



FW de Klerk

FOUNDATION

Upholding South Africa's National Accord

SUBMISSION

The Firearms Control Amendment Bill of 2021

Secretary for Police Service

Attention: **Mr M Ntwana**

The Civilian Secretariat for the Police Service

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Submission on the *Firearms Control Act Amendment Bill 2021*

1. The FW de Klerk Foundation (the Foundation) is a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 (the Constitution). To this end, the Foundation's Centre for Constitutional Rights (the CFCR) seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments, including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their constitutional rights and to assist them in claiming their rights. The Foundation does so in the interest of everyone in South Africa.

2. Accordingly, the Foundation endeavours to contribute positively to the promotion and protection of our constitutional democracy. As such, the Foundation welcomes the opportunity to make a concise submission on the proposed Firearms Control Act Amendment Bill (hereinafter "the Bill").

3. In this regard, please find attached our submission for the Secretariat's attention and consideration.

4. It is not the purpose or intention of this submission to provide a comprehensive legal analysis or technical assessment of the Bill, but rather to draw attention to certain key concerns in relation to thereto.

5. We trust that our submission will be of assistance in guiding the Secretariat in its deliberations on the Bill.

6. We are available and at your disposal to make verbal presentations on the Bill if so required.

Yours sincerely,

Adv Jacques du Preez

CEO

FW de Klerk Foundation

[1] Introduction and Synopsis

In principle the FW de Klerk Foundation shares the alarm of many South Africans over the recently published Bill. Among other things one of the most concerning proposals contained in the Bill seeks to remove self-defence as a reason to own a firearm in South Africa.

The Constitution guarantees the right to life and the right to freedom and security of the person - which includes the right to be free from all forms of violence whether they are of a public or private nature. Indeed, the right to life may be regarded as the most fundamental right of all - because, axiomatically, without it none of the other constitutional rights can be enjoyed. The right to freedom and security of the person - not to be subject to violence or rape - is crucial for the enjoyment of the capstone right to human dignity.

For this reason, the protection of the lives and persons of citizens is generally regarded as the most fundamental function and duty of any state. Yet, in the case of South Africa, it is a duty that the state has lamentably failed to carry out.

South Africa's murder rate of 35,9 per 100 000 people (2019) is the second highest of any country in the world with a population over 4 million. The highest is Venezuela with 36,69/100K in 2018 - but with only about half South Africa's number of murders. And the situation is deteriorating. The Minister of Police, Mr Bheki Cele recently released the latest SAPS crime statistics for the first quarter of 2021 - indicating an increase in murder and attempted murder of 8,45% and 8.7% respectively. The shocking reality is that more than 500 000 people have been murdered in South Africa since 1994. That is about 100 000 more than the number of US servicemen who died in World War II.

South Africa also has the highest rape rate in the world with 132,4 rapes per 100 000 people. The second highest - Botswana - lags behind South Africa with 92,8/100K. (The EU average is 10,19/100K and that of the USA is 27,3/100K.)

South Africa is undisputedly one of the most violent countries in the world. Whether the state (and by implication South Africa's security cluster) is capable of carrying out its primary duty of protecting the lives and persons of its citizens has not only been increasingly questionable over the last years but has also been confirmed in light of the recent serious outbreaks of violence, looting and killing in particular in Gauteng and Kwazulu-Natal, following the conviction and imprisonment of former president, Jacob Zuma.

The unfortunate reality is that, for many South Africans, owning a firearm is often the only legitimate way of protecting themselves, their families and possessions. This is particularly true of the country's embattled farming community.

South Africa's unacceptable crime statistics - particularly for violent crimes such as murder, rape, armed robbery and GBV - unfortunately substantiate the institutional *incapacity* of the state to protect people and safeguard the lives and persons of its citizens - and especially of its most vulnerable populations.

The explanation given by the Minister Cele, for stripping South Africans of their right to use firearms to defend themselves is entirely unconvincing. The Minister has indicated that the reason for this proposal "is to curb the rise in illegal firearm ownership" because "once legal firearms are stolen they become illegal".

It will be submitted that, rather than disarming South Africans and removing the only option they may have to defend themselves, the Minister and SAPS should address their own institutional failures to carry out their most fundamental duty to protect their citizens.

South Africans recently witnessed -unfortunately- that the only real recourse they had to defend themselves, their lives and property as well as the lives and property of other communities – were themselves, and they had to arm themselves in this process not only to effect, legally, protection of their livelihoods, but also as a deterrent to further escalating violence.

A disturbing question then stands: why - at this increasingly volatile time in the evolution of our post-1994 society - does the government actually want to disarm its citizens who do so legally, and within the confines of our Constitution and laws?

As indicated *supra* it is not the purpose or intention of this submission to provide a comprehensive legal analysis or technical assessment of all aspects of the Bill, but rather to draw attention to certain key concerns in relation to thereto – in this case specifically relevant to self defence in South Africa and owning a firearm to effect such.

[2] Applicable Legal Framework

The Foundation submits that a wide range of interrelated constitutional rights potentially stand to be affected by the Bill should it become law. This is briefly set out hereunder.

[2.1] The Constitution¹ - Bill of Rights²

Rights

7(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

7(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

7(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

Application

8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

8(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

8(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

Equality

9(1) Everyone is equal before the law and has the right to equal protection and benefit of

¹ Act 108 of 1996

² Ad Idem, Chapter 2

the law.

Human dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

Life

11. Everyone has the right to life.

Freedom and security of the person

12(1) Everyone has the right to freedom and security of the person, which includes the right— (c) to be free from all forms of violence from either public or private sources;

12(2) Everyone has the right to bodily and psychological integrity, which includes the right— (b) to security in and control over their body.

Freedom of religion, belief and opinion

15(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

Property

25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

25(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[2.2] The Constitution - Security Services³

Governing principles

198. The following principles govern national security in the Republic:

198(a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.

198(b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.

198(c) National security must be pursued in compliance with the law, including international law.

198(d) National security is subject to the authority of Parliament and the national executive.

Establishment, structuring and conduct of security services

199(1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

199(2) The defence force is the only lawful military force in the Republic.

199(3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.

³ Ad Idem, Chapter 11

Defence force

200(1) The defence force must be structured and managed as a disciplined military force.

200(2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

Police service

205(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

205(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

[2.3] National Legislation - The Firearms Control Act 60 of 2000

Section 13 – License to possess a firearm for self-defence

(1) A firearm in respect of which a license may be issued in terms of this section is any –

- (a) Shotgun which is not fully or semi-automatic; or*
- (b) Handgun which is not fully automatic.*

(2) The Registrar may issue a license under this section to any natural person who –

- (a) Needs a firearm for self-defence; and*
- (b) Cannot reasonably satisfy that need by means other than the possession of a firearm.*

[3] Specific Submissions

[3.1] Within the broader constitutional framework of South Africa the existing Firearms Control Act⁴ (hereinafter referred to as “the Firearms Act”) clearly enables those in South Africa who wish to obtain certain categories of firearms for purposes of self-defence, the right to do so.

⁴ Act 60 of 2000

[3.2] In this sense it must be noted that, interestingly, the Firearms Act pertinently refers to -and indeed acknowledges- the existence of this right and that it is coupled to and flows from a number of interrelated rights in the Bill of Rights.

[3.3] The *preamble* to the Firearms Act states as follows –

WHEREAS every person has the right to life and the right to security of the person, which includes, among other things, the right to be free from all forms of violence from either public or private sources;

AND WHEREAS the adequate protection of such rights is fundamental to the well-being and social and economic development of every person;

AND WHEREAS the increased availability and abuse of firearms and ammunition has contributed significantly to the high levels of violent crime in our society;

AND WHEREAS the Constitution places a duty on the state to respect, promote and fulfil the rights in the Bill of Rights”.⁵

[3.4] The Firearms Act then also stipulates as follows as to its own purpose in section 2 thereof:

The purpose of this Act is to –

- (a) Enhance the constitutional rights to life and bodily integrity;***
- (b) Prevent the proliferation of illegally possessed firearms and, by providing for the removal of those firearms from society and by improving control over legally possessed firearms, to prevent crime involving the use of firearms;***
- (c) Enable the state to remove illegally possessed firearms from society, to control the supply, possession, safe storage, transfer and use of firearms and to detect and punish the negligent or criminal use of firearms;***
- (d) Establish a comprehensive and effective system of firearm control and management; and***
- (e) Ensure the efficient monitoring and enforcement of legislation pertaining to the control of firearm.***

⁵ Ad Idem

[3.5] It is submitted that the existing Firearms Act, following from the above, recognizes a number of clear principles –

- a) the right to life and the right to security of the person, which includes, among other things, the right to be free from all forms of violence;
- b) that the protection of such rights is fundamental to the well-being and social and economic development of every person;
- c) that the increased availability and abuse of firearms and ammunition has contributed significantly to the high levels of violent crime in our society;
- d) that the state has a constitutional duty to respect, promote, fulfil and protect the rights in the Bill of Rights; and
- e) that prevention of the proliferation of illegally possessed firearms is crucial – coupled to improving control over legally possessed firearms while simultaneously enabling the state to remove illegally possessed firearms from society.

[3.6] It is thus clear that the existing Firearms Act makes no mention of the insinuation, as alluded to by Police Minister, Beki Cele, that the removal of legal firearms is a necessary measure to curb illegal firearms and/or any proliferation thereof.

[3.7] It is respectfully submitted that, quite to the contrary, the Firearms Act very clearly recognises and establishes -in section 13- the right to own a legal firearm for purposes of self-defence to give effect to the rights as entrenched in the Bill of Rights.

[3.8] The legitimate question must then be raised – why would the state seek to disarm those South Africans who obtained their firearms legally, for self-defence, if the core problem areas identified by the Act are illegally possessed firearms and the proliferation thereof?

[3.9] It is respectfully submitted that this assertion in essence comes down to the Police Minister admitting to serious institutional security failures of his own department and mandate, ie, that the South African Police Service (SAPS) cannot effectively combat illegal firearms and the proliferation thereof in South Africa. Is it rational then, for the Minister, to blame legal handgun/firearm owners for this?

[3.10] It is submitted that the Police Minister, in suggesting this non-sensical proposal, admits serious institutional security failures of his own department and mandate. In that sense, the Foundation submits that it would make much more sense for the Minister to strengthen the institutional effectiveness and operational capacity of the SAPS – specifically in the context of a number of related developments including -

- a) recent budget cuts to the South African Police Service (SAPS) that will leave millions of South Africans even more vulnerable to crime - (although the budget of the VIP Protection Unit has been increased to R1,7 billion);
- b) the complete disarray at the SAPS Central Firearms Registry in Pretoria with an estimated backlog of over 1 million cases;
- c) unacceptable backlogs (more than 208 000) in DNA and forensic case exhibits at the SAPS Forensic Science Laboratory - which Mr Cele has admitted to being “completely unacceptable”; and
- d) a rise in violent mob-justice incidents (as recently seen at Zandspruit near Johannesburg) where residents indicated that the reason the community took the law into their hands was a lack of police response to crimes in the area.

[3.11] It is respectfully submitted that it is misleading for the Police Minister to create the impression that legal firearms - and not the state’s institutional incapacity and failures - are the cause for increased crime rates in South Africa.

[3.12] The Foundation is of the view that this rationale is fatally flawed and not a valid reason, in law, to regress on the existing legal right of South Africans to arm themselves legally for reasons of self defence as stipulated in section 13 of the Firearms Act.

[3.13] The Foundation would also like to refer the Secretariat to jurisprudence relevant to these points in issue –

[3.13.1] In the well-known matter of *S v Makwanyane*⁶ Chaskalson P stated -

⁶ [1995] ZACC 3; 1995 (2) SACR 1 (CC)

“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. “

In relation to the ground of justification raised the learned President of the Constitutional Court proceeded as follows:

“Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. This is consistent with s 33(1).⁷

To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life (own emphasis).

The same is true where lethal force is used against a hostage taker who threatens the life of the hostage. It is permissible to kill the hostage taker to save the life of the innocent hostage. But only if the hostage is in real danger. The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty. But there are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon these limits being adhered to”;

[3.13.2] In the matter of *Mugwena & Another v Minister of Safety and Security*⁸ the Court indicated as follows -

“Self-defence, which is treated in our law as a species of private defence, is recognised by all legal systems. Given the inestimable value that attaches to human life, there are strict limits to the taking of life, and the law insists upon these limits being adhered to. Self-defence takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less severe alternative is readily available to the potential victim”;

[3.13.3] The matter *S v Steyn*⁹ the Court fully set out the legal position as follows:

⁷ Of the 1993 (Interim) South African Constitution

⁸ 2006 (4) SA 150 (SCA)

⁹ 2010 (1) SACR 411 (SCA)

“It is indeed so that when an accused raises a plea of private defence, the court's initial inquiry is to determine the lawfulness or otherwise of the accused's conduct and that, if found to be lawful, an acquittal should follow. Every case must be determined in the light of its own particular circumstances and it is impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relies upon private defence. However, there should be a reasonable balance between the attack and the defensive act as 'one may not shoot to kill another who attacks you with a flyswatter'.

As Prof J Burchell has correctly explained -

“Modern legal systems do not insist upon strict proportionality between the attack and defence, believing rather that the proper consideration is whether, taking all the factors into account, the defender acted reasonably in the manner in which he defended himself or his property”.

Factors relevant to the decision in this regard include the following (the list is by no means exhaustive):

- the relationship between the parties;*
- their respective ages, genders and physical strengths;*
- the location of the incident;*
- the nature, severity and persistence of the attack;*
- the nature of any weapon used in the attack;*
- the nature and severity of any injury or harm likely to be sustained in the attack;*
- the means available to avert the attack;*
- the nature of the means used to offer defence;*
- the nature and extent of the harm likely to be caused by the defence.”*

[3.13.5] In the matter of *Nene v S*¹⁰ the requirements for the defence of private defence are stated as the following (the honourable Court referring to CR Snyman):

¹⁰ (AR65/2017) [2018] ZAKZPHC 46 (4 May 2018)

“(a) It must be directed against the attacker.

(b) The defensive act must be necessary. Here one considers whether there is a duty to flee and the defensive act must be the only way in which the attacked party can avert the threat to his/her rights or interest.

(c) There must be a reasonable relationship between the attack and the defensive act. Here it is not necessary that there be a proportional relationship between the nature of the interest threatened and the nature of the interest impaired.

(d) The attacked person must be aware of the fact that he/she is acting in private defence.

The test is an objective one and our courts have emphasised that one should not judge the events like an armchair critic, but rather place oneself in the shoes of the attacked person at the critical moment and bear in mind that at such point in time the attacked person only has a few seconds in which to make a decision. The court should then ask whether a reasonable person would have acted in the same way in those circumstances. A person who suffers a sudden attack cannot always be expected to weigh up all the advantages and disadvantages of his/her defensive act and to act calmly”.

[3.13.6] The often-cited matter *Ex parte Die Minister van Justisie: In re: S v Van Wyk*¹¹ must also be considered where then Appellate Division stated as follows:

“Self-defence is treated in our law as a species of private defence. It is not necessary for the purpose of this judgment to examine the limits of private defence. Until now our law has allowed killing in defence of life, but also has allowed killing in defence of property, or other legitimate interests, in circumstances where it is reasonable and necessary to do so. Whether this is consistent with the values of our new legal order is not a matter which arises from consideration in the present case. What is material is that the law applies a proportionality test, weighing the interest protected against the interest of the wrongdoer. These interests must now be weighed in the light of the Constitution.”

¹¹ 1967 (1) SA 488 (A)

[3.13.7] In the well-known *Carmichael*-case¹² the Court (although in reference to the Interim Constitution at the time) indicated the following –

*“Thus, one finds positive obligations on members of the police force both in the interim Constitution and the Police Act. In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from their threat of sexual violence. As it was put by Counsel on behalf of the amicus curiae: ‘Sexual violence and the treat of sexual violence goes to the core of women’s subordination and society. It is the single greatest threat to the self-determination of the South African woman’.”*¹³

Further to the above the Court went further –

“Under both the interim Constitution and the Constitution, the Bill of Rights entrenches the rights to life, human dignity and freedom and security of person. The bill of rights binds the State and all of its organs. Section 7(1) of the interim Constitution provided: this chapter shall bind all legislative and executive organs of State at all levels of government. Section 8(1) of the current Constitution provides: the Bills of Rights apply to all law, and binds the legislator, the executive and judiciary and all organs of State.”

*“It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection”.*¹⁴

[3.14] In light of the above legal principles and jurisprudence, the Foundation also submits respectfully that validation for self defence (and by implication, self defence with a firearm as regulated by law) can be found in international law. The International Convention on Civil and Political Rights (ICCPR)¹⁵ determines as follows –

¹² *Carmichael v Minister of Safety and Security and Another* (Center for Applied Legal Studies (Intervening) 2001 (4) SA 938 (CC),

¹³ Ad para 62

¹⁴ Ad para 44

¹⁵ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

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.

Article 9(1)

Everyone has the right to liberty and security of person.

Article 23(1)

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

[4] Conclusion

[4.1] The Foundation submits that the proper legislative framework exists in terms of the existing Firearms Control Act to adequately make provision for the control and management of legal firearms issued for purposes of self-defence in South Africa.

[4.2] From a legal vantage point the Foundation submits that it will be an irrational and unjustifiable regression for the Police Minister to remove the right of South Africans (as stated in the existing Firearms Act) to arm themselves for purposes of self-defence.

[4.3] The Foundation submits that the above point is validated by the legislation and jurisprudence referred to *supra*. Added to this the Foundation submits that although our Constitution contains no explicit right which guarantees the ‘right to bear arms’ (as for example in the United States of America by virtue of their Constitutional 2nd Amendment)¹⁶ the right do so implied by our Bill of Rights (and then regulated by section 13 of the existing Firearms Act).

[4.4] The Foundation can also indicate that it is most assuredly not trying to advance an argument that says if there are more legal guns in South Africa, we will have lower crime rates.

¹⁶ Amendment II -

“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”.

[4.5] In conclusion the Foundation submits that the position must be one that is more holistic. A more effective and pragmatic approach -if the Minister's *real* aim with removing this right of South Africans is to *combat crime*- would be institutional capacity strengthening of not only the SAPS in particular but also various related security cluster and administration of justice components involved in combating crime in the country.

[4.6] Flowing from the above submission, the Foundation submits that the recent violence in Gauteng and Kwazulu-Natal proved the supportive and institutional value of Community Policing Forums (CPF's) and their efforts in support of SAPS and SANDF law and order, community security and safety operations.

[4.7] Rather than oppose an increased role for such CPF's the Foundation strongly submits that the Police Minister and his department -in consultation with security cluster, private security and civil society stakeholders- should take immediate, measurable and *proactive* steps to develop and strengthen the capacity of Community Policing Forums and that the Secretariat engage with the same stakeholders on the same issue as soon as possible.

[4.8] It is submitted that one example of this could include (perhaps by way legislative amendment) the proposal that, rather than removing self-defence as a legitimate reason for owning a firearm from the existing Firearms Act, if a South African citizen can prove that he/she is a member of an organized CPF he/she can apply for a firearm license for purposes of self-defence in terms of the existing Firearms Act. In this way:

- a) Citizens retain the right to own a firearm for purposes of self-defence;
- b) SAPS and the state can introduce measures to regulate the above without removing that right; and
- c) It proactively involves communities in security and safety operations in conjunction with SAPS thus broadening the capacity of SAPS to deliver on its constitutional mandate.

[4.9] The Foundation wishes to express its' gratitude for this opportunity and would welcome, if necessary, further engagement with the Secretariat on this issue – also by way of verbal presentations if so required.

Most sincerely,

A handwritten signature in black ink, appearing to read 'Adv Jacques du Preez', with a large, stylized flourish at the end.

Adv Jacques du Preez

CEO

FW de Klerk Foundation