



15 February 2024

Attorney-General

Advice on the consistency of the Firearms Prohibition Order Legislation Amendment Bill with the New Zealand Bill of Rights Act 1990

Our Ref: ATT395/399

Summary

1. This briefing provides our view that the Firearms Prohibition Order Legislation Amendment Bill (PCO 26013/5.0) (**the Bill**) as currently drafted is inconsistent with the New Zealand Bill of Rights Act 1990 in one respect.
2. Specifically, we consider it breaches the right to be free from unreasonable search in s 21 of the Bill of Rights Act because it authorises the police to search any person who is in a vehicle with someone subject to a Firearms Protection Order (FPO) without a warrant and without cause. This inconsistency could be resolved through an amendment to the power, requiring Police to have 'reasonable grounds to suspect that the person is concealing a firearm or related item' before they are searched.
3. We understand from the Ministry of Justice that Cabinet authority will be sought next week to make this change. If this occurs, the Bill will not be inconsistent with the Bill of Rights Act.
4. We also understand that Cabinet will consider whether to make the proposed search power retrospective, to allow police to search those who had FPOs issued against them before the search power came into effect. Such retrospective application would need to be clearly set out in the Bill, but we do not consider this addition would raise any inconsistency with s 26 of the Bill of Rights Act because that right protects against the application of retrospective punishments/penalties and the proposed search power is not a penalty or punishment.

Preparation of a report under s 7 of the Bill of Rights Act

5. Although we are advising you of an inconsistency with the Bill of Rights Act, the Bill is still subject to active consideration that, in our opinion, would remove the inconsistency. For that reason, we have not prepared a draft s 7 report. We will prepare any report that is required as soon as the final form of the Bill is determined.

Background

The Bill

6. The Bill seeks to make various amendments to the FPOs regime to address gang-related offending and reduce firearms crime and its impact on communities. It:
 - 6.1 extends the groups of persons against whom FPOs may be made;¹
 - 6.2 establishes a new review process that enables people subject to an FPO to apply to the court to have their FPO varied, modified, or revoked;² and
 - 6.3 gives Police a warrantless search power to check compliance with FPOs.³

Current FPO regime

7. A person may have an FPO issued against them as part of their sentence if they are: aged 18 or over; convicted of a specified violent offence; and the judge is satisfied that an FPO is necessary, reasonable and appropriate to meet a risk they pose to public safety.⁴
8. An FPO prohibits the person from accessing, possessing or using a firearm or firearm related items and is subject to standard and specified conditions that operate to restrict the person's access to firearms, including by limiting their ability to associate with people, or reside in places, with firearms.⁵
9. FPOs remain in force for a period of 10 years, unless sooner revoked by the Court. They come into force once made, if the person has a non-custodial sentence imposed on them, or once that person is released from custody, if they have a custodial sentence imposed on them.⁶
10. Breaching the conditions of an FPO is an offence punishable by up to 7 years imprisonment.⁷

Consistency with the Bill of Rights Act

Extending the group of persons against whom an FPO may be made

11. The Bill proposes to extend the group of persons against whom a FPO can be made to include:⁸
 - 11.1 members or associates of a gang or organised criminal group;

¹ Clauses 4, 5, 6, 7, 10 and 11.

² Clauses 8.

³ Clause 14.

⁴ Arms Act 1983, s 39A.

⁵ Sections 39B, 39C and 39E.

⁶ Section 39F.

⁷ Section 42A.

⁸ Clause 7.

- 11.2 who are 18 years or older;⁹
- 11.3 and have been convicted of an offence under the Arms Act, the Crimes Act 1961; the Misuse of Drugs Act 1975; or the Psychoactive Substances Act 2013;
- 11.4 that is punishable by a term of imprisonment of 1 year or more;
12. This addition is proposed to apply prospectively, to people in this category who commit the relevant offence after the commencement of this amendment.¹⁰
13. The Bill also proposes to add and amend various definitions in the Arms Act. This includes amending the definition of “gang” to align it with the definition in the Gangs Legislation Amendment Act 2024, if passed, and the definition of “organised criminal group” to align it with the Crimes Act 1961.¹¹
14. The Bill does not seek to amend the threshold for an FPO. This means that FPOs will only be able to be made against members of this broader class if the “court is 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.”¹²

Freedoms of association and movement and the right not to be subject to disproportionately severe punishment – sections 17, 18 and 9

15. Section 17 of the Bill of Rights Act protects the freedom of association. This involves the right to form or participate in an organisation, to share information and ideas to act collectively.¹³
16. Section 18 of the Bill of Rights Act protects the right to freedom of movement and residence within New Zealand.
17. The standard conditions imposed with an FPO limit an individual’s right to freedom of association or freedom of movement.¹⁴ The standard conditions may be modified by the Court, taking into account the nature and seriousness of the

⁹ At the time of the offending.

¹⁰ Clause 7.

¹¹ Clauses 4, 5, and 6.

¹² Arms Act, s 39A(2).

¹³ *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142, [2021] 2 NZLR 795.

¹⁴ Per s 39C, under these standard conditions the person against whom an order is made must not:

(a) 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:

(b) reside at any premises in which any firearms or related items are stored:

(c) 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:

(d) attend any shooting range or shooting gallery:

(e) attend an activity of any kind that involves the use of any firearms or related items:

(f) visit any premises or place at which firearms or related items are manufactured, sold, repaired, hired, lent, or otherwise supplied.

offending, the circumstances of the offending, the offender's personal circumstances, and any other matters the court considers relevant.¹⁵

18. Whether the limitation on ss 17 and 18 is justified under s 5 of the Bill of Rights Act will depend on the facts of each case, including whether the FPO is necessary, reasonable, and appropriate to assist in managing the risk that the person poses to public safety.
19. Section 9 of the Bill of Rights Act provides, in part, that everyone has the right not to be subjected to disproportionately severe punishment. Whether the imposition of an FPO amounts to disproportionately severe punishment will depend on the facts of each case.¹⁶
20. In exercising its discretion about whether to impose an FPO and/or whether to modify the standard conditions or impose special conditions, the court must act consistently with the Bill of Rights Act. This means that an FPO and/or standard or special conditions will not be able to be imposed on members of the broader class of people proposed by the Bill when this would result in an unjustified breach freedom of movement or association or would amount to a disproportionately severe punishment.
21. We advise that this element of the Bill is therefore consistent with the Bill of Rights Act.

Establishing a new review process

22. The Bill also proposes to:
 - 22.1 Insert a new power for people who have been subject to an FPO for at least five years to apply to the court for revocation, variation, or modification of an FPO.¹⁷
 - 22.2 Update the existing power for a sentencing court to modify, vary, or revoke and reissue an FPO, if someone subject to an FPO is convicted of a further offence that would qualify them for an FPO to reflect the extended category of offenders against whom an FPO may be issued.¹⁸
23. We advise that these changes are consistent with the Bill of Rights Act.

¹⁵ Arms Act, s 39D.

¹⁶ Noting that a limit on s 9 of the Bill of Rights Act cannot be justified under s 5.

¹⁷ Clause 8.

¹⁸ Clause 9.

Establishing new search powers

24. Finally, the Bill proposes to introduce a warrantless search power into the Search and Surveillance Act 2002 to allow constables, when they have reasonable grounds to suspect that a person is subject to an FPO, to search:¹⁹
- 24.1 the person;
 - 24.2 anything in their possession or under their control;
 - 24.3 any premises or vehicle in which they are present;
 - 24.4 any other person present in the vehicle; and
- to seize and detain any arms found.
25. The constable may exercise this power without having any reasonable grounds to suspect that the person is breaching any conditions of their FPO, or that any offence is, or will be committed by the person.

Right to be free from unreasonable search and seizure – Section 21

26. Section 21 protects the right to be free from unreasonable search or seizure. This protects reasonable expectations of privacy as between individuals and the state. This balance is usually struck by allowing searches only for evidence of serious offending that has already happened or is in progress and where the evidence is believed to be in the place to be searched.
27. The purpose of the proposed search power is not to locate evidence of offending, but to check on whether people subject to FPOs are complying with them.
28. Searching to monitor compliance is generally reasonable where a person is subject to a community-based sentence or on bail or engaging in highly invigilated activity such as driving a car on a road. Administrative searching and surveillance to ensure compliance with the law is also common to some highly controlled industries like commercial fishing.
29. On this basis, except in the below respect, we consider the proposed search power is not *per se* unreasonable. We note that the power could still breach s 21 if it were used unreasonably, through, for example, excessive searching, searching at unreasonable times or searching for an ulterior purpose.
30. We consider the unfettered ability for police to search any other person present in a vehicle with the person suspected of being subject to an FPO amounts to an unreasonable search and therefore a breach of s 21 of the Bill of Rights Act.
31. The purpose of searching such people must be to check whether they are concealing a firearm. However, the proposed power is not limited to this purpose, i.e. it does not require the constable to have reasonable grounds to suspect or

¹⁹ Clause 14.

believe that the person is concealing a firearm or related item.²⁰ The Bill in this respect authorises unreasonable searches and is inconsistent with s 21 of the Bill of Rights Act.²¹ Although a Police Constable is a person exercising public power and required to act consistently with the Bill of Rights Act, that does not resolve the inconsistency because we consider a threshold should be required (the presence of grounds to believe) before the power can lawfully be exercised. That can only be supplied by Parliament.

32. As above, we understand this element of the search power may be qualified by Cabinet before the Bill is introduced, by introducing a requirement that the constable have 'reasonable grounds to believe the person is concealing a firearm.'
33. If this was included, this would cure the inconsistency with s 21.

Freedom of association - Section 17

34. It is possible the proposed warrantless search power may also marginally limit freedom of association, as it may dissuade persons who would otherwise associate with the people who have FPOs from doing so, because they or their property would then be potentially liable to search. It is not clear the extent to which this is a realistic possibility, but for the avoidance of doubt we think any limit would be justified under s 5, due to the important social objective of FPOs and the need to ensure compliance with them.
35. With respect to others in vehicles with people with an FPO who may be searched, we advise that the primary right affected is section 21.

Discrimination – section 19

36. Section 19 of the Bill of Rights Act provides that everyone has the right to freedom from discrimination on the grounds in section 21 of the Human Rights Act 1993. Race is one of the prohibited grounds.²² Gang membership is not.
37. Legislation will discriminate if it:²³
- 37.1 treats or effects persons or groups in comparable situations differently on the basis of a prohibited ground;
 - 37.2 this differential treatment or effect causes material disadvantage; and
 - 37.3 this is not justified under section 5 of the Bill of Rights Act.
38. It is well established that a disproportionate percentage of gang members are Māori.

²⁰ The term 'firearm or related item' is defined in the Bill in cl 6 as "any firearm, pistol, pistol carbine conversion kit, restricted weapon, airgun, imitation firearm, magazine, part of a firearm or restricted weapon, prohibited item, or ammunition".

²¹ Noting that unreasonable searches cannot be justified under s 5 of the Bill of Rights Act.

²² Human Rights Act 1993, s 21(f).

²³ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [143].

39. However, applying the reasoning of the Court of Appeal in *Ngaronoa v Attorney-General*, we do not consider the Bill engages section 19.²⁴ Specifically, because:

39.1 While the Bill expands the category of people against to whom FPOs may be made gang members or associates, in particular circumstances, it treats Māori and non-Māori gang members and associates the same.

39.2 If the Bill was discriminatory under the Bill of Rights Act because of the disproportionate representation of Māori in gangs, this would mean all attempts to protect the public from gangs would be discriminatory.

39.3 Gang membership represent a very small percentage of both the total Māori and non-Māori populations so the difference in the constitution of gangs does not create a material disadvantage as between Māori and non-Māori.

Review of this advice

40. In accordance with Crown Law's policies, this advice has been peer reviewed by Austin Powell, Senior Crown Counsel.

Recommendations

41. In summary our advice is that you should:

1. Determine that the Bill as currently drafted would be inconsistent with s 21 of the Bill of Rights Act so far as it confers a power to search without cause other persons who are in a vehicle with a person suspected of being subject to an FPO.	Agreed / Disagreed
2. Determine that should the Bill be amended to impose a requirement to have cause before undertaking a search of other persons who are in a vehicle with a person suspected of being subject to an FPO, the Bill will be consistent with s 21	Agreed / Disagreed
3. Should the amendment proposed in 2 above not be made, instruct us to prepare a section 7 notice to that effect.	Yes / Not applicable <i>To be seen.</i>

²⁴ *Ngaronoa v Attorney-General* [2017] NZCA 351 at [137], [138] and [147] – [148].

42. If the Bill remains as it but you do not accept our advice as to the inconsistency we will prepare a report in your name explaining why you consider the Bill to be consistent with the Bill of Rights Act, for publication on the Ministry of Justice website.



Abbey Lawson
Crown Counsel

Noted / ~~Approved~~ / Declined



Hon Judith Collins KC
Attorney-General

19/12/2024

After this advice was prepared, the proposed Bill was changed to no longer include the matter giving rise to the inconsistency with the New Zealand Bill of Rights Act 1990 (referred to in paragraphs 1-2, 5, 30-33 of the advice). The Attorney-General was satisfied that the Bill as amended was consistent with the New Zealand Bill of Rights Act.