COLFO
COUNCIL OF LICENCED FIREARMS OWNERS INC.

Concerns and issues in the draft Arms Amendment Bill, September 2019

My name is Nicholas Taylor. I am a specialist firearms lawyer and have practiced in the field of criminal and civil law relating to firearms in New Zealand for the past 22 years. Over this time I have appeared before the courts in New Zealand on a daily basis in regards to firearm cases (with approximately 4500 appearances for 1500 clients). I regularly advise shooters, collectors and gun dealers nationwide on issues relating to firearms law in New Zealand. I have assisted in the training of Police Arms Officers and have assisted and advised various Ministers of Police and parliamentary inquiries.

Note: for simplicity reasons and ease of reading of this document I have not specified or quoted the individual sections of the Arms Act or Bill except in broad terms, or cited individual case law in great detail (only in footnotes), but rather am speaking in a generic way. This is not to be taken as constituting legal advice but rather a discussion document drawn from my 22 years of dealing with firearms law and cases in New Zealand.

1. Proposed firearms register

The arguments for this are extremely weak, namely, i) "that the police will know who has guns when they attend an address"; and ii) "that the guns used in criminal offending can be traced" during the course of "their life".

i) It will only be fully complying and law abiding individuals who will register their firearms in the first instance.
ii) The police already have information, as it has been a legal requirement that a person's address is recorded against their firearms licence.
iii) Therefore it can, and always is, assumed by attending police that the person may or will likely have firearms. Evidence in court given by attending police over the years confirms this to be the case.

iv) An individual can have 20 firearms but can only use one at a time.

v) The police already do not distinguish between a person who has one or 20 firearms; they treat it as "the person may be armed" in all circumstances.

vi) Serial numbers. If firearms are stolen, the argument that "the guns can be traced" is nonsense, as within the space of one minute, using a grinder purchased from Bunnings for $100, all serial numbers on all guns can (and are, in my experience with numerous cases) ground off. A serial number on a gun is not magic.

vii) There are risks of mistakes, errors, and misinterpretation in the registry, leading to prosecutions for individuals who have made mistakes, forgot, been distracted, unwell, or not understood a computer based system etc. All are non-criminal intention reasons why a person may not fully comply with the registration process.

viii) My view, after dealing with thousands of cases involving firearms is that, in reality, a firearms register will achieve nothing in reducing crime or assisting the police, and may in fact do some serious harm. Its cost and complexity will outweigh its usefulness as a crime prevention tool.

2. The fit and proper person test

This is not unique to firearms law but is in CAA, Land Transport and other sectors. There are 30 years of case law determining what is a fit and proper person. It is an assessment made on a case by case basis; an assessment made by a judge based on the individual's circumstances and needs. Many of the factors in the Bill are, and have been, applied over a long period of time by the courts successfully, but if they are qualified in statute it prevents flexibility in the discretionary ability of both the police and the courts to properly determine an individual's fit and proper status.

i) **S 23 (2)** - Mental health issues and doctors reporting. This will lead to the lack of reporting and the hiding of symptoms by individuals until it is too late. Doctors are not legal experts and often have a range of views towards firearms, ranging from total dislike for firearms to high and unreasonable levels of risk aversion that are not reasonably based on evidence. The reporting of a mental heath issue to the police[1] is dealt with, in my experience, in a wide variety of ways. Most of these are on the extreme

[1] Often done by a partner, ex-partner, friend, or neighbour, or occasionally by a Doctor.

side, and involve the police responding by sending multiple armed police teams to the person's home, who forcibly enter and search[2], and seize firearms and licences. The proposed notion that a concerned community constable would contact the firearms licence holder for a "chat" is in my experience currently a fiction.

ii) **S 22 G** - Exclusion from reapplying for licences for 10 years. This is unreasonable. A person can change considerably over a ten-year period, from being an older teenager who gets into trouble with friends to a responsible adult married with a job and a family. These matters are currently dealt with by appeals to the District Court and the judges assess the individual on a case by case basis. This 10-year ban is a "one size fits all" situation and is unreasonable.

iii) **S 23 (1)** - A person who has had a firearms licence revoked in the previous five years is unable to apply for a new firearms licence. A revocation of a firearms licence occurs for a multitude of reasons around the country and, in my experience, is totally subject to the individual whims of both the local Arms Officers and regional Inspectors. These decisions to revoke are often unreasonable and unlawful, with the only recourse being an appeal to the District Court. It is important to note that 90% of appeals to the District Court by individuals who have had their licences revoked are successful in having the decision of the police overturned. It is unreasonable to exclude individuals just because an individual police Inspector has revoked a person's licence. It also does not take into account changes in that person's life or rehabilitation potential.

iv) **S 25 (1)** - 5-year licence renewal periods. The police Arms Officers have alerts given to them involving all matters from speeding tickets to drink driving, family violence and other information as relevant. They are constantly dealing with issues as they arise over the 10-year period for licences. A 5-year licence will add nothing to public safety but will increase the workload and stress of Arms Officers for no noticeable return.

v) **22 G (b)** - Protection order issues. Temporary protection orders are granted ex parte (only one side is heard from and no opportunity to defend yourself is possible). If they are not challenged, and they often aren't due to numerous reasons, including expense, they will become permanent. The fact that they are made permanent is not a reflection of their accuracy or credibility. This Bill indicates that a person who has had a permanent protection order made against them will not be eligible for a firearms licence again within 10 years and will not be able to apply for one at any time without it being

[2] Search and Surveillance Act or Arms Act 1983 search powers often cited.

deliberately considered by a commissioned officer. Once again, this is a matter which has been successfully dealt with by the judges and the courts when assessing an individual's personal circumstances on appeals from a refusal by the police to issue a firearms licence. I have dealt with a situation where a temporary protection order wasn't challenged after a person's relationship broke down, as the partner was moving permanently back to the UK and there was a lack of money to hire a lawyer to challenge the making of a permanent protection order. This individual was a commercial pest controller who worked for DOC. This should be a matter that can be appealed to the courts, or have an independent review, rather than a blanket ban of 10 years being imposed.

vi) **S27 A -** Family violence and firearms licences. I question why this section is required. This material is already covered in the Domestic Violence Act, which can already suspend a firearms licence for the same reasons, and, if there is sufficient evidence, can be used for a consideration of revocation of firearms licence process to start. This process has been established by the courts as being one that requires a natural justice process to be undertaken[3].

3. Shooting ranges and gun club certification (part 6)

Overall this is complex and bureaucratic, with the reasoning behind these new requirements not being clear. It is written in such a way that makes an ad hoc sighting-in or target practice in the back of a farmer's field unlawful without a certificate issued from the Commissioner of Police. In practice it will have a devastating effect on small rifle clubs throughout NZ. There is no right of appeal to a District Court Judge[4] for a refusal by the Police to issue a certificate. No evidence whatsoever has been put forward indicating that this will increase public safety with or around the use of firearms. This entire section seems to have been lifted directly from an Australian model. This therefore is not fit for purpose, as no Australian legislation is relevant to the application of New Zealand firearms law, as they have always been totally divergent. Australia, unlike New Zealand, has never based their model on the 'Fit and Proper Person' test. Their model was founded, and heavily reliant and focused, on the 'gun' itself. Australia and

[3] Fewtrell v Police, Police v Dobbs.
[4] S 62 appeal Arms Act 1983.

New Zealand have been totally different in regards to firearms licencing for 36 years. The systems are not comparable, as they do not start from the same basic foundation.

4. Right of inspection for standard licence holders; s 24 B (1) (b) and (c) (d)

Individuals who had restricted weapons, pistols and MSSAs in the past had a requirement that the police could ask to see their firearms and storage, primarily because there were special conditions imposed on their storage and security. Having a person's private home entered into by police for no other reason than they possess a firearms licence and a .22 rabbit rifle is an unreasonable intrusion onto an individual's private property and privacy for no good or sufficient reason. This is indicative of loss of trust in a person selected as a fit and proper person to maintain and undertake the responsibilities of adhesion to the law themselves. This is echoed again and again in the Bill and the 2019 Amendment now passed.

The reality of the increase in this power for the police to enter a persons home for no better reason than the fact that they hold a standard firearm licence, is that it is very often abused because of the misinterpretation, both accidental and deliberate, by individual attending police officers. In many cases I have dealt with the attending police "invite themselves in" or make statements such as "if you don't let me in you're breaking the law" and "you have to let me in to inspect your guns or I'll take your licence away". This increase in police power must be carefully and properly considered, especially when there is no suggestion of any wrong doing on behalf of the homeowner/firearms owner concerned.

A fit and proper person is a person that can be trusted to comply with the Act and Regulations. That is the point of the high degree of scrutiny an individual is put under in the first instance.

5. Blank firing guns; s16 (1)(a) and (b)

There is no reasonable reason for this inclusion. The High Court has already established[5] that the police statement that they can be converted to live-fire firearms is false; there is no evidence of this occurring, and they are not starting pistols. In this case no evidence was forthcoming from the police armourer whatsoever that criminals had ever converted blank firing guns to fire

[5] Tipple v Chief Executive NZ Customs 2014

live rounds at any time. Blank firing guns are important for film and theatrical companies, both inside and outside of professional film armourers. They are used as a safe and reliable prop for drama and play productions because of their safety and lack of regulation. This section should be removed in its entirety as it does not contribute to public safety at all but will have a negative effect on our important film, stage and television industry.

6. Loss of the right to silence 24 B (1)

The right to silence is a fundamental right of all New Zealanders and is a common law right. The NZ Bill of Rights indicates that a person, if arrested or detained, has the right to silence. However the courts have acknowledged that even before a person is detained there may be circumstances where a Bill of Rights warning should be given, especially if questions being asked may be directly self-incriminatory, or can be mistaken as being self-incriminatory, leading to wrongful prosecution and in some instances wrongful conviction. Certain requirements exist in the Policing Act and the current Arms Act concerning a person's details and licence, however this section in the Bill goes too far into specific details and if a person can't, or doesn't want to for some reason, and wishes not to make a statement they can be prosecuted for that. This is a major and serious departure in NZ legislative history and should be considered extremely carefully before such an important precedent in legislation is set.

7. Increase of Commissioner's powers to "make the law"

The discretion and policymaking abilities of the Commissioner of Police has increased by 70% from the previous Arms Act. The Commissioner's creation and police policy-making abilities outside of parliament have been greatly problematic in the past. Numerous times in the last 15 years a Commissioner of Police "created" policies and used their discretion, and the courts have later found this to be unreasonable and unlawful. The unfettered and almost uncontrolled increase in the powers of the Police and Commissioner for policy making (eg. conditions imposed, forms of permits etc) will lead, in effect, to law changes outside of parliamentary control, and may result in the criminalisation of individuals not caught by the legislation but by the change in a police-made policy, or a discretion determined, or a form created.

8. Lack of recourse to the law in regards to the exercising of the Commissioner's (and a "member of the police's") discretion

S 62 needs to include greater scope to appeal to a District Court Judge on decisions made by the Commissioner. For example, as discussed above, the refusal to recognise a "range" or a "shooting club approval" is entirely missing from the rights of appeal or review. Every discretionary decision by the Commissioner, both direct and delegated, must have a right to appeal and review. Another example is in the proposed s 60 "improvement notices". There is currently no appeal process outlined for a person who is issued with a "temporary suspension notice" (s 60 A (1)) issued by a member of police (not even a commissioned officer in this instance).

9. Dealers licences; S 29 (2A) and S 30 A (2)

For the first time this section indicates that a licenced firearms dealer needs to apply for a separate endorsement on their dealer's licence. A dealers licence has always, and for good reason, been issued to persons who, by way of their business, buy and sell firearms, all types of firearms. This includes pistols, rifles, machine guns, submachine guns, airguns, restricted airguns and now prohibited firearms. The Act and Regulations have always made the recording and regulation of a place of business and security precautions for dealers an important aspect of that licence. The amendment proposed is unnecessary and overly administrative and bureaucratic, and I can see no reason for its inclusion. There will be no advantage to public safety or improvement at all with this requirement. A dealer's licence should encompass permissions to possess and sell all types of firearms, as the problem will rapidly become that one dealer will have only an endorsement to "deal" on pistols but not "prohibited firearms" and another will only have an endorsement for "restricted weapons". This will, for no benefit, cause a dramatic increase in unnecessary complexity.

10. S 66B - Compulsory to supply personal details to police

A person in possession of a firearm, airgun, magazine, part or ammunition must give their details to a member of police.

This is a great expansion from the current requirement for an individual to produce a firearms licence within seven days if they are in possession of a firearm. This expansion is dramatic and concerning. This type of power is traditionally reserved only for when a person is lawfully detained by an enactment. This would allow police to require a person, who may or may not be in actual physical possession of one of the items specified, or even just an airgun, to be forced, through threat of six months imprisonment or a fine of $10,000, to answer questions from the police. This fundamental loss of the right of every New Zealander to not have to answer questions from the police unless detained is a very major and serious potential degradation of basic human rights and needs to be carefully considered, as this type of power can be, and so often is, abused and the edges smeared by inexperienced and/or overzealous police officers, who will often take advantage of legislative power that is so broad.

General concerns

Too many sections rely on a subjective test of an individual police officer, or the Commissioner of Police too easily redelegating his/her power confirmed under the Act, without recourse to the law by way of appeal

The proposed internal review of a case before a person is eligible to have it assessed by an independent court is a breach of natural justice. If a review is to be done it should be conducted by an independent individual, such as a lawyer with 10 years PQE, or an independent panel headed by counsel, who will make a finding and revert the finding back to the police. This section should be greatly expanded.

The penalties being imposed for minor breaches of administration are grossly disproportionate to the "offence" committed and are unfair and unreasonable.

Conclusion

The number of administrative offences has increased by 80% and the overall penalties have increased by 100% from the previous Act[6].

[6] The Arms Act 1983, as amended 1992.

The level of bureaucratic and administrative complexity on this Bill has doubled that of the old Act. It is poorly written, poorly constructed and complex, with many sections in practice repeating themselves in their function. This will lead to potential errors and mistakes in its application and interpretation that will inevitably lead to wrongful and unreasonable prosecution being brought by overzealous or equally confused, badly informed or advised police officers, leading to wrongful convictions of individuals who, for no particular fault of their own, have been unable to comply with or decipher this maze of requirements.

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COLFO and the Fair & Reasonable campaign would like to thank Nicholas Taylor for his support in providing this information.

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If you would like to keep up to date with the Fair & Reasonable campaign, please subscribe to updates at:

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We will be providing support for you to make your voice heard on this Bill, through a submission to the Select Committee. Information on how to do so will be available on www.FairandReasonable.co.nz