

Privacy Commissioner's Submission to the Justice Committee on the Arms (Firearms Prohibition Orders) Amendment Bill (No 2) Member's Bill (217—1)

Executive Summary

1. The Arms (Firearms Prohibition Orders) Amendment Bill (No 2) (the Bill) amends the Arms Act 1983 (the Arms Act). The Bill seeks to provide new powers for Police to ensure gang members do not have access to firearms. It does this by:
 - introducing Firearms Prohibition Orders (FPOs) that can be issued against gang members when certain criteria are met;
 - making it an offence to contravene an FPO;
 - prohibiting a firearms licence from being issued to a person who is a member of a gang or is subject to an FPO; and
 - seeking to provide Police with new powers to search the persons, vehicles and premises of gang members for firearms at any time.
2. The Privacy Act 2020 is New Zealand's main privacy law. One of my functions under the Privacy Act is to examine legislation before Parliament and to consider any matters affecting individuals' privacy. Central to my examination of any proposed legislation is the principle that policy and legislation should be consistent with privacy rights unless there is a very good reason (and evidence) to override those rights.
3. I do not support this Bill. I consider that the Bill is unnecessary given the tools already available to law enforcement agencies under the Arms Act and the Search and Surveillance Act 2012 (the Search and Surveillance Act). My comments on the Bill relate to clauses 5 to 7.

Summary of provisions in Bill

4. The explanatory note states that the Bill provides new powers for Police to search the persons, vehicles and premises of specified serious and violent gang members for firearms at any time. It also provides that the offending history and profile of gang members will make it reasonable for Police to be able to check they do not have access to firearms.
5. Clause 7 enables the Police Commissioner to issue an FPO against a person who is identified as a gang member. The Police Commissioner must consider it necessary in the public interest to ensure that the person does not have possession of a firearm. The person must also have been convicted in the past 10 years of:

- an offence under the Arms Act or the Domestic Violence Act 1995¹; or
 - a serious violent offence as defined in section 86A of the Sentencing Act 2002.
6. A person who contravenes an FPO commits an offence and is liable for a term of imprisonment up to 14 years. A person subject to an FPO must not:
- acquire, possess or use a firearm or part
 - acquire or possess ammunition
 - reside at premises where firearms, parts or ammunition are present, or
 - attend the place of business of a licensed dealer, a shooting range or a firearms club.
7. Clause 5 prohibits a firearms licence from being issued to a person who Police consider to be a member of a gang or is subject to an FPO.² Clause 6 provides that if a person becomes subject to an FPO their firearms licence is revoked. Police could also revoke a firearms licence if they consider a person issued with a firearms licence is, or is seeking to become, a member of a gang.

Privacy Impacts of Bill

Establishment of an FPO regime

8. Police released a consultation document in January 2020 seeking the public's views on whether an FPO regime should be established in New Zealand. I submitted against establishing an FPO regime on the basis that I was not aware of any research or evidence to demonstrate that one was necessary. While the Bill appears more limited in its impacts regarding without cause searches, my position on the establishment of an FPO regime is the same.
9. Police already have sufficient ability to limit lawful access to firearms. The Arms Act requires that Police must be satisfied an applicant is a fit and proper person to be in possession of a firearm before they can be issued a licence. Police also have the power to revoke a licence if they consider the holder is not a fit and proper person.³ A new criteria for determining when a person is not fit and proper comes into force on 24 December 2020 and will include whether the person is charged with or has been convicted of an offence punishable by a term of imprisonment, the person has inflicted or is inflicting family violence or the person is a member of a gang.⁴

¹ The Domestic Violence Act 1995 was repealed on 1 July 2019 by section 258 of the Family Violence Act 2018.

² A gang is defined as any organisation, association or group of persons that is known by a name that is the same or substantially similar to a list provided in section 4 of the Prohibition of Gang Insignia in Government Premises Act 2014 or identified in regulations.

³ S 27(2)(a), Arms Act 1983.

⁴ S 42, Arms Legislation Act 2020. These criteria are yet to come into force.

Inclusion of “gang member” as criterion

10. Including ‘gang membership’ as part of the criteria for prohibiting a firearms licence, revoking a firearms licence or issuing an FPO could also give rise to accuracy issues. As noted in a Parliamentary Library report, obtaining accurate statistics on gangs can be difficult.⁵ It should also not be assumed that a person is involved with criminal activity just because they are a gang member or appear to be seeking to join a gang. The fit and proper person test should be enough to prevent a dangerous person who is also a gang member from obtaining a firearms licence.

New search powers for Police

11. From my reading of the Bill, there is no express provision to provide new powers for Police to search the persons, vehicles and premises of gang members for firearms at any time. In absence of an express provision, Police could rely on section 18(3) of the Search and Surveillance Act which allows for warrantless searches of a person, place or vehicle in respect of an offence under the Arms Act. To rely on this power, Police must have reasonable grounds to suspect a person carrying, possessing or controlling a firearm is in breach of the Arms Act.
12. I consider the existing legislative framework under the Arms Act and the Search and Surveillance Act to be sufficient to capture the offending the Bill seeks to address. Police can already carry out warrantless searches of a person, place or vehicle and seize and detain any arms or licence where there a reasonable grounds to suspect a firearm is present in respect of a breach of the Arms Act or if the person has a protection or police safety order against them. They can also search a place or vehicle when there are reasonable grounds to suspect a firearm is present in respect of a category 3 or 4 offence. Police also have powers of warrantless entry in urgent circumstances under section 14 of the Search and Surveillance Act, including when there is a risk to the life or safety of any person.
13. It is unclear how the Bill will enable Police to “check [gang members] do not have access to guns, ammunition, or firearms parts” as stated in the explanatory note. However, I note that if the proposed FPO did give Police power to do this outside of the existing legislative framework it could raise significant privacy concerns.

Restrictions on freedom of movement

14. The restrictions on freedom of movement provided for under new section 59D and 59E could also result in impacts on individual privacy. There may be circumstances when people living with a person subject to an FPO have to disclose whether they have firearms at their house. The person subject to an FPO may also have to tell people they live with or their employer that they are prohibited from possessing a firearm, cannot

⁵ *Youth gangs in New Zealand* (Parliamentary Service, 13 Dec 2019) at <https://www.parliament.nz/en/pb/library-research-papers/research-papers/youth-gangs-in-new-zealand/>

reside at a premise where there are firearms present and cannot attend certain premises. This may impact employment and living opportunities.

Power to issue an FPO

15. It is my view that any application for an FPO should be made to a senior judicial officer, due to the intrusive nature of the powers that could possibly be exercised. The judiciary has the necessary independence to assess broader considerations such as the limitations on freedom of movement and association. In no case should the powers to make such an order be given to the Commissioner of Police alone.

Conclusion

16. I trust my comments are of use to the Committee in its consideration of the Bill. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.



John Edwards
Privacy Commissioner

14 December 2020