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New Zealand Police
Wellington

By email: FPOConsultation@police.govt.nz

Proposed Firearms Prohibition Orders regime – consultation

The New Zealand Law Society (Law Society) welcomes the opportunity to provide a response to the Firearms Prohibitions Orders public consultation document.

Overview: context for introducing Firearms Prohibition Orders

The government is considering the introduction of a Firearms Prohibition Order regime to support and complement the proposed increased controls in the Arms Legislation Bill, both of which are aimed at improving public safety. Firearms Prohibition Orders would do so by reducing the unlawful use of firearms by unlicensed people. As noted in the consultation document,

“Firearms Prohibition Orders [would] prohibit [unlicensed] 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.¹

The Law Society’s central submission

The statistics presented in the consultation document indicate that the criminal use of firearms is a problem in New Zealand. Stronger legislative and/or regulatory controls on access to firearms by ‘high-risk’ individuals may therefore be justified in principle.

Significantly, however, the consultation document acknowledges that the proposed orders are likely to impose limitations on certain individual rights under the New Zealand Bill of Rights Act 1990 (Bill of Rights). These include the rights to freedom of association, to freedom of movement, to be secure from unreasonable search, and the right to be presumed innocent.

Any limit on individual rights must be reasonable and able to be demonstrably justified in a democratic society.² The limit must be rationally connected to the purpose it seeks to achieve; and

¹ Firearms Prohibition Orders public consultation document, November 2019, at p5.

² Section 5 of the New Zealand Bill of Rights Act 1990.

the limiting measure must impair the right no more than reasonably necessary to achieve its purpose.³

The Law Society submits that further research and analysis is required to meet this test. Unless the proposed Orders are restricted to those individuals who are convicted of a criminal offence using a firearm, the data presented in the consultation document does not establish a rational connection between the objective of reducing criminal use of firearms and the categories of 'high-risk' individuals that will be captured by the proposed regime. In particular, it does not identify the characteristics of the individuals who committed the relevant offences. It therefore does not establish that the individuals that will be targeted by the proposed regime are the persons committing the offences it seeks to reduce.

Absent further research and data analysis, the Law Society submits that the proposed regime would be likely to impose an unjustified limitation on individual rights and be contrary to the Bill of Rights.

The consultation questions

The response to consultation questions is set out below. The Law Society's focus is on the operation of proposed legislation, including the potential effect it may have on rule of law concerns and individual rights; the Law Society tends not to make submissions on matters of public policy and for that reason some of the questions in the consultation document have been marked 'not applicable'.

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:

Yes. The statistics presented in the consultation document indicate that firearms were used in the commission of a significant proportion of some serious offences.

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

Yes

No

Comment:

No. The Law Society submits that:

1. In principle, the aim of preventing individuals who pose a high risk of criminal use of firearms having access to firearms is desirable; however
2. The data presented in the consultation document is insufficient to identify such high-risk individuals. The statistics on criminal use of firearms do not identify the characteristics of the individuals who committed those offences.
3. The problem statement therefore does not sufficiently link, or establish a rational connection between, the stated aim of reducing the risk of harm caused by criminal use of firearms and the individuals targeted by the proposed orders.

³ R v Hansen [2007] NZSC 7, [2007] 3 NZLR 1 at [103] per Tipping J.

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:

Not applicable.

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

Yes

No

Comment:

This is a question of policy on which the Law Society does not express a view. As noted above, however, it is submitted that more data analysis is required to ensure that a regime that limits individual rights is justified. In particular, that it is appropriately targeted to individuals who are demonstrably at high risk of criminal use of firearms and therefore rationally connected to its objective.

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

Yes

No

Comment:

See the Law Society's central submission and response to question 2.

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:

See the Law Society's central submission and response to question 2.

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:

See the Law Society's central submission and response to question 2.

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:

Not applicable.

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:

Not applicable.

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

Yes

No

Comment:

In line with the Law Society's central submission, the answer to this depends on the results of data analysis regarding the characteristics of those using firearms in the commission of offences.

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:

See answer to question 10.

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:

Not applicable.

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:

No. The Law Society submits that the principle against retroactivity should apply to the proposed regime unless there is strong evidence to show that retrospective application is required to protect public safety.

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

Comment:

Not applicable.

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 Law Society strongly opposes the suggestion that membership of a group could of itself be a sufficient reason to limit an individual's rights under the Bill of Rights Act. In addition, the Law Society notes that difficulties are likely to arise in defining terms such as "gang", "prospect" and "member" for the purposes of criminal legislation.

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:

Not applicable.

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:

See the Law Society's central submission and response to question 2.

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:

See the Law Society's central submission and response to question 2.

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

Comment:

Not applicable.

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 the Law Society's central submission and response to question 2.

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 the Law Society's central submission and response to question 2.

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:

The Law Society strongly opposes Option 3. It would be inappropriate for the Police Commissioner to have a discretionary power to impose restrictive orders.

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:

See the Law Society's central submission and response to question 2.

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:

The Law Society submits that only a short sentence of imprisonment, if any, would be warranted for breach of a Firearms Prohibition Order.

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:

See the Law Society’s central submission and response to question 2.

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

Comment:

The Law Society submits that any regime should be rigorously monitored. To ensure the limits placed on individual rights are proportionate and demonstrably justified, an annual report should be provided by the Ministry of Justice to Parliament recording the number of Orders made, their duration and conditions, and the annual statistics on criminal use of firearms.

If further discussion about the Law Society’s comments would be helpful, please contact the Law Society’s Law Reform Manager, Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz).

Yours faithfully

A handwritten signature in black ink, appearing to read 'Herman Visagie', enclosed within a large, loopy oval shape.

Herman Visagie
NZLS Vice President