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*After Port Arthur - Issues of Gun Control in
Australia*

Current Issues Brief
No.16 1995-96



ISSN 1321-1560

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***After Port Arthur - Issues of Gun Control in
Australia***

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7 May 1996

**Current Issues Brief
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Acknowledgments

Jennifer Norberry wishes to acknowledge the assistance of Bob Bennett, Director, Law and Public Administration Group.

Kirsty Magarey wishes to acknowledge the assistance of Wiltrud Harms, Reference Specialist for United Nations and Human Rights Law at the University of California, Berkeley's Law School Library (Boalt).

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Contents

Major Issues	i
How many firearms are there in Australia?	1
Firearms and death in Australia	1
Recent Multiple Killings in Australia	2
Military-Style Weapons	2
National Committee on Violence	4
National uniform gun laws?	5
The Commonwealth Constitution and firearms laws	6
Australasian Police Ministers Council	7
What can be done to introduce uniform firearms laws in Australia?	7
A Cooperative Approach	7
Referral Of Powers From The States To The Commonwealth	7
Constitutional Amendment	8
Commonwealth Powers	8
Some questions about firearms laws	10
Table 1	12
Attachment A:	13
The External Affairs Power and Gun Laws in Australia	13
Multilateral Treaties	13
An Issue of International Concern?	14
Endnotes	15

Major Issues

On 28 April 1996, 35 people were killed at the Port Arthur Historic Site and many others were injured. The lives of many others - families, friends and those who care for the wounded and dying - have been permanently effected.

In 1994, over 400 Australians used a firearm to commit suicide, about 20 Australians were killed in firearms accidents and over 70 Australians were the victims of intentional killing - often by people known to them or by family members.

There is no uniform national firearms legislation in Australia. The Commonwealth controls importation and the States and Territories each have their own legislative schemes to regulate the ownership and use of firearms. It has been estimated that there are about 3.5 million firearms in Australia. Over 10,000 firearms are legally imported into Australia each year (excluding those imported for military or police use).

In an *Age* poll of 2058 Australians taken on 3-5 May 1996, 90 per cent of those surveyed supported a national ban on all automatic and semi-automatic firearms, 88 per cent supported firearms registration, 73 per cent thought that gun owners should pay an annual registration fee for each gun they own, and 69 per cent thought that gun owners should be required to store their guns at an armoury or with the police.

The Hoddle Street and Queen Street mass killings in Victoria in 1987 provoked a great amount of community concern and resulted in the establishment of the National Committee on Violence (NCV). The NCV made 17 recommendations relating to firearms. Many of these, including a recommendation for uniform firearms laws in Australia, have not been implemented. Once again, Australians must consider the need for a concerted, national approach to firearms control, what that approach should entail and how it should be implemented. The lethal use of firearms is a dramatic indication of violence in society. Evidence suggests that the availability of guns increases the likelihood of death in cases of assault, self-inflicted injury and accident.

The events at Port Arthur have focussed the attention of all Australians on whether and how such occurrences can be prevented. But there are other reasons to consider anti-violence measures, including gun control. While mass killings are horrific events they are also relatively rare occurrences and our attention should not be diverted from violence that more commonly occurs in the community. The tragedy at Port Arthur should stimulate community debate and political action about violence prevention strategies in general, as well firearms laws in particular.

How many firearms are there in Australia?

Estimates of the number of firearms in Australia vary. Not all jurisdictions require firearms to be registered and, in addition, there are unauthorised firearms in the community. In 1990, the National Committee on Violence put the number of firearms in Australia at 3.5 million, at that time, approximately one firearm for every four Australians.¹

Firearms and death in Australia

Statistics on firearms deaths in Australia for 1994 have been published by the Australian Institute of Health and Welfare.² These figures show that of 522 firearms deaths in 1994, 420 were suicides, 76 were the result of interpersonal violence, 20 were the result of an accident and in six cases, the intent was unknown.³

Firearms are not the only weapons used in homicides in Australia. Figures for 1992-93 show that firearms were used in 25 per cent of homicides. Sharp instruments were used in 30 per cent of homicides, assault or the use of blunt instruments was the cause of death in 27 per cent of homicides, strangulation in 7 per cent and in 10 per cent of cases the primary weapon or method of homicide was unknown or categorised as 'other'.⁴

In the same year (1992-93), in 40 per cent of homicides involving a firearm the weapon was a .22 calibre rifle, in 30 per cent of cases it was a shotgun, in 13 per cent of cases it was a hand gun, in 7 per cent of cases an automatic or semi-automatic and in 4 per cent of cases, a .303 calibre rifle.⁵

It has been estimated that 84 per cent of victims in mass killings between 1987 and 1993 were killed by a licensed gun holder, while 86 per cent of the victims were reportedly killed by a person with no recorded history of violent crime or mental illness.⁶

The recent mass killing at Port Arthur, Tasmania, which left 35 people dead has sparked understandable concern about firearms in Australia. It is important to remember, however, that firearms are also significant contributors to deaths by accident, suicide and in individual killings - in particular, domestic homicides. Firearms are important contributors to death and injury in two ways. First, in terms of their availability and second, because they are lethal. The National Committee on Violence concluded:

The vast majority of firearms homicides are unplanned and impulsive, and in all likelihood would not occur if such a lethal weapon were not to hand. The availability of a firearm in these circumstances makes death a far greater likelihood, for research has demonstrated that the death rate for victims assaulted by guns is several times that of those assaulted with lethal intent by knives or other weapons.⁷

International experience appears to support this finding and the view that the amount of violent death in the community is related to gun ownership. One study, based on a sample of 18 countries concluded:

Substantial correlations were found between gun ownership and gun-related as well as total suicide and homicide rates. Widespread gun ownership has not been found to reduce the likelihood of fatal events committed with other means. Thus, people do not turn to knives and other potentially lethal instruments less often when more guns are available, but more guns usually means more victims of suicide and homicide.⁸

Recent Multiple Killings in Australia

Recent multiple killings in Australia have included:

- August 1987 - seven people shot in Melbourne in the Hoddle Street killings;
- December 1987 - eight people killed in Melbourne in the Queen Street massacre;
- August 1990 - five people shot in Surrey Hills, Sydney;
- August 1991 - six people shot and one stabbed in the Strathfield Shopping Plaza, Sydney;
- October 1992 - six people shot by a lone gunman in the Central Coast of New South Wales;
- February 1992 - four people hacked to death at a farmhouse north of Perth;
- August 1993 - three people shot dead by a gunman in the inner west of Sydney;
- December 1995 - three members of the one family knifed to death in Brisbane;
- January 1996 - seven people shot dead in a murder-suicide in a Brisbane suburb.⁹

Military-Style Weapons

Reports of the shooting at Port Arthur indicate that the suspect was using high powered semi-automatic rifles with large capacity magazines. These weapons are usually referred to as military-style rifles because they have most of the characteristics of weapons developed for the use of troops in the armed forces of various countries. In many cases, civilian versions of the rifle are identical to their military counterparts, in others they are sold slightly modified, sometimes by deleting a fully-automatic fire option, often by being offered with a lower-capacity magazine. In practice, however, such changes can be overcome by modifying the firing mechanism or purchasing replacement parts, such as the original high-capacity military magazines.

There has been some confusion about the nature of military-style weapons in past attempts to regulate them. For instance, Customs Regulations before 1990 described such weapons as those 'incorporating a pistol grip in its design'¹⁰, although this was not a characteristic of earlier military semi-automatic rifles. In general, however, two characteristics of military-style rifles stand out for their possible danger to the public — the high velocity at which they fire bullets and the large capacity of their magazines.

Two weapons matching these characteristics have been cited as being used at Port Arthur, an AR15 of American origin and an SKS which may have been made in the Peoples' Republic of China. In addition there have been reports of some further weapons of possible military background being recovered from the Seascope Guesthouse, although whether they were taken there during the affray has not been stated. One of them was said to be a military shotgun of Belgian make.

The AR15 is the company designation of the M16, the standard US ground forces weapon in the Vietnam conflict. It is a semi-automatic rifle which fires a 5.56mm bullet at a muzzle velocity of 1 000 metres per second [more than twice that of 'traditional' military rifles, such as the 303], out to an effective range of 400 metres. It can be equipped with 20 or 30 round magazines and has a theoretical [cyclic] rate of fire of 700 to 900 rounds per minute.

The SKS was the standard Soviet infantry weapon of the 1950s and was manufactured throughout much of the then Eastern Bloc. Later versions of the Chinese weapon can be identified by the fact that the integrally mounted bayonet has a triangular blade. The SKS differs from the AR15 in firing a larger 7.62mm bullet at significantly slower velocity — 735 metres per second. It has a ten round magazine as standard but will accept a 30 round version.

Ammunition for these guns is available commercially. The standard US 5.56mm military ammunition had been a development of commercially available .222 sporting ammunition, and has been adopted for manufacture in many countries. The military round is sold for civilian use as conventional sporting ammunition and tends to be unsuitable for high velocity rifles. Versions of the standard NATO 7.62mm bullet are sold commercially as the .308 Winchester.

Several features of this type of weapon make military-style rifles extremely dangerous. Their high rates of fire and large magazines allow rapid, indiscriminate firing at targets, and require no mechanical action that might allow a break in the mood of the operator. The shooting at the Port Arthur site itself reportedly lasted no more than eight minutes.

The major danger posed by these weapons, however, is their enormous destructive power. There is some debate in military circles about the most effective calibre of bullet. This tends to concern the characteristics of the projectile at extended ranges and selection is usually based on issues of doctrine and tactics rather than the performance of the projectile. These concerns are not relevant in cases where these weapons have been used in mass murders. When fired from close range, both weapons of the type used at Port Arthur create massive damage, temporarily displacing tissue outwards from the bullet's path to diameters of around

20 centimetres, and shattering bone on impact. Although the 5.56mm bullet has about half the energy of the larger round, even at close range, its effects on bone are more severe, as the bullet shatters, pulverising sections of bone that are hit¹¹.

These characteristics have significant implications for those victims who are wounded but survive an attack by a military-style weapon. Surgery may be more difficult because of the massive disruption to the wound site. Injuries suffered may inflict a life-long handicap, or at the least require extended physiotherapy. These characteristics are consistent with reports that amputations were required for the treatment of some survivors of Port Arthur.

The ballistic characteristics of military-style rifles also reduce their usefulness in roles other than those they were designed for — that is, killing enemy soldiers. The performance of high velocity 5.56mm bullets is exactly the opposite of traditional hunting rounds. Game rounds have usually been designed to remain intact and kill the prey by damage to a vital organ, leaving the carcass intact.¹² Small game of around 10 to 15 kilograms mass, suffers exaggerated damage when shot by military-style weapons¹³. It is difficult to think of any area of hunting or commercial game shooting where the potential damage to trophy or carcass is not so great as to immediately rule-out the use of military style-weapons. Perhaps an application might be occasionally found in vermin control but, if the concentration of feral pests is so great as to require the rate of fire of a semi-automatic weapon, it could be that alternative control methods would be more efficient.

It is difficult to estimate how many military-style weapons are in civilian hands in Australia. The importation of military-style rifles with magazine capacities greater than five rounds was controlled under amendments to the Customs (Prohibited Imports) Regulations in 1991. However, those weapons already in the country can still be held, subject to the regulations of the States, and are currently sold by mail order throughout the country. The *Melbourne Age* [5 May 1996] estimates that there are more than 850 registered owners, possessing a total of 2000 military-style, semi-automatic rifles.

There seems to be agreement between Commonwealth and State governments that military-style weapons should be prohibited. The issue would now appear to be how to withdraw those weapons which are in Australia from the civilian population, and how to monitor whatever approach is adopted to ensure that this objective has been met.

National Committee on Violence

The Queen and Hoddle Street mass killings led to the establishment of the National Committee on Violence. In December 1987, an agreement was reached between Prime Minister Hawke, the State Premiers and the Chief Minister of the Northern Territory. The Committee was established in October 1988 and funded through contributions by the Federal, State and Territory Governments.

The Committee made over 130 recommendations for violence reduction in its report, *Violence: Directions for Australia*. Seventeen of these were on the subject of firearms control. Among other things, the Committee recommended:

- the enactment of uniform legislation throughout Australia to regulate the acquisition and possession of firearms,
- a ban on the importation of military weapons except when imported for use by law enforcement officers and the defence force,
- if constitutionally possible, a Commonwealth ban on the sale of mail order firearms,
- a ban on the sale of surplus military weapons,
- the establishment of a computerised national firearms registry,
- the prohibition of automatic weapons and some types of ammunition,
- restrictions on the possession of semi-automatic weapons,
- a requirement that all firearms owners be licensed,
- shooters' licences should not be available for minors,
- a cooling off period between application for and the grant of a shooter's licence,
- the introduction of training and competence standards for shooter's licence holders,
- the introduction of mandatory safekeeping standards for individuals and businesses,
- restrictions on private sales of firearms,
- the imposition of severe penalties for those convicted of using a firearm in the commission of a crime.

National uniform gun laws?

At present, control of firearms is fragmented between eight different Australian jurisdictions. The Commonwealth controls the importation of firearms and ammunition and the States and Territories regulate the sale, purchase, possession and storage of firearms.

While some States and the Territories have moved to amend their firearms laws, others have lagged behind. In some jurisdictions:

- minors can obtain a firearms licence;

- a firearms licence is valid for life,
- there is no specific requirement relating to the mental or physical condition of the applicant for a licence,
- there is no limit on the number of guns that can be held by a particular owner,
- automatic firearms can be owned by collectors or for the purposes of film production,
- semi-automatic weapons can be legally owned,
- there is no restriction on ammunition sales,
- not all firearms need be registered.

The Commonwealth Constitution and firearms laws

Under the Commonwealth Constitution, there is a division of powers between the Commonwealth and the States.

In order to legislate on a particular subject the Commonwealth must first find a relevant Constitutional head of power. The majority of these powers are found in section 51 of the Constitution. Section 51 enables the Commonwealth Parliament to legislate for the 'peace, order and good government of the Commonwealth with respect to' the matters then listed. These matters include overseas and interstate trade and commerce, taxation, postal and similar services, trading and financial corporations, and external affairs.

In contrast to the Commonwealth, the States can legislate for the peace, order and good government of the State - in other words, the legislative power of the States is not confined to a specific list of subjects. There are limits on State power - for example, under section 109 of the Commonwealth Constitution, a State law which is inconsistent with a valid Commonwealth law is inoperative to the extent of the inconsistency.

There is no express power over firearms and ammunition in the Commonwealth Constitution. Further, there is no right under the Commonwealth Constitution enabling citizens to bear arms.¹⁴

While no express power in relation to firearms exists under the Constitution, the Commonwealth has used its power over overseas trade and commerce to prohibit the importation of certain types of firearms.¹⁵ Under the *Customs Act 1901*, the Governor-General may make regulations prohibiting the importation of certain goods into Australia. These prohibitions are found in the Customs (Prohibited Imports) Regulations. In brief, they prohibit absolutely the importation of firearms other than exempt firearms. The Regulations also

prohibit absolutely the importation of firearms parts, except in the case of parts for exempt firearms.¹⁶

Australasian Police Ministers Council

The need for uniform national firearms laws was considered by the Australasian Police Ministers Council (APMC) in 1991. Recommendations for reform were drawn up as a result of that meeting.

At its meeting in May 1995, the Council noted the 'varying registration and licensing systems applicable to firearms and firearm ownership within the States and Territories to control the use of firearms' and agreed to establish a working party composed of officials from each jurisdiction to 'identify mechanisms which would achieve uniformity' in a number of areas. These mechanisms included uniform recognition of licensing between the States and Territories, a system to control mail order sales of firearms, uniform standards for training as a prerequisite to licensing, uniform standards for security and storage of firearms, and a uniform approach to the registration of pistols. Victoria agreed to coordinate the Working Party and reported to the Council meeting in November 1995. Further consideration of the subject was set down for February 1996. The February 1996 meeting was postponed when the Federal election was called. Following the Port Arthur massacre, an emergency meeting of APMC has been set down for 10 May 1996 in Canberra.

What can be done to introduce uniform firearms laws in Australia?

There are a number of options that could be used to produce uniform firearms laws in Australia. These are set out briefly below.

A Cooperative Approach

This is the approach that has been adopted through APMC. Prime Minister Howard will go to an APMC meeting on 10 May 1996 with further proposals for the type of uniform gun laws that the Commonwealth wants to see in place throughout Australia.

Referral Of Powers From The States To The Commonwealth

Under section 51(xxxvii) of the Constitution, the Commonwealth Parliament can make laws on matters referred to it by a State or States. Section 51(xxxvii) further provides that 'the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards

adopt the law.' The Premier of New South Wales, Mr Bob Carr, has introduced the Commonwealth Powers (Firearms) Bill into the New South Wales Parliament. The purpose of the proposed legislation is to refer control of firearms to the Commonwealth. In order for a referral of powers to work, all States would have to agree to refer their powers and the Commonwealth would have to be willing to enact legislation as a result of those referrals.

Constitutional Amendment

Section 128 of the Commonwealth Constitution sets out the manner in which the Constitution can be amended. First, an absolute majority of each House of Parliament must pass the proposed law for the alteration of the Constitution. The proposed law is generally called a Constitutional Alteration Bill.

It is important to note that section 128 of the Constitution contains a provision for the resolution of a deadlock if the House of Representatives and the Senate cannot agree on a proposal to alter the Constitution. If a proposed constitutional amendment is passed by one House but rejected by the other, then it can be resubmitted after three months have elapsed. If it is again accepted by one House and rejected by the other, then the Governor-General can submit the proposal to a referendum.¹⁷

In the case of a proposed law that has passed through both Houses of Parliament, the proposed law must then be submitted to a referendum not less than two months and not more than six months after it has passed through both Houses of Parliament. For the proposed Constitutional amendment to proceed, a majority of electors in a majority of States voting in the referendum must approve the proposed amendment to the Constitution.

Commonwealth Powers

As stated earlier, there is no power over firearms in the Commonwealth Constitution. Without a referral of powers from all the States or a constitutional amendment giving it power to enact laws about firearms and ammunition, the Commonwealth would have to rely on relevant heads of Constitutional power in order to introduce firearms laws. Any such legislation would be subject to express and implied Constitutional limitations - such as that providing for freedom of interstate trade.¹⁸

There are a number of heads of power that might be useful. For example, the Commonwealth could probably use the corporations power¹⁹ to regulate or prohibit trading and financial corporations from dealing in certain firearms and ammunition or from dealing in firearms not on a national firearms register.²⁰ It might be possible for the Commonwealth to use its power over postal services²¹ to prohibit or restrict mail order sales of firearms. The Commonwealth

might be able to use the interstate trade and commerce power to prohibit or regulate interstate trade in certain firearms and ammunition.²²

If a relevant international treaty existed to which Australia was a party, then the external affairs power could be used to legislate on the subject of firearms in a way reasonably proportionate to the treaty.²³ The idea has been floated of using the external affairs power as a basis for a Constitutional head of power through which the Commonwealth could regulate gun laws in Australia. This is certainly a novel concept, and the viability of such an approach has never been tested in the courts. Nor has it previously received a significant degree of academic or bureaucratic consideration. Failing the existence of a relevant treaty²⁴, there are High Court dicta that the Commonwealth could use the external affairs power to legislate on a matter of international concern or in accordance with the recommendation of a relevant international body (assuming, of course, that such a recommendation existed. See Attachment A).

The Commonwealth could also use the territories power²⁵ to legislate comprehensively on firearms and ammunition in the ACT and the Northern Territory.

Uniform controls over firearms might also be achieved in an indirect fashion. For example, the Commonwealth might use its grants power under section 96 of the Constitution. Section 96 enables the Commonwealth to 'grant financial assistance to any State on such terms and conditions as the Parliament sees fit.' High Court decisions suggest that:

Financial assistance may be granted over subject matter on which the Commonwealth otherwise has no authority and the terms and conditions imposed may be such that a recipient State has no control over the activities being financed.²⁶

Using section 96 of the Constitution, the Commonwealth could make grants available to the States on the condition that each enacts firearms legislation containing particular provisions - thus enabling uniform legislation to come into existence. The Commonwealth could also withhold monies where undertakings were not honoured or a State refused to comply with the Commonwealth's wishes.

The Commonwealth also has the power to make laws for taxation and excise.²⁷ At present firearms and ammunition are subject to the general rate of sales tax (22 per cent); with exemptions being allowed in some circumstances. The Commonwealth might place a high rate of tax on firearms and ammunition creating financial disincentives to ownership of firearms and ammunition. Taxes collected might be used to help fund a firearms 'buy back' scheme. Some concerns have been expressed about the costs of a 'buy back' scheme. In assessing these costs, it must be remembered that gun-related homicides and suicides themselves involve economic costs to the community. For example, mass killings like that in Port Arthur involve very substantial costs to the criminal justice system and also to tourism.

It has also been suggested that anyone in possession of a firearm not registered on a national firearms register could be subject to a high rate of tax based on the value of the firearm and

calculated for each year that the person has been in possession of the firearm.²⁸ However, section 53 of the Constitution states that a law is not a law about taxation merely because it imposes or appropriates fines or other pecuniary penalties. Thus, the exaction of such a payment might not survive a constitutional challenge because it might be regarded as a penalty rather than a tax.²⁹

Using the Executive Power of the Commonwealth, it is likely that the Commonwealth could establish a national firearms register, financed through an appropriation made under section 81 of the Constitution. It might also be possible, using section 51(xxxix) of the Constitution in conjunction with the Executive power, to establish a national statutory authority to register firearms and to confer the necessary powers on the authority. Given the difficulties encountered with a fragmented system of firearms regulation in Australia and the consequences for the nation as a whole of inadequate firearms laws, it is arguable that such measures might survive a constitutional challenge on the basis of the character and status of the Commonwealth as a national government.

Some questions about firearms laws

If national uniform firearms laws are to be enacted, then a number of questions must be asked about the contents of those laws. These questions include:

national registration of firearms. Should there be a national firearms register and what information should it contain? What privacy issues are raised by a firearms register and how can they be addressed?

absolute bans on some firearms. Are there some types of firearms that should be absolutely banned for members of the public? Is there a need for some members of the community, for example, professional shooters to own semi-automatic weapons and, if so, which ones? On the other hand, should all automatic and semi-automatic firearms be proscribed?

licensing. What eligibility requirements should be met before a person obtains a firearms licence? Should the person have to satisfy a licensing authority that he or she is a fit and proper person; should the applicant have to satisfy a licensing authority that he or she has an acceptable and demonstrated need? Should a licence to own a firearm be a licence for life or should licences be reviewed periodically? Are there any circumstances in which minors should be able to obtain a licence for a firearm? Should there be circumstances in which a person's firearms licence is automatically cancelled for life - for example, where a domestic violence order has been issued against the person or where the person is convicted of certain offences?

sales. Should there be a cooling off period in relation to the purchase of a firearm and, if so, how long should the cooling off period be?

training. What are the appropriate minimum training requirements for any citizen who wishes to own a firearm? Should it be a legislative requirement that certified completion of a training course in firearms use and safety is a prerequisite for a firearms licence? Should licence holders be required to participate in refresher courses in firearms use and safety from time to time?

storage. Should it be possible for private citizens to store firearms and ammunition in their own homes. If so, legislative requirements be prescribed and what should they be? If not, should legislation specify that firearms and ammunition must be kept at shooters' clubs or other secure premises?

surplus firearms What arrangements are necessary when law enforcement agencies or defence forces are getting rid of surplus or outdated firearms and ammunition?

an amnesty. Should there be a permanent firearms amnesty to encourage people who possess or own firearms to surrender them without penalty?

penalties. What penalties should be prescribed for the possession of unlicensed firearms? Should heavy penalties also apply to a licensed firearms owner who lends or sells a firearm to an unlicensed person?

sentencing. Should possession of an unlicensed firearm result in a heavier penalty being imposed on an offender who has used the firearm to commit a crime?

third party insurance. Should firearms owners be required to take out third party insurance so that victims and others who might be the subject of accident or violence from firearms use?

Table 1

Australia

Deaths Caused by Firearms, 1983 to 1993

Number		1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993
Accident	M	33	28	29	27	21	26	18	28	28	23	16
	F	7	4	6	1	6	4	1	2	1	1	2
	T	40	32	35	28	27	30	19	30	29	24	18
Suicide	M	485	478	507	508	534	489	421	456	487	464	418
	F	35	46	45	41	38	32	30	32	23	26	17
	T	520	524	552	549	572	521	451	488	510	490	435
Assault	M	59	77	69	64	55	79	60	45	46	62	42
	F	34	44	30	37	42	45	20	34	38	34	22
	T	93	121	99	101	97	124	80	79	84	96	64
Legal Intervention	M	4	5	4	4	7	4	7	4	6	7	3
	F	0	0	0	0	0	0	0	0	0	7	0
	T	4	5	4	4	7	4	7	4	6	14	3
Unknown	M	5	6	19	12	10	16	15	15	4	7	6
	F	1	1	5	3	0	1	0	1	1	0	0
	T	6	7	24	15	10	17	15	16	5	7	6
Total Males		586	594	628	615	627	614	521	548	571	563	485
Total Females		77	95	86	82	86	82	51	69	63	68	41
Total Persons		663	689	714	697	713	696	572	617	634	631	526

Notes:

M = Male. F = Female. T = Total

Accident = accident caused by firearm missile.

Suicide = suicide and self inflicted injury by firearms and explosives.

Assault = homicide and injury purposely inflicted by other persons, assault by firearms and explosives.

Legal intervention = by police officers, security staff and injury by: other law enforcement agents, military on duty, in course of arrest or attempting to arrest, law breakers, suppressing a disturbance, maintaining order, other legal activities.

Source: ABS mortality tabulations, 1983 to 1993.

From: Australian Institute of Criminology, *Crimes in Australia; The First National Outlook Symposium*, Canberra, 1995

Attachment A:

The External Affairs Power and Gun Laws in Australia

The legal threshold which must be passed before an issue can fall within the Commonwealth's external affairs power has not been finally, or at least fully, determined. If an issue is the subject matter of a multilateral treaty it can certainly provide the basis for a use of the external affairs power (provided the implementing legislation is suited to the purposes of the treaty), however, if an issue has not yet been enshrined within a treaty but is nevertheless an issue of 'international concern' there are various statements indicating that it could still qualify as the basis for the use of the external affairs power.³⁰

Multilateral Treaties

The two multilateral treaties under which the Commonwealth Government could arguably act to regulate gun laws on the basis of the external affairs power are:

- The International Covenant on Civil and Political Rights (the ICCPR).³¹

The ICCPR provides (Article 6):

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The ICCPR is one of the three central parts of the UN's Bill of Human Rights and this particular provision is a reaffirmation of the *Universal Declaration of Human Rights* Article 3 which states that 'Everyone has the right to life, liberty and security of person.'³²

There is a plausible argument that these provisions could form the legal basis on which to justify gun laws directed at guns *the specific purpose of which* is to kill people. The argument would be tenuous but is nevertheless viable. Furthermore the tenor of the Human Rights Committee's General Comment on this Article is more categorical than most of its General Comments. They exhort States to take active steps to protect the right enshrined in Article 6,³³ saying that States parties should take '*specific and effective measures*' to protect the right to life - a right which 'has been too often narrowly interpreted'. (In passing it is interesting to note that it was this same Committee whose views on the Tasmanian criminal provisions regarding homosexuality³⁴ the Government relied on in enacting the *Human Rights (Sexual Conduct) Act 1995*, believing that they had the Constitutional power to do so.)

- The Convention on the Rights of the Child (CROC)

The CROC provides that States Parties should take:

all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, ...³⁵

Once again it would be arguable that this provision would justify the use of the external affairs power to regulate gun laws in such a way that children are protected from firearm homicides.

It should be noted that, along with the ICCPR, the CROC has one of the highest number of signatories of the multilateral treaties. Australia is a signatory to both these instruments.

An Issue of International Concern?

While there are no multilateral treaties which deal directly with the issue of the regulation of gun ownership, there are bodies within the United Nations which have expressed views dealing explicitly with gun ownership and which are also concerned at the issue of violence more generally. The Congress on the Prevention of Crime and the Treatment of Offenders, for instance, has recommended that Member States take the necessary steps to control urban violence by limiting and controlling access to 'weapons, including through international co-operation'.³⁶

The issue of violence, particularly violence against women, has formed the basis of a significant number of UN Resolutions and Comments. While the Convention on the Elimination of All Forms of Discrimination Against Women does not have an article comparable to CROC's – i.e. an article specifically commenting on the need to prevent violence against women – this lack has often been noted by commentators and steps are being taken to remedy the omission.³⁷ In 1993 the General Assembly passed the Declaration on Violence Against Women, which is quite specific in its demand for States to act to end violence against women, demanding that they:

Develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence...³⁸

The usual progression within the UN's treaty system is to move from a Declaration to a Treaty. The concern regarding intra-State violence and the need to take steps to prevent it is certainly a growing issue within the UN. The 1995 Congress on the Prevention of Crime and the Treatment of Offenders included excerpts from the Australian Report by the National Committee on Violence, *Violence: Directions for Australia*³⁹ and included its

series of recommendations on the control of firearms for the further consideration of its participants.⁴⁰ The UN's Commission on Crime Prevention and Criminal Justice has included firearm control as one of the strategies which could be adopted to control urban crime, and the Economic and Social Council have instituted a global study on the issue of civilian-owned firearms, small arms trafficking and firearms regulations.⁴¹

The various provisions on violence, and particularly the international concern regarding violence against women and children, would certainly create an arguable case that the external affairs power could be used by the Commonwealth to curtail violence through the regulation of gun ownership. This argument would be strengthened by the fact that violence resulting from the misuse of firearms is often directed towards women and children.

However, the dicta on using the existence of an 'international concern' as a basis for Commonwealth legislation under the external affairs power have never been directly tested. Furthermore, it has often been Australia (or a trio of Canada, New Zealand and Australia) which has raised the issue of gun control at international fora. It is doubtful whether the High Court would consider proposals put forward by Australia itself as grounds on which an issue would qualify as attracting the external affairs power. Furthermore the current Chief Justice gave a very restrictive reading of what would qualify as a matter of international concern in the *War Crimes* case,⁴² although the addition of Kirby J to the bench, who has displayed an avid interest in the activities of various international bodies, may have an interesting effect on the balance within the High Court regarding the impact of international law on the Commonwealth's external affairs power, and therefore on Australia's constitutional balance of power.

Endnotes

¹ National Committee on Violence, *Violence. Directions for Australia*, Australian Institute of Criminology, Canberra, 1990.

² Australian Institute of Health and Welfare, *Injury Issues Monitor*, No.8, February 1996.

³ In 1995, the Australian Institute of Criminology published figures on the number of deaths caused by firearms in Australia from 1983 to 1993. These figures include deaths by accident, by suicide, assault (including homicide) and by law enforcement agencies in the course of arrest or other legal duties. These figures appear as Table 1. The source of these figures is *Crime in Australia. The First National Outlook Symposium*, June 1995.

⁴ James, M & Hallinan, J Homicides in Australia 1992-93, *Trends & Issues in Crime and Criminal Justice*, No.51, December 1995.

⁵ Ibid.

- 6 'Most killings by licensed shooters,' *The Age (Melbourne)*, 12 February 1996. Various conclusions are drawn from these sorts of data. One is that the existence of licensing and registration schemes will not prevent homicides occurring. The other is that existing licensing schemes may not be stringent enough and that gun control measures need to be directed to ordinary gun owners as well as to criminals or the mentally ill.
- 7 National Committee on Violence, op.cit, p.170.
- 8 Killias, M 'Gun ownership, suicide and homicide: an international perspective,' in *Understanding Crime: Experiences of Crime and Crime Control*, United Nations Interregional Crime and Justice Research Institute, Rome, 1992.
- 9 *Canberra Times*, 29 April 1996.
- 10 *Firearms: Clarifying the Legislation*, The Library, Parliament of Victoria, Background Paper No 5/95, August 1995, p. 17.
- 11 Bruce D. Ragsdale, M.D. and Steven S. Sohn, Cdr., U.S. Navy, 'Comparison of the Terminal Ballistics of Full Metal Jacket 7.62-mm(NATO) and 5.56-mm M193 Military Bullets:A Study in Ordnance Gelatin, *Journal of Forensic Sciences*, May 1988, pp. 676 — 695.
- 12 *Ibid.*, p.693.
- 13 Martin L. Fackler, MD, 'Wound Ballistics A Review of Common Misconceptions', *Journal of the American Medical Association*, 13 May 1988, p. 2730.
- 14 This can be contrasted with the United States Constitution which states 'A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.' (Second Amendment to the Constitution).
- 15 Section 51(i), Constitution.
- 16 Schedule 1, Customs (Prohibited Imports) Regulations 1901.
- 17 Note, however, that the Governor-General acts on the advice of the Federal Executive Council which is composed of Government ministers. In recent times, Parliamentary Secretaries have also been appointed as members of the Federal Executive Council. This is particularly important, should the constitutional alteration bill be passed in the Senate but rejected by the House of Representatives. In 1913-1914, the Senate passed constitutional alteration bills on two occasions. On the second occasion the statutory period of three months had elapsed. The Bills were not passed by the House of Representatives. A motion was later passed by the Senate that an address be presented to the Governor-General requesting him to submit the proposed laws to the electors. The Governor-General acted on the advice of his Ministers and refused to grant the Senate's request. See Odgers, JR *Australian Senate Practice*, 5th ed, AGPS, Canberra, 1976.
- 18 Section 92, Constitution.
- 19 Section 51(xx), Constitution.
- 20 Hull, C 'Federal resolve needed on guns,' *Canberra Times*, 1 May 1996.
- 21 Section 51(v), Constitution.
- 22 Section 51(i), Constitution.

23 Section 51(xxix), Constitution.

24 A more detailed explication of the United Nations Convention on the Rights of the Child is provided in Appendix A. It is arguable that national firearms legislation could be a method of implementing obligations under the Treaty to protect children against all forms of physical and mental violence and neglect. Children are the victims of stranger killings and domestic killings; if their parents are the victims of such shooting, then this may well result in mental injury to the child or in neglect.

25 Section 122, Constitution.

26 Booker, K; Glass, A & Watt, R *Federal Constitutional Law. An Introduction*, Butterworths, Sydney, 1994, p.117. This view of the grants power was settled in *Deputy Federal Commissioner of Taxation (NSW) v. WR Moran Pty Ltd* (1939) 61 CLR 737 and *WR Moran Pty Ltd v. Deputy Federal Commissioner of Taxation (NSW)* [1940] AC 838.

27 Section 51(ii) & section 90, Constitution.

28 Hull, C op.cit.

29 Booker et al, op.cit.

30 *Koowarta v Bjelke Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Polyukovich v Commonwealth* (1991) 172 CLR 501, just to mention a few of the more pertinent.

31 Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976.

32 Adopted by UN General Assembly Resolution 217A (III) of 10 December 1948.

33 General Comment 6 (Sixteenth Session, 1982), HR1/GEN/1/Rev.1 p. 6.

34 *Toonen v Australia* CCPR/C/50/D/488/1992, 31 March 1994.

35 Article 19.

36 A/Conf.144/28/Rev.1 Resolution on the Prevention of urban crime, p. 127.

37 In its General Recommendation No. 19 the Committee on the Elimination of Discrimination Against Women put forward the view that the Convention *does* actually cover violence against women.

38 Article 4(f).

39 Canberra, Australian Institute of Criminology, 1990. See a discussion of this report on pp.4-5.

40 Background paper for the workshop on the prevention of violent crime, p21.

41 See attachment. Press Release SOC/CP/178.

42 *Polyukovich v Commonwealth* (1991) 172 CLR 501



**Press Release
SOC/CP/178**

**UNITED NATIONS GLOBAL STUDY BEGUN ON CIVILIAN-OWNED FIREARMS, SMALL ARMS TRAFFICKING,
FIREARMS REGULATIONS**

Project Prompted by Concerns About World-wide Rise in Violent Crime

VIENNA, 19 December (UN Information Service) -- With the passing of the cold-war era and a shift from inter-State military conflicts to insecurity resulting from violent crime, the United Nations is turning its attention to a class of armament that is killing more people than major weapons -- namely, small, civilian-owned firearms. Such arms are increasingly associated with crime, accidents and suicides, and form a major source of illicit profits for transnational criminal networks.

In an effort to assemble relevant data on the seriousness and scope of the problem, an international team of experts in firearms matters and crime control has gathered here for a three-day meeting, which began on 18 December, to launch the first world-wide survey of firearms ownership and related issues, with support provided by the Government of Japan. The study is aimed at obtaining clear and practical information on arms ownership by civilians, the relationship between firearms and crime and the status of regulatory measures in force in about 50 selected countries throughout the world. The data compiled could be used by the Commission on Crime Prevention and Criminal Justice and Member States in the development of related strategies.

The experts -- drawn from police, customs and military services as well as representatives of the United Nations regional criminal justice institutes -- are consulting on procedure for carrying out the study, which will include country profiles and assessment reports based on reports submitted by national consultants. They will select the countries to be profiled, the topics to be covered and will draw up guidelines to be followed in gathering and submitting information.

While trade in major weapons is on the decline, small arms are spreading throughout society with little documentation, as they are frequently bought from private individuals, smuggled across borders or stolen from police and defence forces. In his report to the current session of the General Assembly,

- 2 - Press Release SOC/CP/178 22 December 1995

Secretary-General Boutros Boutros-Ghali spoke of a world "awash" with small arms for a number of reasons, including criminal activity and the fear of violent crime which led ordinary citizens to acquire firearms for their own defence.

The world-wide survey of firearms was called for by the Economic and Social Council, following up on a resolution adopted unanimously by a United Nations Crime Congress held in Cairo earlier this year, and recommended to it by the Crime Commission at its last session. The resolution, based on a Japanese initiative, calls on the Crime Commission to consider measures to regulate illegal firearms activities, such as the prevention of illicit trafficking in those weapons, in order to suppress the use of firearms in criminal activities. In discussion of the subject in the bodies concerned, delegations noted an alarming rise in the proliferation of small arms and underscored that their mounting use by drug traffickers and criminal gangs posed a grave threat to public safety and the rule of law.

Coordinating the project is James Hayes of the Firearms Control Task Group of the Canadian Department of Justice. Team members include Tony Dittenhoffer, Senior Research Officer of the Firearms Research Unit of the Canadian Department of Justice; Yvon Dandurand of the Vancouver-based International Centre for Criminal Law Reform and Criminal Justice Policy and the Department of Criminology and Criminal Justice of the University College of the Fraser Valley, British Columbia; Mikinao Kitada, Public Prosecutor and Deputy Director of the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders; and Eric P. Kibuka, Deputy Director of the United Nations African Institute for the Prevention of Crime and the Treatment of Offenders (UNAFRI). Other team members are Richard Block of the United Nations Interregional Crime and Justice Research Institute (UNICRI) and Loyola University, Chicago; Jaime Malamud Goti, former Secretary of Justice of Argentina and philosophy professor at the University of Arkansas; Masao Horikane, Assistant Director of the Firearms Control Division of the Japanese National Police Agency; Stewart Allen, Chief of the Intelligence Division of the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury; and Anatoly Bakayev, head of the Firearms Control Division of the Russian Federation Ministry of the Interior.

Taking part in addition are Herman Woltring, Director of the United Nations Interregional Crime and Justice Research Institute (UNICRI); Don Manross, Firearms and Explosives Specialist of the International Criminal Police Organization (Interpol); and Seppo Leppa, Senior Researcher of the European Institute for Crime Prevention and Control.