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Report of the

*ATTORNEY-GENERAL*

under the New Zealand Bill of Rights Act 1990  
on the Firearms Prohibition Orders Legislation  
Bill

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1. I am satisfied Firearms Prohibition Orders Legislation Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). There are a number of provisions in the Bill which engage rights or freedoms protected by the Bill of Rights Act. I have concluded that any limitation they pose on rights are reasonably justifiable under s 5 of the Bill of Rights Act.

### **The Bill**

2. The Bill amends the Arms Act 1983 (the principal Act) to introduce Firearms Prohibition Orders (FPOs). The General policy statement states that the introduction of FPOs addresses some limitations with the Arms Act 1983 that might enable a 'high risk' person to legally access or use firearms or restricted weapons, associate with people in physical possession of firearms, or reside at or visit locations where firearms are held, including gun shops, arms fairs, or gun clubs.
3. The explanatory note to the Bill states that the single broad policy implemented by the amendments in this Bill is to improve public safety by preventing people whose behaviour and actions represent a high risk of violence, or reflect an underlying risk of violence, from being able to access fire-arms or restricted weapons. The explanatory note also states that the Bill complements recent amendments to the Arms Act 1983, which ensure only those people considered fit and proper to possess firearms can be issued with a firearms licence.
4. The Bill amends the principal Act to allow the court to make an FPO when sentencing an offender who (s 39A(1)):
  - 4.1 has been convicted of:
    - 4.1.1 an offence under s 16(4), 16A, 44A, 50A, 50D, 51A, 53A, 54, 54A, 55, 55A, 55D, 55E, or 55F of the principal Act; or
    - 4.1.2 a serious violent offence as defined in s 86A of the Sentencing Act 2002; or
    - 4.1.3 an offence under s 98A of the Crimes Act 1961; or
    - 4.1.4 an offence under any of ss 6A to 10 or ss 12 to 13E of the Terrorism Suppression Act 2002; and
  - 4.2 committed the offence when aged 18 or over, and after the commencement of this section.
5. The court must also be satisfied, on the balance of probabilities, that the imposition of an FPO is necessary, reasonable, and appropriate to assist in managing the risk that the offender poses to public safety.
6. An FPO made against an offender prohibits the offender from accessing, possessing, or using any firearm or related item. An FPO is also subject to standard conditions (which the court may vary or modify), and any special conditions imposed by the court.

7. There are a number of offences associated with an FPO being imposed. Most notably, a person who is subject to an FPO must not breach the FPO by:
  - 7.1 accessing, possessing, or using any firearm, pistol, pistol carbine conversion kit, restricted weapon, imitation firearm, airgun, magazine, part of a firearm or restricted weapon, prohibited item, or ammunition; or
  - 7.2 failing, without reasonable excuse, to comply with any condition of the FPO.
8. An FPO continues in force for a period of up to 10 years, unless sooner revoked by the court, and can be modified or replaced following a subsequent conviction of a qualifying offence for an FPO.

### **Section 17 – Freedom of association & Section 18 – Freedom of movement**

9. Section 17 of the Bill of Rights Act affirms that everyone has the right to freedom of association. The right recognises that people should be free to enter into consensual arrangements with others and promote the common interests of the group.
10. The freedom of association can be limited in a number of ways, including where legislation treats people differently on the basis of their membership of an association, or prohibits or creates disincentives towards membership.
11. Section 18(1) of the Bill of Rights Act affirms that everyone lawfully in New Zealand has the right to freedom of movement and residence within New Zealand.
12. As set out above, all FPOs are subject to standard conditions. All of these conditions either limit an individual's right to freedom of association or freedom of movement. The standard conditions are that the offender against whom the order is made must not (s 39C):
  - 12.1 associate with or, in any place (including a vehicle), otherwise be in the presence of a person who has with them any firearms or related items that are not in secure storage;
  - 12.2 reside at any premises in which there are stored any firearms or related items;
  - 12.3 join, or remain a member of, any shooting club (including an airsoft shooting club) or firearms club of any kind, visit the premises of such clubs, or attend the events of such clubs;
  - 12.4 attend any shooting range or shooting gallery;
  - 12.5 attend an activity of any kind that involves the use of any firearms or related items;
  - 12.6 visit any premises or place at which firearms or related items are manufactured, sold, repaired, hired, lent, or otherwise supplied.

*Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?*

13. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:
  - 13.1 does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - 13.2 if so, then:
    - 13.2.1 is the limit rationally connected with the objective?
    - 13.2.2 does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - 13.2.3 is the limit in due proportion to the importance of the objective?<sup>1</sup>

*Is the limit rationally connected to a sufficiently important objective?*

14. The objective of the Bill is to improve public safety by preventing people whose behaviour and actions represent a high-risk of violence, or reflect an underlying risk of violence, from being able to access firearms or restricted weapons. Clearly this public safety objective is sufficiently important to warrant some limitation on the right to freedom of association and freedom of movement.
15. There is a clear rational connection between the interests of public safety and the conditions of FPOs. The explanatory note of the Bill states that FPOs are being introduced to address some limitations with the principal Act that might enable a 'high risk' person to legally access or use firearms or restricted weapons, associate with people in physical possession of firearms, or reside at or visit locations where firearms are held, including gun shops, arms fairs, or gun clubs. These conditions help lower the risk posed by someone deemed a risk to public safety by the court by explicitly restricting situations where these people can come into contact with firearms or other restricted weapons.

*Is the impairment of the right no more than reasonably necessary?*

16. In respect of FPOs' impact on freedom of association and movement, there are some relevant safeguards included in the Bill that may help to lessen the severity of the conditions, including:
  - 16.1 the need for the court to be of the opinion that the imposition of an FPO is necessary, reasonable, and appropriate to assist in managing the risk that the offender poses to public safety;
  - 16.2 that FPOs can only be made if an offender is convicted of certain specified offences;

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<sup>1</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1

- 16.3 the ability to appeal the court's decision to make an FPO under subpart 4 of Part 6 of the Criminal Procedure Act 2011;
  - 16.4 that FPOs are revocable by the court;
  - 16.5 the conditions are expressed in specific language to avoid unduly wide interpretation and the Court will only impose special conditions when necessary.
17. Conversely, there are factors that suggest the impairment on the right of freedom of association may not be reasonably necessary to achieve the objective, including:
- 17.1 the length of time an FPO remains in force for (10 years);
  - 17.2 that while the court may revoke an FPO, the only situation explicitly envisioned in the Bill where it can do so is to impose a new FPO on someone who has been convicted of an offence under the new s 39A(a);
  - 17.3 the serious criminal nature of the offences and penalties for breach of an FPO.
18. Additionally, I note that restrictions similar to those discussed here in relation to FPOs are found in relation to other court-imposed orders, bail conditions and sentences. It is not unusual for someone to be prohibited from associating with certain people or visiting or residing in certain places through such orders, conditions, and sentences.
19. On balance, I consider that the rights are impaired no more than reasonably necessary, given the significance of the objective of the introduction of FPOs.

*Is the limit in due proportion to the importance of the objective?*

- 20. In considering due proportionality, the balance is between social advantage and harm to the right.<sup>2</sup>
- 21. For the reasons outlined above, I consider the limits on ss 17 and 18 of the Bill of Rights in respect of conditions imposed on offenders who are subject to FPOs are in due proportion to the importance of the objective.

*Conclusion on ss 17 & 18 of the Bill of Rights Act*

- 22. For the reasons above, I consider the Bill appears to be consistent with the freedom of association affirmed by s 17 and the freedom of movement affirmed by s 18 of the Bill of Rights Act.

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<sup>2</sup> *Hansen v R*, above n 1, at [134].

### Section 25(c) – Right to be presumed innocent

23. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.
24. The purpose of s 25(c) is to protect the fundamental liberty and dignity of those accused of offences in light of the grave consequences a criminal charge and conviction may entail.<sup>3</sup> To this end, the right to be presumed innocent includes three main components:<sup>4</sup>
  - 24.1 the onus of proof lies with the prosecution throughout;
  - 24.2 the standard of proof is ‘beyond reasonable doubt’; and
  - 24.3 mens rea (a guilty mind) is a requirement of the offence.
25. There are a number of factors that point to the importance of the right to be presumed innocent, including the:
  - 25.1 serious economic, social, and personal consequences for any person convicted of a serious criminal offence;
  - 25.2 role that the presumption of innocence plays in curing or mitigating defects in criminal procedure;
  - 25.3 maintenance of public confidence in the integrity of the criminal justice system; and
  - 25.4 constitutional role played by the presumption by providing a bulwark against the power and resources of the state in prosecuting criminal offences.
26. New s 39B of the Bill provides that a person subject to a FPO must not access, possess or use a firearm or related item (pistol, pistol carbine conversion kit, restricted weapon, airgun, imitation firearm, magazine, part of a firearm or restricted weapon, prohibited item, or ammunition).
27. Under s 42A(1)(a) of the Bill, a person who breaches this prohibition commits an offence and is liable on conviction to a term of imprisonment not exceeding seven years.
28. In respect of possession, s 66 of the principal Act creates a rebuttable presumption that, once the prosecution has proved that the defendant was in occupation of any land or building where a firearm has been found, the defendant was in possession

<sup>3</sup> See *R v Oakes* (1986) 26 DLR (4<sup>th</sup>) 200 (SCC) at [212] – [213].

<sup>4</sup> See, Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2015) at [23.4.19]; Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at [675].

of that firearm.<sup>5</sup> In this respect, therefore, new s 42A(1)(a) creates a reverse onus offence.<sup>6</sup>

29. Reverse onus provisions raise a prima facie issue of inconsistency with s 25(c) because, once the prosecution has proven the defendant committed the act in question, the defendant must prove a defence, or disprove a presumption, on the balance of probabilities in order to escape liability. In the case of reverse onus offences, a defendant who is unable to prove a defence, or disprove a presumption, could be convicted even if reasonable doubt exists as to their guilt.
30. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act.

*Is the limit rationally connected to a sufficiently important objective?*

31. The objective of the offence introduced by s 39B is, logically, to enforce compliance with an FPO. The reverse onus imposed by s 66 of the principal Act likewise logically makes enforcing the terms of a FPO a simpler prospect for law enforcement. The use of firearms in the commission of crimes is plainly a matter of the utmost concern for public safety and in particular for the safety of our police officers. The offence lends effectiveness to the regime, and thereby contributes to the safety of the public and of police officers. Therefore, I consider the limit may be seen as rationally connected to a sufficiently important objective.

*Is the impairment of the right no more than reasonably necessary?*

32. The offence is ‘truly criminal’, rather than being in the realm of ‘public welfare regulatory offences’ for which a reversal of the onus of proof is generally considered to be more easily justifiable.<sup>7</sup>
33. However, on this occasion I consider the right to be presumed innocent is impaired no more than reasonably necessary to achieve the objective.
34. While there is potential for imprisonment, I note the maximum penalty of up to seven years’ imprisonment is not as long as those proposed in previous Member’s Bills attempting to introduce FPOs.<sup>8</sup> The penalty appears to me to appropriately allow for the full range of criminality potentially involved.

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<sup>5</sup> See, for example, *R v Coultas* [2009] NZCA 71; *R v McKeown* (1988) 3 CRNZ 438.

<sup>6</sup> Previous Crown Law advice on the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019 concluded that the reverse onus issues associated with s 66 of the principal Act did not arise on that Bill (See Crown Law, *Arms Legislation Bill: consistency with New Zealand Bill of Rights Act 1990*, ATT395/298, 6 September 2019 at [31]). This was because that Bill proposed no amendments to s 66 of the principal Act and because that Bill did not introduce any new offences that were likely to rely on s 66 of the principal Act. This Bill does introduce a new offence that could likely invoke s 66 of the principal Act.

<sup>7</sup> *Civil Aviation Authority v MacKenzie* [1983] NZLR 78.

<sup>8</sup> See for example, BORA vets for previous similar members bills: *Report of the Attorney-General under the New Zealand Bill of Rights Act on the Arms (Firearms Prohibitions Orders) Amendment Bill* (16 May 2018) and *Report of the Attorney-General under the New Zealand Bill of Rights Act on the Arms (Firearms Prohibitions Orders) Amendment Bill (No 2)* (23 June 2020).

35. I do not consider that an evidential onus would make the law effective on this occasion. To be effective the prohibition must be enforceable. In many instances the Police will encounter when searching premises or cars, it will be impossible for them to prove that the person who is subject to the FPO is the owner of a weapon that is found, even where it is their house or their car. If there are other occupants of the house or visitors to it, if there are other persons in the car or who habitually use it, particularly for persons involved in organised crime, it would be relatively easy to preserve a reasonable doubt.
36. There will also be a very limited class of persons who have been examined by the Court and found to be somebody who warrants one of these orders. It should be abundantly clear to them on the making of the order that they must be vigilant to ensure they do not come into possession of firearms. If there is a credible narrative for an innocent association with the firearm, it will lie within their capacity to establish it on the balance of probability.
37. Therefore, I consider the impairment of the right no more than reasonably necessary.

*Is the limit in due proportion to the importance of the objective?*

38. As noted above, the public safety objective is truly pressing and sufficiently important to warrant some limit on the right to be presumed innocent until proven guilty. The use of firearms in the commission of crimes is plainly a matter of the utmost concern for public safety and in particular for the safety of our police officers, who are themselves still not routinely armed but find themselves increasingly confronted by persons who are. Rather than tighten up on firearm ownership generally the Bill targets those who have demonstrated that by reason of their propensity for violence or firearms offending, they should not be allowed access to them.
39. Additionally, I do not consider there to be a reasonable alternative to the reverse onus that would achieve the same objective.
40. Therefore, in my view the severity of the limit imposed by the offence in the new s 42A(1)(a) in conjunction with s 66 of the principal Act is in due proportion to the importance of the objective.

*Conclusion on s 25(c) of the Bill of Rights Act*

41. For the reasons above, I consider that the limit in the Bill on the right to be presumed innocent affirmed by s 25(c) of the Bill of Rights Act, is justified under s 5 of that Act.



42. I therefore conclude that the Bill is consistent with the rights and freedoms affirmed in the Bill of Rights Act.

A handwritten signature in blue ink, appearing to read 'D. Parker', is positioned above the typed name.

Hon David Parker  
**Attorney-General**

15<sup>th</sup> December 2021