

Memorandum 2011-3

Nonsubstantive Reorganization of Deadly Weapon Statutes: Clean-Up Legislation (Comments on Tentative Recommendation)

Last year, the Legislature enacted two bills to implement the Commission's recommendation on *Nonsubstantive Reorganization of Deadly Weapon Statutes*, 38 Cal. L. Revision Comm'n Reports 217 (2009). The new legislation is scheduled to become operative on January 1, 2012.

Before that operative date, a clean-up bill should be enacted, to take care of a few loose ends from last year. In December, the Commission approved a tentative recommendation regarding those matters, which has been circulating for comment. The comment deadline was January 21, but comments are still welcome.

To date, the Commission has not received any communication that is clearly intended as a comment on the tentative recommendation. That is not surprising, because the comment period was short, and virtually all of the matters addressed in the tentative recommendation are technical, nonsubstantive points that are unlikely to generate concern or debate.

Although the Commission has not received any communication that is clearly intended as a comment on the tentative recommendation, it has received other relevant input since December, from several sources. These include: (1) a number of suggestions from the Office of Legislative Counsel on the bill draft request we submitted, which was based on the tentative recommendation, (2) a suggestion from a long-time legislative staffer regarding simplification of certain deadly weapon statutes, and (3) a citecheck of the tentative recommendation. That input is discussed below.

The Commission needs to decide whether to approve its proposal (with or without revisions) as a final recommendation, for printing and introduction in the Legislature.

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.

SUGGESTIONS FROM THE OFFICE OF LEGISLATIVE COUNSEL

This year's bill introduction deadline is February 18, and the deadline for submitting a bill draft request to the Office of Legislative Counsel for timely introduction was January 21. To be able to meet those deadlines, the staff (with the Commission's approval) submitted a bill draft request based on the tentative recommendation.

In preparing the bill draft for introduction, the Office of Legislative Counsel suggested a number of revisions, which are discussed below.

References to "Sections 26700 to 26915, inclusive"

In several places, the Office of Legislative Counsel suggested replacing a reference to "Sections 26700 to 26915, inclusive" with a reference to "Article 1 (commencing with Section 26700) and Article 2 (commencing with Section 26800) of Chapter 2 of Division 6 of Title 4 of Part 6." See the following provisions in the tentative recommendation: Code Civ. Proc. § 527.9(b) (p. 24, lines 24-25); Fam. Code § 6389(c)(2) (p. 28, line 21); Penal Code § 11106(a)(1)(G), (b)(4), (c)(1)(A), (d)(1)(B) (p. 79, line 20; p. 80, lines 13-14, 19; p. 81, line 33).

The staff recommends that the Commission accept this suggestion. The Commission Chair has already given his approval for purposes of preparation of the bill draft.

The phrase "Sections 26700 to 26915, inclusive" encompasses exactly the same statutory material as the phrase "Article 1 (commencing with Section 26700) and Article 2 (commencing with Section 26800) of Chapter 2 of Division 6 of Title 4 of Part 6." Although the latter phrase is more cumbersome than the former, using it will not impede the readability of the provisions in question. The phrase suggested by the Office of Legislative Counsel also has a significant advantage: If new material is added at the end of Article 2 sometime in the future (e.g., Section 26916), that phrase will automatically encompass the new material, while the phrase "Sections 26700 to 26915" will need to be adjusted to reflect the addition of the new material. In light of this, the suggested change appears reasonable and entirely nonsubstantive. **Is it acceptable to the Commission?**

References to Former Penal Code Section 12084

In three places, Penal Code Section 11106 refers to "Section 12084 as that section read prior to being repealed by the act that amended this section." See Penal Code § 11106(a)(1)(F), (b)(1)(B), (b)(2). Those references predate last year's

nonsubstantive reorganization. The Office of Legislative Counsel suggests replacing each of them with the phrase “Section 12084 as that section read prior to being repealed on January 1, 2006.”

The staff recommends that the Commission accept this suggestion. The Commission Chair has already given his approval for purposes of preparation of the bill draft.

Former Penal Code Section 12084 was repealed on January 1, 2006, by an act that also amended Section 11106 (2005 Cal. Stat. ch. 715, AB 1060). Thus, the phrase suggested by the Office of Legislative Counsel (“Section 12084 as that section read prior to being repealed on January 1, 2006”) is equivalent to the current phrase (“Section 12084 as that section read prior to being repealed by the act that amended this section”), but much more straightforward. In light of this, the suggested change appears reasonable and entirely nonsubstantive. **Is it acceptable to the Commission?**

Correction of Cross-Reference to Public Utilities Code Section 2891.1(c)(2)

Government Code Section 6254(z) says:

6254. Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

....
(z) Records obtained pursuant to *paragraph (2) of subdivision (c)* of Section 2891.1 of the Public Utilities Code.

(Emphasis added.) The Office of Legislative Counsel recommends replacing the reference to paragraph (c)(2) of Public Utilities Code Section 2891.1 with a reference to paragraph (f)(2) of that section.

The staff recommends that the Commission accept this suggestion. The Commission Chair has already given his approval for purposes of preparation of the bill draft.

Subdivision (z) was added to Government Code Section 6254 in 1998 (see 1998 Cal. Stat. ch. 110). It has not been changed since that time, but Public Utilities Code Section 2891.1 has been repeatedly amended. The material that used to be in paragraph (c)(2) of that section is now in paragraph (f)(2) of that section. Consequently, the cross-reference in Government Code Section 6254(z) should be updated as the Office of Legislative Counsel suggests.

The Comment to Government Code Section 6254 should also be revised to note the cross-reference correction:

Comment. Subdivision (u) of Section 6254 is amended to reflect nonsubstantive reorganization of the statutes governing control of deadly weapons.

Subdivision (z) is amended to correct a cross-reference. Subdivision (z) was added to Section 6254 by 1998 Cal. Stat. ch. 110, § 1. Subdivision (z) has not been changed since that time, but the provision cross-referenced in it (Pub. Util. Code § 2891.1) has been repeatedly amended. The material that used to be in paragraph (c)(2) of that provision has been relocated to paragraph (f)(2) of that provision. The cross-reference in subdivision (z) of Section 6254 is now updated to reflect that relocation.

Are these changes acceptable to the Commission?

Stylistic Revision of Penal Code Section 629.52

To reflect the nonsubstantive reorganization of the deadly weapon statutes, the tentative recommendation proposes to revise Penal Code Section 629.52 as follows:

629.52. Upon application made under Section 629.50, the judge may enter an ex parte order, as requested or modified, authorizing interception of wire or electronic communications initially intercepted within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines, on the basis of the facts submitted by the applicant, all of the following:

(a) There is probably cause to believe that an individual is committing, has committed, or is about to commit, one of the following offenses:

.....
(2) Murder, solicitation to commit murder, the commission of a felony involving a destructive device in violation of Section ~~12303, 12303.1, 12303.2, 12303.3, 12303.6, 12308, 12310, or 12312~~ 18710, 18715, 18720, 18725, 18730, 18740, 18745, 18750, or 18755, or a violation of Section 209.

The Office of Legislative Counsel suggests moving the phrase “or a violation of Section 209” to make the sentence read more smoothly, as follows:

(1) Murder, solicitation to commit murder, a violation of Section 209, or the commission of a felony involving a destructive device in violation of Section ~~12303, 12303.1, 12303.2, 12303.3, 12303.6, 12308, 12310, or 12312, or a violation of Section 209~~ 18710, 18715, 18720, 18725, 18730, 18740, 18745, 18750, or 18755.

The staff recommends that the Commission accept this suggestion. The Commission Chair has already given his approval for purposes of preparation of the bill draft.

If the change is made, the Comment should also be revised to reflect the stylistic revision:

Comment. Subdivision (a) of Section 629.52 is amended to reflect nonsubstantive reorganization of the statutes governing control of deadly weapons.

Subdivision (a) is also amended to make a stylistic revision.

Are these changes acceptable to the Commission?

Suggested Change to Penal Code Section 166(c)(4)

Penal Code Section 166(c)(4) says:

A second or subsequent conviction for a violation of any order described in paragraph (1) occurring within seven years of a prior conviction for a violation of any of those orders and involving an act of violence or “a credible threat” of violence, as provided in *subdivisions (c) and (d) of Section 139*, is punishable by imprisonment in a county jail not to exceed one year, or in the state prison for 16 months or two or three years.

(Emphasis added.) The cross-referenced provisions — “subdivisions (c) and (d) of Section 139” — state:

(c) As used in this section, “a credible threat” is a threat made with the intent and the apparent ability to carry out the threat so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.

(d) The present incarceration of the person making the threat shall not be a bar to prosecution under this section.

The Office of Legislative Counsel suggested revising Section 166(c)(4) such that it would cross-refer only to subdivision (c) of Section 139, instead of both subdivisions (c) and (d). In support of this suggestion, the office pointed out that (1) Penal Code Section 273.6(d) refers to “‘a credible threat’ of violence, as defined in subdivision (c) of Section 139,” (2) the legislative history supports this approach, and (3) the “reference is to a definition, and it has always resided in one subdivision not two.”

The staff recommends that the Commission reject this suggestion. The Commission Chair has already taken this position for purposes of preparation of the bill draft.

Paragraph (c)(4) was added to Section 166 by 1993 Cal. Stat. ch. 583, § 4. At that time, it read exactly as it does now, and Section 139(c)-(d) read exactly as they do now (see 1990 Cal. Stat. ch. 80, § 1). Referring to subdivision (d) in

addition to subdivision (c) is not unreasonable, because subdivision (d) can be considered an embellishment on the definition provided in subdivision (c). The staff did not see anything in the legislative history indicating that the reference to subdivision (d) might be a mistake. We fear that deleting that reference might be viewed as a substantive change, at least by some people. It seems prudent to avoid that risk and leave the current language alone. **Does the Commission agree?**

Amendment of Government Code Section 53071.5

Finally, the Office of Legislative Counsel suggested withdrawing the amendment of Government Code Section 53071.5 that's proposed in the tentative recommendation. As the Commission might recall, Section 53071.5 concerns preemption of regulations relating to imitation firearms.

The version of Government Code Section 53071.5 that existed when the Commission prepared its report included three cross-references to material that would be relocated by the deadly weapons reorganization. To reflect that reorganization, the Commission recommended the following amendment of that section:

53071.5. By the enforcement of this section, the Legislature occupies the whole field of regulation of the manufacture, sale, or possession of imitation firearms, as defined in ~~Section 12550~~ subdivision (a) of Section 16700 of the Penal Code, and that ~~section~~ subdivision shall preempt and be exclusive of all regulations relating to the manufacture, sale, or possession of imitation firearms, including regulations governing the manufacture, sale, or possession of BB devices and air rifles described in ~~subdivision (g) of Section 12001~~ Section 16250 of the Penal Code.

Comment. Section 53071.5 is amended to reflect nonsubstantive reorganization of the statutes governing control of deadly weapons.

Nonsubstantive Reorganization of Deadly Weapon Statutes, 38 Cal. L. Revision Comm'n Reports at 1088.

That amendment was included in the lengthy bill consisting of conforming revisions, but with a deviation from the language recommended by the Commission. The bill only corrected two of the three cross-references; it did not replace "that section" with "that subdivision." See SB 1115 (Committee on Public Safety), 2010 Cal. Stat. ch. 178, § 35. To avoid the expense of amending such a lengthy bill, that problem was not addressed in the legislative process.

The failure to replace “that section” with “that subdivision” could be viewed as a substantive change, because “that section” now refers to new Penal Code Section 16700 (operative Jan. 1, 2012), instead of Penal Code Section 12550 (to be repealed Jan. 1, 2012). Those sections are not interchangeable. Although new Section 16700(a) derives from soon-to-be-repealed Section 12550, new Section 16700(b) does not. It derives instead from Section 12555(c) (to be repealed Jan. 1, 2012).

By replacing “that section” with “that subdivision,” the new amendment of Government Code Section 53071.5 shown at page 40 of the tentative recommendation would fully implement the Commission’s recommendation, and would conform to the nonsubstantive intent of the reorganization of the deadly weapon statutes.

As a substantive matter, however, it might make sense to refer to the entirety of new Section 16700 (or perhaps even additional statutory material on imitation firearms) in Government Code Section 53071.5. It might also make sense to revise the section’s introductory clause by replacing “enactment” with “enforcement.” Those points are explained in more detail in the note on pages 40-41 of the tentative recommendation.

The key question for the Commission is whether to (1) simply conform Section 53071.5 to the nonsubstantive reorganization of the deadly weapon statutes, or (2) try to substantively improve Section 53071.5 at this time? If the former, then the Commission should proceed with the amendment in the tentative recommendation. If the latter, then leaving the statute in its current form is only one possibility; there are perhaps better means of revising the provision to address the perceived problems.

The staff strongly recommends that the Commission proceed with the amendment in the tentative recommendation. The Commission Chair has already taken this position for purposes of preparation of the bill draft. Moreover, a key legislative contact has firmly cautioned us against doing anything that might be perceived as a substantive change.

The amendment in the tentative recommendation is consistent with the nonsubstantive intent of last year’s reorganization, and it is what the Commission has recommended all along. This year’s bill is just a clean-up bill, to ensure that the reorganization is fully implemented. Substantive improvements should not be made in this bill, but achieved in a separate vehicle at an appropriate time. It is questionable whether the Commission even has authority

to propose the type of improvements under discussion; this matter is not on the list of “Minor Clean-Up Issues for Possible Future Legislative Consideration” that the Commission included in its report. See *Nonsubstantive Reorganization of Deadly Weapon Statutes*, 38 Cal. L. Revision Comm’n Reports at 265-80.

For all of these reasons, the staff is convinced that the Commission should follow through and amend the Section 53071.5 as originally proposed (replacing “section” with “subdivision”), so as to adjust it in a nonsubstantive manner to reflect the deadly weapons reorganization.

Does the Commission agree?

SIMPLIFICATION SUGGESTION FROM IRWIN NOWICK

Attorney Irwin Nowick, a long-time legislative staffer, has submitted a suggestion to the Commission “for simplicity sake.” Email from I. Nowick to B. Gaal (1/4/10). He notes that the waiting period exemptions in Penal Code Sections 26955 to 26970 and the waiting period exemptions in Penal Code Sections 27655 to 27670 “are duplicative.” He suggests repealing Sections 27655 to 27670, and “stating a dealer shall comply with what was 12072(c) as a licensing condition.” *Id.*

Mr. Nowick is correct that there is considerable overlap between (1) Sections 26955 to 26970 and (2) Sections 27655 to 27670. But Sections 26955 to 26970 are exemptions to the waiting period described in Penal Code Section 26815, while Sections 27655 to 27670 are exemptions to the waiting period described in Penal Code Section 27540.

The content of Section 26815 is quite similar to the content of Section 27540(a)-(d). However, breach of Section 26815 is grounds for forfeiture of a dealer’s license (see Penal Code § 26800), while breach of Section 27540 is a crime (see Penal Code § 27590).

Mr. Nowick is clearly cognizant of that distinction. That is evident from what he proposes: He not only suggests repealing Sections 27655 to 27670, but also suggests “stating a dealer shall comply with what was 12072(c) as a licensing condition.”

The staff is not sure precisely what Mr. Nowick has in mind in making the latter suggestion. We are confident, however, that it would amount to more than mere clean-up of a loose end from last year’s bills.

We therefore recommend that the Commission not attempt to incorporate his suggestion into this year's clean-up bill. That bill should focus on the technical revisions necessary to fully implement the nonsubstantive reorganization that the Commission proposed in its report, and the Legislature and Governor approved through the enactment of SB 1080 and SB 1115. Mr. Nowick's suggestion is beyond that narrow scope, but may warrant future legislative consideration.

CITECHECK

During January, the Commission was fortunate to have volunteer assistance from Benjamin Lee, a third-year student at the University of Virginia School of Law. Among other things, Mr. Lee did a citecheck of the tentative recommendation.

He brought to our attention a few minor technical points that should be changed:

- Footnote 6 should indicate that the operative date for sections 7 and 9 of SB 1080 was January 1, 2011, not January 1, 2012.
- There is a period after the ampersand in item #14 of footnote 11, which should be deleted.
- It would be helpful to insert explanatory parentheticals in footnote 13.
- The citation to Commission Staff Memorandum 2009-28 in footnote 16 should include the date of the memorandum.
- The Comment to Code of Civil Procedure Section 527.9 should be revised to indicate which subdivisions are amended ("Subdivisions (b), (c), and (e) of Section 527.9 are amended to"). Similar revisions should be made in the Comment to Family Code Section 6389 and the Comment to Penal Code Section 171.7.
- The Comment to Penal Code Section 186.22 should be revised as follows: "Subdivision (e) of Section 186.22 (as it reads in ~~by Section 2 of Chapter 256 of the Statutes of 2010~~ Cal. Stat. ch. 256, § 2) is amended to"
- On page 55, lines 34 and 36, the reference to section 55 should be replaced with a reference to section 61.
- The Comment to Penal Code Section 626.10 should be revised as follows: "Subdivisions (a)(1), (f), and (i) of Section 626.10, ~~as~~ (as it reads in 2010 Cal. Stat. ch. 178, § ~~55,~~ 61) are amended to"

Unless the Commission otherwise directs, the staff will make these changes.

We are grateful to Benjamin for his careful and diligent assistance with this project.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel