



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Arms (Firearms Prohibition Orders) Amendment Bill (No. 2)

29/01/2021

Submission on the Arms (Firearms Prohibition Orders) Amendment Bill (No. 2)

Introduction and summary

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Arms (Firearms Prohibition Orders) Amendment Bill (No.2) (**the Bill**), a member's bill in the name of National MP, Brett Hudson.
2. The Bill proposes to amend the Arms Act 1983 (**principal Act**) to allow the Commissioner of Police to make Firearms Prohibition Orders (**FPOs**) against gang members who have committed certain offences, and to prevent gang members from holding firearms licences.¹ It creates a number of offences associated with an FPO being imposed, including residing at premises where firearms are present, and attending certain premises.²
3. The Bill was introduced in February 2020, passed its first reading in July 2020, and is now before the Justice Select Committee. It is materially identical to a previous member's Bill which was introduced to the House in May 2018 but negated on 5 September 2018.
4. The Attorney-General has issued section 7 reports in respect of this Bill and its 2018 predecessor.³ Those reports conclude that the Bill is inconsistent with the rights to freedom of association and to be presumed innocent, protected by the New Zealand Bill of Rights Act 1990 (**Bill of Rights**).⁴
5. Because this is a member's Bill, no regulatory analysis has been undertaken.
6. Further, the New Zealand Police undertook public consultation on a proposed FPO regime in late 2019/early 2020. However, the results of that consultation have not been made public. The Law Society understands that further work relating to reform of firearm licensing and administration is ongoing and is yet to be considered by Cabinet.⁵
7. While the policy aim of reducing firearms-related offending is understandable, the Law Society agrees with the Attorney-General's conclusion that the Bill is inconsistent with the Bill of Rights. In addition, the practicalities of the Bill's provisions require further consideration. In light of the Bill's inconsistency with the Bill of Rights and the ongoing work in this area still to be completed, the Law Society submits that the Bill should not proceed. If the Bill does proceed, the Law Society makes several recommendations to improve the operation of the Bill.
8. The Law Society wishes to be heard.

¹ Explanatory Note to the Arms (Firearms Prohibition Orders) Amendment Bill (No. 2), 1.

² Proposed sections 59D and 59E.

³ Report from the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Arms (Firearms Prohibitions Orders) Amendment Bill, 15 May 2018 : <https://www.justice.govt.nz/assets/Documents/Publications/bora-arms-firearms-prohibition-orders-amendment-bill.pdf>; Report from the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Arms (Firearms Prohibitions Orders) Amendment Bill (No 2), 14 June 2020: <https://www.justice.govt.nz/assets/Documents/Publications/Arms-Firearms-Prohibition-Orders-Amendment-Bill-No-2.pdf>

⁴ New Zealand Bill of Rights Act 1990, sections 17 and 25(c).

⁵ See for example: <https://www.stuff.co.nz/national/politics/122205536/nz-first-will-support-national-party-bill-to-take-guns-off-gangs>

Inconsistency with the New Zealand Bill of Rights Act 1990

9. The Law Society agrees with the Attorney-General's conclusion that the Bill appears inconsistent with sections 17 and 25(c) of the Bill of Rights Act and that those inconsistencies cannot be justified under section 5 of that Act.
10. Any limit on individual rights must be reasonable and able to be demonstrably justified in a democratic society.⁶ The limit must be rationally connected to the purpose it seeks to achieve; and the limiting measure must impair the right no more than reasonably necessary to achieve its purpose.⁷
11. The Bill limits the right to freedom of association by treating gang members differently on the basis of their membership of an association.⁸ The Bill does this by stating that a firearms licence must not be given to a gang member, and making gang membership a prerequisite for an FPO.
12. The Law Society submits that to meet the rational connection requirement, the limits the Bill places on individual rights must be supported by data and analysis showing that gang membership in itself increases the risk of the harms the legislation aims to prevent. For the right to be impaired no more than reasonably necessary, that analysis would need to demonstrate that the risk cannot be adequately met by the current provisions of the Act (which includes a fit and proper person requirement for holding a firearms licence, and makes it an offence to possess a firearm without a licence) or other less rights-restricting measures.
13. Absent such evidence, the Law Society considers the Bill is inconsistent with the Bill of Rights Act.
14. In addition, the Bill limits the right to be presumed innocent until proven guilty. Under section 66 of the principal Act the proved fact of a person being in occupation of land or buildings, or the driver of a vehicle in which a firearm is found, becomes a *deemed* fact that the person was in possession of the firearm, unless the person proves (a) the firearm is not their property, and (b) it was in the possession of some other person.
15. In this respect, new section 59B in the Bill creates a reverse onus offence. This raises a prima facie issue of inconsistency with section 25(c) of the Bill of Rights.⁹ Moreover, the maximum penalty for an offence under the provision is severe, as discussed further below. The Law Society agrees with the Attorney-General's conclusion that reasonable alternatives exist, including consideration of an evidential onus,¹⁰ which would place a person at lower risk of wrongful conviction. The current limit on the section 25(c) right cannot be justified under section 5.

⁶ New Zealand Bill of Rights Act 1990, s 5.

⁷ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [103] per Tipping J.

⁸ See *Dawson v Delaware* 503 US 153(1992) at 165, 166; *Butler & Butler* The New Zealand Bill of Rights Act: A Commentary (2nd ed, LexisNexis, Wellington, 2015) at 15.9.4 - 15.9.13.

⁹ Section 25 Minimum standards of criminal procedure – (c) “The right to be presumed innocent until proved guilty according to law”.

¹⁰ As noted by the Attorney-General at [40], an evidential onus is one that requires the accused to satisfy the judge that there is sufficient evidence before the court to raise a triable issue, rather than requiring the defendant to prove something to a certain standard.

Operation of the Bill

Interpretation (Clause 4)

16. The Bill proposes to amend the principal Act to define possession as including a firearm, part, or ammunition that is subject to a person's control but that is in the custody of another person.¹¹ This creates inconsistencies with other provisions of the principal Act.
17. For example, under section 43 it is an offence for a person to supply a firearm to a person (A) who does not hold a firearms licence. A defence is available if at all times while A was in "possession" of the firearm, A was under the immediate supervision of a licence holder.¹² The proposed amendment to the definition of possession does not make sense in the context of section 43.
18. Moreover, the proposed amendment conflicts with section 66 of the Act, which is outlined above at paragraph 14. The Law Society recommends the proposed amendment to the definition of possession be deleted.

Amendments to section 24 and 27: Clauses 5 and 6

19. The proposed amendment to section 24 prevents a member of the Police issuing a firearms licence to a person who, "in the opinion of a commissioned officer of Police, is a member of a gang", or where a police officer considers it reasonably likely that access to the firearm or airgun will be obtained by a gang member. The proposed amendment to section 27 allows a police officer to revoke a firearms licence where, in the officer's opinion, "the person is, or is seeking to become, a member of a gang".
20. These clauses create a number of difficulties.
21. First, it is unclear what "membership" comprises, and whether it includes prospects. The meaning of "seeking to become" a gang member is also unclear. For example, whether it is sufficient if the police officer believes a person has subjective aspirations to become a gang member at an indeterminate point in the future, or a higher evidential threshold must be met.
22. Second, the Law Society considers that the opinion of a police officer is not an appropriate measure of a person's status as a gang member or otherwise. This is especially so given the difficulties with definition.
23. Third, section 24(2) of the principal Act already provides that a firearms licence must not be issued to an applicant if a police officer considers that a person is not fit and proper to be in possession of a firearm, or access is reasonably likely to be obtained by a person who is not fit and proper. If the aim of the proposed clause is to prevent firearms falling into unsuitable hands that is already covered and the proposed amendment is unnecessary.
24. The Law Society recommends the amendments relating to gang members be removed.

Firearms prohibition orders: Clause 7

25. A key amendment proposed by the Bill is the introduction of a power for the Commissioner of Police (**Commissioner**) to make an FPO against a person where:

¹¹ The proposed definition of possession is consistent with that used in the Misuse of Drugs Act 1975.

¹² Arms Act 1983, s 43(2)(b).

- i. in the opinion of the Commissioner, it is necessary, in the public interest, to ensure that the person does not have possession of a firearm;
 - ii. the person is a member of a gang; and
 - iii. the person has, within the past 10 years, been convicted of:
 - an offence under the principal Act;
 - an offence under the Domestic Violence Act 1995; or
 - a serious violent offence.
26. Section 59A(1) authorises the Commissioner to make an FPO against a person if the conditions are met. The Commissioner cannot delegate that power.¹³ The Law Society considers it is inappropriate for the Commissioner to have a discretionary power to impose restrictive orders. It is submitted that the Bill should be amended to confer the power to make FPOs on a judicial officer, not the Commissioner.
27. While the Commissioner may revoke an FPO at any time, an FPO otherwise remains in force indefinitely. We therefore recommend the Bill should be amended to include a time limit by which FPOs will expire.
28. Further, the Bill does not establish any monitoring/oversight of the proposed FPO regime.¹⁴ The Law Society submits that any FPO regime should be rigorously monitored. To ensure the limits placed on individual rights are proportionate and demonstrably justified, an annual report should be provided by the Ministry of Justice to Parliament recording the number of Orders made, their duration and conditions, and the annual statistics on criminal use of firearms.
29. The prerequisite of “gang membership” is likely to create definitional difficulties similar to those identified in respect of clauses 5 and 6. In addition, the evidential threshold is not stated. For example, whether a person’s gang membership needs to be proved before an FPO is issued, or whether it is sufficient that the Commissioner holds the opinion / is reasonably satisfied that a person is a gang member.
30. Evidence showing a link with an increased risk of firearms-related offending is required to inform the prior convictions that will justify the imposition of an FPO, and the relevant time period. The Domestic Violence Act 1995 contains offence provisions that do not appear relevant to an FPO. For example, it is an offence to fail to comply with a court direction to attend an assessment.¹⁵ The inclusion of all offences under the Domestic Violence Act in the proposed section 59A appears overly broad. Similarly, it is not apparent why convictions incurred within the previous 10 years should be relevant, rather than a shorter or longer timeframe.
31. As currently drafted, the proposed section 59A has partial retrospective effect. This is because it allows FPOs to be made in respect of convictions incurred prior to the proposed FPO legislation coming into force. Absent strong evidence to show retrospective application is required to protect public safety, the Law Society submits the principle against

¹³ See clause 9 which amends section 72 of the Act.

¹⁴ With the exception of a right of appeal from the Commissioner’s decision to make an FPO.

¹⁵ Domestic Violence Act 1995, s 51T.

retroactivity should apply.¹⁶ Accordingly, only convictions entered after the commencement of the proposed legislation should be relevant.

Excessive penalties: Proposed sections 59B and 59C

32. The proposed amendments create offences where a person subject to an FPO acquires, possesses or uses a firearm or part, or ammunition. The Law Society considers the proposed maximum penalties are excessive. Moreover, they are inconsistent with the maximum penalties for existing offences under the principal Act.
33. The proposed maximum penalty for acquiring, possessing or using a firearm while subject to an FPO is 14 years in the case of a pistol or restricted weapon, or 5 years in any other case. By contrast, the maximum penalty under the principal Act for unlawful possession of a pistol or restricted firearm is 3 years' imprisonment or a fine not exceeding \$4,000,¹⁷ and for possessing a non-prohibited firearm without a licence is 1 year imprisonment or \$15,000.¹⁸
34. The Law Society considers that the relative seriousness of existing and proposed offences means the disparity in maximum penalties is contrary to the principle of proportionality. If new offence provisions are to be created, it is submitted that the maximum penalties should be reduced.

New Police powers to search

35. The Bill's explanatory note states that "FPOs provide new powers for Police to search the persons, vehicles, and premises of specified serious and violent gang members for firearms at any time".¹⁹ However, the Bill does not contain any provision enabling such powers to be exercised.²⁰
36. If the Committee were to consider including a provision in the Bill that empowers warrantless searches, the Law Society submits that a further Bill of Rights analysis would be required.



Tiana Epati
NZLS President

29 January 2021

¹⁶ Legislation Design and Advisory Committee, *Legislation Guidelines* (2018 ed), Guideline 4.7 and chapter 12.

¹⁷ Arms Act 1983, s 50.

¹⁸ Arms Act 1983, s 20.

¹⁹ Explanatory Note, Arms (Firearms Prohibition Orders) Amendment Bill (No 2), p 1.

²⁰ As recorded in the Attorney-General's section 7 report, section 18 of the Search and Surveillance Act 2002 would therefore apply to restrict the power of warrantless search.