

6 September 2019

Attorney-General

Arms Legislation Bill: consistency with New Zealand Bill of Rights Act 1990
Our Ref: ATT395/298

Summary

1. We have reviewed the Arms Legislation Bill (“**the Bill**”) for consistency with the New Zealand Bill of Rights Act 1990 (“**Bill of Rights Act**”). This advice is based on version 18958/14.0 of the Bill, received the afternoon of Thursday 5 September 2019.
2. The Bill comprises amendments to, principally, the Arms Act 1983. It amends several offences and penalties, as well as proposing new offences.
3. Some, but not all, of these are strict liability offences or involve reverse onuses – raising issues about their consistency with the “right to be presumed innocent until proven guilty according to law” in s 25(c) of the Bill of Rights Act. To the extent these offences (both new and amended) limit the right in s 25(c), we consider the limits are reasonable and demonstrably justified in terms of s 5.

Overview of the Bill

4. The Bill will amend the Arms Act 1983 by introducing:
 - 4.1 a new statement of its purposes (promoting safe possession and use of firearms and other weapons, and imposing controls on them);
 - 4.2 requirements for dealers’ licences and permits to import firearms;
 - 4.3 restrictions on the sale or supply of ammunition;
 - 4.4 provisions as to obtaining, and disqualification from holding, firearms licences, as well as for their suspension and revocation;
 - 4.5 provision for shooting clubs and shooting ranges, and the marking of firearms;
 - 4.6 provision for certain agencies and health practitioners to have access to the firearms register;

- 4.7 amendments to existing offences (chiefly by increasing penalties but in some cases reducing them or adding in a “without reasonable excuse” element) and some new offences;
- 4.8 various miscellaneous provisions.

Consistency with s 25(c) – strict liability offences

5. Section 25(c) affirms the “right to be presumed innocent until proved guilty according to law.”
6. Strict liability offences are generally seen as *prima facie* inconsistent with s 25(c). This is because a strict liability offence may be proved by a finding that certain facts occurred without proof of *mens rea*. A defence of “total absence of fault” is available in terms of the Court of Appeal decision in *Civil Aviation Department v MacKenzie*.¹ The burden of proof of that defence is on a defendant (to the balance of probabilities standard).
7. Whether a limit on a right is a reasonable one falls to be determined in accordance with the test in *R v Hansen*.²
- does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
- (i) is the limiting measure rationally connected to its purpose?
- (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
8. In the specific context of strict liability offences, considerations especially relevant to the reasonableness of limits on s 25(c) are:
- 8.1 the regulatory context – where a field of activity (as here, dealing in, possessing and using firearms) is an activity that is licensed and regulated in the interests of public welfare, and persons entering the field (here, to become owners, users or dealers in firearms) do so in the knowledge that it is a regulated activity;
- 8.2 whether matters of justification and excuse for particular actions or states of affairs are likely to be in the particular knowledge of defendants rather than the prosecution, such that it is reasonable to require that defendants advance evidence of or prove those matters to avoid conviction;
- 8.3 penalty levels – generally fines or low levels of imprisonment are reasonable in the regulatory context.
9. Having regard to these considerations we consider the amended and new offence provisions are consistent with s 25(c).

¹ *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA).

² *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (SC) at [104].

Offences where “without reasonable excuse” or similar is an element of the offence

10. A number of the amended offences are to be amended so as to incorporate the element of “without reasonable excuse”. The same phrase is included in some of the new offences.
11. Until its repeal by the Criminal Procedure Act 2011, s 67(8) of the Summary Proceedings Act 1957 had placed on defendants a burden of proving the application of “any exception, exemption, proviso, excuse or qualification” to a summary offence. Now there is no such statutory requirement. The question whether a defendant bears any onus turns on construction.³ If the defendant’s being “without reasonable excuse” is an element of the offence then it is a matter that must, in addition to other salient facts, be proved by the prosecution beyond reasonable doubt.
12. We consider the phrase “without reasonable excuse”, when employed in the Bill, to be an element of the offence. Where a defendant adduces or points to evidence capable of amounting to a reasonable excuse, the burden is on the prosecution to prove the lack of any such excuse. On that basis, offences of strict liability containing such a provision are consistent with the right to be presumed innocent. They would not enable defendants to be proved guilty where there remains reasonable doubt that the defendant was “without reasonable excuse”.
13. The above reasoning applies to the offences being amended, or introduced, by this Bill, contained in clauses 10,14, 15, 16, 22, 31, 40, 47, 51, 52, 55, 64, 69, 70, 71, 72, and 79.

Clause 19, proposed new s 15(3)

14. Under proposed new s 15(3) a dealer whose licence has been revoked and who carries on dealer activity commits an offence punishable by up to one year of imprisonment and a \$15,000 maximum fine. To the extent this is an offence of strict liability (potentially able to be committed when a person did not *know* their licence had been revoked) we consider it a reasonable limit on the right to be presumed innocent.
15. The important purpose is the safety of the public. The limiting measure is rationally connected to that purpose as it makes convictions easier to secure given the likely propensity of persons to deny facts peculiarly within their knowledge. A person who is licensed is in a position to know when their licence has been revoked, and the processes leading to possible revocation under s 27C include written notice of revocation being given to them. Requiring the prosecution to prove that a person knew their licence was revoked would be more onerous than requiring that person to affirmatively prove they did not know and had made diligent inquiry about their licence status. Ultimately, the defence recognized by the Court of Appeal in *Civil Aviation Department v MacKenzie*⁴ (of having acted with a total absence of fault) may be available to a defendant whose licence has been revoked without their knowledge. The persuasive burden of proving that defence would rest in such a defendant but

³ A Butler and P Butler, *The New Zealand Bill of Rights Act 1990: A Commentary*, (2nd Ed, LexisNexis, Wellington, 2015) ch 24.4.32; *Adams on Criminal Law*, paragraph ED1.07.

⁴ *Civil Aviation Department v MacKenzie* [1983] NZLR 78.

we consider this a reasonable limit on the right in the regulatory context applicable to dealers.

Clause 21, proposed new s 16

16. This amends the offence of importing firearms without a permit, retaining existing penalties save for the increase in the maximum possible fine (from \$2,000 to \$15,000). To the extent this is a strict liability offence the defence of total absence of fault is available and we consider it a reasonable limit.

Clauses 29 and 30, proposed amended s 20(3) and 21

17. Proposed s 20(3) increases the penalty for possession of a non-prohibited firearm without a licence) from 3 months to one year maximum imprisonment and from \$1000, to \$15000 maximum fine); proposed s 21 reduces the penalty in relation to possession of an airgun by removing potential imprisonment. In the regulatory context these offences of possession without a licence, where such is required, are reasonable limits.

Clause 51, proposed amended s 36(3)

18. The proposed amendment is to penalty only; the existing offence provides that a defendant carries the burden of proving that a pistol or restricted weapon was carried by him under and in accordance with the conditions endorsed upon his firearms licence. These details would be in the knowledge of a defendant and it is a reasonable limit upon the right to be presumed innocent that proof of such is upon a defendant.

Clause 53, proposed new s 38B and s 38K

19. These relate to establishing a shooting club and operating a shooting range without a permit or certification. They do not carry imprisonment. To the extent a person could operate a shooting club without knowing the club has no permit, it is strict liability but in the regulatory context this is a reasonable limit. In a case of total absence of default the defence established in *Civil Aviation Department v McKenzie* is available.⁵

Clauses 58 and 62, proposed amended s 43 and s 44

20. This offence of selling or supplying a firearm or airgun to an unlicensed person (s 43) or a pistol or restricted weapon (s 44) allows a statutory defence if a person can prove that they took reasonable steps to ascertain whether the person to whom they sold or supplied was the holder of a firearms licence. As the steps taken would be in the knowledge of a defendant this is a reasonable limit. (The clauses amend the current provisions which have no such defence, and which require the defendant instead to prove that the person supplied held a licence.)

Clause 63, proposed amended s 46

21. As it stands s 46 creates an offence of carrying an imitation firearm except for some lawful, proper and sufficient purpose. It provides that in any prosecution the burden

⁵ *Civil Aviation Department v MacKenzie* [1983] NZLR 78.

shall lie on the defendant to prove the existence of the lawful, proper and sufficient purpose.

22. Proposed new s 46 does not change that, but reduces the penalty from a 2 year to a 1 year maximum term of imprisonment (and retains the \$4,000 fine).
23. On its face s 46 might be said to criminalise a considerable amount of innocent conduct. It is clear, however, that a police decision to arrest and charge can only be lawful if authorities have good cause to suspect there is no such lawful excuse.⁶ At trial, however, the burden is on the defendant to establish that excuse, and not simply to establish that there is a reasonable doubt about there being no such excuse.
24. While we view this as finely balanced we conclude that in this case the reverse onus is justifiable, on the ground that the material information bearing upon lawful, proper and sufficient purpose will necessarily be within the domain of the defendant. It is for them to proffer that purpose in evidence. The prospect of there being a person who has a sufficient purpose but who cannot prove it to the requisite standard is low.

Clause 65, proposed amended s 50D

25. This is a decrease in the penalty for possessing a prohibited firearm in a public place without lawful purpose. We consider that proviso to be an element of the offence such that an evidential burden only is on the defendant to adduce evidence sufficient to generate a reasonable doubt as to whether there was a lawful and sufficient purpose.

Clause 66, proposed amended s 52

26. This is a simple increase in the penalty for presenting a firearm etc. at another person except for some lawful and sufficient purpose. We consider that proviso to be an element of the offence such that an evidential burden only is on the defendant to adduce evidence sufficient to generate a reasonable doubt as to whether there was a lawful and sufficient purpose.

Clause 67, proposed amended s 53A

27. This is a decrease in the penalty for possessing a prohibited firearm at the time of committing an offence punishable by imprisonment for a term of 3 years or more. The affirmative defence – that the person had possession of the prohibited firearm for a lawful purpose – requires the person to prove that lawful purpose. It therefore reverses the onus of proof and limits the right to the presumption of innocence.
28. However, the reverse onus applies only to the establishment of a positive defence, rather than the elements of the offence. Where a person has a lawful purpose for a prohibited firearm being in their possession, it should lie easily within their capacity to provide proof of that lawful purpose on the balance of probabilities. While s 25(c) of the Bill of Rights Act is limited by the Bill, that limitation is, in our view, justified.

⁶ *Caie v Attorney-General* HC Auckland CP334-SD99, 6 April 2001.

Reverse onus in s 66 of the principal Act for possession offences – whether it leads to inconsistency in this Bill insofar as new or amended possession offences are concerned

29. Section 66 of the Arms Act 1983 is a reverse onus provision whereby a *proved fact* (a person's 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 is in possession of that firearm) *unless the person proves* (a) the firearm was not his property and (b) it was in the possession of some other person.⁷
30. In previous advice it was concluded that s 66 is inconsistent with s 25(c) insofar as it is possible that a person who occupies land or buildings or is a driver may be able to generate a reasonable doubt as to whether they knew of (and so possessed) a firearm found on their land or in their car but are not able to prove the same on the balance of probabilities.
31. Section 66 is a provision of existing law and is not being amended by the Bill. There is no new offence being introduced by the Bill as to proof of which s 66 might be invoked.
32. Proposed new ss 22A and 22B deal with possession (respectively) of non-prohibited magazines and parts, and ammunition. These items are not included in s 66 as items to which the reverse onus attaches.
33. The offence in s 53A (being amended by reduction of the penalty) is committed only when a person commits an offence punishable by 3 or more years imprisonment while "at the time of ... committing the offence" is in possession of a prohibited firearm. That assumes *actual* possession, and not one deemed to arise by dint of occupying premises or driving a car in which a firearm is found.
34. Sections 20 and 21 are being amended (possession of non-prohibited firearms and airguns, respectively, without a licence). The penalty for the former is increased from 3 months and \$1,000 to one year and \$15,000; the penalty in relation to airguns is reduced by removing the possibility of imprisonment and making it punishable by fine only.
35. In our view the fact that ss 20 and 21 are being amended does not render the amending provisions in the Bill (clauses 29 and 30) inconsistent with s 25(c) on the ground that the reverse onus in existing s 66 may (but not must, and in any event is not likely to) be used to prove those offences. The inconsistency is between s 66 in the principal Act and s 25(c).

Conclusion

36. The Arms Legislation Bill appears to be consistent with the Bill of Rights Act.

⁷ The courts have ameliorated this second requirement. It is not necessary to prove the identity of another person who had possession of the firearm, only that it was not the defendant's and, being unknown to them, must have been in the possession of *some* other person: *R v McKeown* (1988) 4 CRNZ 438 (CA).

Recommendations

37. We recommend that you:

37.1 **Note** this advice

Yes/No

Noted/Declined

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