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Arms (Firearms Prohibition Orders) Amendment Bill (No 2)

Submission for the Council of Licenced Firearms Owners

Background

1. The New Zealand Council of Licenced Firearms Owners Incorporated (COLFO) is the overarching organisation for firearms users in New Zealand. It is an association of shooting sports organisations, currently twelve. Many of the estimated 250,000 New Zealanders who have firearms (and the hundreds of thousands more who occasionally use them) do not belong to organisations, but our membership represents the views of those who organise to hunt, target shoot, and collect firearms. We also represent people who work in the industry, including professional guides. From experience, we are confident that we represent the predominant views of firearms owners in this country.
2. Our board includes representatives 12 national firearms organisations including Pistol NZ, the NZ Deerstalkers Association, the National Rifle Association of NZ, NZ Antique and Historical Arms Association, NZ Service Rifle Association and Sporting Shooters Association NZ. Other members include the International Military Arms Society, Target Shooting New Zealand, New Zealand Shooting Federation, Airsoft New Zealand, New Zealand Clay Target Association and NZ Black Powder Shooters Federation. COLFO has renowned and published authors on the subject of firearms and has ready access to technical experts.
3. We are an UN-accredited organisation and have represented New Zealand internationally at the UN Arms Trade Treaty and the UN Programme of Action. We are a member of the World Forum on Shooting Activities (WFSA).

Introduction

4. COLFO supports a focus on the illegal use of firearms. The Arms Act changes over the past 18 months have targeted licensed firearm owners. As we warned they have driven thousands of firearms underground, including into the hands of criminals.
5. But our members are not convinced that FPOs will be effective in targeting illegal use of firearms, and may in fact discourage legal use or compliance with the law.
6. Firearm Prohibition Orders [“**FPO**”] are a means of targeting those who should not have access to firearms – who do not meet the tests of ‘fit and proper’ that our system is built on. However, the FPO designed in this Bill is built around, and exacerbates the unintended consequences and risks from one of the most badly conceived elements of the recent changes. In essence, it relies on concepts of possession that do not catch what they should, and could instead criminalise large numbers of innocent people, most of whom will have no knowledge of the risk, and no way to mitigate it even if they do know.
7. This Bill should not proceed until the term “possess” has been properly defined in the principal Act, or better still, replaced with provisions based on “use or control” or “user” concepts.
8. The flaws in this Bill highlight the rushed and clumsy application of the Arms (Prohibited Firearms, Magazines and Parts) Amendment Act 2019 and the Arms Legislation Act 2020. In our submissions to those Acts we stated the Government, through a failure to consult with the licensed firearms community, were enacting legislation that was impractical and in some common circumstances would result in outcomes opposite to the intention.

9. The law should discourage and prevent criminal access to firearms. Given the way the recent changes have sacrificed some of the traditional cooperation and partnership between law-abiding users, and the Police, the likelihood of successful Police suppression of illegal access has reduced. The FPO intention – to focus prohibitions or restrictions on criminals and others who definitely should not have firearms, could be a sound way to restore the essential role of the community in upholding firearms law.
10. But this Bill builds fatally on one of the core provocations in the recent law. Instead of removing and replacing it, this Bill makes the problem even more serious, giving more power to Police to threaten the rights and freedoms of inoffensive people. Without the right checks and balances within Police, these provisions could be easily abused. They may become the unwitting cause of law-breaking by relatives, friends, employees or casual acquaintances. Or they may become parties themselves to offending.
11. Some of the offending defined by this Bill will seem so unfair and unrelated to any real community purpose that it will reinforce what has recently become a consensus in some communities that some routine breaches of Arms law is not real offending. A seriously worrying result of the bad recent law changes is a spreading attitude that reporting such offending to the authorities is inexcusable.
12. Without widespread and near universal community discouragement of unlawful arms ownership and use, the Police will never be able to ensure that only fit and proper people hold them. This Bill does not help restore that respect. It will instead unduly trespass on the rights and freedoms of law abiding citizens.

Overseas experience

13. FPOs operate in New South Wales, Victoria, South Australia and Tasmania. They have been operating in NSW since 1973, however the current NSW model was enacted in 2013. Victoria introduced FPOs in May 2018.

New South Wales

14. In 2016, the NSW Ombudsman conducted a review of the FPO search powers. These search powers (as we detail below in paragraph 32) are not in this Bill. The Review found that the Police found firearms, ammunition and parts in 2% of interactions.¹ Worryingly, the Review found that “Police conducted these searches on what appears to be an erroneous application of the FPO search powers and the searches may have been unlawful”.²
15. The Ko to tatou Kainga tenei, Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 stated there was inadequate Police guidance and training for officers. We are concerned based on the current experience of their administration of the Arms Act that if, like NSW, the Police were given wide-ranging powers, that they would not apply them correctly.

¹ John McMillan AO *Review of police use of the firearms prohibition order search powers* (Ombudsman NSW Report, August 2016) at 34.

² John McMillan AO *Review of police use of the firearms prohibition order search powers* (Ombudsman NSW Report, August 2016) at iv.

Victoria

16. In May 2020, the Legal and Social Issues Committee of the Parliament of Victoria tabled their report in to an inquiry into firearms prohibition legislation. The inquiry was self-initiated after a decision by a tribunal to set aside a FPO in respect of an individual who was known to be involved in criminal organisations.
17. The Inquiry's findings included that:
 - a. the broad application of the criteria for FPO meant the risk that members of the community with little or no criminal involvement could be targeted. The criteria in NZ's Bill are narrower than in Victoria. It may be less likely that law abiding citizens will become the target of FPOs; and
 - b. the level of discretion for police in applying and enforcing FPOs may lead to inconsistent practice and confusion. This conclusion, similar to that of the NSW Ombudsman adds to our concern about potential application in NZ.³

Tasmania

18. FPOs were introduced in Tasmania following the Port Arthur massacre. Police appear to see FPO as another tool to fight illegal use of firearms. We have not seen evidence that it actually has. In 2013, FPOs were broadened to ensure that people with FPO could not possess firearms as well as not own them.
19. The Bill in NZ is focused on possession, although as discussed in detail below the definition of 'possess' in the Bill is problematic.

Definition of possession

20. This Bill proposes a definition of 'possess' for the Arms Act. The definition would apply across the Arms Act, not just to FPOs. The implications have not been fully appreciated.
21. Currently the Act has no definition of possess. The Arms Legislation Act 2020 introduced new offences of illegal possession and significantly increased the penalties for existing possession offences. Inserting a definition has significant consequences.
22. We have not attempted a comprehensive analysis of the new definition or the definition issue, but draw to your attention to these issues with Clause 4 of the Bill:
 - a. The definition does not exclude any case law definitions of possess, but nor does it codify or embody them. This makes it difficult for a non-lawyer to understand and be confident about what it means;
 - b. It is not clear how clause 4 interacts with Section 66 of the Arms Act, as introduced by the Arms Legislation Act. It says:

³ John McMillan AO *Review of police use of the firearms prohibition order search powers* (Ombudsman NSW Report, August 2016) at 8.

66 Occupier of premises or driver of vehicle deemed to be in possession of firearm, airgun, pistol, imitation firearm, restricted weapon, prohibited magazine, or explosive found therein

For the purposes of this Act every person in occupation of any land or building or the driver of any vehicle on which any firearm, airgun, pistol, imitation firearm, restricted weapon, prohibited magazine, or explosive is found shall, though not to the exclusion of the liability of any other person, be deemed to be in possession of that firearm, airgun, pistol, imitation firearm, restricted weapon, prohibited magazine, or explosive, unless he proves that it was not his property and that it was in the possession of some other person.

- c. The Clause does not explain how it interacts with established case law that allows for joint possession.⁴ Currently two people could be convicted of illegal possession of a firearm without knowing who had ‘control’ and who had ‘custody’.
23. When section 66 of the Arms Act was introduced by the Arms Legislation Act, it was unlawful for an unlicensed person to possess a firearm except under the close supervision of a licensed person. Among the problems created by the combination of that provision with new section 66 are:
- a. If for example, the driver of a car remains with the car while licensed owners of arms safely stowed in the car go to eat, or to buy takeaways, the unlicensed person is breaking the law;
 - b. Most members of any household in which a licensed person’s firearms are safely stored, will from time to time be the only occupiers. They may not even know of the firearms, or where they are stored, or how to access them if they do know. But section 66 may criminalise them nevertheless;
 - c. There are endless innocuous circumstances in which people occupy land and building without needing to know what is stored in them. Indeed the first element of security for items which are attractive theft targets is to minimise knowledge of their whereabouts;
 - d. Employees, including household cleaning staff, temporary visitors such as nurses and tradespeople, are often trusted to occupy land and buildings with no reason to have knowledge of firearms that may be present;
 - e. The defence built into the provision is almost useless. Section 66 deems possession without a defence in most of the situations of innocuous or unknowing and shared occupancy of land or building where there are also firearms or “explosives”. Note that the definition of “explosive” includes “ammunition of all descriptions”. Few New Zealand farmhouses do not contain ammunition, often forgotten in coat pockets or drawers. Because ammunition is rarely dangerous without a firearm, it is highly unlikely that hundreds of thousands of New Zealanders will come to support a provision which stupidly treats it as problematic. There is far more likelihood of danger from the family motor mower fuel, or child access to the keys to the car;
 - f. Every year explosives are found in urban areas like Wellington and Paraparaumu that were left behind from World War II or other defence preparations. While these

⁴ *New Zealand Police v Krause* [2016] NZDC 16091 at [15].

ammunitions are treated carefully, there is no need for those possessing the land to be putatively criminal.

24. With breath-taking indifference to the “by-catch” last year’s law change casually criminalised hundreds of thousands of New Zealanders. This FPO Bill will compound the incoherence of the law, and its damage to public confidence and support. Your committee should instead take this Parliamentary slot and opportunity to fix the egregious section 66. We suggest that the law focus on use and control of firearms, instead of possession.
25. The FPO Bill sets out on that path, but it simply does not fit with what it attempts to build on, after last year’s bad legislative work.

Interaction with registration

26. In the House on 3 December 2020, the Minister for Police in response to a question about the firearms register stated, “I don’t expect criminals to do anything lawful”.⁵
27. The firearms register, as introduced in the Arms Legislation Act 2020, wastes taxpayers money while providing no benefit to community safety. Only LFOs will register their firearms. Therefore, the register will never be complete and accurate enough for Police to rely upon.
28. Few LFOs are likely to be subject to FPOs. The target subjects of FPOs are unlikely to have received a licence in the first place or would have had it revoked. The new section 24A of the Arms Act 1983 prohibits the grant of firearms licence to a person who is a member of, or has a close affiliation with, a gang or organised criminal group.
29. Probably the most common way for the Police to know that someone subject to a FPO has access to a firearm is if they are in the presence or house of a LFO. The Police will presumably know about the license, and the presence of firearms. The person subject to the FPO will often, or usually not know, unless they enquire. The LFO may have good reasons for not wanting to tell that person, or anyone.
30. The exposure for a person subject to a FPO will:
 - a. Not be readily mitigated by information to the person who can best warn them not to be in the house;
 - b. Prevent them from normal family or whanau fraternisation, where the family or whanau have LFO’s among them;
 - c. Mean that there may be less arrest or other legal risk of spending spare time in a gang house, than with law-abiding family and friends;
 - d. Send the message that people who have been deemed fit and proper to hold a firearms licence are not fit enough or proper enough to keep their firearms locked away; and
 - e. A ban of this kind should relate to actual access the firearm. LFOs must observe security protocols for storage of their firearms to prevent unauthorised access.

⁵ (3 December 2020) 748 NZPD https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD_20201203_20201203

31. Rebuilding community trust around firearms possession and use will not come from driving a wedge between those who are licensed and those who are not. COLFO recognises that in some communities in NZ much firearm use is mostly unlicensed but not for criminal intent. This is more common in rural communities. Bringing fit and proper people within the licensing regime ensures better safety training and community control. If the consequence is greater likelihood of coming to Police attention and the potential for FPO issues, this Bill could make it harder to encourage parts of the community who currently operate in the grey area to become licensed.

Search and Seizure powers

32. The Explanatory Note for this Bill states “FPOs provide new powers for Police to search the persons, vehicles, and premises of specified serious and violent gang members for firearms at any time.” There is no corresponding clause in the Bill.
33. The Arms Legislation Act 2020 significantly expanded the ability of Police to stop, search and seize firearms. It also granted significant ability to make firearms regulation without the scrutiny of Parliament. Our supporters are concerned about any further such powers for Police.
34. The Explanatory Note is therefore worrying. COLFO members worry that this signifies a new derogation from right to be free from unreasonable search and seizure. We are particularly anxious to know how the existence of an FPO impacts on LFOs who, have in their home or premises a person a person subject to a FPO. Does the Bill sponsor contemplate a power to seize the firearms of LFOs who have properly secured their firearms and allowed the person subject to the FPO no access? Would that happen if they had no knowledge of the FPO?
35. What obligations and rights will govern information about FPO issues, and who remains subject to them?
36. What is the situation for the person subject to the FPO who has no knowledge that the home or premise contains firearms, or that the owner or occupier is an LFO? These questions are not theoretical and remote. They will be everyday problems if the Bill proceeds.
37. Similar problems arise under the possession prohibitions of the law as it now stands. They should be resolved before the situation is made more confusing and more likely to demand Police attention with an FPO regime.

Resourcing

38. Police have previously taken funding earmarked for Arms Act administration and used it for other priorities.⁶ Despite, as the Royal Commission Report found, Police having not spent enough on Arms Administration.⁷

⁶ New Zealand Police Annual Report 2017/18 at 50.

⁷ Ko to tatou kaina tenei, Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 (2020) at 276.

39. The Police Consultation Document on FPOs stated that, “if a Firearms Prohibition Order regime was established, it would need effective monitoring and enforcement to ensure compliance.” Furthermore, “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.”⁸
40. There is currently a mass backlog in processing licences with many people waiting months for processing of their applications and renewals. COLFO are concerned that FPO administration costs could come at the expense of other Arms Act administration and used by Police to raise licensing fees for LFOs. That would be another cost imposed on the law-abiding for expense incurred for the ‘benefit’ of the non-law abiding.
41. Since 2019 our supporters have been reporting negative experiences of interacting with Police. For example, over Christmas, we were told of a person searched by Police in the early hours of the morning after conducting controlled target shooting that had the active consent of everyone else in the area. This is while there were multiple incidents of drive-by shootings, a dairy owner shot in the leg and increased arming of Police officers in response to these incidences.
42. Police should not be focused on targeting criminal behaviour not dealing with administrative matters for LFOs.

Government’s position

43. In November 2019, the Prime Minister and former Minister for Police stated that consultation on FPOs would provide Police with more powers to help keep guns out of the hands of criminals, gangs and high risk offenders.
44. We were encouraged that the Government was finally turning their mind to fighting the illegal use of firearms rather than targeting law abiding citizens with dummy laws that do not make the community any safer.
45. Unfortunately, despite the time volunteered by many in submitting neither the Police nor Government have reported feedback on this consultation. Now they apparently state that they will not support FPOs. We think that is prudent in relation to the current Bill and the mess left in relation to possession by the law changes from last year. But that does not excuse the absence of feedback on the consultation last year, and the absence of announcement of urgent improvement of the existing law.

Conclusion

46. Whilst COLFO supporters have differing views on the likely practical consequences of FPOs, we are united in our concern that firearm legislation and regulation should not be made any

⁸ *Firearms Prohibition Orders* (New Zealand Police, Public Consultation Document, November 2019) at 28.

more complex or inaccessible. We would like to see all fit and proper persons using a firearm obtain a licence and operating within the law. The sloppy firearms reform of the last two years focused more on political headlines. Law drafting in slogans takes us further from law that will rebuild a respectful community collaboration between the firearms users and the Police, to achieve some of the of the claimed objectives.