

13 December 2004

Attorney-General

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
Arms Amendment Bill (No 3)

1. We have considered whether the Arms Amendment Bill (the “Bill”) (PCO5730/5) is consistent with the New Zealand Bill of Rights Act 1990 (the “Bill of Rights Act”). We understand that the Bill will be considered by the Cabinet Legislation Committee at its meeting on Thursday, 16 December 2004.
2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we considered potential issues of inconsistency with section 21 (unreasonable search and seizure) and section 27 (right to justice) of the Bill of Rights Act. Our analysis of these potential issues is set out below.
3. The Bill seeks to:
 - enable New Zealand to comply with the minimum legislative requirements of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (the “Firearms Protocol”) (supplementing the United Nations Convention against Transnational Organised Crime). These requirements include: extending import permit requirements to cover the import of ammunition; including the harbours and territorial waters of New Zealand in the scope of the Arms Act 1983 (the “principal Act”); and providing for the seizure and disposal of illegally imported ammunition;
 - improve the effectiveness and clarity of the principal Act; and
 - address operational issues that have emerged since the principal Act was last significantly amended in 1992, for example, the Bill makes it clear that police search powers under the principal Act in respect of buildings, premises, and vehicles include the detention and search of people found on or in those places.
4. In accordance with the Firearms Protocol the Bill establishes three new offences relating to:
 - illicit manufacture of firearms and their parts;

- illicit trafficking of firearms, their parts, and ammunition; and
- removal or altering of firearm markings without lawful excuse.

ISSUES OF INCONSISTENCY WITH THE BILL OF RIGHTS ACT

Section 21: right to be secure against unreasonable search and seizure

Clause 40 – New sections 61 and 61A substituted

5. Clause 40 of the Bill gives rise to prima facie issues of consistency with section 21 of the Bill of Rights Act. This clause amends the principal Act by repealing section 61 and substituting new sections 61 and 61A. New section 61(1) provides any commissioned officer of police with powers of entry, search and seizure if he or she has reason to suspect that there is in any place any firearm, airgun, imitation firearm, restricted weapon, ammunition, explosive, or body armour in respect of which an offence against the principal Act or an indictable offence has been or is about to be committed.
 - New section 61(3) provides that if a commissioned officer of police has reason to suspect that any place contains a firearm, airgun, imitation firearm, restricted weapon, ammunition or explosive, or anything that is intended to be used as part of such an item and is not secured in storage facilities that comply with regulations made under this Bill the commissioned officer, or any member of the police authorised in writing by the commissioned officer, may enter the place, using force if necessary, and search it; and seize and detain any such item found there.
 - New section 61(5) also authorises a police officer who enters a place under either section 61(1) or 61(3) who has reasonable grounds to suspect that a person on or in the place has a firearm, airgun, imitation firearm, restricted weapon, ammunition, explosive, or body armour in his or her possession may search and detain the person¹ using any force that is reasonable in the circumstances for the purposes of carrying out the search, and seize and detain any such item found on the person.
6. In determining whether these powers are consistent with section 21, we noted and considered the following:
 - The searches may take place without a warrant and require a commissioned officer of police to only have reason to suspect that an

¹ We have considered whether such a detention gives rise to an issue under section 22. However, we note that the Court of Appeal in *Everitt v Attorney General* [2002] 1 NZLR 82, 87 held that the concept of detention required more than a temporary check on a citizen's liberty, and that police work requires that officers make proper inquiries. The brief time involved in responding to an inquiry "could not sensibly be described as an unlawful detaining". We therefore consider that the power to detain under section 61(5) does not raise an issue under section 22 of the Bill of Rights Act because the power is limited to the power to detain while the officer carries out a search.

offence has been or is about to be committed, as opposed to the normal threshold of reasonable grounds to believe.

- However, this can be balanced against the context in which such a search would take place. New section 61 allows the Armed Offenders Squad to obtain access to premises where there is a potential threat to public safety. The powers provided for in the new section can only be exercised by either a commissioned officer of police or by a member of police who has been provided with written authorisation for entry by a commissioned officer. This highlights that the power is not one that is to be exercised lightly.
 - Furthermore every member of the police conducting a search has a duty to:
 - (a) identify him or herself to the occupant of the place concerned;
 - (b) tell any occupant that the search is being made under new section 61(1) or (2); and
 - (c) produce on initial entry (and if requested at any time later) evidence that he or she is a member of the police if he or she is not in uniform (new section 61A).
 - A member of police must, within 3 days of exercising the power under section 61, provide the Commissioner with a written report on its exercise and the circumstances in which it came to be exercised (new section 61A(2)).
7. Overall, we have formed the view that the entry, search, seizure and detention powers, in light of the restrictions and safeguards outlined above, and the context within which they are conducted are reasonable. We consider that clause 40 of the Bill is consistent with section 21 of the Bill of Rights Act.

Section 27(1) Right to observance of principles of natural justice

Clause 15 – New Sections 26A-27A Substituted

8. New section 27B of the Bill provides that a commissioned police officer may under sections 24, 26A and 26B be satisfied that a person is not or is no longer "fit and proper" to be issued with or hold a firearms license where there are grounds for making either a protection order under the Domestic Violence Act 1995 or a restraining order under the Harassment Act 1997. In the event of making such a determination the officer may refuse to issue a person with a license, or, if they already have a license, temporarily suspend or revoke that person's license.
9. We note that the ability of an officer to make such a determination is not dissimilar from the situation under the Domestic Violence Act where

interim orders can be obtained on an *ex parte* application.² The Harassment Act requires that applications for orders under the Harassment Act must be made with notice to the other party.³ We also note that a standard condition of such an order is that a person subject to a domestic protection order may not possess a firearm or license. The presumption is that such a person is no longer a fit and proper person. However, we consider that the process under the Domestic Violence Act can be distinguished because it requires an independent decision-maker, the court, to make such a determination after hearing the evidence. There is no such requirement in this case.

10. We consider that the ability of an officer to make determinations that there are grounds for making orders under the Harassment Act and Domestic Violence Act raises an issue of consistency with section 27(1) of the Bill of Rights Act. This is because the person is not provided with an opportunity to be heard by the officer or a court before a decision not to issue the license is made or the license is suspended or revoked. We have therefore gone on to consider whether such a power is justifiable under section 5 of the Bill of Rights Act.

Is this a justified limitation under section 5?

11. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a “reasonable limit” that is “justifiable” in terms of section 5 of the Bill of Rights Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and that objective.⁴

A significant and important objective?

12. The purpose of the provision appears to be aimed at enabling police officers to act responsively to situations where people’s lives and safety may be at risk. We consider that such an objective is significant and important.

A rational and proportional connection?

13. In considering whether the *ex parte* process is rationally and proportionately connected to the objective of protecting the public, we have taken into account two key considerations. Firstly, we consider that a distinction can be made between a decision that there are grounds for the order to be made and the order actually being made. The ability of the officer to make an assessment based on the fact that there may be *grounds* for making an order implies a lower standard of proof needs to be

² Section 13 of the Domestic Violence Act 1995.

³ Section 15 of the Harassment Act 1997

⁴ See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, and *R v Oakes* (1986) 26 DLR (4th)

met. That is, the threshold for meeting the standard under section 26B is easier to satisfy than the standards under either the Harassment Act or the Domestic Violence Act.

14. Furthermore, we note that orders made under the Domestic Violence Act and Harassment Act are made after a judicial officer has weighed the competing interests involved in making such a determination. That is, the decision is made by an independent body. The independence of the commissioned police officer is less apparent.
15. We are aware that a person who has had their license suspended or has not been issued with the license is provided with an opportunity to challenge the officer's decision and provide him or her with submissions on why the license should not be suspended (new section 26A) or should be issued (section 62). A person who has had their license revoked may also appeal that decision to the District Court. However, while the right to appeal and contest the decision is significant, we note that a person whose license has been suspended or revoked is not only entitled to a fair appeal but an initially "fair-minded decision".⁵ The appeals process may not always be able to rectify any defect during the initial decision-making process.⁶
16. We have weighed these considerations against the following factors.
17. Firstly, the commissioned police officer who issues the notice of suspension or possible revocation under sections 26A and 26B is required to act consistently with the principles of natural justice. He or she would therefore have to have act fairly and with regard to the interests of the license applicant and license holder.
18. The officer would also need to have regard to the criteria under the Domestic Violence Act and Harassment Act when determining whether there were grounds for the making of an order. In other words, he or she would need to act consistently with the statutory framework and not on an arbitrary basis.
19. Furthermore, the ability to suspend or revoke a license is restricted to commissioned police officers. Because the power is able to be exercised by only a limited number of police officers, there is greater potential for consistent decision-making. Finally, there are rights of appeal or opportunities to contest the decision of the police officer. A person whose license is suspended is provided with reasonable opportunity to make representations to the Police giving reasons why his or her license should not be revoked. There is also a right of appeal to the District Court for persons whose license has been revoked or who have been refused a license.

⁵ *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA (Civ) 1481 para 15

⁶ *Supra* note 5

20. On balance, we consider that the limitations placed on the right to the observance of the principles of natural justice are reasonable and justified in terms of section 5 of the Bill of Rights Act.

CONCLUSION

21. We have concluded that, on balance, the Bill appears to be consistent with the Bill of Rights Act.

22. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to the Minister of Police, if you agree.

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