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Report of the

# ***ATTORNEY-GENERAL***

under the New Zealand Bill of Rights Act 1990  
on the Arms (Firearms Prohibition Orders)  
Amendment Bill (No 2)

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Presented to the House of Representatives pursuant to  
Section 7 of the New Zealand Bill of Rights Act 1990  
and Standing Order 265 of the Standing Orders of the  
House of Representatives

1. I have considered whether the Arms (Firearms Prohibition Orders) Amendment Bill (No 2) ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. I have concluded the Bill limits s 17 (freedom of association) and s 25(c) (right to be presumed innocent) of the Bill of Rights Act and that those limits cannot be justified under s 5 of that Act.
3. As required by s 7 of the Bill of Rights Act and Standing Order 265, I draw this to the attention of the House of Representatives.

### **The Bill**

4. The Bill amends the Arms Act 1983 ('the principal Act') to allow the Commissioner of Police ('the Commissioner') to make a Firearms Prohibition Order ('a FPO') against a person if:
  - a. in the opinion of the Commissioner, it is necessary, in the public interest, to ensure that the person does not have possession of a firearm;
  - b. the person is a member of a gang;<sup>1</sup> and
  - c. the person has, within the past 10 years, been convicted of:
    - i. an offence under the principal Act;
    - ii. an offence under the Domestic Violence Act 1995; or
    - iii. a serious violent offence.<sup>2</sup>
5. There are a number of offences associated with a FPO being imposed. In particular, a person who is subject to a FPO must not:
  - a. acquire, possess, or use a firearm or part;
  - b. acquire or possess ammunition;
  - c. reside at premises where firearms, parts or ammunition are present; or
  - d. attend the place of business of a licensed dealer, a shooting range, or a firearms club.
6. Further, it is an offence for any other person to knowingly supply firearms, parts or ammunition to a person who is subject to a FPO.
7. The Bill also provides that a firearms licence cannot be granted to a person who, in the opinion of a commissioned officer of Police, is a member of a gang. Further, a commissioned officer of Police may revoke a firearms licence if its holder is, or is seeking to become, a member of a gang.

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<sup>1</sup> As defined in s 4 of the Prohibition of Gang Insignia in Government Premises Act 2013.

<sup>2</sup> As defined in s 86A of the Sentencing Act 2002.

### **Inconsistency with s 17 — Right to freedom of association**

8. 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.
9. 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.
10. The Bill treats gang members differently from other persons, namely by specifying that:
  - a. a firearms licence must not be given to a gang member and allowing an existing firearms licence held by a gang member or a person seeking to join a gang to be revoked; and
  - b. a person must be a gang member to be eligible for a FPO.
11. The differential treatment means that the Bill *prima facie* engages s 17 of the Bill of Rights Act.

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

12. Where a provision appears 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 demonstrably justified in a free and democratic society under s 5 of the Bill of Rights Act. The s 5 inquiry may be approached as follows:<sup>3</sup>
  - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - b. if so, then:
    - i. is the limit rationally connected with the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?

#### *Is the objective sufficiently important?*

13. The express objective of the Bill is to make sure the most dangerous gang members do not have access to firearms. Clearly this public safety objective is sufficiently important to warrant some limitation on the freedom of association.

#### *Is there a rational connection between the limit and the objective?*

14. There is a clear rational connection in respect of the requirement not to allow, or the ability to revoke, a firearms licence for a gang member. Gang membership has

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<sup>3</sup> *Hansen v R* [2007] NZSC 7 at [123].

repeatedly been found to pose an appreciable risk of firearms coming into the possession of another person who does not meet the ‘fit and proper person’ test to obtain a firearms licence.<sup>4</sup>

15. The rational connection in respect of the FPO regime is less clear, however, as it is already an offence under the principal Act to possess a firearm without a licence. The primary effect of the Bill as drafted is, effectively, to provide for more severe penalties for unlawful possession of firearms and to place restrictions on where a gang member can be without becoming liable on conviction to those penalties.
16. Reliance on law enforcement efforts to suppress gangs has been largely unsuccessful, both in New Zealand and internationally.<sup>5</sup> FPO regimes have, however, been introduced in other jurisdictions, including Australia, which may help to shed some light on the efficacy of such regimes. The New South Wales Ombudsman, for example, though noting it was too early to draw specific conclusions about the effectiveness of FPOs, highlighted that firearms, parts or ammunition were found in only two percent of the approximately 1,343 uses of the search powers under the regime.<sup>6</sup>
17. However, to the extent the overseas’ experience indicates the potential for even a marginal benefit to the policy of reducing the risk of unlawful firearms, this must be taken into account. I therefore conclude there may be a rational connection to a sufficiently important objective, albeit not a strong one.

*Is the impairment on the right greater than reasonably necessary?*

18. The question of whether the right is impaired no more than reasonably necessary involves consideration of whether the objective might be sufficiently achieved by another method involving less cost to the freedom of association.<sup>7</sup>
19. Making gang membership a sole ground for declining or revoking a firearms licence might be seen to limit s 17 more than the status quo, where gang membership is but one factor to consider. However, Parliament is entitled to appropriate latitude to achieve its objectives.<sup>8</sup> Moreover, as noted above, the Bill largely confirms an accepted position in case law that gang members holding firearms licences may be seen to pose an undue risk to the community.<sup>9</sup> Further, gang members without firearms licences who wish to engage in responsible firearms use under the responsible supervision of a licence holder, may continue to do so (provided they are not subject to a FPO).<sup>10</sup>
20. In respect of FPOs’ impact on the freedom of association, there are some relevant safeguards included in the Bill that may help to lessen the severity of the regime and, thus, the cost to s 17, including:

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<sup>4</sup> See, for example *Fewtrell v Police* [1997] 1 NZLR 444; *Innes v Police* [2016] NZDC 4538.

<sup>5</sup> Office of the Prime Minister’s Chief Science Advisor (2018), pg. 22.

<sup>6</sup> New South Wales Ombudsman, ‘Review of police use of the firearms prohibition order search powers: Section 74A of the Firearms Act 1996’ (2016) pg. 34.

<sup>7</sup> *Hansen* at [126] per Tipping J.

<sup>8</sup> *Ibid.*

<sup>9</sup> See, for example, *Fewtrell* and *Innes*.

<sup>10</sup> Arms Act 1983, s 22 refers.

- a. the need for the Commissioner to be of the opinion that it is necessary, in the public interest, to make a FPO;
  - b. that the Commissioner is not able to delegate the ability to make a FPO;
  - c. the ability to appeal the Commissioner's decision to the District Court under s 62 of the principal Act; and
  - d. that FPOs are revocable at any time.
21. Conversely, there are factors that suggest the impairment on the right of freedom of association is more than reasonably necessary to achieve the objective, including:
- a. that while the Commissioner may revoke a FPO, they are potentially indefinite as there is no mandatory statutory expiry period for the order;
  - b. the lack of an explicit link in the FPO criteria between a person's gang membership and the relevant offence for which they were convicted;<sup>11</sup>
  - c. disproportionately severe offences and penalties for breach of a FPO;
  - d. the restrictions on where a person subject to a FPO may reside and be present at;
  - e. that a FPO takes effect from the point it is served and will apply notwithstanding that an appeal may be pending.<sup>12</sup>
22. I consider the objectives of the Bill could still be met were the factors outlined above addressed. Specifically, the inclusion of a time limit for a FPO, proportionate penalty levels, and judicial scrutiny prior to the imposition of the order would help to impair s 17 less. I am not aware of any evidence such changes would imperil the functioning of the regime.
23. Moreover, the *Inquiry into the Illegal Possession of Firearms in New Zealand* recommended a suite of actions that could help to address the issue of unlawful possession and use of firearms that would come at less or no cost to the freedom of association.<sup>13</sup>
24. Given the availability of alternatives that could still achieve the objective, I conclude the impairment on the freedom of association is more than reasonably necessary.

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

25. In considering due proportionality, the balance is between social advantage and harm to the right.<sup>14</sup>

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<sup>11</sup> See, for example, *Dawson v Delaware* 503 US 153 (1992) at [165 – 166]. Similar issues have arisen in New Zealand in the context of proposals to punish gang members more severely for an offence.

<sup>12</sup> Arms Act 1983, ss 62 and 72A refer.

<sup>13</sup> House of Representatives, *Inquiry into the Illegal Possession of Firearms in New Zealand: Report of the Law and Order Committee* (2017).

<sup>14</sup> *Ibid* at [134].

26. For the reasons outlined above, I believe the limit on s 17 in respect of gang members' ability to obtain or retain firearms licences is in due proportion to the importance of the Bill's objective.
27. However, I do not consider the limit on s 17 imposed by the FPO regime to be in due proportion to the importance of that objective.
28. The freedom of association is an important building block of a free and democratic society. It may be more justifiable to place limits on s 17 in the context of gangs.
29. While there is evidence indicating that unlawful firearms possession is an integral aspect of gang culture in New Zealand,<sup>15</sup> it is unclear that the scale of the issue is such that it would warrant the severity of the FPO regime as proposed by the Bill. In the absence of clear evidence of social advantage resulting from the limit and efforts to impair the right no more than reasonably necessary, I am not of the view that the limit on freedom of association imposed by the FPO regime can be viewed as proportionate.

*Conclusion on s 17 of the Bill of Rights Act*

30. For the reasons above, I consider the Bill appears to be inconsistent with the freedom of association affirmed by s 17 of the Bill of Rights Act.

**Inconsistency with s 25(c) — Right to be presumed innocent**

31. 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.
32. 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.
33. Section 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 of that firearm.<sup>16</sup> In this respect, therefore, new s 59B in the Bill creates a reverse onus offence.
34. 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.

<sup>15</sup> See, for example, *Inquiry into the Illegal Possession of Firearms in New Zealand*, pg. 13 – 14.

<sup>16</sup> See, for example, *R v Coultas* [2009] NZCA 71; *R v McKeown* (1988) 3 CRNZ 438 .

*Is the limit rationally connected to an important objective?*

35. It is arguable whether the limit on s 25(c) is rationally connected to the overarching objective of the Bill. It is, after all, already an offence under the principal Act to possess a firearm without a licence.
36. However, the objective of the offence introduced by s 59B is, logically, to enforce compliance with a FPO.<sup>17</sup> 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. To the extent that this lends effectiveness to the regime, the limit may be seen as rationally connected to a sufficiently important objective.

*Is the limit no more than reasonably necessary and in due proportion to the objective?*

37. In my view, the right to be presumed innocent is impaired more than reasonably necessary to achieve the objective. The limit is also not in due proportion to the importance of the objective.
38. The offences in the Bill are "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>18</sup>
39. A reverse onus offence is also likely to be of less concern where the penalty is relatively low and therefore has a less significant impact on the defendant. However, the maximum penalties of up to five or 14 years' imprisonment are severe and appear to be highly disproportionate to similar offences; for example, a breach of an extended supervision order carries a maximum of two years.<sup>19</sup> The maximum penalty of 14 years' imprisonment is equivalent with, for example, sexual conduct with a child under 12,<sup>20</sup> aggravated wounding or injury,<sup>21</sup> or attempted murder.<sup>22</sup>
40. Lastly, I am not aware of any evidence to persuade me that the objective could not be served by a lesser impairment on the right to be presumed innocent, such as an evidential onus on the defendant instead of a persuasive burden.<sup>23</sup> An evidential burden would give rise to less risk that an innocent person may be convicted and imprisoned, while still requiring the defendant to adduce evidence calling into question whether or not they indeed possessed the firearm or part.<sup>24</sup>
41. As noted above, while the public safety objective is sufficiently important to warrant some limit on the right, there are reasonable alternatives available that would place a person in less jeopardy of wrongful conviction. The Bill appears to create just such a risk and, further, carries significant penalties as a consequence.

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<sup>17</sup> Note that the new s 59B proposed by the Bill has no relation to the extant s 59B contained in the principal Act.

<sup>18</sup> *Civil Aviation Authority v MacKenzie* [1983] NZLR 78

<sup>19</sup> Parole Act 2002, s 107T refers.

<sup>20</sup> Crimes Act 1961, s 132.

<sup>21</sup> Crimes Act 1961, s 191.

<sup>22</sup> Crimes Act 1961, s 173.

<sup>23</sup> A persuasive onus requires the defendant to affirmatively prove a specified standard (here the balance of probabilities) of a position. An evidential onus, meanwhile, requires the accused to satisfy the judge that there is sufficient evidence before the court to raise a triable issue; see *Hansen* at [96].

<sup>24</sup> See, for example, *Hansen* at [126 – 131].

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

42. For the reasons given above, I conclude that the Bill appears to be inconsistent with the right to be presumed innocent affirmed in s 25(c) of the Bill of Rights Act.

**Consideration of consistency with other sections of the Bill of Rights Act**

43. I also considered the consistency of the Bill with s 21 of the Bill of Rights Act, which affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise.
44. The right to be secure against unreasonable search or seizure protects a number of values including personal privacy, dignity, and property.<sup>25</sup>
45. The explanatory note to the Bill states that the Bill provides for new powers for Police to search persons, vehicles and premises of specified serious and violent gang members for firearms at any time.
46. Warrantless searches without a requirement for reasonable cause would constitute a significant intrusion on the rights affirmed by s 21 of the Bill of Rights Act. It is difficult to see how such a power could be justified.
47. However, no provision in the Bill appears to create such powers. In the absence of bespoke search provisions, the Search and Surveillance Act 2012 would apply. Specifically, s 18 of the Search and Surveillance Act authorises warrantless search of a person, thing, place or vehicle where a constable has reasonable grounds to suspect a person is in breach of the principal Act.
48. On this basis, I consider the Bill appears to be consistent with s 21 of the Bill of Rights Act.

**Conclusion**

49. For the above reasons, I have concluded the Bill appears to be inconsistent with s 17 and s 25(c) of the Bill of Rights Act and these inconsistencies cannot be justified under s 5 of that Act.

Hon David Parker

**Attorney-General**

*March 2020*

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<sup>25</sup> See, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.