

Firearms Prohibition Orders Legislation Amendment Bill

Submission of the New Zealand Law Society Te Kāhui
Ture o Aotearoa

5 April 2024

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 Amendment Bill (**Bill**).
- 1.2 The Bill proposes several amendments to the Firearm Prohibition Orders (**FPO**) regime to address gang-related offending and reduce firearms crime. Specifically, it extends the groups of persons against whom FPOs may be made; establishes a new review process that enables people subject to an FPO to apply to the court to have their FPO varied, modified, or revoked; and gives Police a warrantless search power to check compliance with FPOs.
- 1.3 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 overarching aim of the Bill to improve public safety. We are also pleased to see the inclusion of a fairly robust review process, a point raised in an earlier submission on the Firearms Prohibitions Orders Amendment Bill.¹
- 1.4 However, the Law Society considers that as drafted the proposed amendments will not result “in an improved FPO regime that supports FPOs to be better targeted to more high-risk offenders” but rather risks unintentionally breaching rights affirmed in the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**) and casting the net too wide. The Law Society’s key concerns include:
 - (a) Given the regime is in its early days, there is a lack of evidence to evaluate whether the FPO regime is (or is not) working as intended. It would appear premature to legislate further until better evidence and data becomes available. Once this is available, more informed amendments can be made to the regime if needed.
 - (b) The proposed definition of “associate of a gang or an organised criminal group” is overly broad and applies to persons who commit the broader range of offences but are not meaningfully involved in criminal gang activity, are not high-risk offenders, and do not pose risks to public safety.
 - (c) The policy development process does not show that broadening the category of offences which make an offender eligible for an FPO is rationally connected to the purpose of protecting public safety from high-risk offenders.
 - (d) As drafted, the new search power, confers an unlimited power of search of a person solely on the grounds of suspicion that the person is subject to an FPO. There does not need to be any reasonable grounds to believe an offence has been, is being or will be committed by the person to be searched. A monitoring power not tied to the underlying purpose of monitoring whether a person subject to an FPO is accessing firearms, is unreasonable.
 - (e) The creation of a warrantless search of any premises in which the person is present, or that the person owns, occupies, or controls is unreasonably broad and inconsistent with the right to be free of unreasonable search and seizure.

¹ Law Society submission, *Firearms Prohibitions Orders Amendment Bill*, 28 March 2022, at [8.3].

(f) As drafted, the seizure and detention of arms is not limited to the seizure of ‘illegally held firearms’.

1.5 This submission has been prepared with assistance from the Law Society’s Criminal Law Committee, and Human Rights and Privacy Committee.²

1.6 The Law Society wishes to be heard.

2 General Comments

2.1 The Law Society acknowledges the Bill proposes amendments to a regime that is already in force.

2.2 However, we remain concerned (for the reasons outlined in our submission on the original Bill) that the FPO regime (as enacted) imposes limitations on rights protected under the Bill of Rights Act that had not been demonstrably justified on the evidence presented at the time the regime was enacted.

2.3 The Bill of Rights Act does not include a right to bear arms. However, the Attorney-General noted in his report on the original Bill,³ the regime infringes other rights, including:

(a) Freedom of association (section 17) and freedom of movement (section 18) — in that FPOs are subject to standard conditions that place limitations on the offender’s right to associate with or be at places connected with firearms.

(b) Right to be presumed innocent (section 25(c)) — by creating a reverse onus offence in relation to firearms possession.

2.4 The Attorney-General concluded the limitations on these rights were demonstrably justified under section 5 of the Bill of Rights Act. At the time, the Law Society took the contrary view on the basis that the limitations had not been justified by the arguments set out in the explanatory note and accompanying material.

2.5 The Law Society submits that the current Bill now proposes further rights limitations that have not been demonstrably justified on the basis of the evidence presented with the Bill. Quite apart from controlling access to arms, the proposed amendments create broad warrantless search powers. The lack of evidence to justify this, in part, reflects the fact that the existing regime is still in its infancy such that it is difficult to assess whether the regime is (or is not) working as intended and, accordingly, whether amendments are required.

2.6 This point is confirmed by the Supplementary Analysis Report (**SAR**) provided by Police. It highlights a lack of evidence establishing that FPOs are effective. This Bill creates a tougher regime (including by broadening the group of people to whom an FPO applies) without an evidential basis showing that the original FPO regime has led to a marked improvement to public safety. The SAR summaries this by stating (our emphasis):⁴

² More information on the Law Society’s law reform committees can be found here:

<https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>

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 Police, *Supplementary Analysis Report – Firearms Prohibition Orders Amendments*, 15 February 2024, at p 7.

There is an assumption that the current FPO regime is insufficient to mitigate firearms violence or control gang crime, which has not been rigorously tested. Given the newness of this FPO regime, *it is difficult to assess if it is working effectively, or whether amendments are needed to increase its efficacy*. As at 1 February 2024, 30 FPOs have been issued, eight of which apply to gang members. Many of these individuals are likely to still be serving sentences of home detention or imprisonment, making it difficult to assess whether current FPO settings are *actually effective in reducing risks to public safety*.

- 2.7 Given that, it would appear premature to legislate further until better evidence and data about the current regime becomes available.

3 Amendments to Arms Act

Extending group of persons covered by FPO

- 3.1 The Bill amends the Arms Act 1983 (**Act**) to extend the group of persons against whom an FPO may be made to include those aged 18 years or over who are a member or an associate of a gang or an organised criminal group and who have been convicted of an offence under specified provisions. The targets of this proposed amendment are gang and organised criminal offenders who have been convicted of a wider range of offences and who pose a risk to public safety. The Bill does this by including new definitions in proposed section 39 and broadening the range of specified offences in proposed section 39A.

Definition of “associate of a gang or an organised criminal group” and “prospective member or nominee”

- 3.2 The Law Society notes the proposed definition of “associate of a gang or an organised criminal group” is different to the proposed definition in the Gangs Legislation Amendment Bill. In that Bill, “associates with another person” means to be in the company of the other person. That definition, taken literally, will include police officers and lawyers (including prosecutors interviewing gang members who might give evidence for the Crown at a forthcoming trial).
- 3.3 The FPO Bill does not repeat that provision. Rather, it defines a person as an associate of a gang or organised criminal group if that person “associates with a member of a gang or an organised criminal group” [and is not a “mere acquaintance of the member”]. This may be interpreted as having some kind of on-going relationship with the other person, though not being in their physical presence at the relevant time. Without some external referent to specify what “associates with” means, the current drafting lacks sufficient clarity. The criminal law should clearly provide individuals with guidance as to what conduct will, or will not, be contrary to the law. The current language of the proposed definition invites uncertainty and considerable risk of inconsistency of application. Given the intrusive nature of the police powers conferred by the Bill, clarity is important.
- 3.4 Moreover, as drafted, the Bill’s definition would include as an associate of a gang member that person’s parents, spouse, children, wider whānau, friends, counsellor or religious leader, work colleagues and employers – even where those “associates” do not themselves have anything to do with the gang. This broad approach to “associates” means the Bill allows FPOs to apply to persons who commit the broader range of offences but are not

involved in gangs, are not high-risk offenders, and do not pose risks to public safety. This approach has not been demonstrably justified: the proposed limitation (an FPO for offenders who commit low-level offences and are not involved in a gang) is not rationally connected to the purpose for which rights are limited (protecting public safety from high-risk offenders).

- 3.5 We do not think this is intended. We therefore recommend that “a member of” is removed from paragraph (a) of the definition of associate. We also recommend that further legislative guidance be given to indicate to Police and to the courts that an associate is intended to be a person who is involved in criminal aspects of a gang’s activity, rather than any lawful activity undertaken by the gang or its members.
- 3.6 Further, the proposed definitions of “associate of a gang or an organized criminal group” and “prospective member or nominee” are likely to pose significant factual issues, particularly through the use of the qualifier “not a mere acquaintance” (in respect of associates). While on their face, the terms may seem simple enough, in practice distinguishing “mere acquaintances” from those actively supporting a gang will likely prove difficult. For example, would the wearing of a red hoody by an 18-year-old attending a party or a football match be sufficient to show “support” for the Mongrel Mob?
- 3.7 As noted in the SAR, Police consider proving the additional identifiers imposed the new definitions (i.e. proving that an individual is a member or associate of either a gang or organised criminal group), will introduce administrative and procedural challenges.⁵
- 3.8 The Law Society recommends further clarification of these proposed definitions to address these issues.

Definition of “criminal activity”

- 3.9 A new definition of “criminal activity” is proposed in clause 6 of the Bill. However, this term is only used once more, later in the definition section. As such, using the term “commission of an offence” instead of “criminal activity” might be less circuitous.

Definition of “member of a gang or an organised criminal group”

- 3.10 The definition of “member of a gang or an organised criminal group” largely replicates the proposed definition included in the Gang Legislation Bill. However, that Bill also separately defines the term “gang insignia”. We suggest it would be helpful to similarly include a definition of insignia in the FPO Bill to avoid any unnecessary issues regarding interpretation.

Amendment to section 39A - when FPO may be made

- 3.11 The amendment to section 39A of the Act proposes to broaden the category of offences which make an offender eligible for an FPO. This includes the commission of any Crimes Act or Misuse of Drugs Act offence punishable by a term of imprisonment of one year or more a basis for the making of an FPO, where the offender is a member or an associate of a gang.

⁵ Ibid, at p 4.

- 3.12 The range of possible offences falling within that category is too broad and is unconnected with the purpose of protecting public safety from high-risk offenders. Many of the proposed offences have little or no likelihood of involving the use of firearms: for example, bribery offences in part 6 of the Crimes Act 1961; conspiring to pervert the course of justice (section 116); indecency offences (sections 124, 124A, 125 and 126); and most forms of property offending (other than robbery and aggravated robbery), will all be covered. Many more of the proposed offences are not able to be described by themselves as “high-risk” offending, such as: possession of a pipe or seeds of a prohibited plant;⁶ making false statements to procure a licence;⁷ forceable entry;⁸ criminal nuisance;⁹ and possessing an intimate visual recording.¹⁰
- 3.13 Further, when considering the proposed broad definition of “associate” and by casting the net so wide as to be almost any crime, the regime risks including a wide variety of individuals that it was not intended to cover. For example, an 18-year-old convicted of unlawfully taking a motor vehicle, who happens to have Black Power-aligned friends, could be subject to an FPO. Were this person to want to end any connection with the Black Power, find employment and the like, then the existence of the FPO may pose some significant, but probably unforeseen, hurdles:
- (a) Accommodation options may be limited owing to the proximity to firearms restrictions. While this may be a niche issue, there is no evidence to indicate this practical issue has been contemplated and therefore quantified.
 - (b) In terms of unskilled or semi-skilled opportunities for work and rehabilitation, firearms are still used (or at least stored/kept) in industries including farming, horticulture, conservation work, merchant naval work, and pest control. As a result, the Bill has the potential to someone out of such work, potentially at a relatively young age, and on the basis of tenuous “gang” links. This appears to be an unintended consequence of the broad definitions proposed.
 - (c) Any employer, landlord or the like, regardless of their firearm status, may object to housing/employing an FPO holder if there is a risk of warrantless searches being conducted without cause.
- 3.14 As with the submission on the Firearms Prohibitions Orders Amendment Bill,¹¹ the Law Society notes that broadening the category of offences to which the regime applies has not been rationally connected to the purpose of protecting public safety from high-risk offenders. In this way, the amendments do not infringe the relevant rights as little as possible. The result is that the policy development does not show that limitations posed on the relevant rights are demonstrably justified.
- 3.15 In the Law Society’s view, there needs to be a rational connection between the qualifying offences and the risk of harm to the public from high-risk offenders. It might, for example,

⁶ Misuse of Drugs Act 1975, s 13.

⁷ Section 15.

⁸ Crimes Act 1961, s 91.

⁹ Section 145.

¹⁰ Section 216(1).

¹¹ Above n 1, at [3.2]–[3.13].

be appropriate to limit the qualifying Crimes Act offences to the more limited number where commission of the offence might or will create a risk of harm to one or more members of the public, such as where violence, threats of violence, and/or a weapon was used. However, in the Law Society's submission, the assessment of where to draw appropriate limits ought to take place once data from the current regime has been analysed and adequate consultation of affected parties has taken place.

3.16 We invite the Select Committee to consider these issues in more detail.

New section 39FA inserted (Varying, modifying, or revoking FPOs)

3.17 As noted earlier, the Law Society commends the inclusion of a review process to vary, modify or revoke a FPO after five years. While we had earlier suggested a period of three years, the fairly robust process for review and potential revocation of FPOs is a positive change.

3.18 We note that the burden of proof (balance of probabilities) is explicitly stated in new section 39F(4), but is absent in new section 39F(3). For clarity and consistency, we suggest the same burden of proof is explicitly stated in new section 39F(3).

4 Amendments to Search and Surveillance Act: New Search powers

- 4.1 Proposed new section 18AA of the Search and Surveillance Act 2012 allows a constable to conduct a warrantless search if they have reasonable grounds to suspect a person is subject to a FPO. This amendment confers an unlimited power of search of a person solely on the grounds of suspicion that the person is subject to an FPO. However, as subsection (2) makes clear, there need not be any reasonable grounds to believe an offence has been, is being or will be committed by the person to be searched. Nor are there any reasonable grounds to believe the person is breaching a condition of the FPO. As such, this is a prima facie breach of the section 21 right to be free from unreasonable search and seizure under the Bill of Rights Act.
- 4.2 While the Law Society acknowledges the Crown Law advice indicated that the addition of a "reasonable grounds to believe the person is concealing a firearm" threshold to proposed section 18AA(1)(d) will allow the power to be lawfully exercised, we do not consider this cures the inconsistency of the proposed section with section 21 of the Bill of Rights Act.
- 4.3 There are no restrictions (other than those in the Bill of Rights Act limiting unreasonable searches) imposed on Police. No adequate basis is provided for the conferral of such an extensive power, particularly given the Police SAR makes it clear the Police currently lack sufficient information to know whether or not the current law is working and cannot predict whether the change will be effective to promote public safety.
- 4.4 It is concerning that Police have not consulted on consistency with Te Tiriti o Waitangi obligations beyond Te Puni Kōkiri, nor has the substance of Te Puni Kōriki's feedback been appropriately disclosed in the Departmental Disclosure Statement.¹²
- 4.5 Further, the SAR notes the proposed amendment risks the FPO framework being considered inconsistent with the Bill of Rights Act by the judiciary, resulting in the courts

¹² Police *Departmental Disclosure Statement*, 22 February 2024, at p 7.

taking a narrow interpretation on when FPOs and associated search powers are available.¹³ The response to this concern is for Police to develop ‘internal guidelines’ to apply reasonableness limits on when and how searches are conducted, as well as options to provide legislative direction on when FPO search powers should be used. However, the SAR concludes that risks of inconsistency with the Bill of Rights Act are likely to remain significant.¹⁴

- 4.6 The Law Society agrees with that conclusion. The Bill’s relevant purpose is to “improve public safety” by providing Police with “more effective tools” to monitor whether those who “pose a high risk to public safety” are accessing firearms.¹⁵ If the purpose is to monitor whether high-risk offenders are accessing firearms, a monitoring power that is not tied to that purpose is not rationally connected to its objective. New section 18AA as drafted is not tied to that purpose and, as such, it would permit unreasonable searches contrary to section 21 of the Bill of Rights Act.
- 4.7 The Law society therefore recommends that new section 18AA(2) be amended to provide: “A constable may exercise the power in subsection (1) if he or she has reasonable grounds to believe the person subject to a firearms protection order has been, is, or will be in breach of the order by accessing firearms”.

Subsection 18AA(1)(c) - premises

- 4.8 The Law Society is particularly concerned with the creation of a warrantless search of “any premises in which the person is present, or that the person owns, occupies, or controls” (proposed section 18AA(1)(c)). This is unreasonably broad. The power to search the entire “premises” on which a person is found is far-reaching.¹⁶ “Premises” will include not only the dwelling of the individual searched, but the entire building (and appurtenant land) where the individual is found. If the individual alleged to be subject to a FPO is, for example, in a hotel bar, the power of search will therefore extend to every room in the hotel. That is a manifest overreach and involves potential infringement of the rights of all other persons in, or occupying if temporarily absent from, other parts of the premises.
- 4.9 The Law Society recommends the proposed subsection be redrafted to make it clear that any power of search of parts of the premises is limited to those where Police have a reasonable belief that firearms or evidence of a breach of an FPO may be discovered.
- 4.10 The second limb of the proposed section, dealing with property “owned, occupied by or controlled by the person” to be searched is also too broad. It risks jeopardising the rights of tenants of property owned/controlled by the relevant individual regardless of the lack of any evidence or grounds for belief that the search will produce firearms or evidence of breach of an FPO.
- 4.11 The stance taken in this subsection is also in contrast to the limitation on searches in proposed subsection (1)(d) which requires the constable to have “reasonable grounds to believe [the person] is in possession of arms”. If the reasonable grounds formula used in

¹³ Above n 4, at p 5.

¹⁴ Ibid.

¹⁵ Firearms Prohibition Orders Legislation Amendment Bill 2024 (24-1) (Explanatory Note) at 1–2.

¹⁶ This was a point the Law Society previously made in a different context in its submission on the Firearms Control Bill.

subsection (d) was similarly repeated in subsection (1)(c), the latter would be less objectionable. While the Law Society acknowledges the Crown Law advice indicated that the addition of a “reasonable grounds to believe the person is concealing a firearm” threshold to proposed section 18AA(1)(d) would allow the power to be lawfully exercised,¹⁷ it is unclear why such a threshold was not similarly included in section 18AA(1)(c).

Proposed subsection 18AA(1)(f) - seizure and detention of arms found

- 4.12 The Law Society notes that proposed subsection (1)(f) allows the seizure and detention of “any arms found”. This provision is not limited to the seizure of illegally held firearms. As such it may be invoked to confiscate lawfully held firearms, in breach of the right to be free from unreasonable seizure of property.
- 4.13 In addition, as drafted, this subsection would also allow the seizure of arms belonging to an individual who is not subject to an FPO and who, for example, did not realise that an individual with them was subject to an FPO. This creates a range of issues including for example whether seizure is appropriate in those circumstances, and what alternatives may be available to address concerns of protecting public safety.
- 4.14 The Law Society recommends limiting the power to seize arms to illegally held arms only, with a limited right to temporarily seize arms whose status is uncertain. This would avoid issues such as detention of legally held arms.



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¹⁷ Crown Law, *Advice on the consistency of the Firearms Prohibition Order Legislation Amendment Bill with the New Zealand Bill of Rights Act 1990*, at [32].