

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

1. I am pleased to provide a submission on the Firearms Prohibition Orders Legislation Amendment Bill (the Bill). The key measures in the Bill are:
 - Expanding the qualifying criteria to enable Firearms Prohibition Orders (FPOs) to be issued to members and associates of gangs and organised criminal groups who have committed any serious offence.
 - Creating new search powers allowing the New Zealand Police to conduct without-cause searches in respect of a person who the Police suspects on reasonable grounds is subject to an FPO.
 - Establishing a process for persons subject to an FPO to request it is revoked early when they no longer pose a risk to public safety.
2. The functions of the Privacy Commissioner include examining new legislation for its possible impacts on individual privacy. The Privacy Act 2020 is New Zealand's main privacy statute. It governs the collection, use, storage, and disclosure of personal information and provides a mandate for my Office to consider wider developments that affect personal privacy, such as the expansion of search powers.
3. 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 good reason (and evidence) to override those rights. Privacy is not an absolute right and limits on individual privacy are justified in some circumstances.

Key privacy concerns

4. The focus of my submission is on the proposed 'without cause' search power. The exercise of search powers is intrinsically privacy invasive. It is my role as Privacy Commissioner to comment on the case for broader law enforcement search powers, and where the case is made, whether there are adequate checks and balances in place.
5. I acknowledge that the intent of this search provision is to give Police mechanisms to respond to criminal activity. However, Police already have considerable search powers under the Search and Surveillance Act 2012, including warrantless search powers to carry out searches related to arms offences. It is not clear to me what evidence there is to demonstrate that an expansion of these powers is necessary.
6. Given the lack of evidence of a need for a 'without cause' search power, and the privacy and other impacts of such a power, **I do not support** clause 14 of the Bill. I **recommend** that Police rely on existing search powers to police FPOs.
7. If clause 14 remains in the Bill, I **recommend** that it be amended to require that Police must have reasonable belief that a person is subject to an FPO, rather than reasonable cause to suspect that a person is subject to an FPO, before the new search power can be used. This will mean that Police will be subject to a higher threshold and will need to have a good reason to believe that someone is subject to an order before carrying out a search. For example, a Police officer may rely on a list of individuals subject to an FPO list and the

person in question matches a description rather than assuming someone is subject to an FPO because they are acting suspiciously and fits into a category that tends to own firearms (e.g. rural farmer).

8. I am pleased to see the introduction of a review process for those subject to an FPO. However, I **recommend** that individuals should be allowed to apply to have an FPO revoked sooner than the 5-year period proposed in the Bill.

Firearms Prohibition Orders

9. I recognise that violent offending involving firearms, particularly associated with gangs and organised crime, is a significant source of harm in the community. I support the Government's intent to ensure that Police have the necessary tools to prevent and respond to criminal activity.
10. As noted above, privacy is not an absolute right: where criminal activity has been identified, or is reasonably suspected by Police, privacy is not a barrier to effective law enforcement. I support the use of effective enforcement to disrupt violent offending involving firearms.
11. FPO legislation came into effect in November 2022. It allows an order to be made against an individual who has been convicted of a specified violent offence, prohibiting them from accessing, possessing, or using any firearm or related item.
12. In a previous submission on FPO legislation, my office raised concerns about the lack of persuasive evidence to demonstrate that limitations on privacy are justified or necessary. The submission raised specific concerns about the duration of the orders, and the impacts on privacy, freedom of association and employment of the restrictive standard conditions of FPOs.¹ It recommended a reduced duration for the orders; requiring courts to consider certain factors when varying or modifying FPO conditions; requiring periodic reviews of the regime; and requiring Police to complete a comprehensive report on the use of search powers and their effectiveness. I still hold these concerns and recommend these changes.

'Without cause' search power

13. The Bill introduces a new 'without cause' search power allowing Police to conduct searches in respect of a person the Police suspect, on reasonable grounds, is subject to an FPO (clause 14, inserting new section 18AA of the Search and Surveillance Act 2012). This also extends to individuals in the same vehicle if Police believe that they are in possession of firearms. This is to enable Police to adequately monitor compliance with FPOs.²
14. While search and seizure powers are a necessary mechanism to enable Police to respond to criminal activity, it is appropriate that there are proportionate limits on these powers to reflect the right to be free from unreasonable search and expectations of privacy affirmed under the New Zealand Bill of Rights Act and the Privacy Act.

¹ Privacy Commissioner's Submission to the Justice Committee on the Firearms Prohibition Orders Legislation Bill, https://www.parliament.nz/resource/en-NZ/53SCJU_EVI_118254_JU226992/a481891428f4d3cb05854dd7cbdf39f29e9f762b

² Supplementary Analysis Report: Firearms Prohibition Orders Amendments at page 2

15. At present, Police rely on existing search powers associated with arms to monitor compliance with FPOs.³ These existing powers allow a constable to conduct a warrantless search of a person, place, or vehicle if they believe that an individual is committing an offence under the Arms Act 1983. This includes breaching an FPO. Police may also seek specialised search powers during gang conflicts, which includes powers to search and seize weapons.⁴

Insufficient policy rationale

16. There is little analysis or evidence to demonstrate why the existing search powers available to Police are not effective or adequate in allowing Police to carry out searches where necessary. In the supplementary analysis report (SAR) for the Bill, Police acknowledge that it is too early to evaluate whether the current FPO regime is improving public safety. The SAR also states that alternative options to achieve the objectives of the Bill have not been considered, and that there is insufficient evidence about the effectiveness of the existing FPO regime to be able to assess whether amendments are needed to increase its efficacy.⁵

17. These search powers are based on similar powers found in Western Australia, New South Wales, and Victoria in Australia. Different reviews into Police use of these powers in Victoria and New South Wales stated that the powers were too new to determine whether they are effective but found that there is potential for these powers to be used arbitrarily and unreasonably and that this should be the focus of future reviews.^{6 7}

18. The Legislative Design and Advisory Committee advise that warrantless search powers should only be created where there is a compelling reason to do so.⁸ The new warrant power appears to be a departure from established approaches to warrantless search powers under the Search and Surveillance Act. At present, warrantless search powers used by Police require reasonable grounds to suspect offending is taking place. The rationale behind warrantless powers is to allow officers to respond to urgent situations, including apprehending an offender, preventing immediate loss or damage of evidence, and averting an immediate risk to life or safety of a person or property.⁹

19. The shift from requiring reasonable grounds to suspect offending is taking place, to a lower threshold of reasonable grounds to suspect an individual is subject to an FPO, carries a higher level of privacy risk. As it stands, the new search power may capture individuals who may not be subject to an FPO.

20. The requirement to have objective grounds to suspect offending before a search is carried out is an appropriate legal safeguard to protect individuals against unreasonable interference with their right to privacy. To justify departure from the usual legal safeguards,

³ Search and Surveillance Act 2012, s 18.

⁴ Search and Surveillance Act 2012, ss 18A – 18E.

⁵ Supplementary Analysis Report, page 7.

⁶ <https://www.parliament.vic.gov.au/48fe09/contentassets/b67078d8b26a4a7aa7740bfd1a86b26c/inquiry-into-firearms-prohibition-legislation.pdf> at 50

⁷ https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0003/138297/Review-of-police-use-of-firearms-prohibition-order-search-powers.pdf at 105

⁸ <https://www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition/new-powers-and-entities-2/chapter-21/>

⁹ https://consultations.justice.govt.nz/independent/search-and-surveillance-act/user_uploads/07-warrantless-powers.pdf page 158

a robust policy case is needed showing the benefits outweigh the privacy intrusion. Based on the information and limited analysis available to me, this case has not yet been made.

Impacts of search powers

21. Search powers are inherently privacy invasive, not only for the individual but potentially also their whānau. I am concerned that this power will have disproportionate effects on vulnerable populations, including young people and Māori.
22. Tamariki and rangatahi are particularly vulnerable to the distress and intrusion caused by Police searches in their homes and neighbourhoods, and this may erode trust in Police and damage relationships with community workers.
23. Māori are more likely to belong to a gang compared to any other population group.¹⁰ This means that it is likely that Māori will be disproportionately affected by this privacy intrusion.
24. I am not aware of any analysis considering the unintended consequences of these privacy-invasive search powers, for example animosity towards Police.

Conclusion

25. Given the lack of evidence of a need for a 'without cause' search power, and the privacy and other impacts of such a power, **I do not support** clause 14 of the Bill. I **recommend** that Police rely on existing search powers to police FPOs.
26. If clause 14 remains in the Bill, I **recommend** that it be amended to require that Police must have reasonable belief that a person is subject to an FPO, rather than reasonable cause to suspect that a person is subject to an FPO, before the new search power can be used. This will mean that Police will be subject to a higher threshold and will need to have a good reason to believe that someone is subject to an order before carrying out a search. For example, a Police officer may rely on list of individuals subject to an FPO list and the person in question matches a description rather than assuming someone is subject to an FPO because they are acting suspiciously and fits into a category that tends to own firearms (e.g. rural farmer).

Expanding eligibility

27. The Bill proposes to expand the qualifying criteria for an FPO to enable them to be issued to members and associates of gangs and organised criminal groups who have committed any significant offence.
28. 'Member of a gang or an organised criminal group' is defined in replacement section 39 of the Arms Act 1983 (inserted by clause 6 of the Bill) and includes prospective members and nominees, individuals who demonstrate affiliation to a gang or organised criminal group by displaying its insignia, and individuals who are involved in the affairs of a gang or organised criminal group for the purpose of participating in a criminal activity. The Bill uses the definition of 'gang' in the Gangs Legislation Amendment Bill (clause 4, amending section 2 of the Arms Act).

¹⁰ <https://www.parliament.nz/en/pb/library-research-papers/research-papers/new-zealand-gang-membership-a-snapshot-of-recent-trends/>

29. The definition of ‘associate of a gang or an organised criminal group’ excludes an acquaintance of a gang or criminal group member. However, this definition is drafted very broadly and may have the potential to capture more people than intended.
30. I have concerns over these new broad qualifying criteria, as they raise issues around accuracy. I have questions about how Police and the District Court will ensure that FPOs are issued based on accurate and up-to-date personal information, specifically about whether an individual belongs to or is an associate of a gang or an organised criminal group. The need for accuracy is high given the significant impacts of an FPO.
31. I understand that Police consider the National Gang List to be the most reliable indication of gang members or prospective members but that there may be inaccuracies.¹¹ There are also system biases, for example individuals are much more likely to be put on the National Gang List than they are to be removed from it.
32. It is key that these orders are made based on accurate and up-to-date information regarding an individual’s gang association or membership, given the privacy intrusions of an order, including the potential (if the Bill is passed in its current form) for individuals subject to an FPO to undergo without-cause searches. In addition, I note that the Gangs Legislation Amendment Bill, which is going through Parliament at the same time as this Bill, would make being subject to an FPO one of the criteria for the issuing of a non-consorting order. As I will explain in my submission on the Gangs Legislation Amendment Bill, the restriction on communications that can be imposed through a non-consorting order has implications for privacy.

Review Process

33. The Bill introduces a review process to allow individuals subject to an FPO to apply to the court to modify or revoke their FPO early. I **support** the introduction of this review process. However, I **recommend** that individuals should be allowed to apply to have an FPO revoked as soon as they can show they no longer pose a public safety risk rather than the 5-year period proposed in the Bill. An ability to apply at an earlier date for modification or revocation of an FPO would somewhat mitigate my concerns about the long duration of FPOs.

Conclusion

34. Given the lack of evidence of a need for a ‘without cause’ search power, and the privacy and other impacts of such a power, I **do not support** clause 14 of the Bill. I **recommend** that Police rely on existing search powers to police FPOs.
35. If clause 14 remains in the Bill, I **recommend** that it be amended to require that Police must have reasonable belief that a person is subject to an FPO, rather than reasonable cause to suspect that a person is subject to an FPO, before the new search power can be used.
36. I support the introduction of a review process. However, I **recommend** that individuals should be allowed to apply to have an FPO revoked sooner than the 5-year period

¹¹ <https://www.parliament.nz/en/pb/library-research-papers/research-papers/new-zealand-gang-membership-a-snapshot-of-recent-trends/>

proposed in the Bill. As stated above, this would somewhat mitigate my initial concerns about the long duration of FPOs.

37. I trust my comments are of use to the Committee. I seek to present this submission to the Committee in person and be available to answer any questions.

A handwritten signature in blue ink that reads "Michael Webster". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael Webster
Privacy Commissioner

5 April 2024