IN SECTION 26045

Section 25850 establishes the offense of carrying a loaded firearm while in a public place. Section 26045(b) provides a defense to prosecution for that offense:

> A violation of Section 25850 is justifiable when a person who possesses a firearm reasonably believes that person is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person who has been found to pose a threat to the life or safety of the person who possesses the firearm. This subdivision may not apply when the circumstances involve a mutual restraining order issued pursuant to Division 10 (commencing with Section 6200) of the Family Code absent a factual finding of a specific threat to the person's life or safety. It is not the intent of the Legislature to limit, restrict, or narrow the application of current statutory or judicial authority to apply this or other justifications to a defendant charged with violating *Section 25400* or committing another similar offense. Upon trial for violating Section 25850, the trier of fact shall determine whether the defendant was acting out of a reasonable belief that the defendant was in grave danger.

(Emphasis added.)

The italicized cross-reference to Section 25400 is likely incorrect, and should probably be replaced with a cross-reference to Section 25850. Section 25400 concerns carrying a *concealed* firearm, which is not the subject of this section.

That conclusion is supported by the fact that Section 26045 is almost identical to Section 25600, which provides a parallel defense to a violation of Section 25400. Section 25600 is consistent in referring only to the provision it governs (Section 25400).

The apparent reference error could be corrected as follows:

> A violation of Section 25850 is justifiable when a person who possesses a firearm reasonably believes that person is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person who has been found to pose a threat to the life or safety of the person who possesses the firearm. This subdivision may not apply when the circumstances involve a mutual restraining order issued pursuant to Division 10 (commencing with Section 6200) of the Family Code absent a factual finding of a specific threat to the person's life or safety. It is not the intent of the Legislature to limit, restrict, or narrow the application of current statutory or judicial authority to apply this or other justifications to a defendant charged with violating Section ~~25400~~ 25850 or committing another similar offense. Upon trial for violating Section 25850, the trier of fact shall

determine whether the defendant was acting out of a reasonable belief that the defendant was in grave danger.

Should such a revision be included in a tentative recommendation?

CLEAN-UP ITEM #64: "SUBDIVISION (A) *OR* (B)" V. "SUBDIVISION (A) *AND* (B)"

Section 26890 regulates the storing of firearms inventory when a licensed dealer is not open for business. Subdivision (a) provides that the firearms must be stored in a secure facility that is part of the licensee's business premises or that they must be secured with a steel rod and lock. Subdivision (b) allows the licensing authority of an unincorporated area of a county or city to impose stricter security requirements than those in subdivision (a).

Subdivision (d) provides an exception to those provisions:

> (d) *Subdivision (a) or (b)* shall not apply to a licensee organized as a nonprofit public benefit corporation pursuant to Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code, or as a mutual benefit corporation pursuant to Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code, if both of the following conditions are satisfied:
>
> (1) The nonprofit public benefit or mutual benefit corporation obtained the dealer's license solely and exclusively to assist that corporation or local chapters of that corporation in conducting auctions or similar events at which firearms are auctioned off to fund the activities of that corporation or the local chapters of the corporation.
>
> (2) The firearms are not handguns.

(Emphasis added.)

The staff suspects that the actual intent of the Legislature would be better-expressed by replacing the italicized "or" with "and." The way subdivision (d) is currently drafted suggests that both subdivisions (a) *and* (b) were not intended to apply to certain corporations. The use of *or* seems irregular as it is not being used to link alternatives. If the Commission agrees, subdivision (d) could be revised as follows:

> (d) Subdivision (a) ~~or~~ and (b) shall not apply to a licensee organized as a nonprofit public benefit corporation pursuant to Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code, or as a mutual benefit corporation pursuant to Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code, if both of the following conditions are satisfied:

Should such a revision be included in a tentative recommendation?

CLEAN-UP ITEM #68: REVISING SECTION 32010 TO IMPROVE CLARITY

Section 32010 requires that certain firearms be tested by an independent laboratory to ensure that they meet applicable standards. Subdivision (b) of that section provides:

> On or before October 1, 2000, the Department of Justice shall certify laboratories to verify compliance with the standards defined in Section 31910. The department may charge any laboratory that is seeking certification to test any pistol, revolver, or other firearm capable of being concealed upon the person pursuant to Sections 31900 to 32110, inclusive, a fee not exceeding the costs of certification.

The staff previously suggested revising this language to make it clearer. The staff believes that the following revision would be helpful:

> On or before October 1, 2000, the Department of Justice shall certify laboratories to verify compliance with the standards defined in Section 31910. The department may charge ~~any~~ a fee to certify a laboratory ~~that is seeking certification~~ to test any pistol, revolver, or other firearm capable of being concealed upon the person pursuant to Sections 31900 to 32110, inclusive~~, a fee not exceeding~~ The fee shall not exceed the costs of certification.

Should such a revision be included in a tentative recommendation?

CLEAN-UP ITEM #73: REVISING SECTION 23685 TO IMPROVE READABILITY

Section 23685 contains some awkward wording. It reads as follows:

> Each lead law enforcement agency investigating an incident shall report to the State Department of Health Services any information obtained that reasonably supports the conclusion that:
> (a) A child 18 years of age or younger suffered an unintentional or self-inflicted gunshot wound inflicted by a firearm that was sold or transferred in this state, or manufactured in this state.
> (b) Whether as a result of that incident the child died, suffered serious injury, or was treated for an injury by a medical professional.

The staff believes that this section could be reworded to improve its phrasing without any change in its meaning, thus:

> Each lead law enforcement agency investigating an incident shall report to the State Department of Health Services any information obtained that reasonably supports the conclusion ~~that:~~ that a

~~(a) A~~ child 18 years of age or younger suffered an unintentional or self-inflicted gunshot wound inflicted by a firearm that was sold or transferred in this state, or manufactured in this state. The report shall also indicate whether,

~~(b) Whether~~ as a result of that incident the child died, suffered serious injury, or was treated for an injury by a medical professional.

Should such a revision be included in a tentative recommendation?

CLEAN-UP ITEM #86: REVISING SECTION 18260 TO INCLUDE A REFERENCE TO "OTHER DEADLY WEAPONS"

Section 18260 provides:

> Any peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of *a firearm or deadly weapon* pursuant to this division, shall deliver *the firearm* within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located.

(Emphasis added.)

Read literally, this section requires the delivery of a firearm, *but not other deadly weapons*. However, it is likely that this section was meant to require the delivery of all types of deadly weapons that are taken into custody.

To avoid any misunderstanding or dispute, the staff recommends the following change to Section 18260:

> Any peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or other deadly weapon pursuant to this division, shall deliver the firearm or other deadly weapon within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located.

Should such a revision be included in a tentative recommendation?

Respectfully submitted,

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