QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	Young v Queensland Police Service Weapons Licensing Branch [2010] QCAT 629
PARTIES:	Darryl Varloy Young v Queensland Police Service Weapons Licensing Branch
APPLICATION NUMBER:	**GAR290-10**
MATTER TYPE:	General administrative review matters
HEARING DATE:	1 November 2010
HEARD AT:	Brisbane
DECISION OF:	Sean Barry, Member
DELIVERED ON:	8 December 2010
DELIVERED AT:	Brisbane
ORDERS MADE:	1. The application is allowed. 2. Pursuant to *section 24(1) (c) of the Queensland Civil and Administrative Tribunal Act* the decision of the Respondent dated 6 August 2010 is set aside and it is directed that the Respondent renew the Applicant's firearm licence no 12207860.
CATCHWORDS :	Weapons licensing; consideration of correct test for Tribunal to apply in hearing an application; meaning of 'fit and proper person'; principles and objects of the *Weapons Act 1990* considered ; meaning of 'term of imprisonment; whether serving a term of imprisonment should exclude a person from renewing a weapons licence.

APPEARANCES and REPRESENTATION (if any):

APPLICANT :	Darryl Varloy Young represented himself
RESPONDENT:	Queensland Police Service Weapons Licensing Branch represented by Senior Sergeant Cavanagh

REASONS FOR DECISION

Introduction

[1] This is an application to review the decision of the Queensland Police Service Weapons Licensing Branch to refuse the renewal of a weapons license, previously held by the Applicant.

[2] The substance of the Applicant's application to review, in the words of his application are:

> 'I would like the Tribunal to over turn the rejection notice as I have not broken any laws to stop me having a gun licence … there is no were (sic) in the laws of the gun laws that I have broken to stop me having a gun licence ... I need my gun licence for my business. I hope the Tribunal over turns the decision so I can have my licence.'

[3] Not surprisingly, the Respondent for its part in its material filed with the Tribunal argues the decision previously made to refuse the renewal of the weapons license should be upheld and the Applicant not be the holder of a weapons license.

Factual background

[4] The applicant first applied for a Weapons Act licence on 14 February 1992. A Shooters Licence was issued to him on 21 May 1992. On 18 March 1998, the licence was cancelled and a Firearms License was issued on 19 March 1998, with an expiry date of 17 March 2005. On 25 April 2005 the licence was renewed, with an expiry date of 18 June 2010. On 2 June 2010, the Applicant lodged an application to renew his licence.

[5] On 6 August 2010 the authorised officer from the Queensland Police Service signed a 'Notice of Rejection of Application to Issue or Renew Licence. The reasons quoted for the rejection in that notice are:

> 'It is not considered to be in the public interest that you hold a license authorising the possession of weapons.
>
> It is considered by the Authorized Officer the you are presently not a fit and proper person to hold a license under the Weapons Act 1990.'

[6] The authorised officer also attached an 'Information Notice' to the Notice of Rejection giving details to the Applicant about why the application had been refused. Effectively, the Authorised Officer argued the Applicant was not a fit and proper person to hold a weapons licence and is not in the public interest he holds one, applying the facts to some case authorities, which provide guidance on the term, 'fit and proper person'.

[7] In particular in this case, the Respondent argues the Applicant is currently serving a term of imprisonment and places great weight on that issues, relying on a principle it says is contained in an unreported 2003 decision from the Magistrates Court.

[8] In an affidavit filed on behalf of the Respondent, Senior Sergeant Cavanagh (who was the Authorised Officer in this case), there is some lesser reliance placed on the fact the Applicant did not notify the police, when was convicted of

offences, which earned him the term of imprisonment. Lesser reliance is placed on the Applicant not formally advising he had been convicted of some offences in 2006, which will be discussed shortly.

[9] A perusal of the Applicant's criminal history shows in 1995 he was convicted, with no convictions recorded, of a false pretence charge and a stealing charge, for which he was fined $800.00, with $600.00 compensation. In 2002 he was placed on 18 months probation with no conviction recorded, for a charge of possession of tainted property. Of more concern, in the Mackay District Court on 20 September 2006, he pleaded guilty to a charge of conspiracy to steal (between 1 December 2002 and 5 July 2003) and a count of having possession of stock with suspected the face of brands (between 6 May 2003 and 10 May 2003) ('the Mackay matters'). The Applicant was convicted and sentenced to two years imprisonment, suspended after six months, with an operational period of five years. A compensation order was also made in the sum of $18,994.75. I note that since 2006 and his release from prison. The Applicant has not been convicted of any further offences, since 2006.

[10] The Applicant in his application to renew his licence, indicated he needed the weapons to deal with the control of feral animals on a property in the Gladstone area. His licence allowed him to possess four rifles and two shotguns

The Hearing

[11] At the outset on the hearing, it became clear to me the Applicant (who was self-represented) was concerned about certain aspects of the decision process. I went to great lengths to ensure he understood the way in which the Police Service processes weapons licence matters. Of particular concern to the Applicant, was that Senior Sergeant Cavanagh did not personally look at the material, before refusing the application, simply he signed off on someone else's decision.

[12] Senior Sergeant Cavanagh explained in detail the process the Police Services uses in assessing applications. With tens of thousands of such applications being made each year, clerical staff initially examine applications and matters of concern are raised on initial assessment and referred to the authorised officers for further attention. The current matter is one which raised concern, due to the imprisonment order made against the Applicant.

[13] After hearing what Senior Sergeant had to say about the process and in particular in this case, I see nothing unusual in the way the application was processed, and am satisfied Senior Sergeant Cavanagh fully and properly assessed the material, before arriving at his decision.

[14] The Applicant explained to me he had used weapons on two properties to control feral animals. One property he owned and the other is held in a lease by family members and both are effectively used to graze cattle. He explained to me he had not contravened the weapons related laws at any stage.

[15] With regard to the Mackay matters, the Applicant said he pleaded guilty on the second day of the trial of those charges, for what I might describe as 'commercial reasons'. He could not afford any further legal fees and he says

he was led to believe that his plea would result in a wholly suspended sentence for his mother being sought (she was charged with more, but similar charges)

[16] Whilst I have listened to what the Applicant has to say about those issues, he did plead guilty to those offences, was represented at an earlier time by very experienced Counsel and again had Counsel at his trial. This is not an opportunity for the Applicant to re-argue the merits of his prospects of defending those charges. In any case, there is little doubt the Authorised Officer was not so concerned about the offences or the nature of them, but the fact that it is argued he continues to serve a period of imprisonment.

[17] Mr Young explained to me he informed Police in the cells after he had been taken into custody following his sentence, that he was the holder of a weapons licence and this, he said, was enough to comply with his obligations contained in section 24 of the Weapons Act (the Act). The Applicant did admit to me he did not take the issue any further, by trying to formally notify Police in accordance with the Act of his imprisonment, either whilst he was in custody or after he had been released. Senior Sergeant Cavanagh explained to the hearing that some offences, for example those related to violence or drug, would immediately trigger a response from the Service itself, but they otherwise were forced to rely on self-reporting, I should think because of the vast number of licences. Again I repeat that this is not the major issue of concern to the Police in this case.

[18] The Respondent for its part through Senior Sergeant Cavanagh argued this matter in a fair and balanced way, taking into account the Applicant was not represented, relying on the well-drafted material put before the Tribunal. The substance of that material and his arguments before me, were that the Applicant is simply not a fit and proper person and it is not in the public interest he hold a weapons licence. He placed great reliance on an unreported decision by a Magistrate, which I will refer to shortly. He explained he did not consider the issue of non-disclosure of the convictions following the 2006 Court appearance, to be an important one. It was the fact the Applicant remains serving a term of imprisonment.

[19] During the hearing the Applicant raised the issue of his mother being charged with similar and indeed more serious charges based largely on the same set of facts that led to his convictions in 2006. The material he provided to the Tribunal in this regard, indeed supports his contention.

[20] The Applicant's mother was sentenced to a wholly suspended sentence for her part in the Mackay matters. Although the Police Service initially rejected the renewal of Ms Young's weapons licence, but not because she was serving a 'term of imprisonment', which is inconsistent with the handling of the Applicant's matter. Before Ms Young's appeal of her matter could be heard on its merits, the Police Service changed its stance to the objection and she was able to renew her licence. On the face of it, this inconsistency might raise concerns about the how the Police Service approaches these matters and the systems they have in place.

General legal principles

[21] The Weapons Act (the Act) makes provision for a person who is dissatisfied with a decision refusing an application for a licence, permit, approval or other authority under the Act to apply for a review of the decision.[1] The review jurisdiction is exercised in accordance with section 18 of the *Queensland Civil and Administration* Act (the QCAT Act) and section 20 of that act makes it clear that a review of such a decision is by way of a fresh hearing on the merits.

[22] As Her Honour the Deputy President said in *Kehl v Bord of Professional Engineers of Queensland* points out:

> 'It is apparent from Mrs Kehl's submissions on this application that she has misapprehended the function of the Tribunal on an application to review a decision. The Tribunal's role in exercising review jurisdiction is to reconsider the original decision and to make the correct and preferable decision. The review is conducted on the merits, by way of a fresh hearing. Unlike judicial review, the Tribunal's function is to review the decision – not the process by which it was arrived at, nor the reasons given for making it. Accordingly, the Tribunal is not required to identify an error in either the process or the reasoning that led to the decision being made. There is no presumption the original decision is correct.[2]' (emphasis added)

[23] Very recently, section 20 of the QCAT Act has become the subject of appeal and discussion in the Tribunal by His Honour the President and Member Dr Mandikos and the following comments were made:

> '[41] The need to undertake a comprehensive merits review is underscored by the interpretation that has been given to s 20 of the QCAT Act. The appropriate interpretation of the words contained in s 20(1) is to produce the "correct and preferable" decision, were addressed in *Queensland Building Services Authority v Meredith* [2010] QCATA 50:
>
> *"The term commonly used in similar legislation touching administrative review and, I think, the better expression is "the correct or preferable" decision – for reasons explained by Kiefel J in Shi v Migration Agents Registration Authority."*
>
> [42] My conclusions regarding the applicability of the reasoning of McGill DCJ in *Wallace* are therefore galvanised by s 20 of the QCAT Act, which requires a "fresh hearing, on the merits". To suggest that this expression, when considered in juxtaposition with the relevant provisions in the *Racing Act*, gives rise to something other than an appeal by way of hearing *de novo* would be to require a gloss on these words that cannot be credibly supported given the clear and unmistakable language used in s 20. In this instance the "correct and preferable decision" is one that allows QCAT to consider matters relating to both the alleged contravention of the standards by the jockey, as well as the penalty.'[3]

[24] That is not to say the original decision is not considered and the arguments by the decision-maker are not taken into account, that would be a ridiculous outcome, it is just that the task here is to take into account all the evidence and arrive at the correct and preferable decision, based on a fresh hearing on the merits'.

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1 Section 142(1)(a).
2 [2010] QCATA 58, at para 9.
3 Q*ueensland Racing Ltd v McMahon* [2010] QCATA 73.

The Weapons Act

[25] The clear intention of the legislature in the principles underlying the Act and the weapons possession regime in Queensland, is that the possession of a weapon is not something which occurs of right. Indeed, section 3 states:

> '(1) The principles underlying this Act are as follows—
>
> (a) weapon possession and use are subordinate to the need to ensure public and individual safety;
>
> (b) public and individual safety is improved by imposing strict controls on the possession of weapons and requiring the safe and secure storage and carriage of weapons.
>
> (2) The object of this Act is to prevent the misuse of weapons.'

[26] However, it is not an impossible test for someone to possess a weapon in a decentralised, rural state such as Queensland, for as the Senior Sergeant told the Tribunal during the hearing, the Police Service is responsible for supervising some 150,000 licences in this state.

[27] What an applicant for a licence has to do, is establish they have a legitimate reason for possessing a weapon. Section 11 of the Act sets out the genuine reasons for possessing weapons, which among others includes an occupational requirement, including an occupational requirement for rural purposes. It has never been suggested the Applicant in this case is not someone who possesses weapons for anything other than a legitimate purpose.

[28] The other important issue (particularly in this case and others like it) is an applicant for a licence must establish they are 'fit and proper person' to hold a licence.

Fit and proper person and public interest

[29] Section 10B of the Act states:

> '**10B Fit and proper person – licensees**
>
> (1) In deciding or considering, for the issue, renewal suspension or revocation of a licence, whether a person is, or is no longer, a fit and proper person to hold a license, an authorised officer must consider, among other things–
>
> (a) the mental physical fitness of the person: and
>
> (b) whether a domestic violence order has been made against the person:
>
> (c) whether the person has stated anything in or in connection with the application for a license, or an application for the renewal of a license, the person knows is false or excluding material particularly: and
>
> (ca) whether there is any criminal intelligence or other information to which the authorised officer has access and indicates:
> (i) the person is at risk to public safety; or
> (ii) that authorising the person to possess a weapon would be contrary to the public interest; and

(d) the public interest.'

[30] In the current matter, the Respondent has referred me to a number of authorities, to assist in providing guidance in determining what it means to be a 'fit and proper person'.

[31] In the decision of *Pollock v Queensland Police Service Weapons Licensing Branch* [2010] QCAT 77, Senior Member Oliver said the following on this issue, when he was referred to the same authorities:

> '22. When considering public interest and the discretion involved in making a decision, here to revoke the licence, the discretion should be exercised in the way that promotes the principles and objects of the act.
>
> 23. The respondent relied on a number of decisions which includes *Director of Public Prosecutions v Smith*[4]*; Comalco Aluminium (LA) Ltd v O'Connor and others*[5]. In particular, in *Smith* it was held that the public interest embraced matters, among others, of standards of human conduct and of the function of government and government's accepted and acknowledged standards to be for the good order of society against the well being of its members. The interest is therefore the interest of the public and is distinct from the interests of the individual or individuals. This is undoubtedly correct and for the purposes of this decision it is adopted.
>
> 24. Even so, some conduct on the part of the applicant must be identified to show that it would not be in the public's interest for Mr Pollock to retain his weapons license.'

[32] I note section 3 of the QCAT Act when referring to the objects of the QCAT legislation, that it explicitly explains an intention to promote and enhance the quality and consistency of decisions and decision-makers in the Tribunal and so in determining this matter I have examined those authorities and I adopt the views expressed by the Learned Senior Member above.

[33] The Respondent also referred me to the decision of *Australian Broadcasting Tribunal v Bond*[6] in which Toohey and Gaudron JJ commented:

> 'The expression "fit and proper person', standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely further conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question'
>
> and further the words of His Honour, The Chief Justice Mason:
>
> 'The question whether a person is fit and proper is one of value judgment. In that process the seriousness or otherwise of particular conduct is a matter for evaluation by the decision maker. So too is the weight, if any, to be given to matters favouring a person whose fitness and propriety are under consideration.'[7]

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4 [1991] 1 V.R.51 at 63
5 (1995) 131 ALR 657
6 (1990) 94 ALR 11, at 56
7 (1990) 94 ALR 11, at 63

[34] It is clear from these authorities and simply applying common sense, that an exact formula cannot ever be determined for such a task as determining what it means to be a 'fit and proper person' and the facts and circumstances of the particular case, the particular person and the relevant legislative regime need to be considered. What is in the public interest will also been inextricably linked to the whether someone is a fit and proper person.

Why the Respondent argues the Applicant is not a fit and proper person due to the Mackay matters

[35] Both the material filed in support of its case and the submissions at the hearing made it clear that if the Applicant had not been convicted of the Mackay matters and sentenced to imprisonment, the Respondent would not have harboured concerns he was not a fit and proper person. In other words, the Mackay convictions are crucial to their arguments.

[36] In summary, the Respondent argued the applicant continued to serve a term of imprisonment following his release and as such he should not be allowed to hold a weapons licence. One should think the converse argument applies, that if the sentence of imprisonment (from their point of view) had ended, then the Applicant might be otherwise a fit and proper person.

[37] The Respondent relied on an unreported weapons appeal from the Magistrates Court. In the matter of *Barry James Power v Queensland Police Service*[8] the Learned Magistrate in his decision addressed each subsection of section 10B in turn, making findings about whether the Applicant in that case was, or was not a fit and proper person. It seems in summary the Learned Magistrate failed to find any concerns from those findings, that would directly preclude or exclude the licence being held. The Learned Magistrate then moved on to discuss a conviction that Applicant had for dangerous operation of a vehicle causing death. For that offence the Applicant was imprisoned for four years, released on home detention and parole, with the sentence expiring on 16 March 2004, about eight months after the decision.[9]

[38] The Learned Magistrate explained he did not have concerns the Applicant would put the public at safety risk from possessing a weapon as the dangerous driving offence was not one of violence, which might exclude him under section 10B(2)(a)(ii) of the Act.

[39] However, the Learned Magistrate held the Applicant was not a fit and proper person to hold a licence by referring to the need for strict control of weapons in the Act, saying:

> 'Now leaving aside for the time being the offence for which Mr Power was convicted and sentenced, the question is does the issue of a weapons licence to a prisoner serving a term of imprisonment indicate of any control. I am satisfied that there can only be one answer to that and it is no.
>
> The object of the Weapons Act is to apply strict control. I am satisfied that to issue licences to persons serving a period of prison would be indicative of no control whatsoever.'[10]

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8 (unrep., Magistrates Court of Queensland, Noosa, 28 August 2003).
9 See page 7.
10 See page 7.

And further

> 'I am compelled strongly to the view that it is simply not open to restore – to conclude a licence can be issued to a person serving a sentence of imprisonment for a crime. And I see no basis whatsoever for applying any different principle to a person (who) is on parole. Parole simply means that the person is serving his term in the community rather than in prison, but he is still a person who is serving a term of imprisonment.'[11]

[40] So, it would seem the view held in that case is if someone is 'serving a term of imprisonment', they should not hold a weapons licence. I cannot find any decision or legislative provision, which supports this absolute view. Therefore, it is a view held on an exercise of the general discretion, which in itself cannot act as a precedent, or binding authority. Whilst of interest, I find I am not bound by this decision and particularly not so in this case, for reasons which will become clear.

[41] If I am wrong about the conclusions about what I say in the previous paragraph, I would like to say something about whether the Applicant in the case is 'serving a term of imprisonment'.

Is the Applicant currently serving a term of imprisonment?

[42] Mr Young was convicted of the Mackay matters on 20 September 2006 and sentenced to two years imprisonment, suspended after six months, for an operational period of five years. That means the operational period expires on 19 September 2011, because the operational period commences on the day the order is made.[12]

[43] In addition to the case of *Power*, the Respondent referred me to the decision of *Smith v Queensland Community Corrections Board*[13]. I should say that case (and many like it which followed) discussed the issue of sentence calculations in regard to parole and remission entitlements alone. His Honour Davies JA said:

> 'Although the present respondent plainly came within s. 165(1)(a)(i), other parts of that subsection are relevant to the question of construction. The phrase ''term of imprisonment'' in par (a)(ii) means term of imprisonment imposed by the court for that is the only reasonable inference to be drawn from the phrase ''term of imprisonment imposed under the *Penalties and Sentences Act* …''. The period referred to in s. 165(1)(b) is also one which was fixed by the court, ''fixed by a judge under the *Criminal Law Amendment Act* …''. It is unlikely therefore that the phrase ''term of imprisonment'' in par (a)(i) has any different meaning.'

[44] The Respondent argues the opinion expressed in *Power* coupled with the principle in *Smith* mean the Applicant remains serving a 'term of imprisonment' and is therefore not a fit and proper person to hold a licence.

[45] The later cases which cited, applied or discussed *Smith* were also cases which concerned themselves with the issues of calculating sentences for issues or remissions (as they then existed), or parole, not a suspended sentence.[14]

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11 See page 8.

12 See section 144(6) of the *Penalties and Sentences Act 1992*.

13 [2002] 1 Qd R 448.

14 See *Swan v Chief Executive, Department of Corrective Services* [2004] QCA 159, at paras 16 and 17; *Sutherland v Davidson* [2005] QCA 56, at para 10; *Hooson v Department of Corrective Services* [2005] 1 Qd R 154, at 156 (paras 5 – 8) and 157 (para 12); *Uittenbosch v Chief Executive,*

[46] However the situation for people being supervised on Parole Orders, or for those completing Intensive Correction Orders[15] is they are required to have constant contact with the Department and complete courses an so on, as part of their orders. As each days moves by they are serving more time of the actual sentence they have received until it has held they have breached their orders and parole is suspended or cancelled or they are re-sentenced for breaching their intensive correction order. That means they can actually reduce the period of imprisonment by complying with their orders.

[47] Conversely, whilst the *Penalties and Sentences Act* 1992 says compliance during an operational period is something the court can take into account when dealing with someone for breaching a suspended sentence[16], at first instance they are liable to serve the entire unexpired portion of the sentence. In the hypothetical case Mr Young had been placed on parole, that period would have been for 18 months following his release and he would now have completed the sentence. If he had been sentenced to an ICO and had completed the requirements of 12 month order in the community, the sentence would also have been at an end.

[48] In the current case, he was effectively not serving a period of imprisonment after his release, he was simply living through an operational period of the sentence. On the face of it this is very different to a parole order (such as in the case of *Power*)

[49] It could be argued, 'term of imprisonment' in regard to a suspended sentence may be caught by section 4 of the *Penalties and Sentences Act*, where it says:

> '***term of imprisonment***' means the duration of imprisonment imposed for a single offence, and includes the —
> (a) imprisonment an offender is serving, or is liable to serve —
> (i) for default in payment of a single fine; or
> (ii) for failing to comply with a single order of a court. … '

[50] I think that is not the case and the specific provisions concerning suspended sentences are more revealing. The mechanics of a suspended sentence are that an offender can only be returned to Court regarding a breach of a suspended sentence, if they commit another offence punishable by imprisonment, during the operational period.[17]

[51] A Court then has the power to deal with the person for the breach of the suspended sentence, or if for example it were a District Court order following a breach offence in the Magistrates Court, commit the person to that Court to be dealt with for a breach of the original offence.[18] The Court dealing with the breach, is then required to exercise one of the powers contained in section 147 of the *Penalties and Sentences Act 1992*.

[52] Section 147 states in part:

Department of Corrective Services [2006] 1 Qd R 565, at 567 (para 8); *Laman v Department of Corrective Services* [2005] QSC 209, at para 31 – 40.

[15] See Part 6 of the *Penalties and Sentences Act 1992*, concerning general conditions etc of Intensive Correction Orders.

[16] Section 147(3)(a)(v)(A).

[17] Section 144(5) of the *Penalties and Sentence Act 1992*.

[18] Section 146.

'**147 Power of court mentioned in s 146**

(1) A court mentioned in section 146(2), (2A), (4) or (6) that deals with the offender for the suspended imprisonment may—

(a) order—

(i) that the operational period be extended for not longer than 1 year; or

(ii) if the operational period has expired when the court is dealing with the offender—

(A) that the offender's term of imprisonment be further suspended; and

(B) that the offender be subject to a further stated operational period of not longer than 1 year during which the offender must not commit another offence punishable by imprisonment if the offender is to avoid being dealt with under section 146 for the suspended imprisonment; or

(b) order the offender to serve the whole of the suspended imprisonment; or

(c) order the offender to serve the part of the suspended imprisonment that the court orders.' (emphasis added)

[53] It can quickly be observed that subsections (1) (b) and (c) deal with the situation where a Court orders the offender to serve whole, or part, of the remaining period of imprisonment. The wording there is important and revealing, because it invites the Court to order the offender to 'serve' that remaining period.

[54] If the offender was serving the term whilst living in the community during the operational period, why would it use these words? It is clear that suspended sentences can be characterised somewhat differently to Parole Orders, or Intensive Correction Orders, the latter having been held to be a term of imprisonment.[19] Whilst the person lives in the community, they are not serving a 'term of imprisonment', but living through the operational period of the order of the Court, which is quite different.

[55] So, in the current case Mr Young was serving a 'term of imprisonment' for the first six months whilst in actual custody, but since his release has not been serving the 'term of imprisonment', something he will only do if he re-offends.

[56] In instances where people have been imprisoned and they are not automatically precluded form holding a licence by the Act, it is necessary to look at the nature of the offences which have been committed (as well as the other normal relevant considerations), not the mere fact they exist at all. There can be no express rule, otherwise the Legislature would have created one, instead of the exclusions it has listed in section 10B(2)(a)(ii) of the Act.

Discussion

[57] The arguments of the Respondent in this case in refusing renewal of the licence are that following the decision of *Power*, the Applicant is not a fit and proper person because he is currently serving a term of imprisonment.

[58] I have concluded that the Applicant is not serving a term of imprisonment. If I am wrong, I am not satisfied that *Power* is authority for what the Respondent is arguing in this matter. The Learned Magistrate was not applying an absolute legislative exclusion, when finding the Applicant in that case, was not a fit and proper person, because he was serving a term of imprisonment.

[19] *R v Skinner* [2001] 1 Qd R 322, at 325.

[59] I hold a different view to that held by the Learned Magistrate in *Power*. If the Legislature had wanted to exclude people serving terms of imprisonment without exception, surely it would have said so in section 10B of the Act, or is some other part of the Act. The fact it does not must mean it wished the Tribunal to exercise a discretion based on the provisions of the Act and the facts and circumstances of the particular case.

[60] Obviously someone actually serving a term should not hold a licence, but once in the community the discretion must apply. In a list which is not exhaustive, the Tribunal would then take into account the:

- provisions of the Act;
- personal circumstances of the Applicant:
- intended use and need for the weapon(s);
- criminal history of the Applicant;
- nature and seriousness of the offences committed by the Applicant;
- any other relevant matters.

[61] In the current case I have approached the matter afresh, without being bound by the arguments in *Power*, for I have distinguished those, but if I am wrong about the Applicant currently serving a 'term of imprisonment', I would not have made a different decision. That is because I am still entitled to exercise a discretion, to make the correct and preferable decision in the circumstances and there is no absolute legislative exclusion for someone serving a term of imprisonment, from holding a weapons licence.

Conclusion

[62] After carefully considering this matter, I have taken the following into account, which act in favour of the Applicant (not exhaustive):

- need for weapons;
- legitimate use of the weapons;
- no offences which automatically exclude him;
- specifically no offences involving weapons' related facts;
- nature of the Mackay matters;
- the period of time he has held weapons-related licences without complaint;
- the fact his mother kept her licence without real complaint by the Police Service, when she was in a very similar situation to him;
- other personal circumstances.

[63] I have also taken into account the following matters, which probably do not act in his favour (to varying degrees and not exhaustive):

- the fact he was sent to prison for the Mackay matters;
- that he is subject to a partially suspended sentence;
- that he failed in following up to notify the Weapons Licensing Branch of his conviction of the Mackay matters

[64] I have considered the provisions of the Act and in particular those contained in section 10B. I reject the view it is in the public interest to refuse the renewal of Mr Young's licence and I find Mr Young is a fit and proper person to hold a weapons licence and I therefore allow the application and set aside the refusal to allow him to renew his licence.