



Firearms Prohibition Orders

PUBLIC CONSULTATION DOCUMENT

11 NOVEMBER 2019 – 13 JANUARY 2020

How to make a submission

This section details how to make a submission, what happens to your submission if you make one, and how the Privacy Act 1993 applies.

Making a submission

This document seeks your views on whether or not a Firearms Prohibition Order regime should be established in New Zealand, and if so, what it could look like. Your feedback will help to shape proposals for Government consideration, including whether or not a Firearms Prohibition Order regime should be introduced.

We encourage you to give your views on the questions set out at the end of this consultation document, once you have considered all of the options for the design of the regime. You can also provide any other comments you may have about the matters discussed. You do not have to answer all of the questions. If you wish to raise further issues not covered in this paper, please take the opportunity to do so.

The closing date for submissions is **13 January 2020**. A submission form accompanies this consultation document. You do not have to use this form to make a submission, however doing so will facilitate the most effective and efficient process. Please include your name, contact details, and organisation (if applicable) in your submission.

You can submit by:

- sending your submission to FPOConsultation@police.govt.nz
- using the online submission form, located at <https://forms.police.govt.nz/consultation-firearms-prohibition-orders>

What will happen to my submission?

Police will consider all of the submissions received. The submissions will be taken into account when Police reports back to the Government with recommendations on whether to establish a Firearms Prohibition Order regime.

Privacy

Your feedback may be made publicly available by Police either on its website, or to members of the public who request copies of submissions. Please indicate clearly if your identity or comments are provided in confidence or if there is some other reason they should not be disclosed. Any request for non-disclosure will be considered in terms of the [Official Information Act 1982](#). Your feedback may be edited for publication to anonymise it or remove sensitive information.

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Introduction

This document sets out proposals for Firearms Prohibition Orders

This document provides information to help you participate in a consultation on Firearms Prohibition Orders. We're interested in your views as to whether Firearms Prohibition Orders should be introduced into New Zealand, and if so, what they should look like.

How this document is set out

If introduced, a Firearms Prohibition Order regime could be designed in a number of ways. This paper sets out the four key design parameters (criteria, conditions, application and decision-making process, and monitoring and enforcement powers) for consideration.

The document is set out as follows:

- The Introduction provides the context for Firearms Prohibition Orders.
- Part One sets out the **objectives** of a Firearms Prohibition Order regime. It also looks at the impact on freedoms and rights under the New Zealand Bill of Rights Act 1990, the impacts on Māori, and the impacts on youth offenders.
- Part Two sets out **options for the criteria** to determine who would qualify for Firearms Prohibition Orders, with specific considerations around conviction history and type, and whether gang membership should be part of that qualifying criteria.
- Part Three sets out **options for conditions** of a Firearms Prohibition Order – for instance, what activities would be prohibited through standard and specific conditions.
- Part Four sets out **options for the application and decision-making process**, including whether the decision to issue a Firearms Prohibition Order should be made by the Court or by the Commissioner of Police.
- Part Five sets out **options for monitoring and enforcement powers**, covering how compliance with the Firearms Prohibition Order would be monitored and enforced, and additional powers Police may need.
- The Consultation section sets out the process for consultation.
- The Appendix sets out the consultation questions. While the consultation questions are set out under each previous part, this Appendix provides a submission form for your use.

Parts One to Five set out a range of considerations. The different considerations for each design parameter would have an impact on the number of people that would be subject to a Firearms Prohibition Order, the restrictions on behaviour and activity, the effectiveness of oversight and enforcement activity, and the costs associated with each element.

The consultation questions are designed to reflect these considerations and seek feedback on each to help us consider what a Firearms Prohibition Order regime for New Zealand could look like if one was introduced.

Context for Firearms Prohibition Orders

The Government is currently considering changes to the Arms Act 1983 that would strengthen the regulatory framework. The firearms licensing system ensures that only those considered ‘fit and proper’ to own firearms can gain a firearms licence.

The changes proposed in the Arms Legislation Bill address system weaknesses in the licensing framework and seek to reduce the risk of firearms getting into the wrong hands. The Bill introduces new penalties for unlawful use of firearms, but is not primarily focussed on unlawful use of firearms by unlicensed people. Firearms Prohibition Orders are intended to reduce the likelihood of harm by the criminal use of firearms by such people.

Firearms Prohibition Orders prohibit those people who have a history of serious violence offences, firearms offences, or breaches of Protection Orders from accessing, being around, or using firearms. Breaching conditions of a Firearms Prohibition Order would be a criminal offence. Firearms Prohibition Orders assume that people who have committed offences such as serious violence offences, firearms offences or breached Protection Orders, are more likely to commit similar offences in the future.

If implemented in New Zealand, Firearms Prohibition Orders would apply to people considered ‘high-risk’ because they have been convicted of serious violence offences, firearms offences, or breaches of Protection Orders. These restrictions go above and beyond those possible in the firearms licensing system.

Some Australian states have introduced Firearms Prohibition Orders

Firearms Prohibition Orders have been introduced in New South Wales, South Australia, Tasmania and Victoria. These Australian states consider that Firearms Prohibition Orders deter future offending and thus significant harm by:

- limiting the activities and behaviours of individuals subject to them, where they can visit, and who they can associate with; and
- providing penalties for breaching Firearms Prohibition Order conditions.

New South Wales introduced Firearms Prohibition Orders in 1973, and in 2013, strengthened Police powers to conduct searches as part of Firearms Prohibition Orders. In a review of the first 22 months of operation of those additional search powers, two percent of search events resulted in firearms, parts or ammunition being found (resulting in 25 firearms, 9 firearms parts, and 26 lots of ammunition being seized). Overall, 416 items were seized during the 22 months in 1,343 search events, including 51 other weapons, such as explosive devices, nunchakus, swords and knives, as well as an array of illegal substances and associated paraphernalia.¹

¹ New South Wales Ombudsman (2016). *Review of police use of the firearms prohibition order search powers*. Retrieved from <https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/legislative-reviews/review-of-police-use-of-the-firearms-prohibition-order-search-powers-august-2016>

Part One: Objectives of Firearms Prohibition Orders

This Part sets out the objectives of a Firearms Prohibition Order regime. It also looks at the impact on freedoms and rights under the New Zealand Bill of Rights Act 1990, the impacts on Māori, and the impacts on youth offenders.

What is the problem that a Firearms Prohibition Order regime could solve?

The Government is concerned that people who have a history of serious violence offending, firearms offending, or breaches of Protection Orders are able to access and use firearms, and pose an unacceptable risk to the safety of New Zealanders.

While it is unlikely that a person with such a history would be regarded as a ‘fit and proper’ person under either the current Arms Act 1983 or the changes proposed under the Arms Legislation Bill, they do not rule out entirely the possibility that such a person would be able to access firearms. For instance, the person would still be able to access and use firearms under the immediate supervision of a Firearms Licence holder.

Moreover, the ‘fit and proper’ person test does not prevent a high-risk offender from associating with people who are in possession of firearms, or residing at or visiting a location where firearms are held.

A Firearms Prohibition Order, however, would prevent that person from being around firearms, and, depending on the conditions imposed, potentially prevent the person from being around or visiting places where firearms are located.

New Zealand experiences the unlawful and illegitimate possession and use of firearms

While most New Zealanders do not encounter firearms as they go about their daily lives, the numbers of firearms being stolen in burglaries has increased over the last 10 years, as has the number of illegal firearms being seized. There were 771 firearms recorded as stolen in burglaries in 2018 compared to 440 in 2010. In 2018/19, Police seized 1,719 firearms, compared to 1,188 firearms in 2009/10. In the six month period from April to September 2019, 883 illegal firearms were seized by Police in the course of regular investigations and duties.

Police also reports changes in the weapons of choice for offenders, gangs and organised criminal groups. In the last 12 months, increasing numbers of high-risk firearms such as pistols, military style semi-automatics, and cut-down shotguns and rifles have been seized by Police during searches.

Firearms are used in a range of serious offences. During 2017/18, firearms were used in relation to 33.3 percent of murders (13), 43.5 percent of attempted murders (10), and 9.6 percent of aggravated robberies (231).

What is the objective of Firearms Prohibition Orders?

The objective of Firearms Prohibition Orders is to reduce the risk of harm caused by the criminal use of firearms by prohibiting high-risk people from being around, accessing, or using firearms.

Firearms Prohibition Orders work by:

- setting and monitoring conditions that people subject to a Firearms Prohibition Order are expected to abide by; and
- establishing penalties for breaching those conditions.

Why is the Government considering Firearms Prohibition Orders?

The introduction of a Firearms Prohibition Order regime has been under consideration for a number of years. In 2017, the Law and Order Select Committee held an inquiry into issues relating to the illegal possession of firearms in New Zealand. The Committee recommended that Firearms Prohibition Orders be implemented in New Zealand to be used to “*proactively manage high-risk individuals and their possession of, use of, and association with firearms*”.²

Firearms Prohibition Orders are intended to reduce the likelihood of harm caused the criminal use of firearms by people with criminal histories involving serious violence offending, firearms offending, or breaches of Protection Orders.

Introducing a Firearms Prohibition Order regime would support and complement the proposals in the Arms Legislation Bill. The Bill is geared towards addressing weaknesses in the licensing framework and introduces increased penalties for unlawful use of firearms within the regulatory system. Both aim to improve public safety; however, Firearms Prohibition Orders do so by reducing the unlawful use of firearms by unlicensed people.

²

https://www.parliament.nz/resource/en-NZ/SCR_72851/f06602dd80c8bcc69220182d246269b2427510b9

As we strengthen the overall licensing and regulatory framework, we also need to consider how else we can prevent the misuse of firearms and ensure that high-risk people do not have unlawful access to firearms. Firearms Prohibition Orders offer additional controls beyond those provided through the licensing and regulatory framework. They provide a more targeted means of preventing firearms from getting into the wrong hands by restricting access to firearms, beyond ownership, thus reducing the potential harm of firearms.

What are the impacts on freedoms and rights under the New Zealand Bill of Rights Act 1990?

The New Zealand Bill of Rights Act 1990 does not include a right to possess or access firearms – the possession and use of firearms is a privilege, not a right.

While constraining access to firearms does not remove any rights, Firearms Prohibition Orders could affect some rights set out in the New Zealand Bill of Rights Act 1990, in the same way that other supervision, protection or prohibition orders may also impact on those rights and freedoms. There are circumstances where restricting a person's rights will be justified, particularly in the interests of public safety and harm reduction. For example, a person's rights are constrained when they are convicted of a serious crime and sentenced to a term of imprisonment. However, even where an important public safety objective exists, any restriction on a person's rights must be proportionate to that objective.

A Private Members' Bill aimed at incorporating Firearms Prohibition Orders into the Arms Act 1983 was introduced in May 2018 and failed at its first reading. An Attorney-General report on the Bill considered whether limitations on rights were justified, considering the importance of the proposal's objective, proportionality and reasonable necessity. The report found the proposals unduly limited the right to freedom of association in the New Zealand Bill of Rights Act 1990 as its effect would be that members of a gang would automatically become subject to a Firearms Prohibition Order.³ The Attorney-General was also concerned the proposed penalties were too severe for a reverse onus offence. The rights discussion in that report provides some insight as to the type and combination of elements within a Firearms Prohibition Order regime that may or may not be considered an acceptable limitations on rights.

Throughout this consultation document consideration has been given to the impact of a Firearms Prohibition Order on a person's rights and freedoms affirmed in the New Zealand Bill

³ Attorney General report under the New Zealand Bill of Rights Act 1990 on the Private Members' Arms (Firearms Prohibition Orders) Amendment Bill, presented to the House of Representatives, 2018. The Bill was voted down and therefore did not progress into law.

of Rights Act 1990. These include rights such as the right to freedom of association (section 17) and to movement (section 18), the right to be secure from unreasonable search (section 21), and the right to be presumed innocent (section 25(c)).

A limit on a right may be justified under the New Zealand Bill of Rights Act 1990 where it can be considered a reasonable limit that is ‘demonstrably justified in a free and democratic society’.⁴ This analysis generally requires the limit to impair the right or freedom no more than reasonably necessary, to be rationally connected with the objective, and to be proportionate to the importance of the objective.⁵

Safeguards can be built into a Firearms Prohibition Order regime to reduce the impacts on the rights and freedoms contained within the New Zealand Bill of Rights Act 1990. As a general principle, the more a Firearms Prohibition Order regime can be designed so that its application can be tailored to the circumstances of each eligible person, the lower the impact on rights will be. These considerations have been factored into each of the options set out in this document.

What will the impacts on Māori be?

The release of the Ināia Tonu Nei: Māori Justice Hui report in July 2019⁶ highlights a growing concern about inequalities in the criminal justice system, and a recognition that more needs to be done to address those inequalities. This mirrors concerns about Māori offending rates in the Waitangi Tribunal’s report Tū Mai Te Rangi report.⁷

Māori are over-represented at all stages in the criminal justice system. As a result, Māori are likely to be over-represented in the cohort of people who could qualify for, and become subject to, Firearms Prohibition Orders. This is particularly the case for Māori men as the majority of serious violence and/or firearms offences are committed by men.

Māori also have higher victimisation rates, particularly for violent interpersonal offences. The 2018 New Zealand Crime and Victims Survey indicated Māori women were more likely to be victims than the national average, particularly for family violence and intimate partner violence. Māori could therefore benefit from a Firearms Prohibition Order regime as it may result in fewer Māori (particularly Māori women) being victims of violence.

The framework for any Firearms Prohibition Order regime would need to be developed in a way that recognises the importance of whānau and the interconnectedness of people within

⁴ See Section 5 of the New Zealand Bill of Rights Act 1990. See *Hansen v R* [2007] NZSC 7 at para 123.

⁵ www.safeandeffectivejustice.govt.nz/about-this-work/hui-maori/

⁶ [//forms.justice.govt.nz/search/Documents/WT/wt_DOC_121273708/Tu%20Mai%20Te%20Rangi%20W.pdf](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_121273708/Tu%20Mai%20Te%20Rangi%20W.pdf)

⁷ 0W.pdf

Te Ao Māori, while also recognising the need for public safety, including the safety of Māori, and Māori women in particular. An analysis of the effect of any Firearms Prohibition Order regime on fundamental rights and freedoms, discussed above, would also need to specifically consider the impact on Māori, and how any disproportionate effect on Māori could be managed.

What will the impacts on youth offenders be?

While most offenders prosecuted for serious offences are 18 years or older, there is the potential that, depending on the final framework and criteria, some youth offenders would meet the criteria and be subject to a Firearms Prohibition Order. Māori youth, who are more likely to breach Protection Orders compared to other ethnic groups, may be disproportionately represented in this number.

There are four primary youth justice principles: the well-being and best interests of the young person; the public interest (which includes public safety); the interests of victims; and the accountability of the young person for their behaviour. The imposition of such orders could potentially deepen a young person's involvement in the criminal justice system. At the same time, we also need to be mindful that the offences that would qualify for a Firearms Prohibition Order are serious offences, and there is a need to protect the public from such offenders, no matter their age.

As we develop the parameters for Firearms Prohibition Orders, we will be mindful of the balance between public safety and restricting those at risk of future serious offending from having access to firearms, and the impacts of placing such orders on a young person.

Questions

Part One: The establishment and objectives of a Firearms Prohibition Order regime

1. Do you agree that the criminal use of firearms is a problem in New Zealand? Why / Why not?

☒ Yes

☐ No

COMMENT:

Of course it is. This leading question insults intelligence. Any criminal activity is a problem, whether it involves firearms or not. The question should have been open-ended – how serious is the problem? New Zealand's record on international comparisons suggests our problem is

minor. COLFO believes that the historical mutual trust between citizens and police under the fit and proper regime has been a substantial contributor. However, we are not complacent. The criminal use of firearms in any country requires constant intelligent attention. Some countries have proved to be good at it, maintaining social trust and order with the willing assistance of the overwhelming majority of the population. Others rely on devolving ever more oppressive powers to Police. We see the most productive way to control crime, not just with firearms, is by making sure that our social norms make law-breaking generally unthinkable. That requires near universal support for the content of the law, coupled with prompt, certain detection, conviction and penalties for law-breaking. Only if there is near universal support for firearms law can we distinguish between firearm crime and other crimes. We would support there being a consistent penalty premium in penalties, on firearm assisted crime. But that will only work with maintenance of a culture that enlists general population support for the norms that vilify and denounce firearm use in crime, including among sub-groups that are not necessarily law-abiding. The law should try to maintain wedges between those who do resort to use of firearms in crime, and those who do not. If FPO's instead drive together people who are generally law-abiding, with those who are not by making them both feel that not obeying the law is normal, they may disempower those who oppose firearm use in crime. Family members of those subject to the FPO's to them may align with them against the Police, the family complicity in ignoring the FPO may reassure those who might be tempted to use firearms in crime. That will grow the problem it is supposed to mitigate. Continued targeting of licensed fire owners (LFO) with hostile regulation will foster collective resistance, reduce the propensity of LFO's to collaborate with Police, and help create a culture in which compliance with firearms laws is regarded as optional for people who otherwise consider themselves to be honest citizens. Increasing the costs of licensed use of firearms will drive more people to operate outside the system, and for family and friends to tolerate such activity.

2. Do you agree that we have defined the problem statement correctly?

☐ Yes

☒ No

COMMENT:

Our proud tradition of widespread firearms use and ownership with low firearm crime, has depended on strong community norms against criminal misuse of firearms. They in turn have relied on patterns of routine cooperation and mutual respect with the Police. Intelligence and assistance has flowed between Police and the firearms using community with good results. Additionally, expectations that firearm assisted crime will result impromptu conviction and severe punishment. In other words, that firearm assisted crime will not pay. COLFO sees the recent and current firearms law changes as an attempt to foment and exploit suspicion and mistrust between lawful firearms users and the rest of the community. However unpopular it may be to tell the truth, it is already blowing back on those of us who support the law, whatever it may say. Punitive measures against lawful firearms users are seen as an opportunist attempt to blame them for the foul crime of a calculating terrorist. It is a signal of hostility to owners

who are not at fault. The reaction has been to create more solidarity among firearms owners. And that is even before most of them know what is in store for them under the current Bill. Greater costs of being law-abiding will deter people from the system's protections, including safe storage, participation in clubs and competitions where safe use is taught and enforced, and the example of a community of self-regulating people who comfortably reported concerning behaviour to Police. Your problem statement fails to look at the illicit drug trade. It fails to acknowledge the fear that Police cannot protect against violence. By treating the topic of self-defence among criminals as taboo, it pretends to be a solution. Almost any penalties for FPO breach will be trivial compared to the cost of being unarmed, or being known to be unarmed, among some parts of the criminal community. The discussion paper simply does not examine the incentives that prompt some existing non-licensed holding of firearms. This discussion paper perpetuates the unsubstantiated claim that the main source of firearms used in crime is licensed firearm owners. Police intelligence reports state that there are three sources of illegal firearms and that the proportion of illegal firearms coming from burglary is unknown. FPO recipients will be required to avoid places known for having licenced firearms – those places held by licenced firearm owners. In order to work the FPO must prevent contact between law abiding citizens and FPO recipients. We think they will have only marginal effects, but among those effects will be pressure for FPO recipients to associate even more with non-licensed firearm owners. It is not going to stop them having access to firearms though the grey and black market.

3. Have we identified the correct objectives for a Firearms Prohibition Order regime (that is, reducing the risk of harm caused by the criminal use of firearms)?

☐ Yes

☒ No

COMMENT:

That objective is too broad. It does not discipline the answers. Of course that is a sensible objective. You could set out to reduce the risk of harm by imposing the 14 year prison terms (or the death penalty) for firearm crime and possibly achieve a lower risk of harm, however the cost would be borne in generalised disrespect for the law, because of disproportionality according to perceptions of the relative evil or the moral guilt involved. This objective could only be achieved with vast enforcement resource. As a result, a subset of people wholly alienated from society or the Police. You could prompt judges or juries to invent new excuses, or to create new norms for discharges without conviction. However, this would certainly create greater incentives not to be caught for firearm crime, perhaps increasing propensity to eliminate or to coerce witnesses. This paper should set out the costs, risks and trade-offs. For example: reducing the risk of harm caused by criminal use of firearms, without unwarranted social or other costs in the web of relationships and exchanges that sustain a law-abiding culture, and minimise the overall costs of crime, including firearm crime. The discussion paper fails to identify the circumstances that lead to criminal use of firearms, or the social pressures and loyalties and obligations that will frustrate the objectives of FPOs. The objectives mischaracterise the use of firearms in NZ. Most New Zealanders, while not personally encountering firearms, have close family and friends who are regular firearm users, either in

their job or recreationally. Instead the paper takes the opportunity to reinforce a canard. The statement that “the numbers of firearms being stolen in burglaries has increased over the last 10 years” does not reflect the changing numbers, nor does it supply the most recent figures. Information supplied to us through Police OIAs demonstrates that there are three sources of illegal firearms and the numbers vary. An oversimplification of the situation prevents people from understanding the nuances of firearm control in NZ. It merely fosters belief in simplistic theories. It implies that targeting LFOs will somehow impede firearm access to criminals. Fostering barriers between LFOs and the rest of the community will not make either safer.

4. Do you support the introduction of a Firearms Prohibition Order regime into New Zealand?

☒ Yes

☐ No

COMMENT:

COLFO only supports the introduction of FPOs if they are part of a comprehensive review of the current gun reforms, and the factors that lead to criminal misuse of firearms. The FPO regime as drafted in this discussion document is not well defined or based in evidence, nor does it take in to context the overall firearm regulation regime. Introducing FPOs at a time when LFOs are likely to be united in hostility to authorities blaming them and financially mulcting them and enforcing rules that have high compliance costs, will be likely to ensure FPOs fail. Those who are targeted by them will find sympathetic whanau and family members willing to help frustrate the law

5. Will introducing a Firearms Prohibition Order regime reduce the risk of harm caused by the criminal use of firearms?

☐ Yes

☒ No

COMMENT:

The failed confiscation programme has already put tens of thousands of LFOs outside the law, albeit many of them unwittingly. The Arms Legislation Bill follows up with an attack on our traditional culture of social trust, particularly in rural communities. It will significantly increase the number of people operating outside the law. COLFO warned of the likely failure of the confiscation scheme that ended on 20 December. We can even more confidently warn that the current Bill is so impractical that thousands of firearms owners will decide that many aspects do not warrant obedience. This means that firearm ownership will be driven underground. Therefore, while FPO's may order identified people to avoid being near known licensed firearms, it will do nothing to prevent them having access to grey and black market firearms. The failure to discuss FPOs in the overall context of the gun reform package means that FPOs will have limited, negative impact.

Part Two: Options for Qualifying Criteria

This Part sets out options for the criteria for determining who would qualify for Firearms Prohibition Orders, with specific considerations around conviction history and type. It also asks whether gang membership should be part of the qualifying criteria.

Who should be the subject of a Firearms Prohibition Order?

If a Firearms Prohibition Order regime was introduced, it would target people who are assessed as posing the highest risk of causing significant future harm through the violent and criminal use of firearms.

The most efficient and transparent approach to identifying this high-risk cohort would be to select people on the basis of their past criminal behaviour, specifically focussing on those who have been convicted of a relevant offence or offences.

As firearms are often used by offenders associated with organised crime groups to threaten, intimidate and harm others, it is also worth considering whether gang membership should be a criterion.

This Part sets out different options regarding:

- type of prior convictions
- number of prior convictions
- time period of prior convictions
- whether convictions prior to a Firearms Prohibition Order regime coming into force would be relevant
- whether gang membership should qualify a person for a Firearms Prohibition Order
- whether a risk assessment should apply in relation to gang membership.

What type of previous convictions could qualify a person for a Firearms Prohibition Order?

There are three potential options for the type of previous convictions that could be used to qualify a person for a Firearms Prohibition Order. These are:

Option 1 – convictions for offending where a firearm was used

Option 2 – convictions for offending where a firearm was used or for serious violence offences

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Option 3 – convictions for offending where a firearm was used, for serious violence offences, or for breaching a Protection Order

Option 1 – Convictions for offending where a firearm was used

A person could become subject to a Firearms Prohibition Order where their prior conviction or convictions relate to criminal offending involving the use of a firearm. The majority of these convictions would be for offending under the Crimes Act 1961 and would include offences such as murder, attempted murder, abduction, wounding with intent to cause grievous bodily harm, and aggravated robbery.

This option would also include convictions for some firearms offending under the Arms Act 1983, such as carrying or being in the possession of a firearm except for a lawful, proper and sufficient purpose, and discharging a firearm in a manner likely to injure or endanger safety.

However, it would not cover all offending relating to firearms – for instance, offences such as a firearm owner failing to report the loss or theft of their firearm(s). This approach would mean Firearms Prohibition Orders were targeted to those at people who have demonstrated they are prepared to offend with firearms, and in doing so, would meet the objectives of the Firearms Prohibition Order regime.

Option 2 – Convictions for offending where a firearm was used or for serious violence offences

In addition to Option 1, Firearms Prohibition Orders could also be applied to a broader group of high-risk people with a prior conviction or convictions for serious violence offences, whether or not a firearm was involved.

Applying section 86A of the Sentencing Act 2002 would mean that offences such as murder, attempted murder, manslaughter, wounding with intent to cause grievous bodily harm, sexual violation, abduction, kidnapping, and aggravated robbery would potentially be in scope for a Firearms Prohibition Order. People who have been convicted of these offences may be more likely to reoffend, but, in some instances, there may be less of a connection between the serious violence offending and firearms. While it would align with reducing harm, a Firearms Prohibition Order may be viewed as a less proportionate limitation on the subject's rights and freedoms.

Option 3 – Convictions for offending where a firearm was used, for serious violence offences, or for breaching a Protection Order

In addition to Option 2, including convictions for breaching Protection Orders would include a broader group of high-risk people.

Protection Orders are issued by the Family Court where the Court is convinced that an order is needed for the on-going safety and protection of the applicant. A Protection Order has two main conditions: no violence and no contact with the person or people protected by the order.

One of the standard conditions of a Protection Order provides that the person subject to a Protection Order (the respondent) is not able to possess firearms or hold a firearms licence unless that condition is varied by the Court. The Police may also revoke the respondent's firearms licence if they hold one.

In five of the 23 homicides in 2017 and 2018 where a firearm was used, the offender was the subject of a Protection Order. Given this, using a lower benchmark of a breach of a Protection Order, whether firearms were used in the breach or not, would capture people who have demonstrated a propensity to flout such orders. It may also capture those who go on to commit serious violence offences, including murder, with a firearm. However, it may also capture a large number of other people who would not go on to commit serious violence or firearms offences.

While including breaches of Protection Orders aligns with the safety objectives of the Firearms Prohibition Order regime, it may also obscure the connection between firearms, serious violence offending, and Firearms Prohibition Orders. As such, it may not be considered a proportionate response to the limitation placed on affected people's rights and freedoms, particularly the right to freedom of association and the right to freedom of movement.

How many previous convictions should be needed?

In addition to the types of convictions, consideration would also need to be given to how many prior convictions would be needed before a person could become subject to a Firearms Prohibition Order.

A small number of convictions (e.g. one or two) would mean that a large number of people would meet the qualifying criteria. Alternatively, the Firearms Prohibition Order regime could be designed to include recidivist offenders with a higher number of convictions, with fewer people being eligible.

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The following table forecasts the number of people who would qualify for a Firearms Prohibition Order per annum, based on nine options of convictions histories. Other combinations could also be looked at.

	Combination of convictions	Minimum firearms offences	Total offences (serious violence, firearms or breach of Protection Order) required	Number expected to qualify for a Firearms Prohibition Order per annum (based on offenders who met criteria in 2018)
1	<u>Two</u> or more firearms, serious violence or breach of Protection Order offences, at least <u>one</u> of which had a firearm used in the offence	One	Two	440
2	<u>Three</u> or more firearms, serious violence or breach of Protection Order offences, at least <u>one</u> of which had a firearm used in the offence	One	Three	184
3	<u>Three</u> or more firearms, serious violence or breach of Protection Order offences, at least <u>two</u> of which had a firearm used in the offence	Two	Three	142
4	<u>Four</u> or more firearms, serious violence or breach of Protection Order offences, at least <u>one</u> of which had a firearm used in the offence	One	Four	85
5	<u>Four</u> or more firearms, serious violence or breach of Protection Order offences, at least <u>two</u> of which had a firearm used in the offence	Two	Four	67
6	<u>Four</u> or more firearms, serious violence or breach of Protection Order offences, at least <u>three</u> of which had a firearm used in the offence	Three	Four	49
7	<u>Two</u> or more offences with a firearm, at least <u>one</u> of which was serious violence with a firearm	One	Two	68
8	<u>Two</u> or more serious violence with firearms offences	Two	Two	26
9	<u>Two</u> or more offences of any type, at least <u>one</u> of which related to breaching a Protection Order	None	One	1,593

The options with a higher number of previous convictions lead to smaller numbers of people eligible, and provide for a Firearms Prohibition Order regime targeted at higher risk offenders. These options are more proportional from a rights perspective as they restrict the rights of a smaller number of more highly targeted people.

The broader the range of convictions, or the less targeted, the higher the number of people who could potentially be subject to a Firearms Prohibition Order. This may include people at lower risk of future serious violence offending with a firearm.

A further option discussed below would entail a relatively broad eligibility criteria, but with a risk-based judgment being included to more accurately target those made subject to a Firearms Prohibition Order.

Over what time period could the convictions qualify a person for a Firearms Prohibition Order?

A person could become subject to a Firearms Prohibition Order when the qualifying conviction or convictions fall within a specified timeframe.

There are several timeframe options we seek your views on. A person could qualify for a Firearms Prohibition Order if they have been convicted of the appropriate number or combination of convictions (as discussed above), as follows:

Option 1 – The qualifying convictions all took place within the last 5 years

Option 2 – The qualifying convictions all took place within the last 10 years

Option 3 – The qualifying convictions all took place within the last 15 years

Recent convictions suggest a higher level of risk posed by a person and a clearer connection to the objectives of the Firearms Prohibition Order regime. The longer the period for which qualifying convictions are included, the less the regime could be considered to recognise the opportunity for rehabilitation and reform, and the more likely that it would not be a reasonable limit on rights and freedoms contained within the New Zealand Bill of Rights Act 1990.

Should a person's convictions obtained before the commencement of Firearms Prohibition Order legislation be counted?

If the Firearms Prohibition Order regime only applied to convictions after it comes into force, then someone's previous offending would not be relevant. Depending on the combination and number of qualifying convictions that apply, it may take a number of years for any person to become subject to a Firearms Prohibition Order. The higher the number of qualifying

convictions necessary to become subject to a Firearms Prohibition Order, the longer it would be before anybody was eligible for a Firearms Prohibition Order.

While this non-retrospective application would have the least impact on the rights of individuals, it would delay the achievement of the objectives of a Firearms Prohibition Order regime for some time.

The Firearms Prohibition Order regime could be designed to apply retrospectively, that is, to include qualifying convictions obtained prior to the introduction of the Firearms Prohibition Order regime. This approach would contravene a principle in law that legislation should not apply retrospectively, i.e. legislation should not affect existing rights and should not criminalise or punish conduct that was not punishable at the time it was committed. However, retrospective legislation may be appropriate in some situations, including addressing a matter that is essential to public safety.⁸

A compromise could be to include people who already have at least one previous qualifying conviction at the time the Firearms Prohibition Order regime comes into effect (assuming the regime is designed so that more than one conviction is necessary for a person to be subject to a Firearms Prohibition Order). If the person reoffends, or is convicted of a qualifying offence, only then would that person become subject to a Firearms Prohibition Order. This option would achieve the objectives of the Firearms Prohibition Order regime earlier while also creating a deterrent effect due to the ability to signal to people that they may become subject to a Firearms Prohibition Order if they undertake further offending.

Should gang membership be a qualifying criterion?

There is evidence that unlawful possession of firearms is an integral aspect of organised crime and gang culture in New Zealand:

- 44 percent of the members and prospects of New Zealand adult gangs⁹ have been charged with at least one offence involving a firearm over their lifetime, and 10 percent had been charged with five or more offences involving a firearm.
- 35 percent of gang members and prospects have at least one conviction in the previous 10 years for a serious violence offence, breach of Protection Order or an

⁸Legislation Guidelines, Legislation Design and Advisory Committee. Other times retrospective legislation may be appropriate include when it is intended to benefit those affected, decriminalise conduct, address technical errors, provide certainty as a result of litigation, or to make changes to tax law or other budgetary legislation.

Consultation document – Firearms Prohibition Orders

Offence under the Arms Act 1983, and four percent have been convicted of five or more offences.

- 116 (21.5 percent) of the 544 of people proceeded against for a serious violence offence using a firearm between 2009 and 2018 were gang members.¹⁰

Given this, being a member of a recognised gang could be one of the criteria for a Firearms Prohibition Order, without the necessity of meeting any other qualifying conviction criteria.

While this approach would be consistent with the objectives of the regime, it is likely to be considered an unjustifiable limit on the right to freedom of association (section 17 of the New Zealand Bill of Rights Act 1990) as it would treat one group of people differently based on their gang association. The Attorney-General has indicated that while it may be more justifiable to place limits on section 17 in the context of gangs, such limitations still need to be proportionate.¹¹

Should a risk assessment apply to decisions regarding inclusion of gang membership?

An alternative to automatic Firearms Prohibition Orders for gang members would be for gang membership to be part of a risk assessment process undertaken by the decision-maker when deciding whether or not make a Firearms Prohibition Order.

This would give a decision-maker (see Part Four for a discussion on possible decision-makers) the ability to assess the risk presented by an individual (such as their likelihood of doing harm with firearms) before issuing them with a Firearms Prohibition Order. Enabling a decision-maker to determine risk prior to issuing a Firearms Prohibition Order would allow wider criteria for eligibility (such as gang membership) to be balanced with specific risk assessment of each individual considered appropriate for a Firearms Prohibition Order.

The further test for applying a Firearms Prohibition Order would be set at a particular threshold of risk: for example, that there is a risk (potentially defined as high-risk, or very high-risk) of serious violence or other significant criminal offending using a firearm. For example, the test may require information relating to the person's criminal history, the nature of the person's membership of a gang, the type of offending linked to that gang, associations with other criminal organisations, and whether or not the person is or has engaged with rehabilitative treatment.

¹⁰ Based on gang membership as at February 2019, which does not necessarily mean membership at the time of offending.

¹¹ Attorney General report under the New Zealand Bill of Rights Act 1990 on the Arms (Firearms Prohibition Orders) Amendment Bill, presented to the House of Representatives, 2018.

The decision-maker would take all the additional information into consideration and make a decision as to the risk presented by the gang member to public safety in determining whether to issue a Firearms Prohibition Order.

This would mean that only a subset of gang members would become subject to a Firearms Prohibition Order. This enables the Firearms Prohibition Order regime to be targeted to those gang members who pose the highest risk of harm but who, for whatever reason, do not have a significant conviction history of serious violence, firearms offences or breaches of Protection Orders. This approach would capture those gang members who have conviction histories, such as for serious drug offences or lower level violence offences, or members whose role within the gang mean they tend to direct rather than commit offences.

While such an approach would be consistent with the objectives of the regime, it would still potentially pose limits on the freedom of association. However, it is also more consistent with the New Zealand Bill of Rights Act 1990 because such an approach would create a stronger connection between the goal of improving public safety and reducing crime, and the operation of the regime.

Questions

Part Two: Qualifying criteria for a Firearms Prohibition Order

Previous convictions that could qualify a person for a Firearms Prohibition Order

6. Is using previous convictions an effective basis for targeting Firearms Prohibition Orders to high-risk people?
- ☐ Yes
- ☐ No

COMMENT:

This is heavily dependant on whether the qualifying convictions for a FPO are generally accepted by the communities affected as reflecting moral culpability. If they include “deemed” or “technical” wickedness, instead of commonly reviled behaviour, the criteria will backfire. The gun reform undertaken by the current government demonstrates a highly punitive, non evidence based approach to firearm control. There are significant penalties in the current Arms Legislation Bill for administrative missteps, that if prosecuted would not only have a significant impact on the alleged offender but also their wider community. They will discredit the law. If judges do not effectively neuter them by rarely using the upper end of the penalty range, firearms users generally will cause the cost of enforcement to include passive collusion and support for avoidance or evasion. COLFO is strongly against the inclusion of these new offences as a qualifier for an FPO. An FPO should only be imposed for offence circumstances that will be accepted by the families of the “offenders” if there is evidence of harm reduction

7. Which option do you prefer as to type of previous convictions that could qualify for a Firearms Prohibition Order?

- ☐ **Option 1** – Only convictions for offending where a firearm was used
- ☐ **Option 2** – Convictions for offending where a firearm was used or for serious violence offences
- ☐ **Option 3** – Convictions for offending where a firearm was used, for serious violence offences, or for breaching a Protection Order

COMMENT:

The lack of detail in this discussion document on qualifying convictions means that it is impossible to state which option is preferred. In reference to Option 1 - page 13 of the discussion document provides offences such as “being in possession of a firearm except for a lawful, proper and sufficient purpose.” Given that Police policy advice states that possession will be deemed for anyone driving a car where a firearm is present, it is possible for someone to be prosecuted under this offence despite the licensed firearm owner being present in the car. In reference to Option 2 – the qualifying conviction approach appears to ignore the fact the vast majority of criminals using firearms for serious violent offences are not licensed firearm owners. Therefore, they have already proven they have access to illegal firearms – a FPO will have little to no effect on them. In reference to Option 3 - the option including Protection Orders fails to differentiate between temporary and permanent protection orders

8. Should the Government consider other conviction types that are not discussed in this paper? If so, what sort of convictions should also be considered?

COMMENT:

If the focus is on harm prevention, it should be an available order for wherever the evidence shows that it is likely to be effective. That means an assessment of the likelihood that it will be accepted and supported by the generally law-abiding members of the offender’s family, whanau or social group, and that they will know of it and therefore be reasonably held responsible for reckless facilitation of access to firearms, or disobedience. The law should avoid any ‘automatic’ imposition according to conviction criteria so that family circumstances and dynamics can be taken into account. For example, there should be permitted exceptions. The terms of an order should distinguish between association that results in effective access to firearms, association that is incidental, and where the LFOs concerned have taken all reasonable precautions against improper access. If you are seeking modification of behaviour you must provide an avenue to improvement.

Number of previous convictions that could qualify a person for a Firearms Prohibition Order

9. What option do you think is best for the number of previous convictions that would qualify a person for a Firearms Prohibition Order?

- ☐ **Option 1** – Two or more firearms, serious violence or breach of Protection Order offences, at least one of which had a firearm used in the offence
- ☐ **Option 2** – Three or more firearms, serious violence or breach of Protection Order offences, at least one of which had a firearm used in the offence

- ☐ **Option 3** – Three or more firearms, serious violence or breach of Protection Order offences, at least two of which had a firearm used in the offence
- ☐ **Option 4** – Four or more firearms, serious violence or breach of Protection Order offences, at least one of which had a firearm used in the offence
- ☐ **Option 5** – Four or more firearms, serious violence or breach of Protection Order offences, at least two of which had a firearm used in the offence
- ☐ **Option 6** – Four or more firearms, serious violence or breach of Protection Order offences, at least three of which had a firearm used in the offence
- ☐ **Option 7** – Two or more offences with a firearm, at least one of which was serious violence with a firearm
- ☐ **Option 8** – Two or more serious violence with firearms offences
- ☐ **Option 9** – Two or more offences of any type, at least one of which related to breaching a Protection Order

COMMENT:

An arbitrary checkbox approach to firearm safety will not work. Criminals who want to access firearms will get them. The FPO should be part of an armoury of orders that can work with, sustain and reinforce the social taboo that has discouraged routine use of firearms in crime in NZ. The failed firearm 'buy back' has driven more firearms in to the grey and black market. If the Arms Legislation Bill is passed, that problem will be magnified. People will be incentivised to operate outside the knowledge of the authorities. Take for example the proposed new section 24A(1)(i) which prevents anyone with close affiliation to a gang from applying for a licence. A close affiliate could be a family member. Therefore, an otherwise law abiding citizen

will not be able to apply for a licence, but still may need it for their farm or putting food on their family's table. The person who needs the firearm for an innocuous purpose is likely to obtain it, probably by long term "loan" from a senior family member. The person from a gang who has a FPO is therefore likely to be in the presence of a firearm that is known to the whole family, but unknown to Police. Furthermore, because it is unknown, the owner will not have had an inspection of their security arrangements. Others in the household would not have been vetted as to whether their person should have a firearm, and a known criminal will still have access to a firearm. This is the likely reality for many members of rural communities.

10. For the options above, should at least one of the convictions involve offending with a firearm?

- ☐ Yes
- ☐ No

COMMENT:

Please see our answer to Question 7. More information, context and evidence should be provided on the offences before this should be decided

11. Should the Government consider other options for qualifying convictions that are not discussed in this paper? If so, what option/s should also be considered?

COMMENT:

The Government should consider the impact of their overall gun reform programme and how in its current form it will drive, not prevent, criminal activity.

The length of time over which the convictions could qualify a person for a Firearms Prohibition Order

12. Which option do you prefer as a timeframe for qualifying convictions?

- ☐ **Option 1** – All within the last 5 years
- ☐ **Option 2** – All within the last 10 years
- ☐ **Option 3** – All within the last 15 years

COMMENT:

The timeframe for qualifying convictions is arbitrary if the Government continues to look for triggering offences rather than addressing how criminals are likely to access firearms in the first place. However, it is important to note that under new section 25 of the Arms Legislation Bill, licensed firearm owners must apply for a new licence every two years, The new section 22G bars people from holding a firearms licence if they have had one of a series of convictions. It is difficult to reconcile how the Police are considering treating those they deem to be of high risk with FPOs of 5 years, while penalising those people trying to work within the system with a higher regulatory burden

Retrospective application of the Firearms Prohibition Order to convictions

13. Should a person's convictions before the commencement of Firearms Prohibition Order legislation count as qualifying convictions for a Firearms Prohibition Order (i.e. have partial retrospective application)?

☐ Yes

☐ No

COMMENT:

COLFO sees all these questions focussed on technicalities of previous convictions as similarly misconceived. They are not pertinent to creating an effective non-association order oriented specifically to minimising the risk of use of firearms for criminal purposes. The gun reform package has demonstrated a clear disregard for constitutional protections such as fair and reasonable compensation, the presumption of innocence (with reversal of burdens) and large scale regulation powers being given to Police. It is not surprising that the FPO discussion document therefore suggests retrospectivity in regard to convictions.

If you answered yes, how many convictions before the legislation comes into force should count towards qualifying for a Firearms Prohibition Order?

COMMENT:

N/A

Inclusion of known gang membership as a qualifying criterion

14. Should being a known or prospect gang member be a criterion for making a person subject to a Firearms Prohibition Order, without meeting the qualifying conviction criteria?

☐ Yes

☐ No

COMMENT:

The vast majority of gang members are not licensed firearm owners. They access firearms through illegal means, and therefore reducing access due to gang association is going to have little impact.

If you answered yes, rather than this criterion applying universally to all gang or prospective gang members, should legislation include the ability of the decision-maker to decide based on an assessment of the risk to public safety?

☐ Yes

☐ No

COMMENT:

Of course – but the public safety assessment should be steered to require reliance on evidence and the actual dynamics of the communities involved. The law should set out criteria that encourage judges to go behind silly slogans such as “any gun removed from circulation makes for a safer community”. If they feel free to impose orders freely as a form of “punishment”, or as a personal statement of dislike of firearms, then the law will fail. The criteria must oblige them to take responsibility for the consequential effects of their sentencing including inducing grave disrespect for the law and the courts if the Orders interfere unduly with family and friend relationships while not materially affecting access to firearms that are outside the LFO system.

15. Should the Government consider applying other criteria to qualify a person for a Firearms Prohibition Order? If so, what criteria should be considered?

COMMENT:

The criteria should require the courts to take account of how the FPO will impact on normal family association and dynamics. For example, if the family and associates who are LFOs are notified and express their commitment to safeguard their firearms, and not to allow access to them by the FPO recipient, that should be reflected in the Order. Government needs to look at how it can encourage, rather than discourage people to enter and to work within the licensing system.

Part Three: Options for Firearms Prohibition Order Conditions

This Part sets out options for conditions of a Firearms Prohibition Order – for instance, what activities would be prohibited through standard and specific conditions.

What type of conditions could apply to a person with a Firearms Prohibition Order, and for how long?

If a Firearms Prohibition Order regime was established, consideration would be given to the extent and nature of restrictions placed on a person subject to a Firearms Prohibition Order, and for how long those restrictions should apply. Restrictions, or the more commonly used term ‘conditions’, aim to limit the activities and behaviours of a person (such as what they can do, where they can go, and who they can associate with), in order to meet the objective of the regime.

The first consideration is whether all available conditions should apply in the same way to all people subject to a Firearms Prohibition Order. Alternatively, the decision-maker can apply some appropriate conditions from a suite of available conditions, where relevant to the risk and circumstances of the person subject to the Firearms Prohibition Order.

Any condition would need to be monitored and enforced by Police (discussed in Part Five: Monitoring and Enforcement Options).

This Part sets out two options for conditions, and the application of the conditions, as well as options for the length of time the conditions should apply.

Option 1 – One standard condition applying to all people subject to a Firearms Prohibition Order

The standard condition of a Firearms Prohibition Order regime would be to prohibit a person subject to a Firearms Prohibition Order from obtaining, importing, exporting, purchasing, possessing, carrying, using, or supplying firearms or parts (including ammunition and magazines).

If implemented, a standard condition would be aimed at preventing a person subject to a Firearms Prohibition Order from being able to use firearms under the immediate supervision of a Firearms Licence holder (e.g. for hunting). The limitation with this option is that it would

not prevent a recidivist offender from associating with people who are in possession of firearms, or residing at or visiting a location where firearms were held. This would include firearms that are held unlawfully, or where lawfully held firearms are not stored securely and were therefore available for criminal associates to access to use in the commission of crime. Because this option may not effectively limit access to firearms, it is likely to only partially meet the objective of the regime.

This option would be unlikely to encroach on human rights to the same extent as Option 2 as the condition would not limit either the right to freedom of association or the right to freedom of movement.

Option 2 – Additional conditions applied to all people subject to a Firearms Prohibition Order

In addition to the universal application of the condition outlined in Option 1, other types of activities could also be restricted for all those subject to a Firearms Prohibition Order. These could include prohibiting a person subject to a Firearms Prohibition Order from:

- visiting or residing at any place where there are firearms, such as somebody's home or work place
- visiting any place where there would typically be firearms, such as gun clubs, hunting clubs, firearms ranges, firearms manufacturers, or licensed firearms dealers
- associating with others who have firearms on them, or under their immediate control.

Limiting the places and people that someone can associate with is more likely to effectively meet the objective of a Firearms Prohibition Order regime. The assumption is that the greater the restrictions placed on a high-risk person subject to a Firearms Prohibition Order, the lower the likelihood of the person having access to firearms, which in turn means it is more likely that harm will be avoided.

Conversely, the greater the restrictions, the greater the impact on the rights to freedom of movement and freedom of association. A regime that is not well targeted in this regard may mean that some people's rights are disproportionately impacted by the conditions placed on them. For instance, non-association orders may prevent someone from living in an existing home, visiting, or associating with family members or obtaining particular types of employment, which may be important as part of their rehabilitation and reintegration. This is likely to impact on our rural communities, where firearms ownership is relatively common, and where farming and agricultural employers are likely to be a significant source of employment.

It is also likely to impact on Māori, particularly rural Māori, given the importance of whānau and the interconnectedness of people within Te Ao Māori.

However, Firearms Prohibition Orders are aimed at ensuring people do not have inappropriate access to firearms. A balance would be needed between the person's rehabilitation and reintegration needs, and the wider community interest in reducing the risk of firearms offending and preventing the person from accessing firearms.

How long should a Firearms Prohibition Order last?

There are three options for how long a Firearms Prohibition Order could be put in place:

Option 1 – A maximum period time (such as up to 5, 10 or 15 years)

Option 2 – A fixed period of time (such as 5, 10 or 15 years)

Option 3 – For life

At the expiration of a time-limited Firearms Prohibition Order, a further Firearms Prohibition Order could be issued should the qualifying criteria, and any further risk assessment criteria, be met.

Option 1 – A maximum period of time for all Firearms Prohibition Orders

A Firearms Prohibition Order could be applied for up to a maximum number of years, such as for up to a maximum of five, 10 or 15 years. The applicant and decision-maker would take the circumstances of the person into account, and assess the risk to the public when seeking or imposing a Firearms Prohibition Order up to the maximum period of time available. There would be the possibility for Police and/or decision-makers to consider whether another Firearms Prohibition Order is needed following the expiry of the original order.

A discretionary application of a Firearms Prohibition Order duration, according to the risk factors an individual presents, would reduce the impact of the regime on a person's rights. The Attorney-General has indicated that the inclusion of a time limit for a Firearms Prohibition Order would help limit the impairment on the right to freedom of association.¹² However, it may be more difficult to make a decision on duration, and a mandatory or fixed period (Option 2) would be simpler for the decision-maker and have largely the same effect.

¹²

Attorney General report under the New Zealand Bill of Rights Act 1990 on the Arms (Firearms Prohibition Orders) Amendment Bill, presented to the House of Representatives, 2018.

Option 2 – A fixed period of time for all applicable Firearms Prohibition Orders

A fixed term, such as five, 10 or 15 years, could be applied universally to all people subject to a Firearms Prohibition Order.

A fixed-term Firearms Prohibition Order has a lesser impact on a person's rights than a lifetime regime (Option 3), but is less responsive to the individual's circumstances than the maximum term option (Option 1). On the other hand, at the expiry of a fixed term, the Firearms Prohibition Order regime would allow Police and decision-makers to consider whether another Firearms Prohibition Order is needed, based on the individual's rehabilitation and their ability to reform and move away from criminality. A fixed term would therefore provide a mechanism to reconsider the conditions placed on a person to ensure their continued relevance and necessity, in order to mitigate the risk of harm the person may pose.

The shorter the term, the more often the conditions can be reconsidered through a subsequent application for a (renewed) Firearms Prohibition Order, and the more proportionate that a Firearms Prohibition Order is likely to be. This approach would be more consistent with the protection of a person's rights.

Option 3 – Lifetime Firearms Prohibition Order

A Firearms Prohibition Order could be applied for the lifetime of the person subject to the Firearms Prohibition Order.

Universally applying a lifetime duration to Firearms Prohibition Orders is likely to be a significant encroachment on a person's rights unless there are regular reviews to ensure the conditions remained relevant and necessary, and in the public interest.¹³ As such, this would be similar to Public Protection Orders, which have no expiry date but are re-evaluated annually, while the subject person can seek a court review at any time.

A lifetime duration may be appropriate in some situations, such as where an offender has intentionally caused serious harm using a firearm (for instance, a recidivist violent offender who has committed murder or attempted murder using a firearm). However, this would potentially create an ever-increasing monitoring burden on Police as the number of people issued Firearms Prohibition Orders increased. This may impact on how effectively Police were

¹³ Attorney General report under the New Zealand Bill of Rights Act 1990 on the Arms (Firearms Prohibition Orders) Amendment Bill, presented to the House of Representatives, 2018.

able to monitor all subject persons, including whether to target monitoring to those most at risk of breaching Firearms Prohibition Order conditions.

QUESTIONS

Part Three: Conditions on Activities and Behaviours

Conditions that could apply to a Firearms Prohibition Order

16. Which option do you prefer for applying conditions to Firearms Prohibition Orders?

- ☐ **Option 1** - One broad condition, a prohibition from obtaining, purchasing, possessing, carrying, using or supplying firearms or weapons (or parts, ammunition, or magazines)

- ☐ **Option 2** – In addition to Option 1, additional conditions applied to all people subject to a Firearms Prohibition Order prohibiting them from:
 - a. Visiting or residing at any place where there are firearms, such as somebody's home or workplace
 - b. Visiting any place where there would typically be firearms, such as gun clubs, hunting clubs, firearms ranges, firearms manufacturers, or licensed firearms dealers
 - c. Associating with others who have firearms on them, or under their immediate control.

COMMENT:

If a person is deemed to not be a fit and proper person for the purposes of firearm licensing, they should not be able to access firearms. Option 1 provides no new enforcement provision. Regarding Option 2 - reducing access to places where licenced firearm owners are, like ranges, will not reduce their access to firearms. This is not how criminals access and use firearms. It just further paints shooting clubs, ranges (etc) as, mistakenly, inherently dangerous places. As we have previously stated in our answer to Question 2 – we should not be driving high risk offenders to spend more time with unlicensed and illegal firearms, through further polarising law abiding citizens

17. Should the Government consider applying other conditions to a Firearms Prohibition Order?
If so, what conditions should be considered?

COMMENT:

N/A

Length of time that a Firearms Prohibition Order could apply

18. Which option do you prefer regarding the length of time of a Firearms Prohibition Order?

- ☐ **Option 1** – A maximum period of time, with the actual duration imposed at the discretion of the decision-maker
- ☐ **Option 2** – A fixed period of time applied universally
- ☐ **Option 3** – Lifetime

COMMENT:

See answer to Question 12.

19. If a fixed or maximum period of time is applied, what time period do you consider most appropriate?

- ☐ **Option 1** – 5 years
- ☐ **Option 2** – 10 years
- ☐ **Option 3** – 15 years

COMMENT:

See answer to Question 12.

Part Four: Options for Application and Decision-Making

This Part sets out options for the application and decision-making process, including whether a Firearms Prohibition Order would be made by the Court or by the Commissioner of Police.

Who would make a Firearms Prohibition Order, and when?

If a Firearms Prohibition Order regime was established, consideration would be given to the person or entity who:

- applies for a person to be subject to a Firearms Prohibition Order (the applicant)
- makes a Firearms Prohibition Order (the decision-maker).

The point in time when an application and decision could be made would also need to be considered. This Part sets out three broad options that combine these two considerations.

Option 1 – Application made by Police to the Court timed with pending release from prison

This approach would mean that Police makes an application to the Court when a person is coming to the end of their sentence for a qualifying conviction. Police could also apply any time later if increased risk is identified, or if there is not a sentence of imprisonment. The Court would consider the application, applying discretion where legislated for, to determine whether or not to issue a Firearms Prohibition Order. This approach is consistent with Public Protection Orders, which are made by a Court following an application by the Department of Corrections, which is made towards the end of a person's prison sentence.

This option provides legal safeguards through judicial oversight, particularly the separation of the applicant from the decision-maker. Judicial oversight and scrutiny prior to the making of a Firearms Prohibition Order may help to lessen the impairment on the rights and freedoms contained within the New Zealand Bill of Rights Act 1990.

Option 2 – Application made by Police to the Court, timed with sentencing for a qualifying conviction

As with the above option, Police would make an application to the Court for the issue of a Firearms Prohibition Order. This would occur at the time of sentencing for the offence that makes the person subject to a Firearms Prohibition Order. The regime would need to be designed so that a Firearms Prohibition Order would take effect once an imprisonment

sentence for the offence that initiated the Firearms Prohibition Order has been served. This is the approach taken when placing a person on the Child Sex Offender Register.

As with the Option 1, this approach provides legal safeguards through judicial oversight, which may help lessen the impairment on rights and freedoms. This option would also have some administrative benefits over Option 1 in that there would be no need for a further Court hearing to determine if a person should be subject to a Firearms Prohibition Order. As such, this would be consistent with a range of other determinations made during sentencing, such as the issuing of three strikes legislation or the making of a non-association order.

Option 3 – Decision made by the Commissioner of Police

Under this option, the Commissioner of Police would have the authority to determine whether to issue a Firearms Prohibition Order.¹⁴ This option reflects how Australian states operate Firearms Prohibition Order regimes.

This determination could be taken at any time after a person has received the qualifying conviction. If a person is serving a sentence for a qualifying conviction, the Firearms Prohibition Order would take effect once the person was released from prison.

A provision could be built into the process that would give a period for the individual to review or appeal the decision after being notified of the intention to issue a Firearms Prohibition Order. For instance, in the state of Victoria, a subject person has 28 days to review the Commissioner's decision. The ability to appeal or review the decision to the Court would therefore still provide judicial oversight of the order making process, helping to reduce the impact on human rights and freedoms.

¹⁴ The Commissioner may delegate their authority to issue a Firearms Prohibition Order, for example, giving the delegation to police officers at a level no lower than Superintendent.

QUESTIONS

Part Four: Application and decision-making processes

Application and determination of a Firearms Prohibition Order

20. Which option do you prefer as to who makes a Firearms Prohibition Order, and when?

- ☐ **Option 1** – Application made by Police to the Court, timed with pending release from prison, or at any time after sentencing for a qualifying offence
- ☐ **Option 2** – Application made by Police to the Court, timed with sentencing for a qualifying offence
- ☐ **Option 3** – Decision made by the Commissioner of Police at any time after sentencing for a qualifying offence

COMMENT:

Overall, Police have not been shown to be competent in administering the Arms Act, therefore they should not be given unilateral powers in this area

Part Five: Options for Monitoring and Enforcement

This Part sets out options for monitoring and enforcement powers, covering how compliance with the Firearms Prohibition Order would be monitored and enforced, and what additional powers Police would need to have to do so.

How would compliance with a Firearms Prohibition Order be monitored and enforced?

If a Firearms Prohibition Order regime was established, it would need effective monitoring and enforcement to ensure compliance. The success of a Firearms Prohibition Order regime depends on those subject to the orders conforming with the conditions imposed upon them.

Monitoring of a Firearms Prohibition Order subject's compliance with the order is likely to be led and managed by Police. Implementation of a Firearms Prohibition Order regime would need to be carefully planned, and include elements such as a risk assessment framework to determine a graduated response to monitoring efforts, and an agreement with the Department of Corrections regarding information sharing and collaboration when a Firearms Prohibition Order subject is under a Corrections' monitored sentence.

Any non-compliance (breaches of conditions) identified will usually require prosecution and the application of an appropriate penalty.

There are three options for combining monitoring and enforcement approaches:

Option 1 – Monitoring and enforcement under current law

Option 2 – Court issued monitoring plan, with limited search without cause powers

Option 3 – Amend the law to enable search without cause powers linked to Firearms Prohibition Orders

Option 1 – Monitoring and enforcement under current law

Under section 18(3) of the Search and Surveillance Act 2012, Police can carry out warrantless searches of a place or vehicle to look for firearms. They must have *reasonable grounds to suspect* there are firearms in that place or vehicle in respect of which an offence against the Arms Act 1983, or an offence with a penalty over two years imprisonment, has been, or is about to be, committed.

The search powers under the Search and Surveillance Act 2012 could also apply to a Firearms Prohibition Order regime. Under this option, the same approach would be taken to ‘monitoring’ those subject to a Firearms Prohibition Order as is taken for any other people in relation to general compliance with the law. If there is cause to suspect non-compliance with Firearms Prohibition Order conditions, Police would be able to undertake warrantless searches of the person or the person’s premises and property.

However, only those considered at high-risk of causing harm with a firearm would be subject to a Firearms Prohibition Order, based on their criminal history. Given this, an effective means for Police to monitor and ensure compliance with these conditions would be required if a Firearms Prohibition Order regime was to be effective in reducing harm. This option would not give Police any additional powers to search outside those that already exist. This may mean New Zealand Police would not be able to effectively monitor those subject to a Firearms Prohibition Order.

However, a low threshold for search powers, such as a search power without any cause or suspicion, would impact on the rights and freedoms contained within the New Zealand Bill of Rights Act 1990.

Option 2 – Court issued monitoring plan, with limited search without cause powers

This option would involve the Court establishing a monitoring and enforcement plan for a person subject to a Firearms Prohibition Order. The monitoring plan could be established at the same time as the Court determines the conditions of the Firearms Prohibition Order. Alternatively, if the Commissioner of Police made the decision to issue a Firearms Prohibition Order, the Commissioner could apply to the Court for the establishment of a monitoring and enforcement plan.

The Court would set the parameters of a monitoring and enforcement plan, which could include requirements in relation to:

- Regular reporting to Police to confirm continued compliance with the conditions of the Firearms Prohibition Order, and to update changes in personal circumstances (such as where and with whom the individual is residing).
- The ability of Police to undertake reasonable searches, without cause or suspicion, of the person, or their premises, property and vehicles, including those regularly visited by a person subject to a Firearms Prohibition Order. The plan would likely specify the

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number of such searches that can be conducted, over what period, and within what timeframes.

Monitoring plans that give Police a limited ability to undertake searches may strike a balance between effectiveness in meeting the objectives of the regime, and the encroachment on the rights of individuals subject to searches. This would be a relatively new regime for New Zealand, and as such, would need to be carefully implemented to ensure it did not impede Police operational practicalities (that is, the ability to search when required in accordance with the Search and Surveillance Act 2012).

Option 3 – Amend the law to enable search without cause powers linked to Firearms Prohibition Orders

A third option would be to amend the law to enable searches without cause of people subject to a Firearms Prohibition Order, and any premises and vehicles they may have in their possession, or which they visit or use regularly. This is the monitoring regime currently used in most Australian states with Firearms Prohibition Order regimes.

Under this option, Police would not need to establish reasonable grounds to suspect a Firearms Prohibition Order condition is being breached. Instead, the search could be undertaken at any time.

People subject to a Firearms Prohibition Order are high-risk and have a history of serious violence offences, firearms offences, or breaches of Protection Orders. However, the deterrence effect would only be effective if searches were conducted relatively often on those subject to a Firearms Prohibition Order. This could provide effective oversight of compliance and the greatest deterrent to firearms offending.

Search without cause powers would encroach significantly on the rights of individuals, in particular the right to be secure from unreasonable search. A search without cause power, even if for a limited number of high-risk people, would be a significant step for New Zealand. The Attorney-General has noted that it would be difficult to see how warrantless searches without a requirement for reasonable cause could be justified.¹⁵

However, given the nature of the crimes committed by the person subject to the Firearms Prohibition Order in the past and in the interests of public safety, a balance would be needed between an individual's rights and those of the community. The establishment of such powers

¹⁵ Attorney General report under the New Zealand Bill of Rights Act 1990 on the Arms (Firearms Prohibition Orders) Amendment Bill, presented to the House of Representatives, 2018.

may be considered more appropriate if the Firearms Prohibition Order regime targets only a small number of the most serious and recidivist offenders with repeat convictions, and not a wider group with fewer serious convictions (as discussed in the Introduction). Also, a shorter order duration may be more likely to lead to a determination that the power is justified.

What would be the penalty for breaching a condition of a Firearms Prohibition Order?

A breach of a Firearms Prohibition Order would be a criminal offence, with imprisonment as the penalty, and the sentence likely to reflect the seriousness of the breach.

The penalty range for breaches of other orders (including Protection Orders, Extended Supervision Orders, and Restraining Orders) is from two to three years' imprisonment. However, the current penalty for possession of a firearm except for some lawful, proper and sufficient purpose is up to four years' imprisonment and/or a fine up to \$5,000.¹⁶

As such, breaching a Firearms Prohibition Order regime should have consequences that are more severe than those who would commit an offence, such as unlawful possession of a firearm, while not being subject to a Firearms Prohibition Order. This suggests that the penalty for a breach of a Firearms Prohibition Order should be in the order of up to five years' imprisonment.

Section 66 of the Arms Act 1983 creates a presumption that occupiers of premises and drivers of vehicles are deemed to be in possession of firearms found there. This would mean that once the prosecution had proven that the person subject to the Firearms Prohibition Order was at the property/driving the vehicle, that person would then be required to dispose the presumption. The Attorney-General has noted that such reverse onus offences are likely to be of less concern where the penalty is low. However, where the penalty is high, then it is likely to be an unjustified limit on the right to be presumed innocent, as set out in section 25(c) of the New Zealand Bill of Rights Act 1990.¹⁷

¹⁶ See section 45(1) of the Arms Act 1983. Note, some of the penalties in the Arms Act 1983 are proposed to change under the Arms Legislation Bill, which is currently before the Finance and Expenditure Select Committee.

¹⁷ Attorney General report under the New Zealand Bill of Rights Act 1990 on the Arms (Firearms Prohibition Orders) Amendment Bill, presented to the House of Representatives, 2018.

QUESTIONS

Part Five: Monitoring and enforcement

Monitoring and enforcement of Firearms Prohibition Orders

21. Which option do you prefer for monitoring compliance with a Firearms Prohibition Order?

- ☐ **Option 1** – Monitoring and enforcement under the current law
- ☐ **Option 2** – Court issued monitoring plan, with limited 'search without cause' powers
- ☐ **Option 3** – Amend the law to enable 'search without cause' powers specifically when linked to Firearms Prohibition Orders

COMMENT:

The Arms Legislation Bill increases the ability of Police to arbitrarily search licensed firearm holders. We draw your attention, again, to the fact that Police are consulting on a policy decision, that if agreed upon alongside the Bill, would give Police greater powers to search licensed firearm owners than those they deem of the highest risk.

Penalty for a breach of a Firearms Prohibition Order

22. What do you consider an appropriate maximum penalty for a breach of a Firearms Prohibition Order condition?

- ☐ **Option 1** – Less than two years' imprisonment
- ☐ **Option 2** – Two years' imprisonment
- ☐ **Option 3** – Three to four years' imprisonment
- ☐ **Option 4** – Five years' imprisonment
- ☐ **Option 5** – 10 years' imprisonment

COMMENT:

In the Arms Legislation Bill, it proposes that a person that fails to update the firearm registry, is

subject to a term of imprisonment not exceeding 2 years. It is telling that the Government feels that an option for punishment of serious criminals who accesses a firearm illegally is the same appropriate penalty for a licensed firearm owner who fails to update the exact real time location of their firearm. It is a completely impractical law to follow

Additional feedback

23. Do you have any further feedback on Firearms Prohibition Orders, whether they should be introduced in New Zealand, or their possible operation?

COMMENT:

The Government needs to reconsider how their current gun reforms increase the ability for non-licensed people to access firearms.

24. Finally, if introduced, how do you think the use of Firearms Prohibition Orders could be monitored?

COMMENT:

N/A

Consultation

The Government is interested in your views

As noted at the start of this paper, the Government is looking at introducing a Firearms Prohibition Order regime in New Zealand. Firearms Prohibition Orders are aimed at prohibiting certain high-risk people – those who have a history of serious violence, firearms offences, or breaching Protection Orders – from possessing, using, accessing or being around firearms.

This consultation document seeks your views on establishing a Firearms Prohibition Order regime in New Zealand. The document has provided you with a range of options and considerations under each of the four design parameters (Part Two – criteria; Part Three – conditions; Part Four – application and decision-making; and Part Five – monitoring and enforcement powers).

We now ask you to consider what you've read, and consider, firstly, whether a Firearms Prohibition Order regime should be introduced, and if so, how the regime should be implemented.

The Appendix sets out the consultation questions, which are based on the design parameters, considerations and options set out on the paper. The questions are set out in order of the five parts in this document, that is:

- Part One, which covered the **objectives** of a Firearms Prohibition Order regime
- Part Two, which covered the **criteria** for determining who would qualify for Firearms Prohibition Orders
- Part Three, which covered **conditions** restricting the activity and behaviours of those people subject to Firearms Prohibition Orders
- Part Four, which covered the **application and decision-making** process for Firearms Prohibition Orders
- Part Five, which covered the **monitoring and enforcement powers** required to enforce Firearms Prohibition Orders.

You do not have to answer all of the questions, however your feedback will help to shape the proposals for Government consideration.