
Firearms Prohibition Orders Legislation Bill

29/03/2022

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1 Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Firearms Prohibition Orders Legislation Bill (**Bill**).
- 1.2 The Law Society acknowledges the importance of minimising the illegal use of firearms, particularly where they are used in crimes of violence. To that end, this submission commends the aim of the Bill to “improve public safety by preventing people whose behaviour and actions represent a high risk of violence, or reflect an underlying risk of violence, from being able to access firearms or restricted weapon”.¹
- 1.3 We are pleased to see that the Bill does not include an earlier proposal for the making of firearm prohibition orders (**FPOs**) through civil proceedings, and instead adopts a process which allows FPOs to be made by a judge when a sentence is imposed following conviction for an offence.
- 1.4 The Bill and accompanying material² acknowledge that the creation of an FPO regime involves significant limitations on the rights of a person against whom an order is made. The limitations on these rights have not been, and cannot be, justified by the arguments set out in the explanatory note and accompanying material, and we acknowledge that this position is contrary to that expressed in the *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990*.³ This submission respectfully challenges a number of the assumptions and conclusions contained in that Report, and proposes amendments to address the New Zealand Bill of Rights Act 1990 (**NZBORA**) and criminal justice issues which arise in the Bill.
- 1.5 This submission has been prepared with input from the Law Society’s Criminal Law Committee and Human Rights & Privacy Committee.⁴
- 1.6 The Law Society wishes to be heard.

2 Executive summary

- 2.1 In summary, the Law Society submits that:
 - (a) The proposed FPO regime imposes very severe limitations on NZBORA rights that are not sufficiently connected to the policy intent of the Bill and are not demonstrably justified. The select committee should request and consider any evidence which suggests that the proposed FPO regime is justified as a minimum and necessary response to the potential harm caused by the individuals against whom an FPO is made, before any further work is done to progress this Bill.
 - (b) The Bill adopts the proper starting point, which is that FPOs should not be made in all cases involving a conviction for a serious violent offence, and they should only be

¹ Explanatory Note of the Bill.

² Departmental Disclosure Statement, Regulatory Impact Statement and *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Firearms Prohibition Orders Legislation Bill*.

³ *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Firearms Prohibition Orders Legislation Bill* (15 December 2021).

⁴ More information regarding these committees is available on the Law Society’s website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

made where the sentencing judge is satisfied that an FPO is necessary for the future protection of the public. However, the Bill provides for too broad a range of offenders to be subject to the proposed FPO regime.

- (c) The proposed 10-year fixed period for FPOs is too inflexible and such a generalised rule is not justified. It would be more appropriate to provide that the sentencing judge may impose, in relevant cases, an FPO for an appropriate period not exceeding 10 years.
- (d) The Bill should not reverse the onus of proof and require a defendant to persuade the judge not to impose an FPO or include specific conditions. This is particularly important in light of the severity of the proposed 10-year period and conditions of an FPO. In our view, the onus should be on the prosecution to satisfy the judge that an FPO should be made, and of the conditions that should be imposed to protect the public. This would also better align the FPO regime with general sentencing principles, where the prosecution must establish the circumstances or facts which aggravate the offending and justify a more severe sentence than would otherwise be appropriate.
- (e) The standard conditions for FPOs are too broad, and the Court's ability to vary or modify the standard conditions is too constrained.
- (f) Any special conditions that are imposed on an FPO by a sentencing judge should be "reasonably necessary".
- (g) The Bill should be amended to provide that an individual who is subject to an FPO can seek to have it revoked during the currency of the FPO.
- (h) The offence of breaching an FPO by accessing, possessing, or using a specified weapon, a prohibited item or ammunition requires further clarification. The select committee should also consider whether proof of a mental element (such as knowledge or recklessness) should be required to establish whether a defendant has breached an FPO by accessing a specified weapon, a prohibited item or ammunition.
- (i) Some further amendments to the Bill are also desirable, as discussed below.

3 Unjustified limitations on NZBORA rights

3.1 The Bill infringes on the following rights and freedoms to achieve its stated policy intent to "improve public safety by preventing people whose behaviour and actions represent a high risk of violence, or reflect an underlying risk of violence, from being able to access firearms or restricted weapons":

- (a) freedom of movement and association,⁵
- (b) the right to be secure from unreasonable search and seizure,⁶
- (c) freedom from discrimination on prohibited grounds,⁷ and

⁵ NZBORA, sections 17 and 18.

⁶ NZBORA, section 21.

⁷ NZBORA, section 19(1) and the Human Rights Act 1993.

- (d) the right to be presumed innocent until proved guilty.⁸
- 3.2 Legislative measures to achieve that policy aim may subject rights to reasonable limits if those limits can be demonstrably justified in a free and democratic society,⁹ by meeting the ‘proportionality test’ adopted by the Supreme Court in *R v Hansen*.¹⁰
- 3.3 This means the proposed regime must:¹¹
- (a) be “rationally connected” to the objective and not be arbitrary, unfair or based on irrational considerations;
 - (b) impair the right or freedom in question as “little as possible”; and
 - (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.
- 3.4 In the Law Society’s view, the proposed FPO regime does not meet the requirements of the *Hansen* proportionality test for a number of reasons.
- 3.5 First, the Bill does not survive the ‘rational connection’ test, as the mere fact of being convicted of a qualifying offence does not support the inference of a high, or underlying, risk of future violence involving the use or threatened use of firearms. Under the new section 39A(1)(a), a FPO can be made against any offender who has been convicted of a serious violence offence (defined in section 86A of the Sentencing Act 2002), which includes a number of offences that do not commonly involve the use of firearms. The Law Society has considered this issue in a previous consultation on the proposed FPO regime.¹² The Law Society submitted that the data presented during that consultation did not identify the characteristics of the individuals who committed the relevant offences, and therefore, did not establish a rational connection between the objective of reducing criminal use of firearms and the categories of ‘high-risk’ individuals that will be captured by the proposed regime.¹³ Similarly, this Bill does not establish that the individuals that will be targeted by the proposed regime are those who commit the offences it seeks to reduce.
- 3.6 Second, the standard conditions in proposed new section 39C of the Arms Act 1983 are not carefully designed to achieve the policy objectives of the Bill.¹⁴ The effect of, for instance, the prohibition on “residing” at any premises where firearms are stored in a manner that is safe and inaccessible to a person subject to an FPO, for as little as two non-consecutive days per year, cannot sensibly be said to improve public safety by preventing access to firearms.
- 3.7 Third, the proposed regime also impairs the relevant rights more than as “little as possible” because:

⁸ NZBORA, section 25(c).

⁹ NZBORA, section 5.

¹⁰ *R v Oakes* [1986] 1 SCR 103 at [138–139]; adopted in New Zealand by *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

¹¹ *R v Chaulk* [1990] 3 SCR 1303 at [1335–1336]; cited in *Hansen*, above n 10, at [64].

¹² New Zealand Police consultation on Firearms Prohibition Orders, 2019.

¹³ A copy of that submission is available on the Law Society’s website:

<https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/I-NZ-Police-Firearms-Prohibition-Orders-consultation-13-1-20.pdf>.

¹⁴ *R v Oakes*, above n 10, at [139].

- (a) the standard conditions (new section 39C of the Arms Act) are too broad,
 - (b) the 10-year fixed period is too long and inflexible, and
 - (c) the ability of the courts to vary and modify standard conditions (new section 39D of the Arms Act) is too constrained.
- 3.8 Fourth, the effects of the limitation of these rights and freedoms are not proportional to the objective of the Bill. For example, the likelihood of a disproportionate impact on Māori is only acknowledged in passing in the Departmental Disclosure Statement, and there is no information on the outcomes of engagement with Māori. The actual effects do not appear to have been outlined or assessed, and these are likely to be significant.
- 3.9 To take one particularly concerning example, the prohibition on “residing” at any premises where firearms are stored has the capacity to materially affect the ability of Māori to visit whānau, attend events at marae, or to attend tangi without risking (potentially unknowingly) a breach of an FPO. Māori are also more likely to live rurally and rely on firearms for the provision of food. Therefore, the potential for disproportionate impact and increased criminalisation of Māori is of considerable – and as yet unaddressed – concern.
- 3.10 In addition to infringing on freedom of movement and association, these issues also raise the prospect of indirect discrimination contrary to section 19 of the NZBORA. This indirect discrimination is further compounded by:
- (a) the Bill including amongst its qualifying offences the offence of participating in an organised criminal group (which also disproportionately effects Māori), and
 - (b) the reverse onus of proof imposed for breaching an FPO (which requires no element of knowledge and attracts severe consequences of up to seven years imprisonment).
- 3.11 Finally, we note that the Court of Appeal has determined it is inadequate, when assessing whether the limits on freedoms and rights are demonstrably justified, to rely on FPOs being made on an individual basis following a full assessment by a judge.¹⁵ The fact that an FPO may be imposed only once a judge is satisfied of certain matters does not make the regime compliant with the NZBORA (and in any event, as noted above, a court’s ability to vary standard conditions is subject to limitations).
- 3.12 Rather, the central question is whether the relevant provisions “delineate regimes that limit rights in a way, and to an extent, that has been demonstrably justified”.¹⁶ What is required for such regimes to be justified under section 5 of the NZBORA is “a *substantial showing by appropriate affidavit evidence that the regimes are justified* as a minimum and necessary response to the potential harm caused by those against whom such orders would be made” (emphasis added).¹⁷ Although a degree of latitude to Parliament is appropriate in matters of justification, that approach “must be based on more than the fact that Parliament has chosen a particular legislative response. What is required is that the legislative choice be demonstrably justified.”¹⁸

¹⁵ *Chisnall v Attorney-General* [2021] NZCA 616 at [220].

¹⁶ *Chisnall v Attorney-General*, above n 15, at [220].

¹⁷ *Chisnall v Attorney-General*, above n 15, at [219].

¹⁸ *Chisnall v Attorney-General*, above n 15, at [221].

- 3.13 We do not consider that such evidence has been presented in respect of this Bill. As a result, the Bill does not show that the proposed FPO regime is a proportionate response to the objectives of the Bill or that the response is demonstrably justified. We therefore strongly encourage the select committee to request and consider such evidence (including, in particular, any outcomes of engagement with Māori) to determine whether this proposed FPO regime is in fact justified. We do not recommend progressing the Bill until this work is undertaken.

4 When an FPO may be made

- 4.1 Clause 8 of the Bill creates a new section 39A of the Arms Act, which sets out when an FPO may be made. In the Law Society's view, several issues arise in relation to this clause.

Offences for which an FPO may be imposed

- 4.2 This clause is currently too widely drawn because it adopts the complete list of offences described as "serious violent offences" in section 86A of the Sentencing Act 2002. Section 86A includes offences of sexual violence and personal violence which do not, or are most unlikely to, involve any risk of the use of firearms.
- 4.3 The adoption of the section 86A list places many offenders in jeopardy of being subject to an FPO when they pose no risk whatsoever of danger to the public by the use, or threat of use, of firearms. This is not to downplay the severity of the impact on the victims of these violent offences, including sexual violence offences, but rather to point to the lack of any credible justification for considering that such offenders need to be restrained from access to, or the use of, firearms. Even where an offence involves serious injury to – or even the death of – the victim, there may be nothing in the circumstances to suggest the offender will in future have recourse to firearms. Murder by poisoning is one example; another is aggravated robbery committed by two or more persons in company but without weapons.
- 4.4 The current drafting of the Bill can be readily solved by providing that the judge must consider whether the imposition of an FPO is necessary in the interests of public safety when imposing a sentence for a serious violent offence which involved the possession, use or threatened use of a firearm. Such a change would require the prosecution to establish, and the defence to challenge, that an FPO is needed for the particular offender before the court. We believe this would better balance the competing interests of individual freedoms and the protection of the public, and resolve some of the NZBORA concerns that are discussed above.

FPOs as a condition of discharge without conviction

- 4.5 Proposed new section 39A suggests an FPO can only be made if a conviction has been entered. The select committee may wish to consider whether an order might be made as a condition of discharge without conviction under sections 106 and 107 of the Sentencing Act. This would be preferable in circumstances where a judge considers that an FPO should be made and is required to enter a conviction solely on that basis, even if other circumstances support a discharge without conviction.

5 Standard conditions of FPOs

- 5.1 Clause 8 of the Bill creates a new section 39C of the Arms Act, which sets out the standard conditions of an FPO. The Law Society submits that these conditions are too broad and, as discussed above, represent an unjustified limitation on the rights of persons subject to an FPO.
- 5.2 Several of the standard conditions will apply whether or not there is any likelihood that the person subject to the FPO will have any significant opportunity to access, obtain or use firearms. For example, the standard condition in new section 39C(1)(a) prohibits association with, or being in the presence of, a person who has with them a firearm or related items that are not in secure storage. There is no apparent requirement that the person subject to the FPO must have any knowledge, or even suspicion, that firearms are present in the premises or vehicle. Breaches of this condition may therefore occur without any fault on the part of the person subject to the FPO.
- 5.3 A further example is new section 39C(1)(c), which provides for a standard condition which forbids the person subject to an FPO from joining or remaining a member of any shooting club, or visiting the premises of such clubs, or attending the events of such clubs. This provision appears to be contrary to the scope and purpose of the new section 39C(1)(a) standard condition. Under the new section 39C(1)(a) condition, a person who is subject to an FPO may be present where weapons are safely stored, however the new section 39C(1)(c) condition prohibits them from doing so even where there is no likelihood of access to firearms (for example where the club holds an event at a location other than where firearms are stored), simply because of the nature of the particular body involved.
- 5.4 The new section 39C(1)(b) condition is also hard to reconcile with the new section 39C(1)(a) condition. New section 39C(1)(b) prohibits residence in a place where firearms are present – apparently even where they are safely stored and are inaccessible to the person subject to the order. It is not clear why residence in a place where firearms are securely stored poses a greater a risk to the public than travelling in a vehicle where such weapons are securely stored. If there is no greater risk to the public, the more restrictive conditions on residence are not justified.
- 5.5 The Law Society considers that the extremely restrictive nature of this condition is not justified, should be reconsidered for the following reasons:
- (a) In our view, it is not appropriate to suggest that a person “resides” at a premises if they are there for two days over a period of 12 months, and there is no requirement for the two days to be consecutive.
 - (b) It is difficult to define what is meant by “premises” for the purposes of this standard condition. Would it, for example, extend to a motel complex where firearms are securely stored in one motel unit while the person subject to the FPO is in a different, and possibly distant, unit?
 - (c) This condition is also problematic in circumstances where a defendant who is subject to an FPO is arrested and detained in police cells for 48 hours. The current drafting would mean that these defendants would be committing an offence on the basis

that they would be “residing” in premises where firearms are stored. That is an indicator of over-wide drafting.

- (d) Proposed new section 39D(2) of the Arms Act permits the court to vary the standard conditions if the court is satisfied that there are sufficient safeguards in place to ensure that the offender is not reasonably likely to obtain access to firearms or related items stored on the premises. The Bill implicitly acknowledges that if an offender is not reasonably likely to obtain access to firearms or related items stored on the premises, there is no increased risk to public safety.

5.6 These standard conditions do not appear to lower the risk of offending or harm to the public, and they impose limits on the freedom of association and movement which cannot be demonstrably justified in a free and democratic society.

5.7 We therefore recommend amending the Bill to provide that conditions on FPOs should be imposed at the discretion of the sentencing judge (in place of standard conditions which would inevitably be challenged, and require a variation or modification).

5.8 If this recommendation is not taken up, we suggest:

- (a) Narrowing the standard conditions to ensure they prevent a demonstrable risk to public safety, including by narrowing the proposed section 39C(1)(b) condition to include a knowledge requirement, and to limit that condition to premises where firearms are not in secure storage; and
- (b) Removing sub-sections (2)–(4) of proposed new section 39D which limit the ability of the court to vary and modify the section 39C(1)(b) condition.

6 Modifying the standard conditions of an FPO

6.1 Clause 8 of the Bill seeks to create new section 39D of the Arms Act, which would enable the court to vary or modify the standard conditions of an FPO. The Law Society is pleased to see that the drafters of the Bill have recognised that the standard conditions are unduly onerous, and have provided a reasonably workable scheme for varying and modifying those conditions where the circumstances justify it.

6.2 It is essential that proposed new section 39D is amended (as suggested at paragraph 5.8(b)) if the Bill is not amended to provide that FPO conditions should be imposed at the discretion of the sentencing judge (as suggested at paragraph 5.7).

7 Special conditions of FPOs

7.1 Proposed new section 39E of the Arms Act confers an unreasonably broad discretion on the sentencing judge by allowing the judge to impose special conditions on an FPO that are “necessary” to prevent the offender from accessing, possessing, or using any firearms or related items.

7.2 The Law Society considers this discretion should be modified by requiring any special condition to be “reasonably necessary” (as, for example, is the case with imposition of conditions on a grant of bail).¹⁹ This would provide guidance to a decision-maker to ensure

¹⁹ Bail Act 2000, sections 30(2) and (3).

that any special condition is reasonable having regards to the particular circumstances of each case, and that any conditions are rationally connected to and go no further than what is required to meet the aim of the section.

8 Duration of FPOs

- 8.1 Proposed new section 39F of the Arms Act provides that an FPO will have a term of 10-years, unless it is revoked sooner by a court. However, the Bill only provides for revocation where there has been a subsequent conviction for a qualifying offence, at which point the sentencing judge for the second offence may revoke the earlier FPO and impose a new one, again with a 10-year duration.
- 8.2 No justification is provided in the Bill or the accompanying material for the proposed 10-year duration. A blanket 10-year duration may, in many cases, be longer than is necessary for the protection of the public, and could place an unreasonable limitation on the rights of the person subject to the FPO. This is particularly the case where an FPO commences following a custodial sentence (proposed new section 39F(2) of the Arms Act).
- 8.3 The Bill could be amended in two ways – the two not being mutually exclusive – to address this overreach:
- (a) The Bill could provide for a person subject to an FPO to have the right to apply to a court after a period of, for example, three years for a revocation or review of the FPO.
 - (b) The 10-year period could be removed altogether, and the Bill could simply provide that the sentencing judge may impose an FPO of a duration which is necessary for the protection of the public from firearms offending by the offender, with a maximum duration of 10-years.

9 Offence of breaching an FPO

- 9.1 Proposed new section 42A of the Arms Act (clause 10 of the Bill) provides that it is an offence to breach an FPO by accessing, possessing, or using a specified weapon, a prohibited item or ammunition.
- 9.2 There is some uncertainty as to the scope of the term “accessing”. The terms “possession” and “use” each carry a requirement of a mental element (proof of which would normally fall upon the prosecution), however the Bill does not clarify whether “accessing” similarly requires such proof of a mental element. The select committee may wish to clarify this component of the offence, as well as the difference between “accessing” a firearm (or part of a firearm) and “using” or “possessing” a firearm.
- 9.3 We also note that a somewhat different issue arises in relation to proposed new section 42B, which provides that it is an offence to supply a firearm or certain other related items to a person who is subject to an FPO. Unlike proposed new section 42A, there is no mention of providing “access” to a firearm, so the two offences have different parameters. It would be desirable to amend these clauses to ensure consistency between the two new offences.
- 9.4 It is further noted that the maximum penalty for a breach of an FPO is five years’ (and in some cases, seven years’) imprisonment. If new section 42A does not require proof by the

prosecution of any knowledge or recklessness, the section creates, in relation to the “access” component, a strict liability offence requiring the defendant to prove, on the balance of probabilities, a “reasonable excuse”.²⁰

- 9.5 In the Law Society’s view, an offence with such a high penalty should require proof of a mental element. We therefore recommend amending new section 42A to provide for two different levels of offending – one which would be a strict liability offence with a lesser penalty, and one with the current suggested penalties, requiring knowledge of the condition being breached, or recklessness as to the condition being breached.

10 Other amendments to the Arms Act and Sentencing Act

10.1 We make the following observations regarding the remaining amendments to the Arms Act:

- (a) We support the proposed amendments to section 3, relating to prosecutions of police officers who have been acting undercover.
- (b) The proposed amendment to section 22H, to provide that a person who is subject to an FPO is disqualified from holding a firearms licence, is necessary and justified.
- (c) Clause 7 of the Bill seeks to amend section 24A to provide that a person who has had an FPO made against them may not be deemed fit and proper to be in possession of a firearm or an airgun. We are concerned that this amendment is open to an overly broad interpretation. It could mean that an individual who successfully appealed against conviction for an offence following sentencing, which included the imposition of an FPO, would be barred from holding a firearms licence despite the success of the appeal. This issue may have been overlooked, and we invite the select committee to consider clarifying this clause to avoid any unintended outcomes.
- (d) Clause 12 of the Bill seeks to create a new section 69(1A), which provides that any firearm or related item in the possession of a person who is convicted of an offence under new section 42A must be forfeited to the Crown. The proposed section 69(1A) has the potential to require forfeiture of firearms which are owned and registered to someone other than the person who has been convicted of the offence (for example, where the firearm in question has been stolen). In the Law Society’s submission adopting a starting point in favour of forfeiture is contrary to the right to be secure against unreasonable seizure provided by section 21 of the NZBORA in cases where another individual has an ownership interest in the firearm. Clause 12 of the Bill also conflicts with section 377(1) of the Criminal Procedure Act 2011 which states that any property found in the possession of a person who is convicted of an offence may be delivered to the person who is entitled to that property. In circumstances where a firearm or related item was stolen prior to the offending, section 377(1) may require that stolen item to be returned to the person entitled to it (rather than being forfeited to the Crown). We invite the select committee to consider amending this clause to provide a presumption that any firearm or related item be returned to its legal owner unless there are adequate grounds for ordering forfeiture. It is also noted that similar concerns would equally apply to the current

²⁰ Proposed new section 42(1)(b).

section 69(1) of the Arms Act 1983 (which provides for forfeiture in circumstances where a person has been convicted of an offence of using, carrying or being in possession of a specified items).

10.2 Finally, we note that the proposed amendments to the Sentencing Act in clause 21 of the Bill will need to be revised if the recommendations set out in this submission are accepted by the select committee.

A handwritten signature in black ink, appearing to read 'Tiana Epati', with a stylized flourish at the end.

Tiana Epati
President