

Privacy Commissioner's Submission to the Justice Committee on the Firearms Prohibition Orders Legislation Bill

Executive Summary

1. The Firearms Prohibition Orders Legislation Bill (the Bill) seeks to improve public safety and address perceived limitations with the Arms Act 1983 (the Arms Act) that might enable a high-risk person to legally access firearms, associate with people in the possession of firearms, or reside at or visit locations where firearms are held. It intends to do this by introducing firearms prohibition orders (FPOs) which prohibit a person from accessing, possessing, or using any firearm or related item.
2. Under the Bill, a court can make an FPO against an offender who is 18 years or over and has been convicted of a specified offence under the Arms Act, the Crimes Act 1961, or the Terrorism Suppression Act 2002, or is convicted of a serious violent offence as defined in section 86A of the Sentencing Act 2002. The court must be satisfied on the balance of probabilities that the order is reasonable, necessary and appropriate to assist in managing the risk that the offender poses to public safety.
3. The Privacy Act 2020 (the Privacy Act) 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.
4. I am not satisfied there is sufficient evidence to demonstrate that the effectiveness of the FPO regime outweighs the significant privacy impacts on the individual concerned. The Regulatory Impact Assessment (RIA) for this Bill notes that most of the evidence available to support the effectiveness of FPOs is anecdotal and limited in scope and application to New Zealand.¹ More robust evidence is needed to justify the intrusions on privacy created by the proposed FPO regime.
5. If the Bill does progress, I recommend changes are made to the Bill to help minimise the privacy impacts on individuals subject to FPOs. My comments relate to clauses 8 and 19 of the Bill and the need for strengthened process safeguards in the Bill, including subsequent review of the operation of the legislation, due to the lack of a robust evidence-base.

¹ <https://www.police.govt.nz/firearms-prohibition-orders-legislation-bill-regulatory-impact-analysis>

Privacy impacts of proposed FPO regime

6. Police have noted that, in considering existing firearms prohibitions from overseas jurisdictions, there is 'little systematic evidence of their effectiveness', with only some anecdotal evidence². New regimes, such as those established in Australia (Victoria and the Northern Territory), are according to Police 'too new to be able to assess effectiveness'³. Given the considerable privacy intrusion empowered by an FPO, I would have expected more compelling evidence relating to their effectiveness.
7. My comments below relate to restrictions on freedom of association/employment, and the application of search and surveillance powers to FPOs.

Restrictions on freedom of association and employment

8. An FPO prohibits a person from accessing, possessing, or using any firearm or related item.⁴ In addition, standard conditions of an FPO include prohibiting the individual from:⁵
 - associating with or, in any place, otherwise being in the presence of a person who has with them any firearms or related items that are not in secure storage
 - residing at any premises in which any firearms or related items are stored
 - joining, or remaining a member of, or visiting the premises of, or attending an event of any shooting club or firearms club of any kind
 - attending any shooting range or shooting gallery
 - attending an activity of any kind that involves the use of any firearms or related items
 - visiting any premises or place at which firearms or related items are manufactured, sold, repaired, hired, lent or otherwise supplied.
9. The restrictions on freedom of association and employment in the new section 39C of the Arms Act, in essence, put an onus on the individual concerned to disclose that they are subject to an FPO to every person they meet, in case that person has a firearm. This may affect employment and living opportunities of the individual subject to an FPO and negatively impact their rehabilitation into the community.
10. Further, as the duration of an FPO is set to the significant period of 10 years and can be modified or replaced following a subsequent conviction of a qualifying offence for an FPO, an individual may be subject to these privacy intrusions indefinitely.⁶

Recommendation: Requiring courts to consider varying or modifying FPO standard conditions

11. Given the potential intrusion of the standard set of FPO conditions, new section 39D is important to enable the court to appropriately tailor the standard conditions for the particular individual.

² <https://www.police.govt.nz/firearms-prohibition-orders-legislation-bill-regulatory-impact-analysis>

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⁴ See clause 8 (new section 39B of the Arms Act 1983).

⁵ See clause 8 (new section 39C of the Arms Act 1983).

⁶ See clause 8 (new sections 39F and 39G of the Arms Act 1983).

12. Under the proposed new clause 39D, when establishing 'an FPO against an offender, the court *may* vary or modify the standard conditions of the FPO' [emphasis added].
13. If the Bill is to progress, I recommend that courts should be *required* to consider variations or modifications to FPO conditions (in place of the discretion to vary). The court process is an important protection in the implementation of FPOs, including from a privacy perspective, and it is appropriate that a judge be required to consider how an FPO could be tailored to best suit individual circumstances (including the risk they pose to the community).

Application of search and surveillance powers to FPOs

14. The current drafting of the Search and Surveillance Act means that the existing warrantless search powers for suspected offences against the Arms Act under section 18, and the ability for an issuing officer to issue a search warrant under section 6, will automatically extend to offences under the FPO regime, without requiring amendment.
15. In addition, clause 19 amends section 45 of the Search and Surveillance Act 2012 so that trespass surveillance may be undertaken, and interception devices may be used, to obtain evidential material in relation to the offences in new sections 42A (offence to breach an FPO) and 42B (offence to supply firearms etc to a person subject to FPO) of the Arms Act.
16. I am pleased to see that the Bill does not enable 'without cause' searches of individuals subject to FPOs (this was discussed in Police's public consultation document on the introduction of an FPO regime). However, I remain concerned that the Bill enables the use of search and surveillance powers to monitor compliance with an FPO, when there is insufficient evidence to support the proposed effectiveness of the regime.
17. In New South Wales (NSW), a review by the Ombudsman found that only two percent of the approximately 1300 searches conducted under the FPO regime had resulted in firearms, parts or ammunition being located.⁷ While the NSW FPO regime may have some key differences to the design of the Bill, the NSW experience does demonstrate the importance of ensuring the effectiveness of FPOs in the New Zealand context, before enabling search powers to be used to monitor and enforce the regime.

Recommendation: 3 year review of effectiveness of FPO framework

18. If the Bill is to progress, because of the lack of a sufficient evidence base to support these measures, I consider that a robust monitoring and review mechanism is necessary so that the privacy impacts of the regime can be measured and any necessary adjustments to the framework can subsequently be made.
19. I therefore recommend that the Bill include a monitoring and review clause, requiring Police and the Ministry of Justice to keep data of the number of FPOs issued, and the use

⁷ New South Wales Ombudsman, 'Review of police use of firearms prohibition order search powers' (2016), p. 6.

and results of search and surveillance powers to monitor FPOs, to measure the justification for intrusions into personal privacy.

20. I recommend that a suitable review period is three years after the legislation coming into force. That period will also allow for the experience in other jurisdictions to be taken into account when considering whether the FPO framework is effective or requires change based on the experience of the operation of the framework in particular cases.
21. I further recommend consultation with my Office and the Independent Police Complaints Authority on this review.

Recommended changes to reduce privacy impacts of FPO regime

22. There is a lack of persuasive evidence to demonstrate that the limitations on privacy proposed by the Bill are justified or necessary.
23. However, if the Bill does progress, I recommend the following changes are made to help limit the potential privacy impacts, and restrictions of other freedoms, on an individual subject to an FPO:
 - The duration period of an FPO is reduced, for example to two years.
 - Courts are *required* to consider certain factors when varying or modifying FPO conditions.
 - The Bill is amended to provide for periodic reviews of the continued necessity for an FPO.
 - Police are required, within three years, to provide to the Ministry of Justice a comprehensive report on their utilisation of search powers and their effectiveness in relation to FPOs. The Ministry of Justice will consult with the Office of the Privacy Commissioner and the Independent Police Conduct Authority on the contents of this report.

Conclusion

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



Liz MacPherson
Acting Privacy Commissioner

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