



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Arms Legislation Bill

23/10/2019

Submission on the Arms Legislation Bill

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Arms Legislation Bill (the Bill).
2. The Bill amends the Arms Act 1983, (the Act) following an earlier amendment on 12 April 2019 by way of the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019.
3. The Law Society submits the following key points require further consideration by the Select Committee:
 - a. Further clarity is required in respect of aspects of the dealer's licensing regime.
 - b. The list of offences that will automatically disqualify a licence holder under clause 33 should be narrowed so that they only relate to those offences which involve violence or a threat to safety.
 - c. Various aspects of the involvement of health practitioners in firearms licensing require revision.
 - d. A number of the new or amended offences contained in the Bill place the onus on the defendant to establish a defence. These offence provisions need to be reviewed in light of the right to be presumed innocent until proven guilty affirmed in section 25(c) of the New Zealand Bill of Rights Act 1990 (NZBORA).
 - e. Inconsistencies in sentencing for offending involving prohibited versus non-prohibited firearms should be addressed.
4. This submission addresses each of these matters in turn below.
5. The Law Society would like to be heard in relation to this submission.

Dealer's licensing (Clause 10)

6. Clause 10 replaces sections 5 and 6 of the Act and introduces detailed new requirements for the licensing of dealers. There are three aspects of these clauses on which the Law Society makes comment.
7. First, proposed new section 5(1) lists the activities for which a dealer's licence must be held. Most of these refer to activities that are conducted in the course of carrying on business. New section 5(1)(d) is the exception. The circumstances in which a dealer's licence is required for display of a class of arms items is limited to where the display occurs "as the director or curator of a bona fide museum". This wording may be too limited. There might be circumstances where display occurs outside the museum context, such as an exhibition held in an events centre. The Law Society suggests that consideration is given to amending the wording to include display in other contexts.
8. Secondly, proposed section 5(3) provides that a body corporate may carry on any of the activities listed in section 5(1) "if a senior manager of the body corporate has a dealer's licence" authorising them to carry on the activity. Where the applicant for a dealer's licence is a senior manager of a body corporate, proposed section 6B(b)(iii) requires the police officer

deciding the application to take into account whether the senior manager will have “appropriate oversight and control” of the proposed dealer activity.

9. The Law Society submits this requirement should be clarified. On its face, it may be sufficient for one senior manager of an arms dealership to hold a dealer’s licence where sales and supply are conducted through multiple branches. It is unclear whether the senior manager is required to be present when the licensed activity occurs.
10. Thirdly, the requirement that a police officer consider whether appropriate record-keeping systems exist to comply with the requirements of the Act under proposed section 6(b)(ii), applies only where the applicant is a senior manager of a body corporate. It is not clear why that requirement should not apply equally to individuals who are applying for a dealer’s licence.

Persons disqualified from holding a firearms licence (Clause 33)

11. Proposed section 22G disqualifies people from holding firearms licences on a number of grounds. One of these grounds is having a conviction for various types of offences within the previous 10 years. The disqualifying offences include several offences that may not involve violence or a threat to safety. These include:
 - a. Theft of controlled drugs (section 11 Misuse of Dugs Act 1975);
 - b. Blackmail (section 238 of the Crimes Act 1961); and
 - c. Many sexual offences, pursuant to section 86A of the Sentencing Act 2002.
12. Previous convictions are otherwise taken into account by the Police in assessing whether a person is fit and proper to hold a firearms licence under the proposed section 24A. Given that provision, the Law Society submits that further consideration should be given to whether the list of disqualifying offences under the proposed section 22G is too broad.

Health practitioners

13. Clause 34(2) introduces a requirement in a new section 23(2A) that an applicant for a firearms licence must provide the Police with the name and contact details of their health practitioner. In addition, clause 83 introduces a new proposed section 91, which requires a health practitioner to consider notifying the police if a firearms licence holder’s mental or physical condition is such that their ability to hold a firearm should be limited or removed.
14. There are four features of these changes that the Law Society submits require further consideration:
 - a. As currently drafted, new section 91(2) only requires the health practitioner to “consider” notifying the Police if they form the opinion in section 91(1). New section 91(2) should also explicitly authorise the health practitioner to notify the Police, if they form the relevant opinion, and, after consideration, they choose to notify the Police. This would better intersect with the protection from liability in new section 91(5).
 - b. New section 91(3) should include the introductory words “If the Police have been notified by a health practitioner under section 91(2), then...” so as to make the premise of the Commissioner’s power to require a further medical assessment in the subsection explicit.

- c. New Clause 6 of the Bill defines “health practitioner” by reference to section 5(1) of the Health Practitioners Competence Assurance Act 2003. That definition provides that a “health practitioner” means “a person who is, or is deemed to be, registered with an authority as a practitioner of a particular health profession”. In turn, the definition of “health profession” means “the practice of a profession in respect of which an authority is appointed by or under this Act”. Health professionals falling within the definition includes chiropractors, dieticians, and optometrists. The breadth of the definition accordingly needs to be revisited.
- d. A health practitioner’s authority to disclose information to the Police is restricted to firearms licence holders, and does not extend to applicants for a firearms licence. Although new section 23(2A) states that an applicant for a firearms licence must provide the Police with the name and contact details of their health practitioner, the Bill does not contain any specific provisions relating to inquiries of health practitioners by the Police, or disclosure by health practitioners to Police, in relation to applicants for firearms licences. The Law Society suggests the Select Committee revisit this inconsistency.

New and amended offences

Offences with mens rea “without reasonable excuse” – Clauses 10, 14, 15, 31, 40, 47, 52, 64, 69, 70, 71, 72, and 79

15. The Bill amends a number of offences and creates several new ones using language that provides that the offence is committed where a person does the act “without reasonable excuse”. As a matter of construction, the absence of a reasonable excuse appears to be an element of the offence. As such, the wording appears to place an evidential burden on the defendant to show the existence of a possible reasonable excuse. If that is satisfied, the prosecution is then required to negate the existence of reasonable excuse beyond reasonable doubt.
16. On this basis, these offences do not operate as strict liability offences. The Law Society regards this approach as preferable: it is consistent with section 25(a) of the New Zealand Bill of Rights Act 1990 (NZBORA) (which affirms the right to be presumed innocent until proven guilty) and Supreme Court authority, which has suggested that the concepts relating to strict liability may have to be revisited in light of the NZBORA.¹
17. However, the approach does raise significant concerns about inconsistency with other more serious offences within the Act, which retain their strict liability character despite having much higher penalties: see for example, section 50A of the Act, which provides for a term of imprisonment of up to 5 years for being in possession of a firearm without authorisation or permission under the Act. As noted below, the approach also raises concerns about other new more serious offences in the Bill.

Strict Liability offences – Clauses 19, 21, 29, 30, 51, 53, 58, 62, 63, 65, 66,

18. A number of the offences introduced or amended, appear to be strict liability offences, such that the burden will fall on the defendant to show total absence of fault on the balance of

¹ *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [63].

probabilities.² The Law Society submits that further consideration should be given as to whether the number of strict liability offences created by the Bill is justified, especially those punishable by imprisonment for significant periods.

New section 16A (Clause 22)

19. Clause 22 amends section 16A (importing prohibited ammunition) to replace “without reasonable excuse” to “without reasonable cause”. The reason for that change is unclear. Section 16A now uses the word “cause” in two different ways: a person must not, *without reasonable cause, bring or cause to be brought* or sent into New Zealand any prohibited ammunition. For clarity, the original phrase “without reasonable excuse” should be retained.

Reverse onus offences in the Bill

20. Several provisions in the Bill expressly place the onus on the defendant to establish a defence. The Law Society submits that further consideration needs to be given to whether these provisions are contrary to the NZBORA.
21. Clause 63 of the Bill presents a particular concern. This clause amends section 46 (carrying of imitation firearm except for lawful, proper and sufficient purpose) to reduce the maximum penalty to one year’s imprisonment (or a fine not exceeding \$4,000), but retains the burden on the defendant to prove a lawful, proper and sufficient purpose. This provision has the potential to criminalise a considerable amount of innocent conduct, given the breadth of the definition of “imitation firearm”. Imitation firearms are not illegal nor is a licence required for their possession. Further, it is unclear what a proper or sufficient purpose for carrying one might comprise.
22. In addition, the reverse onus in clause 63 is inconsistent with other provisions in the Act. Clauses 65 and 66 amend sections 50D and 52, which provide that it is an offence either to possess a prohibited firearm in a public place “without lawful purpose” or to present a firearm at some other person “except for some lawful and sufficient purpose”. The absence of a lawful, or lawful and sufficient purpose is an element of the offence. The prosecution must prove that element beyond reasonable doubt. It is not clear why a different approach is adopted under clause 63.

Reverse onus under section 66 of the Act

23. Section 66 of the Arms Act is not amended by the Bill. However, certain offences under the Act are affected by it. Under section 66 the *proved* fact of a person being in occupation of land or buildings, or the driver of a vehicle in which a firearm is found, becomes a *deemed* fact that the person was in possession of the firearm, unless the person proves (a) the firearm is not their property; and (b) it was in the possession of some other person.
24. The Attorney-General’s report under section 7 of the NZBORA noted previous advice that section 66 is inconsistent with s 25(c) of the NZBORA.³ There are two aspects of the Bill, however, which the Attorney-General’s report does not specifically go on to address:
 - a. Clause 27 of the Bill introduces restrictions on possession of prohibited firearms, magazines and parts under proposed sections 19A and 19B of the Act. Contravention of those sections is punishable under sections 50A, 50B and 50C of the Act. The reverse

² *Civil Aviation Department v McKenzie* [1983] NZLR 78.

³ Section 7 report for Arms Legislation Bill.

onus contained in section 66 applies to establish possession in this context. This appears to be inconsistent with section 25(c) of the NZBORA, and the Law Society invites the Select Committee to reconsider these provisions.

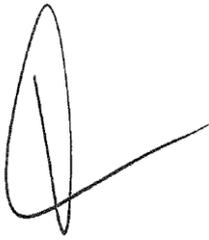
- b. Similarly, clause 79 creates a new offence in new section 66B where a person in possession of a firearm refuses to give identifying particulars to Police. The deeming effect of section 66 means that this offence is likely to be overly broad, and the Law Society suggests that new section 66B is also reviewed.

Inconsistencies in maximum penalties

25. The Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act introduced the concept of a “prohibited firearms”. Offences that involve prohibited firearms are generally to be treated as more culpable, and therefore carry higher penalties than offences involving non-prohibited firearms.
26. However, the Bill introduces discrepancies in sentencing that are difficult to understand. For example:
 - a. Clause 65 of the Bill amends section 50D (unlawfully carrying or possessing a prohibited firearm in a public place) to reduce the maximum penalty from seven to five years’ imprisonment. By contrast, the maximum penalty for unlawful carriage or possession of any other firearm under section 51 is three years’ imprisonment or a fine not exceeding \$4,000.
 - b. Clause 66 amends section 52 (presenting firearm, airgun, pistol or restricted weapon at another person) to increase the penalty from three months’ imprisonment and/or a \$1,000 fine to six months’ imprisonment or a fine not exceeding \$10,000. By contrast, the penalty for presenting a prohibited firearm (or anything likely to lead a person to believe it is a prohibited firearm) at another person under section 51A is seven years’ imprisonment.
27. The difference in penalty between presenting a prohibited firearm versus any other firearm seems unjustified when considered against the underlying objectives of the Bill. The impact on the person to whom the firearm is presented is likely to be similar; the particular type of weapon will make little difference.
28. Moreover, the relative penalties under sections 51 and 52 of the Act indicate that carrying or possessing a non-prohibited firearm in a public place is significantly more culpable than presenting it at a person.
29. Clause 67 amends the maximum penalty in section 53A(2) (possession of a prohibited firearm at the time of committing an offence punishable by imprisonment for a term of three years or more) from seven to five years’ imprisonment. The effect of this is that:
 - a. The maximum penalty for this offence is the same as for section 54(2) (possession of a non-prohibited firearm at the time of committing an offence). This is inconsistent with the intention of the Act being to reflect the additional culpability of conduct involving prohibited firearms; and
 - b. The maximum penalties set out in subsection (1) of sections 53A and 54 and subsection (2) of those same sections are rendered inconsistent:

- i. sections 53A(1) and 54(1) contain offences of use of a prohibited firearm (section 53A) or any other firearm (section 54) with intent to resist or prevent arrest. The maximum penalties are ten and seven years' imprisonment respectively; whereas
- ii. new section 53A(2) and section 54(2) set out the offences of possession of a prohibited firearm (section 53A) or any other firearm (section 54) at the time of committing an offence punishable by imprisonment for a term of three or more years. The effect of the Bill is therefore that the maximum penalty for both offences will be five years' imprisonment.

30. The Law Society suggests further consideration be given to these inconsistencies in penalties.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.

Andrew Logan
Vice President
23 October 2019