

BRIEFING FOR THE MINISTERS OF POLICE AND JUSTICE			
Priority	<input type="checkbox"/> Urgent <input checked="" type="checkbox"/> Time-Sensitive <input type="checkbox"/> Routine Decisions requested by Friday 26 July to enable drafting instructions to be issued for inclusion in the Arms Amendment Bill.		
Title	Arms Act 1983 Offences and Penalties		
Date	Tuesday 23 July 2019	Ref	BR/19/79

Executive summary

1. A number of the offences and penalties in the Arms Act 1983 (the Act) are no longer fully fit for purpose and require updating. Some new offences and penalties are also necessary for new requirements in the Act.
2. Cabinet agreed that Police and the Ministry of Justice (Justice) should work together on the offences and penalties, with the Minister of Police and the Minister of Justice given delegated power to make decisions on the details to enable drafting instructions to be issued [CAB-19-MIN-0288].
3. This briefing seeks your agreement to proposals to modernise some offences, highlights where proposals have been amended from previous suggestions, and recommends maximum penalties for the offences.
4. Officials have agreed on settings for some of the offences, but others present trade-offs that each agency gives different weight to. The paper is structured in three parts:
 - a. Offences where Police and Justice have found agreement (17 offences)
 - b. Offences where Police and Justice are working together to finalise penalty increases and elements of the offences (ten offences).
 - c. Offences that currently attract a reverse burden (the accused is required to prove that they have not committed the offence) through the operation of s 66. Police proposes retaining the current construction, while Justice proposes replacing the reverse onus with an evidential burden (one provision).
5. Once we have your direction, Police and Justice will work with the Parliamentary Counsel Office (PCO) on the drafting of the offences for the Bill.

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Recommendations

Police and Justice recommend that the Minister of Police and the Minister of Justice:

- a) **agree** to the four new offences and their penalties, as discussed at paragraphs [9 - 12].

Yes/No

Yes/No

- b) **agree** to the increased penalties for the strict liability offences listed in table one

Yes/No

Yes/No

- c) **agree** to the increased penalties for the mens rea offences listed in table two

Yes/No

Yes/No

- d) **note** that officials will continue discussions about the offences listed in table three to come to an agreed position and follow up with further advice

- e) **EITHER**

(i) agree to there being no changes to the offences that are subject to the section 66 reverse burden regarding deemed possession (Police preference)

Yes/No

Yes/No

OR

(ii) agree to the section 66 reverse burden regarding deemed possession being changed from a legal burden to an evidential burden (Justice preference)

Yes/No

Yes/No

- f) **note** that should you agree to e(ii) above, officials will seek confirmation of this decision from the Ministers with Power to Act on policy decisions

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- g) **direct** Police to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above decisions.

Yes/No

Yes/No

Minister's comments and signature

..... / / 2019

Hon Andrew Little
Minister of Justice

..... / / 2019

Hon Stuart Nash
Minister of Police

PROACTIVE RELEASE

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Arms Act 1983 Offences and Penalties

Background

1. When seeking policy approval to draft amendments to the Arms Act, the Minister of Police proposed that officials from Police and Justice work together on the construction of existing and new offences and penalties. Cabinet agreed that the Minister of Police and the Minister of Justice be delegated the power to make decisions on the details of the offence and penalty proposals, with Cabinet confirmation of those decisions to be sought when seeking approval to introduce the Bill [CAB-19-MIN-0288].
2. Police and Justice have undertaken further work and are in general agreement to the proposals in Part A of this paper.
3. The matters discussed in Part B require some further discussions between officials.
4. Police and Justice are not in agreement about the issues discussed in Part C about the section 66 reverse burden in relation to deemed possession. Police proposes retaining the current construction, while Justice proposes replacing the reverse onus with an evidential burden.

General approach to the modernisation of offences and penalties in the Act

5. We have grouped offences so that those with similar or commensurate offending have the same proposed maximum penalty. There is not always a consistent increase between the current penalty and the recommended penalty. Some have greater increases to recognise the seriousness of offending, while others have been increased mostly due to the age of the Act. Officials have attempted, where possible, to align the offence with Legislative Design Advisory Committee (LDAC) guidance and ensure that they are consistent with the New Zealand Bill of Rights Act 1990 (BORA).
6. The Minister of Police previously considered a briefing with some suggested penalties and made some amendments [BR/19/46]. The penalties have gone through further consideration by Police in consultation with Justice and a number of further changes have been recommended, as set out in tables one and two.
7. For the offences that are proposed to attract a maximum penalty of 5 or more years' imprisonment we recommend that there will not be any monetary fine provided. This is because these offences are aimed at individual culpability of a more serious criminal nature similar to offending under the Crimes Act 1961, which does not generally specify a maximum fine. However, under the Sentencing Act 2002 it is still possible for the courts to impose a fine instead of imprisonment, home detention, or a community-based sentence, even where a fine is not prescribed (section 39).

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Part A: New offences and updated maximum penalties

New offences and penalties

8. Officials propose the introduction of four new offences and penalties related to new powers in the Amendment Bill. Police note that while there are a number of changes being made to the Act, many of these have implications for compliance in relation to the licensing system and related enforcement tools, rather than having direct offences and penalties provided.
9. There are two offences relating to information required for the new Registry:
 - a. The first is a lesser strict liability offence of failing to provide information without reasonable excuse, with a proposed maximum penalty of \$10,000.
 - b. The second is a more serious offence of intentionally or recklessly not providing information or providing false or misleading information, with a proposed maximum penalty of \$20,000 or 2 years' imprisonment.
10. A new condition on all firearms licences will require a person to permit the inspection of their firearms or where they are secured. Failure to do so will be a strict liability offence, with a maximum penalty of \$10,000.
11. A firearms licence will be required to possess parts, magazines or ammunition. Possession of these without a licence will be a strict liability offence with a maximum penalty of \$10,000.
12. The recommended penalties for these four offences are commensurate with penalties for similar offending in the Act.

Updated maximum penalties – strict liability offences

13. There are 11 strict liability offences where we propose to increase penalties. We will work with PCO to ensure the strict liability offences are identified and have the appropriate defence of having a reasonable excuse (in compliance with the LDAC Guidelines).
14. LDAC Guidelines note that strict liability offences (where the prosecution is not required to prove a mens rea or 'mental' element related to the offence, such as intent or knowledge) are appropriate: in a regulatory context if the offence involves the protection of the public from those who voluntarily undertake risk-creating activities; when there is a need to provide an incentive for people who undertake those activities to adopt appropriate precautions to prevent breaches; and where the defendant is best placed to establish absence of fault because of matters primarily within their knowledge.
15. Justice considers that the rationale at paragraph 14 provides justification for these offences to be strict liability. However, Justice considers that it would be best practice if these offences did not carry the imprisonment term proposed. Maximum penalties should be adjusted down to reflect the fact that strict liability offences relieve the prosecution of the burden of proving the mental element of

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the offence, thereby engaging the right to be presumed innocent (section 25(c) of BORA). Any risks associated with limiting section 25(c) are exacerbated by an imprisonment term.

16. Some mitigation is offered by the provision of a defence ('without reasonable excuse') to enable deserving defendants to exonerate themselves. Additionally, imprisonment is already provided for in these offences. Justice does not oppose these offences but notes the justifiability of any limit on the right may be finely balanced when the Bill undergoes a BORA vet and could lead to a negative vet.
17. Despite concerns raised by Justice, Police consider the strict liability offences that attract a proposed maximum penalty of six months are appropriate in the circumstances, including the mitigations discussed in the paragraph above.
18. Some of the issues set out at paragraphs 15 and 16 apply equally to the new offences added through the April Amendment Act (set out at table four), which do not presently explicitly contain mens rea. Justice would prefer that a mental element be specifically provided, particularly as no defence is specified. Justice notes that it is unclear how the courts would interpret offences with no mens rea: they could conclude that no mental element is required, or equally 'read in' a requirement for prosecution to prove a high mental element such as intent. Such ambiguity is undesirable both for prosecutors and defendants.
19. Police do not propose to make any changes to the new April offences, with the exception of one offence (set out in table one). This is section 55B, which relates to a dealer failing to produce or not allowing inspection of any pistol, restricted weapon, or prohibited firearm or magazine. The penalty is currently set at a \$1,000 fine or 3 months imprisonment. We propose to align the penalty to that proposed for the similar offence under section 12 related to inspections of firearms (maximum penalty \$10,000 or 6 months imprisonment).
20. The strict liability offences, current penalties, previously proposed penalties, and current proposals are set out in the next table.

TABLE ONE: STRICT LIABILITY OFFENCES

#	Section	Offence	Current max penalty	Previous proposal	Proposed change
1	74(1)(r)	non-compliance with any regulations, in the case where it has been identified to be an offence in the regulations to do so	\$400	-	\$2,000
2	34(3)	the holder of a firearms licence does not inform Police in writing within 30 days of any change of address	\$500	-	\$2,000
3	38(2)	not giving four days' notice to Police of intended removal of Pistol, MSSA or restricted weapon out of New Zealand	\$500	\$1,000	\$2,000
4	11(2)	dealers or their employees or agents not having a firearms licence and selling	\$500	\$10,000	\$10,000

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#	Section	Offence	Current max penalty	Previous proposal	Proposed change
5	39(2)	owners of firearms not reporting the loss, theft or destruction of any of their firearms	\$500	\$10,000	\$10,000
6	12(3)	dealer not maintaining records relating to the receipt, sale, or manufacture of firearms as required by regulations, and not producing firearms or allowing security inspections	\$500	\$10,000 6 months	\$10,000 6 months
7	55B (April Act)	having a dealer's licence or an endorsed licence holder fails to produce for Police, or does not permit inspection of, any pistol, restricted weapon, or prohibited firearm or magazine	\$1,000 3 months	\$25,000 6 months	\$10,000 6 months
8	40(3)	any person in possession of a firearm who refuses to give name, address or date of birth or gives false particulars to Police	\$1,000 and/or 3 months	\$10,000 6 months	\$10,000 6 months
9	41(4)	failure to surrender airguns or antique firearms (no Dealers licence or Firearms Licence)	\$1,000 and/or 3 months	\$10,000 6 months	\$10,000 6 months
10	59(4)	failure to comply with a notice to surrender a firearm that has not been brought up to a safe standard after a notice from police to bring it up to safe standard	\$500	\$5,000 1 year	\$10,000 6 months
11	28(5)	when licence revoked, for not delivering firearm, pistol or restricted weapon to Police	\$1,000 and/or 3 months	\$10,000 1 year	\$10,000 6 months

Updated maximum penalties – mens rea offences

21. We propose to increase the penalties for the following six offences. These offences were framed as strict liability offences. However, due to the new higher proposed penalties it is appropriate that a mens rea element be included. We will work with PCO and Justice to ensure that the offences have an appropriate mens rea element (likely to be knowledge, intention, or recklessness).

TABLE TWO: MENS REA OFFENCES

#	Section	Offence	Current max penalty	Previous proposal	Proposed change
1	42(1)	adds to firearms licence, alters licence in any way, lends to another person, uses the licence of another person, supplies information knowing it to be incorrect	\$1,000 and/or 3 months	\$10,000 6 months	\$20,000 2 years
2	43A(1)	sells by mail order a firearm or any ammunition for firearm or restricted weapon without order signed by purchaser and bearing an endorsement by Police	\$1000	\$10,000 2 years	\$20,000 2 years
3	48	without reasonable cause discharges a firearm, airgun, pistol or restricted	\$3000 and/or	\$20,000 2 years	\$20,000 2 years

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#	Section	Offence	Current max penalty	Previous proposal	Proposed change
		weapon in or near a dwelling house or public place (so as to endanger, annoy or frighten any person)	to 3 months		
4	5(4)	dealing without a dealer's licence	\$1,000	\$50,000 1 year	5 years
5	10(3)	a dealer taking possession for sale of a pistol, restricted weapon, prohibited items unless in certain circumstances	2,000	\$50,000	5 years
6	52(1)	except for lawful purpose presents a firearm, pistol, airgun or restricted weapon at any other person	\$1,000 and/or 3 months	\$50,000 5 years	5 years

Part B: Offences that require further discussion between officials

22. Police and Justice are finalising proposals for some offences that require further consideration. Officials are working together to appropriately balance the workability of these offences with BORA implications and compliance with LDAC guidance. This includes any issues related to appropriate mens rea elements or issues arising from the reverse onus elements of some of these offences (where the defendant has a burden to prove certain matters).

TABLE THREE: OFFENCES REQUIRING FURTHER DISCUSSION

#	Section	Offence	Current max penalty
1	43B(1)	sells ammunition for firearm or restricted weapon to anyone who is not a licence holder or dealer	\$1,000
2	58(2)	any person who fails to report causing death or injury by use of firearm, airgun, pistol or restricted weapon (note the actual act of causing death or injury is covered by s53 (proposed \$50 000/5 years) and also offences under the Crimes Act 1961)	\$1,000 and/or 3 months
3	21(2)	possession of airgun unless over 18 or between 16-18 with a firearms licence	\$1,000 and/or 3 months
4	49	except for lawful, proper and sufficient purpose discharges or carries anywhere any bolt gun, stud gun or humane killer etc.	\$1,000 and/or 3 months
5	36(3)	carries a pistol or restricted weapon outside conditions endorsed on firearm licence	\$1000 and/or 3 months
6	43(1)	selling or supplying a firearm (airgun under 18) to a person not having a firearm licence	\$1,000 and/or 3 months
7	47	incapable of proper control of any firearm, airgun, pistol or restricted weapon due to alcohol and/or drugs	\$3,000 and/or 3 months
8	16(3)	brings into NZ a firearm (other than PF) pistol, starting pistol, restricted airgun, or restricted weapon, or parts of firearm, pistol, starting pistol, or restricted weapon, plus new 'blank firing gun' and ammunition	\$2,000 and/or 1 year
9	46(1)	except for lawful, proper and sufficient purpose carries an imitation firearm	\$4,000 and/or 2 years
10	44(1)	selling or supplying pistol, or restricted weapon to anyone who does not have an import permit or permit to possess	\$4,000 and/or 3 years

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Part C: the section 66 reverse burden in relation to deemed possession

Current operation of section 66

23. There are a number of offences that are subject to section 66 of the Act. Section 66 provides a reverse onus related to the possession of a firearm when it is on a person's land or building or in the vehicle they are driving. This places a legal burden on the defendant. That is, unless the person can prove on the balance of probabilities that the firearm was not their property and it was in the possession of some other person, the firearm is deemed as being in their possession. Section 66 applies to every offence of possession in the Act.
24. This reverse onus in section 66 was retained for prohibited firearms in the recent Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019. Justice's preference was to remove its application to prohibited firearms. However, Police reserved its position at that time to enable further work to be done to ensure there would not be any unintended consequences if it did not apply. Per the Addendum to Arms (Prohibited Firearms, Parts and Magazines) Amendment Bill: Approval for Introduction, it was provided at [33] that "Any existing reverse burden of proof in these offences will apply. This aspect of the existing offences will be reviewed in the next phase of work to update the offences and penalties regime in the Act (CAB 19-MIN-0124 refers)."
25. Police considers section 66 should be retained in its current form. Justice considers section 66 should be amended to place an evidential burden on the defendant. These views are reflected in split recommendations at (e)(i) and (ii). The reasons for these views are provided below.

Justice view

26. Justice has serious concerns with the proposed retention of section 66 in its current form, irrespective of whether section 66 or the provisions to which it applies are being otherwise amended. Justice considers section 66 a limitation on the right to be innocent until proven guilty (section 25(c) BORA). This is because section 66 places a positive obligation on the defendant to disprove their guilt: the section deems that the defendant is 'in possession' of a firearm or part unless they can prove it is both in the possession, and the property, of another person.¹ If they are unable to prove this, a defendant is liable to substantial imprisonment terms (up to 7 years). It is possible that multiple people could be prosecuted in relation to one firearm.
27. The right to be presumed innocent plays a critical role in curing or mitigating defects in criminal procedure, as well as maintaining the public confidence in the integrity of the criminal justice system. Serious economic, social and personal consequences fall upon those persons convicted of criminal offences. It is wholly appropriate that the presumption of innocence provide a protection against the power and resources of the state in prosecuting criminal offences. It is not by any

¹ We note that reverse onus provisions differ from strict liability offences by not only removing a burden from the prosecution but placing a positive legal requirement on the defendant.

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means certain that a defendant would have access to information to enable them to prove that a firearm was the property or in the possession of another person.

28. Justice considers that there is no compelling reason why the objective of section 66 could not be served by a lesser impairment on the right to be presumed innocent. We suggest replacing section 66 with an evidential burden. This would require the defendant to bring evidence calling into question whether or not they possessed the firearm or part, while giving rise to less risk that an innocent person may be convicted and imprisoned.
29. Evidential burdens are commonly used in New Zealand statutes² and well understood by the courts. They require the defendant to put evidence before the court of a 'credible narrative', or evidence showing a reasonable possibility that the firearm was another person's property and in their possession. Once the evidential burden is satisfied, the prosecution must disprove this narrative beyond reasonable doubt (which is the criminal standard of proof).
30. While still representing a departure from the right to be innocent until proven guilty, an evidential burden is an appropriate compromise between maintaining operational workability of offences relating to possession and protecting the rights contained in BORA.

Police view

31. Police considers it is appropriate to retain the legal burden on the defendant. Section 66 is relied on in a number of high risk situations where public safety is paramount. This includes matters relating to gang activities and organised crime, where firearms are found on properties and in vehicles, where there are multiple occupants and no one accepts ownership. These are complicated situations, and the firearm not being the defendant's property and being in the possession of someone else is likely to be a matter that is particularly within the knowledge of the defendant.
32. It is not entirely clear how the evidential burden will be met by the defendant (for example to raise credible evidence that the firearm is not their property and is in the possession of someone else) nor how the prosecution would then meet the legal burden in these circumstances. The current burden of proof construct provides a practical legislative tool to Police to enable them to keep the public safe. In the view of Police there may be lower numbers of convictions for possession of dangerous firearms without the current onus on the defendant.
33. Police come across examples regularly where loaded firearms are found in the possession of offenders, who claim the firearm is not theirs. For example, an offender went on the run after seriously assaulting his partner. He was found in a hotel room with another person, and a loaded AK47. Without the burden of proof falling to the offender it may have been difficult for Police to prove a charge of possession against him.

² See s 48 of the Arms Act "discharging a firearm... *without reasonable cause*" places an evidential burden on the defendant to raise a reasonable narrative that they had reasonable cause. It is then for the prosecution to prove the absence of a reasonable cause (*R v Gorrie* [2007] NZCA 144).

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34. In another example, an offender fractured his partner's eye socket during an assault. The offender went on the run, and as he was known to carry firearms, the AOS team were deployed. He was found fleeing from a gang address. A search of the property located an assault rifle. Police consider that without the reverse burden of proof a charge was unlikely to have been successful, given the nature of the gang address.

Affected offences

35. The next table sets out the offences that are subject to the section 66 reverse burden. We are not proposing to increase any of these penalties, nor make any other amendments to these sections, unless Ministers decide to change the burden on the defendant from a legal burden to an evidential burden.

TABLE FOUR: OFFENCES SUBJECT TO SECTION 66 REVERSE BURDEN

#	Section	Offence	Current max penalty
4	20	in possession of firearm and not of or over the age of 16 and the holder of a firearms licence	\$1,000 and/or 3 months
8	49A	in possession of firearm, prohibited magazine, prohibited part, or airgun when they have had licence revoked, and no current licence or authorisation	\$4,000 and/or 1 year
2	43AA (April Act)	possesses or sells or supplies prohibited ammunition without reasonable excuse	2 years
3	50B (April Act)	in possession of a prohibited magazine and not authorised or permitted to do so by Act	2 years
4	50C (April Act)	in possession of a prohibited part and not authorised or permitted to do so by Act	2 years
11	50(1)	in possession of a pistol, or restricted weapon and not authorised or permitted to do so by Act	\$4,000 and/or 3 years
12	51	unlawful carriage or possession in public place of firearm (other than prohibited firearm), airgun, pistol, ammunition, explosive, or restricted weapon	\$4,000 and/or 3 years
10	45(1)	carrying or possession of a firearm, airgun, pistol, restricted weapon, or explosive except for some lawful, proper and sufficient purpose.	\$5,000 and/or 4 years
5	50A (April Act)	in possession of a prohibited firearm and not authorised or permitted to do so by Act	5 years
6	54(2)	possesses a restricted weapon, imitation firearm, ammunition or explosive at the time of committing an offence punishable by imprisonment for a term up to 3 years [note using firearm in committing a crime covered by Crimes Act 198B]	5 years
7	55A (April Act)	without lawful purpose assembles prohibited firearm or converts a firearm into a prohibited firearm	5 years
8	50D (April Act)	carriage or possession in public place of prohibited firearm without lawful purpose	7 years
9	53A(2) (April Act)	possesses a prohibited firearm at the time of committing an offence punishable by imprisonment for a term up to 3 years	7 years

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Next steps

36. Police will issue drafting instructions to PCO to give effect to decisions related to the strict liability offences set out in table one and the mens rea offences set out in table two.
37. We will seek approval of any additional changes when the Bill is considered by the Cabinet Legislation Committee on Tuesday 20 August 2019.

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s 9(2)(a)

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Richard Chambers
Assistant Commissioner, Investigations,
Serious & Organised Crime
New Zealand Police

s 9(2)(a)			