

4 April 2019

The Chair
Finance and Expenditure select committee
Parliament
Wellington

Re: Arms (Prohibited Firearms, Magazines and Parts) Amendment Bill

Thank you for inviting submissions on the Arms (Prohibited Firearms, Magazines and Parts) Amendment Bill (the bill). The New Zealand Law Society appreciates the opportunity to speak to the Finance and Expenditure select committee today about the bill.

We have had a very limited time (less than two days) to consider the bill. We appreciate the need for a swift legislative response but believe that this could have been achieved while still allowing an adequate (albeit short) period – such as five working days – for public input. That would have allowed for better public understanding and buy-in, as well as better quality (and more enduring) legislation.

On a preliminary review of the bill, the Law Society makes four key points.

1. The Law Society joins the Minister of Police and other Members of Parliament in paying tribute to the outstanding work of the New Zealand Police in their response to these exceptionally difficult and tragic circumstances. We also acknowledge the considerable amount of work that has gone into preparing the bill at short notice.
2. Our comments are not intended in any way to undermine or diminish recognition of the efforts of all those involved. However, in circumstances such as these we emphasise the importance of proper democratic processes, including adequate time for public and select committee scrutiny of significant new legislation. The risks of legislating with haste are:
 - a. the lack of opportunity for public input and debate means key stakeholders are unable to provide legitimate perspectives and information and evidence that may be highly relevant to the bill; and
 - b. inadvertent drafting errors and unintended consequences may result from rushed drafting.
3. Officials have alluded to these risks in the supporting materials to the bill. The Interim Supplementary Analysis Report states that the usual degree of analysis has been “*constrained on this occasion by tight timeframes*”, and that “*without these, it is difficult to identify with accuracy the impacts and risks of the proposal.*”¹
4. The Law Society agrees with the Minister that swift action to remedy the immediate, obvious defects in the Arms Act 1983 (the Act) by the introduction of the bill is appropriate. However,

¹ <https://treasury.govt.nz/sites/default/files/2019-04/ria-police-apfm-apr19.pdf> at page 1.

we consider that that could have been achieved while still allowing a more realistic (but still short) period for public input.

5. The Law Society also agrees with the Minister that the Act is clearly not fit for purpose and is in need of wholesale revision² (as has been identified in previous reviews, in 2005 and 2017). The government has indicated that a second tranche of substantive amendments (a second amendment bill) will follow later this year. It is imperative that the development and scrutiny of the second bill is done in a systematic way with adequate time for public input.
6. The committee will no doubt be aware that the Law Society does not comment on matters of policy contained in bills (including this one). The comments below are confined to Bill of Rights considerations, and a limited number of preliminary questions/points on technical drafting matters.

The New Zealand Bill of Rights

7. The Crown Law Office has provided advice to the Attorney-General on whether provisions in this bill appear to limit any of the rights or freedoms affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA). That advice was only made publicly available this morning.
8. Crown Law's conclusion is that the bill (in a near-final draft version) appears to be consistent with NZBORA.
9. That advice addresses the reverse onus of proof in proposed new section 53A. However, it does not address the extension of the reverse onus of proof in section 66 to the new offences of unlawful possession created by clause 49, i.e. new sections 50A to 50C:
 - a. Section 50A: Unlawful possession of prohibited firearm;
 - b. Section 50B: Unlawful possession of prohibited magazine; and
 - c. Section 50C: Unlawful possession of prohibited part.
10. This may be an oversight, since the Departmental Disclosure Statement³ specifically identifies these new possession offences as a source of human rights concerns: *"The Ministry does have residual human rights concerns about the reverse onus of proof for the amended offence of unlawful possession."*⁴
11. NZBORA is engaged by these new possession offences because the reverse onus of proof in section 66 of the Act applies:

"Occupier of Premises or driver of vehicle deemed to be in possession of firearm, airgun, pistol, imitation firearm, restricted weapon, or explosive found therein

For the purposes of this Act every person in occupation of any land or building or the driver of any vehicle on which any firearm, airgun, pistol, imitation firearm, restricted weapon, or explosive is found shall, though no to the exclusion of the liability of any other person, be deemed to be in possession of that firearm, airgun, pistol, imitation firearm,

² https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20190402_20190402_16, at [6]

³ <http://disclosure.legislation.govt.nz/assets/disclosures/bill-government-2019-125.pdf> at Box 3.4.1.

⁴ Ibid 3, at page 8 and see also box 4.4 at page 10.

restricted weapon, or explosive, unless he prove that it was not his property and that it was in the possession of some other person.” [emphasis added]

12. The NZBORA implications of section 66 were considered by the Attorney-General in 2018, in relation to another bill to amend the Act, the Arms (Firearms Prohibition Orders) Amendment Bill.⁵
13. In his section 7 report on that bill, the Attorney concluded that the reverse onus raised a *prima facie* inconsistency with the section 25(c) NZBORA right to be presumed innocent, and that it was not a reasonable limit on that right in circumstances where (a) criminal rather than public regulatory offences were concerned, (b) the penalties had a high impact on defendants in the form of severe sentences of imprisonment, and (c) a lesser impairment such as an evidential onus was available.
14. The Law Society does not suggest that the same conclusion would necessarily be reached about the application of the reverse onus in section 66 to the new offences created by the current bill. However, it is important that Crown Law’s advice is reviewed in relation to this point.

Preliminary questions/points – technical drafting

15. As already noted, we have not had the opportunity to consider the bill in detail and are therefore not able to comment (as we would normally) on the definitions and drafting in the bill and to recommend clarifications and improvements. However, some very preliminary questions and points have been raised by criminal law practitioners on the Law Society’s criminal law committee, and these are in the attached appendix. If there is time, it may be helpful for officials to consider the questions and points.

Yours sincerely



Tiana Epati
President-elect

Appendix: technical questions/points

⁵ <https://www.justice.govt.nz/assets/Documents/Publications/bora-arms-firearms-prohibition-orders-amendment-bill.pdf>, at [31] to [42]

Appendix: technical questions/points

1. *Prohibited ammunition, prohibited firearm*: Clauses 4 and 5 – possible concerns about prohibited ammunition and prohibited firearms being declared by Order in Council, on the basis that this is not transparent nor easy to justify.

The power to prohibit by Order in Council is introduced in respect of two items:

- a. Clause 4(1), amending section 2:

*“**Prohibited ammunition** means ammunition declared by Order in Council under **section 2D** to be prohibited ammunition”.*

- b. Clause 5, inserting new section 2A:

*“In this Act, unless the context otherwise requires, **prohibited firearm** ... includes any other firearm declared by Order in Council made under **section 74A** to be a prohibited firearm for the purposes of this Act.*

On one view, the Order in Council mechanism lacks the transparency and scrutiny of primary legislation. It is not clear why these categories cannot be defined sufficiently clearly and broadly, and incorporated in the bill.

The alternative view is that using the Order in Council mechanism is a practical and sensible way to adapt the legislation to recognise the reality of constantly evolving technology.

2. Clause 10, replacing section 10, appears to contain an inconsistency in that it does not contain a restriction on prohibited ammunition.
3. In clause 18, we query whether for consistency, the burden of proving that a permit is held should also apply to prosecutions for prohibited items at new section 16(1)(c).
4. Clause 27 replaces section 30B and stipulates the conditions under which Police may make an endorsement on an applicant’s firearms licence in respect of prohibited firearms or ammunition. One of the conditions, at section 30B(1)(b), is that it is “*necessary*” for the applicant to possess that firearm or magazine. It is difficult to understand how collectors and curators will be able to satisfy that test.
5. Clause 49: we query whether, for consistency, the existing section 50(3) burden of proving that a permit is held should also apply to the three new offences (sections 50A to 50C) that this clause creates.
6. New section 54A (clause 55) introduces a new offence of carrying a prohibited firearm with criminal intent. We query whether, for consistency, an additional subclause equivalent to section 55(2) should be added to new section 54A.
7. Clause 58, which introduces new section 59B(1), is unnecessary as it merely reaffirms the Solicitor-General’s prosecution guidelines.