

FIREARMS LAW REFORM: THE LIMITATIONS OF THE NATIONAL APPROACH

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THE ONE DEFINITE CONCLUSION THAT CAN BE DRAWN FROM THE PROCEED-ings of this conference is that gun homicides will continue to occur in Australia. There will be another Strathfield, Surry Hills, Queen Street, or Hoddle Street—less sensational, everyday, domestic killings will continue; a few times a year entire families will be annihilated in different parts of Australia when one member of a family uses a firearm against other family members; as well as suicides. There is also substantial agreement that such homicides are preventable by the simple measure of restricting the access of these potential offenders to firearms. Unfortunately, consensus breaks down at this point. There are many who argue that the only effective measure for the reduction of gun homicides is to reduce the level of gun ownership in the entire community—to completely prohibit the possession of certain weapons, and to define and monitor closely the persons permitted to use firearms and the weapons owned by such people. Those who advocate such measures point to analogies with the regulation of other dangerous items and substances. For example, the purchase and use of fireworks is prohibited in many parts of Australia because of the risk of serious injury. The use of certain dangerous pesticides and herbicides is prohibited in the interest of public health or environmental protection, notwithstanding evidence that a particular substance is a very effective agent of control.

On the other hand, there are those who argue that regulation should not be directed at the firearm, but at the human agent. It is argued that particular

individuals identified as potential offenders should be labelled, placed on a prohibited persons register and denied access to firearms. The class of prohibited persons and the methods to be used to identify them is far from settled even amongst those advocating this position. The groups targeted at different times include criminals (variously defined), people who have undergone psychological or psychiatric counselling, and migrants in their first five years of residency.

These different perspectives have led to a fierce debate in the Australian community and considerable timidity on the part of political parties and governments in addressing the problem of the regulation of firearm use. The aims of this paper are to identify the policies that are likely to reduce the level of gun homicide in Australia, to debunk some of the myths, and to place gun law reform in a realistic political perspective.

The Issues

The gun debate in Australia quite properly revolves around several issues: whether there is evidence of a relationship between gun availability and gun deaths, what kinds of legal controls will reduce the pool of weapons in the community and prevent access to people likely to misuse firearms, and whether a national approach is a prerequisite for effective reform. Unfortunately, the gun debate is also confused by inappropriate parallels drawn with the situation in the USA and some rather dubious conclusions drawn from local experience: the constitutional right to bear arms, the possession of firearms as a fundamental freedom of expression, the political muscle of the pro-gun lobby, the assertion that the Unsworth Government lost the 1988 New South Wales state election because of its stand on guns, and the belief that a psychological register of disturbed persons will prevent firearm homicides and assaults.

The Size of the Problem

There are at least 3.5 million guns in private hands in Australia, outnumbering police weapons by ten to one. More than one-quarter of households has a gun (Chappell et al. 1988). About 700 Australians die each year from gunshot wounds. Most of these deaths are suicides, but about 100 are homicides. Guns are used in one-quarter of all homicides and half of all domestic killings (Strang 1991). The New South Wales Domestic Violence Advocacy Service reported that 15 per cent of their clients claim that their partner owns or has access to a firearm. Death threats are common.

According to medical and criminological opinion, the main factor behind gun-related crime is gun availability. Considerable academic effort has been expended on testing this hypothesis. Studies in the USA and Europe show that firearm homicide rates correlate with gun ownership or availability (*see*, for example, Lester 1991). This is hardly surprising, because most homicides are committed on the spur of the moment. If someone is very angry they will use whatever weapon they can get their hands on, and if that happens to be a gun rather than a knife, it 'substantially increases the probability that death,

rather than injury, will be the end result' (Chappell et al. 1988, p. 1). As the Australian Coalition for Gun Control noted:

the use of a gun requires considerably less proximity, strength, agility, skill and squeamishness, and offers less opportunity for self-defence, than does the use of a knife or other weapon (Australian Coalition for Gun Control 1991, p. 2).

The contrast was clearly illustrated in Sydney a few days after the Strathfield shooting when a man wielding a knife went on a rampage in Ryde, causing serious injury to several people, but only one death.

Essentials for Gun Control

There is substantial agreement amongst those in favour of strict gun laws as to the reform agenda. Experts (for example Chappell, Grabosky, Wilson, Mukherjee, and so on), inquiries such as the National Committee Against Violence, and concerned organisations (Gun Control Australia, New South Wales Domestic Violence Committee and so on) all agree that the main aim of gun controls should be to reduce the number of firearms in Australian society. It is important to prevent access to firearms by people with a propensity for violent crime or other misuse. There is also considerable agreement that the minimum requirements include:

- the prohibition of certain weapons and ammunition—namely automatic and semi-automatic firearms;
- the registration of all firearms;
- the licensing of all gun owners and shooters, with restrictions based on age (over 18-years-old), character, and need or reason;
- a cooling-off period between applying for a gun licence and receiving the licence;
- bans on the importation of certain weapons;
- bans on the private sale of firearms; and
- minimum Australia-wide standards incorporating all of the above.

There is occasional disagreement as to the best method of ensuring appropriate safe-keeping for firearms and ammunition, but all agree that in most states and territories the existing requirements are inadequate to prevent accidental, impulsive or intentional misuse.

Debunking Some of the Myths

Despite the rhetoric of freedom and rights invoked by the gun lobby, there is no constitutional right in Australia to bear arms, and even constitutional right

in the USA is often misinterpreted and exaggerated. There is no common law right to possess firearms. The possession of firearms is conduct properly regulated by the parliaments of each state and territory in accordance with the wishes of the people. Legislative restrictions on freedom are common and are widely accepted in the public interest—compulsory roadside random breath tests are the norm across Australia in the interests of reducing the number of road accidents; the wearing of seat-belts is compulsory, and in some states the possession and use of fireworks is completely prohibited because they are so dangerous.

The list of substances and items prohibited or restricted from general use in Australian society is enormous. There is nothing special about firearms. As a society it is a legitimate and indeed desirable exercise for Australia to determine under what circumstances citizens should be allowed to have access to firearms and how those circumstances are to be legally defined, monitored and enforced.

There are no common law, constitutional or legal barriers to effective gun laws in Australia. According to some, however, there are significant political barriers to reform. The political strength of the Australian pro-gun lobby is sometimes compared to that of the National Rifle Association in the USA.

But who is the gun lobby in Australia? The Sporting Shooters Association of Australia (SSAA) is the most vocal group, but it is a relatively small organisation with a relatively small budget. What is the evidence that it is a powerful organised force, a well-oiled political fighting machine?

Despite the threat of political action the 'gun lobby' has not succeeded in electing a single member to a parliament anywhere in Australia. It is alleged that approximately \$1 million was spent by the gun lobby in the 1988 New South Wales state election: a sizeable amount for a single issue group, but small in comparison to the electoral budgets of the minor independent parties, let alone the major parties.

The other main identified group within the so-called gun lobby, are the farmers. An analysis of farmers' views on gun controls fails to reveal a homogeneous position agreeing with the SSAA. Many farmers are strongly in favour of very restrictive gun laws. They are well-aware of the stock costs, personal danger and property damage suffered at the hands of irresponsible weekend shooters.

The 1988 New South Wales state election is often cited as an example of the political muscle of the gun lobby. It is often asserted that the Unsworth Government lost the election because of its stand on guns. However, there is no empirical evidence on the public record to support this assertion. Public opinion polls (Saulwick 1991) and the Australian Labor Party's private polls (ANOP 1988) in 1988 demonstrated overwhelming public support for the Unsworth Government's strong stand on guns. But this was not enough to overcome the many other issues running against this Government—Darling Harbour, time for a change, perceived corruption, perceived inability to deal with law and order, 'early release' schemes, the Jackson and Farquhar convictions, perceived mismanagement of government finances, the monorail, to name a few. It is often forgotten that the Cain Government in Victoria was re-elected in 1988 on a strong gun law platform, not very different from that

advocated by the Unsworth Government. It is both dangerous and misguided to accept uncritically the assumption that the pro-gun lobby in Australia is a powerful political force.

The Australian pro-gun lobby has borrowed a slogan from the USA: 'Guns don't kill people—people do'. It argues that gun controls should target certain groups of people, rather than firearms themselves.

The gun lobby insists that no amount of legislation will inhibit a determined criminal or crazed murderer. It argues that, rather than restricting the availability of guns generally, the solution is to deny gun licences to undesirable people. The SSAA has proposed a register of prohibited persons—that is those with criminal convictions, a history of domestic violence or psychological problems. It claims the Strathfield, Hoddle and Queen Street murderers would have been detected and stopped by such a register, because they all had some signs of psychological disturbance.

The idea of a register has several problems. One relates to privacy. Shooters are concerned about their privacy being violated by a register of lethal weapons. Do shooters expect the rest of the community to consent to their psychological conditions being listed on a police computer, on the off-chance that they might one day apply for a gun licence?

In any event the medical establishment rejects the proposition that only identified disturbed persons kill. Dr William Andrews, who chairs the New South Wales branch of the Royal Australian and New Zealand College of Psychiatrists pointed out that:

the vast majority of homicides are carried out by people who are psychologically indistinguishable from the general population prior to the event (*Sydney Morning Herald*, 4 September 1991, p. 4).

And mass murderers are not typical killers. An indiscriminate massacre of innocents by a complete stranger serves to focus attention dramatically on the dangers of firearms. But the serious business of killing proceeds steadily, on a small scale, among families and acquaintances, in loungerooms and outside pubs. Men kill their wives and girlfriends. Men kill each other in drunken brawls. In Wallace's (1986) study of homicide in New South Wales, only 17 per cent of offenders had prior convictions for violent offences and 1 per cent had a history of mental disorder.

The Development of National Uniform Laws

Prompted by the Strathfield incident, the Australian Police Ministers' Council (APMC) held a special meeting in October 1991 to discuss gun control. The APMC considered the New South Wales Parliamentary Committee's report and came up with its own recommendations for uniform gun laws. The need for uniform laws was demonstrated by Joseph Schwab, the 'Top End Killer', in 1987. Schwab bought four guns over the counter, completely legally, in Queensland. He did not have to show he needed the guns or that he was a fit person to possess them—the ability to pay \$4,000 was the only criterion. In the Northern Territory and Western Australia, where he killed his five victims, he would have found it much harder to obtain those weapons legitimately.

The Federal Government does not have the constitutional power to enact laws regulating possession, other than in the narrow federal and territorial jurisdiction and thus a cooperative state/federal arrangement is the only possible option. In December 1991, Senator Tate, Minister for Justice, used the Customs power to stop imports of automatic and semi-automatic weapons from overseas. But this does not restrict the sale or possession of weapons made here, or of those imported before the ban.

The Federal Government proposed at the APMC that all semi-automatics be declared prohibited weapons, with only a few categories of people entitled to possess them. This is essentially the position in Victoria since the Hoddle and Queen Streets massacres and is also the case in the Northern Territory. However, New South Wales, Queensland and Tasmania would not agree. Under these conditions, if uniformity becomes the overriding aim, the proregulation states are required to observe the lowest common denominator.

Australian Police Ministers' Council Resolution

The police ministers recommended:

- a ban on the sale of all military and military-style semi-automatic firearms, except for 'government and government approved' purposes;
- a special licence required for possession of other centre-fire semi-automatic and self-loading shotguns, for example, the more expensive (but equally deadly) weapons made for hunting. A 'stringent' (but totally undefined) test of 'need' was agreed to;
- a ban on sale of self-loading weapons with detachable magazines holding more than five rounds;
- licensing for other classes of long guns based on a genuine reason to own;
- national character checks on licence applications;
- licence based on 'appropriate qualifications and training';
- licences to last six years, except for the lowest class of licence in Queensland and Tasmania, which will still be issued for life;
- a 28-day cooling-off between application and licence;
- that guns and ammunition must be stored separately and securely;
- compulsory confiscation of guns on domestic violence call-outs or breach of licence conditions.

Deficiencies in the Proposed National Uniform Laws

The meeting failed to agree on one major provision—registration of guns themselves, as opposed to licensing their owners. Registration is favoured by police because it would allow them to keep track of individual weapons. This can be extremely useful in investigating crime. For example, New South Wales has registration for pistols, which meant that when heart surgeon Dr Victor Chang was murdered, police had a list of all legal owners of the type of gun used. By contrast, there is no such list for Ruger rifles as used in the murder of Federal Police Assistant Commissioner Colin Winchester. Registration would also mean police going on a domestic violence call-out would know what weapons were likely to be in the house.

The gun lobby opposes registration as an invasion of privacy. With the exception of New South Wales, Queensland and Tasmania, the police ministers agreed to compulsory and coordinated gun registration which will be effective across state borders. This means a murder weapon used in Victoria would be traceable if bought legally in South Australia but not if bought in New South Wales.

In some other key areas the resolutions are also inadequate. The minimal uniform standards are minimal indeed. Under these standards, the possession and ownership of semi-automatic rifles and shotguns—other than those described as 'military-style'—would still be permitted. Licences would be granted according to an undefined concept of 'strict criteria' (otherwise described in the resolutions as a 'stringent test'). It would be more appropriate to ban them completely.

The possession of other long guns would also be governed by a licensing scheme based on training, character and 'genuine reason'. The crux of the problem is in the definition of 'genuine reason'. As yet there are no resolutions as to what should constitute a 'genuine reason' nor any specific resolutions requiring it to be defined in the statutes. Such an important requirement cannot be left undefined, nor left to the discretion of the police. Should membership of a shooting club be sufficient as 'a genuine reason'? As pointed out by Gun Control Australia, some killers are given club membership.

The issue of gun storage is not addressed by the APMC resolution. Gun Control Australia argues that, with few exceptions, there are no legitimate reasons for keeping guns in an urban or suburban home. However, if guns are kept at home they should be stored in a locked gun safe to prevent theft. Preferably guns should have to be stored outside the home, for example, at local police stations or at shooting clubs.

One recommendation of the New South Wales Parliamentary Select Committee was that no guns should be sold privately or by mail order, but only by licensed and qualified dealers. The police ministers did not address this issue, nor the question of whether children should be allowed to have guns. In New South Wales, a junior licence is available at age ten—six years before they are licensed for that other deadly weapon, the car, and eight years before they are trusted to enter into a lease.

The APMC resolutions do not appear to go far enough to achieve the primary goals of effective gun laws: to reduce the number of guns in Australian society.

Finally, while national uniform gun laws are highly desirable and should remain on the reform agenda, they should not take absolute priority. The regulation of gun ownership is a matter for the states, and the responsibility cannot be sidestepped. The history of national uniform laws in our Federation is largely characterised by compromise, delay and occasionally, complete failure. The usual vehicle for the drafting of national uniform laws—the Standing Committee of Attorneys-General (SCAG)—is affectionately referred to within the state and federal bureaucracies as a black hole. Issues may disappear for inordinate amounts of time and emerge stripped of substance. Agreement between eight governments is often achieved at the cost of effective regulation. Uniformity is an important long-term goal, but state governments, such as New South Wales, should not be able to deflect their failings onto the national scene. The laws in the states of Victoria, Western Australia and the Northern Territory provide an effective, workable and immediate model for gun law reform in other parts of Australia. It is equally important that states like Victoria are not required to relinquish effective laws in the observation of the lowest common denominator of the national uniform approach.

References

- ANOP 1988, Private Polls conducted for the Australian Labor Party, reported in the *Sydney Morning Herald*, 12 March 1988 and *The Age*, 2 February 1988.
- Australian Coalition for Gun Control 1991, Submission to the New South Wales Legislative Assembly and Legislative Council, p. 2.
- Chappell, D., Grabosky, P., Wilson, P. & Mukherjee, S. 1988, *Firearms and Violence in Australia*, Trends and Issues in Crime and Criminal Justice, No. 10, Australian Institute of Criminology, Canberra.
- Lester, D. 1991, 'Crime as Opportunity—a Test of the Hypothesis with European Homicide Rates', *British Journal of Criminology*, vol. 31, pp. 18–188.
- Saulwick 1991, Opinion polls conducted in December 1987 and August 1991 reported in the *Sydney Morning Herald*, 20 August 1991, p. 4.
- Strang, H. 1991, *Homicides in Australia 1989–90*, Australian Institute of Criminology, Canberra.
- Wallace, A. 1986, *Homicide—The Social Reality*, Research Study No. 5, New South Wales Bureau of Crime Statistics and Research.