



LEGISLATION DESIGN AND ADVISORY COMMITTEE

4 April 2019

Michael Wood MP
Finance and Expenditure Committee
Parliament Buildings
Wellington

Dear Mr Wood

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

1. The Legislation Design and Advisory Committee (LDAC) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. LDAC provides advice on design, framework, constitutional, and public law issues arising out of legislative proposals. It is responsible for the *Legislation Guidelines* (2018 edition), which have been adopted by Cabinet.
2. In particular, LDAC's terms of reference include these dual roles:
 - a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
 - b. scrutinising and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.
3. The Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill was not considered by LDAC prior to introduction. LDAC has therefore reviewed and wishes to make the attached submission on the Bill as introduced.
4. Thank you for taking the time to consider the LDAC's submission.

Yours sincerely

Karl Simpson
Chairperson
Legislation Design and Advisory Committee



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Introduction

1. The Legislation Design and Advisory Committee has been given a mandate by Cabinet to review introduced Bills against the *Legislation Guidelines* (2018 edition) (**Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on ensuring good legislative design and the consistency of a Bill with the principles contained in the Guidelines.
2. Our submission is limited to the form of the Henry VIII provisions and the strict liability offences in the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill (the Bill).

Order in Council power to change the items that are prohibited by the Act

3. Clause 66 of the Bill inserts replacement section 74A, which provides for the scope of the firearms, magazines, and ammunition prohibited under the Act to be changed by Order in Council. These changes are subject to subsequent confirmation by the House under section 74B.
4. Section 74A is, in terms of the Guidelines, considered to be a "Henry VIII" power. Under the Guidelines, a Henry VIII power should be "as limited as possible to achieve the objective". In essence, the scope, criteria or context for the power should be clear enough to circumscribe the power so that the policy is set wholly or largely by Parliament (see chapter 15.1 of the Guidelines).
5. The new section 74A(a) and (b) would enable Orders in Council to amend or replace the Act's descriptions of the types of semi-automatic firearms, pump action shotguns and magazines that are prohibited. This would enable the Executive at any point in the future to

narrow (or expand) the scope of the prohibition by removing, or bringing in, types of semi-automatic or pump action firearms, or magazines, from the prohibition.

6. LDAC queries whether this is the intended effect of this power. It seems more likely that the purpose of section 74A(a) and (b) is to ensure that the descriptions in new sections 2A or 2B are able to be modified soon after enactment if unintended consequences arise when citizens and NZ Police begin to apply the new prohibition.
7. If the purpose is intended only to allow for necessary modifications for a limited time after enactment, LDAC recommends that section 74A(a) and (b) be subject to a sunset clause. This would enable any initial adjustment to be made to avoid or reduce any unintended consequences of the wording in the Bill, but remove an ability for the Executive to be permanently empowered to reduce or increase the scope of the prohibition by Order in Council without prior reference to Parliament. While the potential for disallowance and confirmation provides some oversight, this is significantly after the fact.
8. A possible sunset date could be the end of the amnesty period, or potentially a later date such as 1 year from commencement. Any change made prior to sunset would remain in force.
9. We have also considered new section 74A(c), (d) and (e), which provides for declarations to be made by Order in Council that *expand* the scope of the new prohibitions in the Act to additional types of semi-automatic and pump-action firearms, and magazines and ammunition.
10. This power essentially matches the scope of the current section 74A, which was used in the recent Order in Council to expand the scope of what was considered to be military style semi-automatics. LDAC is satisfied that, in terms of the Guidelines, the long title of the Act provides appropriate scope and criteria for the use of the power. On our reading, section 74A(c), (d) and (e) is limited to expanding the scope of the prohibition to *promote both the safe use and the control of firearms and other weapons*, and is guided by the public interest.

Transitional provisions for the Henry VIII powers

11. The Bill does not currently provide for transitional provisions where changes are made to the scope of the prohibition by the Orders in Council in section 74A. Chapter 12 of the Guidelines identifies the risk of uncertainty or injustice if transitional and savings provisions are not addressed.
12. There are likely to be circumstances where transitional and savings provisions are needed (similar to those in Schedule 1 of the Bill) to ensure that persons in possession of a newly prohibited type of firearm or magazine did not become in contravention of the law without a reasonable opportunity to dispose of the prohibited items. LDAC, therefore, recommends that the Order in Council power under new section 74A includes an ability to specify transitional and savings provisions relating to the changes made through the Order in Council.

Strict liability offences

13. The Bill includes a number of new or amended strict liability offences. In the context of the control of firearms, strict liability offences appear to be justifiable under Guideline 24.3, where the offence involves the protection of the public from those who voluntarily undertake risk-creating activities. However, while strict liability may be justified in the general context, we recommend the committee test this in respect of each offence.
14. Further, the committee should test whether the strict liability offences should provide for the defendant to rely on lawful authority or reasonable excuse, or provide for a defence. On this point there appears to be a lack of consistency in the Bill. Many of the new offences have a 'with lawful purpose' excuse but, for example, new section 43AA does not allow for any excuse, and provides for up to 5 years' imprisonment for the possession.

Recommendations

15. LDAC recommends that:
 - 15.1 the Order in Council power to change the Act's descriptions of prohibited items in proposed sections 74A(a) and (b) be subject to a sunset clause aligned with implementation of the prohibition.
 - 15.2 the Order in Council power in proposed section 74A include the ability to make transitional and savings provisions relating to the changes.
 - 15.3 the strict liability offences in the Bill are reviewed to ensure that strict liability is justified, and to identify offences where the defendant should be able to rely on lawful authority, a reasonable excuse, or should have a defence.
16. Thank you for considering our submission. We would be happy to assist departmental officials on these issues.

Yours sincerely



Karl Simpson
Chairperson
Legislation Design and Advisory Committee