

## **Submission to Police on Firearms Prohibition Orders**

This is a summary of our view on FPOs:

We believe that there is currently a gap in the law in that anybody can use a firearm under the supervision of a Licensed Firearms Owner (LFO). We believe that some people should be restricted (via an FPO) from using firearms under supervision. FPOs should also limit the ability of the individual to visit a firearms dealer, gun club or shooting range. Restricting the subject of an FPO from visiting homes or workplaces where firearms may be stored could increase social isolation and work against rehabilitation or increase the likelihood of further domestic violence.

### **FPOs and Illegal Firearms**

There appears to be no basis on which FPOs will have an impact on those people who may use and access illegal firearms. Those in possession of illegal firearms are already subject to substantial penalties and it is not clear why or how FPOs would limit their already illegal and heavily penalised activities. Where Police do not know of illegal firearms, they will not know an FPO is being breached. Where Police do know of illegal firearms, they already have sufficient legal avenues to enable them to search for and confiscate illegal firearms. We expect that Police already follow up on intelligence about illegal firearms.

### **FPOs and Legal Firearms Owners and legal firearms**

The law currently permits a Licensed Firearms Owner to allow any person to use a firearm under their supervision. If specific individuals are prohibited from the use of firearms, responsibilities should also be put on LFOs to not allow anyone subject to an FPO to use their firearms.

### **Appeal Rights**

We are concerned that the discussion document makes no mention of appeal rights for those subject to FPOs and there is no discussion of oversight or monitoring of the implementation of FPOs. At a minimum, we believe an appropriate body (the Ombudsman? IPCA?) should report annually on their implementation by the Police. The entire policy should also be subject to a statutory review after 5 years.

This submission follows the questions set out in the submission form but is in a separate document as the form does not enable the use of paragraphs or footnotes. The form also forces yes/no responses, which are inappropriate, given the broad nature of the consultation.

The form isolates each element of the FPO design. It is also important to consider how all the elements of the FPO design interact: our responses on some specific issues may be different if other elements of the FPO are set up in specific ways.

This submission is made by Philippa Yasbek on behalf of Gun Control NZ [info@guncontrol.nz](mailto:info@guncontrol.nz)

## **1. Do you agree that the criminal use of firearms is a problem in New Zealand? Why / Why not?**

Yes. We define "criminal use" as situations where the use of a firearm is a crime. We do not define it as the use of firearms by those with a criminal record.

Criminal use of firearms is a problem in New Zealand. The Stuff Homicide report<sup>1</sup> has some of the best data on the issue of who uses firearms for criminal purposes, albeit limited to homicides. The Report covers all homicides from January 2004 until March 2019. Perpetrators can be broken down into three groups:

- Licenced Firearms Owners perpetrated at least 12% of homicides for which the killer's status was known. (It was not possible to identify the licence status of the perpetrator in 18% of homicides).
- Those who are unlicensed and unconnected to criminal gangs were responsible for 40-60% of all homicides.
- Those affiliated with gangs (this includes those who committed a crime alongside a gang member) or the criminal underworld made up about 30% of all homicides.<sup>2</sup>

The criminal use of firearms by the largest group, those without licences or connections to criminal gangs is most relevant for FPOs. Some of this misuse could potentially be prevented by the denial of access to legally owned firearms.

There are many examples of homicides where the perpetrator didn't hold a firearms license but had access to guns through a family member or friend who was a license holder. For example, Quinn Patterson<sup>3</sup> murdered two strangers in Northland. Patterson was rejected for a firearms license, however Michael Hayes, an LFO had lent Patterson a number of weapons (we note that lending firearms to someone without a licence is already a crime).

The perpetrator of the Raurimu massacre, Stephen Anderson, had had his firearms licence revoked but Police were not able to revoke his father Neville's licence. The perpetrator lived at home, gained access to his father's firearms and used his father's weapon in the massacre<sup>4</sup>.

These examples reveal a difficulty with the current FPO proposal. Neither of the killers would have been deterred by an FPO. The responsibility for their access to firearms lay with the LFOs: Hayes and the father of the Raurimu killer. LFOs are already subject to penalties for permitting access to firearms without being present to supervise the user. The obvious gap in the law is the absence of any limits on those who can use a firearm when supervised by an LFO.

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

Somewhat

The document defines the problem statement as: people who have a history of serious violent offending, firearms offending, or breaches of Protection Orders are able to access and misuse firearms held by licenced firearms owners.

The problem statement is framed in terms of preventing the subject of the order from being near legally held firearms. There should be an explicit acknowledgement that FPOs are unlikely to limit persons from being in the vicinity of illegal firearms. There are already strong penalties for having illegal firearms, so FPOs are unlikely to have much impact here. The discussion document goes on to conflate legally and illegally held firearms.

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<sup>1</sup> <https://interactives.stuff.co.nz/2019/the-homicide-report/index.html>

<sup>2</sup> Breakdowns from Stuff Homicide Report, reference above. Ranges come from Stuff's inability to determine the licence status of perpetrators in 18% of cases.

<sup>3</sup> [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=12074443](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12074443)

<sup>4</sup> [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11788645](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11788645)

**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)?**

Not fully.

The FPO regime would aim to reduce risk of harm caused by the criminal use of legally owned firearms.

It is not clear how effective an FPO regime would be in achieving this aim.

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

Possibly. We can't indicate support until we know what an FPO regime would look like.

We agree that it would be ideal if those with a propensity to misuse of firearms were unable to directly access or use firearms under supervision as well as not being permitted to legally own firearms. There is also concern about FPOs contributing to social isolation of men in rural communities where use of firearms is common. This may militate against rehabilitation for ex-prisoners and domestic violence perpetrators.

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

Possibly. But practical reasoning and the Australian evidence suggests there are very limited circumstances in which it would be effective.

The report of the NSW Ombudsman suggests that even a widely drawn FPO giving Police wider powers is not effective in deterring criminals from contact with firearms. FPOs could have an impact on people who do not hold a firearms licence themselves but who access firearms through supervision by LFOs. But the effectiveness of FPOs will depend on a number of practical and human rights issues that need to be addressed.

We struggled to come up with specific examples of where an FPO might have changed outcomes in NZ cases. For example, an FPO may have prevented the Raurimu massacre, if the father of the perpetrator had responded to it by removing his own (ie the father's) firearms from the home. The perpetrator used his father's guns. The father might, however have chosen to exclude his son from their joint home, which seems unlikely to have prevented negative outcomes.

FPOs are unlikely to have an effect on the use of firearms by persons affiliated to gangs. They are already denied licensed firearms owner status and so any firearms in their possession are held illegally. Police already have the right to act in such cases, and they already carry the risk of substantial penalties.

**6. Is using previous convictions an effective basis for targeting Firearms Prohibition Orders to high-risk people?**

No.

Using previous convictions ignores the potential for rehabilitation.

There is a substantial literature on assessing the risk of future violent offending, which shows that conviction history is only one salient factor. Actuarial risk models have been developed to predict the risk of re-offending in the general prison population. "Prediction of violent re-offending has been improved by incorporating offence relevant variables such as the following:

- a history of aggressive interpersonal behaviour
- antisocial or psychopathic personality disorder
- offences involving use of weapons
- situational proximity or access to potential victims."<sup>5</sup>

In our view, targeting should be based on the current risk assessment systems used in the New Zealand justice sector to assess recidivism risks. However, we also note that actuarial risk assessment models run the risk of entrenching pre-existing biases.

We note that conviction histories in particular can simply perpetuate pre-existing biases. Māori are arrested, charged, and convicted at higher rates than non-Māori due to systemic racism. Māori now comprise around 16 percent of the general population but make up:

- 38 percent of people proceeded against by police
- 42 percent of adults convicted
- 57 percent of adults sentenced to prison.<sup>6</sup>

This bias is likely to be replicated in the issuance of FPOs.

As discussed under section 7, family violence has high rates of recidivism and is also strongly correlated with other forms of violence, including violent political extremism. Family violence does not always result in convictions. Sometimes Protection Orders are the only record of a history of family violence. Currently, the subject of a Protection Order is immediately required to surrender all their firearms to Police. FPOs could be issued alongside Protection Orders.

**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

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<sup>5</sup> Strategy, Policy and Planning Department of Corrections New Zealand *What Works Now? A review and update of research evidence relevant to offender rehabilitation practices within the Department of Corrections* December 2009 available at [https://www.corrections.govt.nz/data/assets/pdf\\_file/0004/12775/What\\_Works\\_Now\\_Final\\_December\\_2009.pdf](https://www.corrections.govt.nz/data/assets/pdf_file/0004/12775/What_Works_Now_Final_December_2009.pdf)

<sup>6</sup> He Waka Roimata Transforming Our Criminal Justice System First report of Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group. Available at [https://www.safeandeffectivejustice.govt.nz/assets/Uploads/7efb12cccb/teuepureport\\_hewakaraimata2.pdf](https://www.safeandeffectivejustice.govt.nz/assets/Uploads/7efb12cccb/teuepureport_hewakaraimata2.pdf)

- **Option 3** – Convictions for offending where a firearm was used, for serious violence offences, or for breaching a Protection Order

There is a strong research literature on risk factors for violent re-offending, which needs to be drawn on in order to address this question.

Nadesu 2008 found that “It is generally accepted, based on a wide range of studies, that repeat offenders do not “specialise” in any one type of offence: that is, the vast majority of persistent offenders have criminal histories featuring a sequence of convictions for offences across the criminal code. For example, many “violent offenders” have histories in which convictions for violence are interspersed with significant numbers of convictions for traffic offences, property offences, drug use, and so on.”<sup>7</sup> Therefore, the use or absence of firearms in previous offences (Option 1) is unlikely to be a strong predictor of future violent offending with firearms.

A history of family violence is a predictor of future such offences and could be a strong factor supporting issuing of an FPO (Option 3). Evidence for this is set out in the next few paragraphs.

Family violence has a high recidivism rate. Of concern “is the relatively high proportion of “family offenders” (mainly those convicted of domestic violence) who go on to commit further such offences”<sup>8</sup>. The Family Violence Death Review Committee data shows that one in ten family violence deaths involves a firearm<sup>9</sup>.

The press release announcing consultation on FPOs referred to targeting people who are “part of an extremist ideological group”, but the discussion document makes absolutely no attempt to discuss violence that is motivated by extremist political views. Researchers have found that those who perpetrate violent terrorist acts, very frequently have a history of family violence. In *The Age of Lone Wolf Terrorism*, the authors observe “a noteworthy connection between lone wolf attacks and abuse of women ...”<sup>10</sup> This observation is backed up by other case studies<sup>11</sup>. Another author notes that the terror attacks on London Bridge, Manchester, Westminster, the Charlie Hebdo offices, the Finsbury Park Mosque attack and multiple US shootings were all carried out by men with histories of family violence<sup>12</sup>.

The link between violent extremism and family violence cannot, however reasonably be used for targeting family violence perpetrators with FPOs, as extremism, and even more so domestic terrorism, is rare and family violence is unfortunately common. Where an FPO is being considered on the basis of other indicators, however a previous history of family violence Protection Orders or callouts to the home, should be considered as a strong factor supporting the FPO.

Animal cruelty offences are subject to low penalties but they are strong indicators of other risk factors for violent offending. Avoidance of cruelty to animals is also an important aspect of safe

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<sup>7</sup> Nadesu, A *Reconviction patterns of released prisoners: A 48-months follow-up analysis* Department of Corrections March 2008 available at

[https://www.corrections.govt.nz/\\_data/assets/pdf\\_file/0014/10706/Recidivism\\_Report2008.pdf](https://www.corrections.govt.nz/_data/assets/pdf_file/0014/10706/Recidivism_Report2008.pdf)

<sup>8</sup> Ibid

<sup>9</sup> Family Violence Death Review Committee. 2017. Fifth Report Data: January 2009 to December 2015. Wellington: Family Violence Death Review Committee.

<sup>10</sup> Hamm, M., & Spaaij, R. (2017). *The age of lone wolf terrorism*. New York: Columbia University Press

<sup>11</sup> McCulloch, J., Walklate, S., Maher, J., Fitz-Gibbon, K., & McGowan, J. (2019). “Lone Wolf Terrorism Through a Gendered Lens: Men Turning Violent or Violent Men Behaving Violently?” *Critical Criminology* (2019) 27: 437.

<sup>12</sup> Smith, J *Home Grown: How Domestic Violence Turns Men Into Terrorists* 2019 Riverrun

hunting behaviour. Therefore these offences should also be considered as factors supporting issue of an FPO.

**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?**

Yes.

Proxies for antisocial or psychopathic personality disorder (a predictor of future violent offending) such as animal cruelty should be included.

**9. What option do you think is best for the number of previous convictions that would qualify a person for a Firearms Prohibition Order?**

The number of previous convictions is not a useful measure. A tick box approach doesn't consider the scale or nature of convictions. In addition, the number of convictions can be an artefact of practices such as representative charges.

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

No.

The use or absence of firearms in previous offences is unlikely to be a very strong predictor of future violent offending with firearms.

**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?**

Yes. See answers to questions 6, 7 and 8.

**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**

An FPO should be issued as part of the sentence for a qualifying conviction (which matches option 1 or when a Protection Order is issued). However, we wouldn't necessarily want to impose arbitrary time limits on what could be considered as a risk factor in the overall decision on whether or not to issue an FPO.

**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)?**

An FPO should only be issued as part of the sentence for a qualifying conviction (or when a Protection Order is issued). So in that sense there would be no retrospective application. However, we believe that the decision maker should be allowed to consider previous convictions in judging the likely risk posed by an offender.

**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?**

No.

FPOs will most affect people who access firearms through LFOs. See the response to questions 2 and 5. Automatic or routine imposition of FPOs is not likely to contribute to the aims, or to be in keeping with the values, of the Police Māori strategy Te Huringa o Te Tai.

Many Māori men are involved in hunting or have whānau who hunt. Subjecting these men to an FPO is likely to encourage social isolation as they will be unable to visit the homes of whanau and it will limit healthy activity such as hunting. Where men have just completed prison sentences, FPOs may be counter-productive. Ex-prisoners are at risk of social isolation and the social value of participation in activities such as hunting in communities where hunting is widely practiced should be noted.

It is claimed by Police, and other evidence supports this claim, that many gangs have caches of illegal firearms. Possession of these is already subject to penalties – where Police are able to confiscate them. It appears unlikely that FPOs would contribute to practical and effective policing of gangs and their possession of illegal firearms.

We have little knowledge of large scale organised crime and our comments do not relate to those involved in such activity. We note that there is a risk that gangs are conflated with organised crime. Not all organised crime involves gangs. Not all gangs engage in organised crime.

**15. Should the Government consider applying other criteria to qualify a person for a Firearms Prohibition Order? If so, what criteria should be considered?**

The primary criteria for deciding whether or not to issue an FPO (once a candidate has committed a qualifying offence, or was the subject of a Protection Order) is the risk of future violent offending using a firearm. This risk assessment should be based on an assessment of the individual along the lines of what is already done when re-offending risks are considered by the Justice system (such as in sentencing reports, Parole Board deliberations etc), but with a greater weighting on history of family violence.

**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.**

The conditions in Option 1 mostly re-state restrictions that already exist for any persons, the majority of the New Zealand population, who do not have a firearms licence. Therefore these conditions cannot function as additional restrictions.

Option 2 imposes additional restrictions

The main new restriction that should be imposed is on using firearms directly under the supervision of a LFO. This is a reasonable restriction and is unlikely to create incidental hardships for the subject of the Order (such as restricting their occupational choices or their ability to see family and friends).

The conditions in **b.** (not visiting places where there are firearms such as gun clubs and gun dealers) also seem reasonable and could be applied to all subjects of an FPO without imposing onerous restrictions.

The conditions in **a.** (not visiting or residing at a place where there are firearms, such as somebody’s home or workplace) raise a number of significant issues. We have grouped these difficulties into:

- The difficulty of knowing where firearms are stored
- The restrictions on the subject’s ability to work or be supported by family, friends or whānau
- Human rights implications (related to the above)

Even if somebody is very willing to comply with the conditions of their FPO, it may be difficult for them to do so because it is very hard for anyone, except the Police and the respective LFOs to know where firearms are stored. LFOs are generally unwilling to tell people where their firearms are stored and even to disclose that they have a firearms licence. This is for security reasons as well as privacy. Unless an LFO is willing to disclose to everyone that they have firearms at home, the subject of an FPO may unknowingly enter a home where firearms are present. There may also be a reluctance on the part of someone subject to an FPO to reveal this fact to other people.

Consider a six year old child’s birthday party. The parents are LFOs and have a firearms safe in their home that is securely locked. They invited all the children (and by extension their parents) from their



child's class to the birthday party. The parents are unwilling to reveal that there are firearms in the home because this could make them a target for a burglary. One of the children's parents is the subject of an FPO but is unwilling to reveal this because they have a fresh start and want to avoid the stigma of their past actions. The subject of the FPO breaches the FPO when they walk into the house to collect their child from the party.

While we are opposed to any prohibition on entering homes or workplaces where firearms are stored, if this were introduced, it would need a qualification that the subject of the order knew, or would reasonably have known, that there were firearms on the premises.

The more serious issue is the effect that this prohibition would have on some people's ability to live an ordinary life, particularly those in rural areas. A condition of this sort would effectively prohibit anyone subject to an FPO from working in the agricultural sector because almost every farm has firearms. It may also prevent someone from being able to live with or visit their family, friends and whanau, particularly if they are from a rural community where firearms ownership is very common. As is pointed out in the discussion document, this is likely to also have a disproportionate impact on Māori. Effectively banning someone from sectors of the economy and associating with family members will impede their rehabilitation and may even perversely increase the likelihood of them committing further crimes.

There does, however appear to be a case for restricting someone with an FPO from knowingly living in a house where an LFO stores their firearms. On a practical level, even if appropriately stored, every adult in the household effectively would have access to the firearms because they are likely to know, or to be able to discover, where the keys are kept. However this restriction would also need to be weighed up against rehabilitation objectives.

We also note the significant impingement on the rights to freedom of movement and free assembly that these restrictions would impose.

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

No

**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**

We do not support a lifetime FPO. An individual's circumstances change over time and there should be a reassessment after a certain length of time. We would favour a maximum period of time, rather than a fixed period applied to everyone, because, again, it allows the Order to be tailored to the circumstances and risks of an individual person.

**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**

5-10 years, depending on the nature of the other elements of the FPO design.

**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**

We are absolutely opposed to decisions being made by the Commissioner of Police. It is constitutionally inappropriate for Police to be given a quasi-judicial decision-making function such as this. We would be opposed to any type of FPO if the decision were made by Police. FPOs should be issued as part of the sentencing decision. The conditions of FPOs should also be integrated with other parole conditions.

One option which hasn't been considered is for the Parole Board to make decisions on FPOs as part of the overall package of parole conditions. The Parole Board has the necessary expertise to rationally assess the risk of violent re-offending.

**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**

In our view, Option 1, the current law is sufficient for monitoring and enforcement. Warrantless searches on the basis of a reasonable suspicion seems a low enough standard to enable enforcement.

We note that in NSW, only 2% of searches related to FPOs resulted in firearms, parts or ammunition being found. This suggests that at least in NSW, FPOs are a mere pretext for constant searches of FPO holders without any real connection to firearms risks. If the Police are seeking extensive surveillance powers over those affiliated with criminal gangs, then they should seek these directly and explicitly, without the pretence of reducing harm from the misuse of firearms.

**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**

Option 1, a penalty of less than two year's imprisonment seems most appropriate for breaches of FPOs and would be in line with breaches of other types of orders. More serious breaches of an FPO would be associated with other forms of criminal offending such as unlawful possession of a firearm, which already have higher penalties. Prosecutors could then choose to charge the perpetrator with the offence that carries a higher penalty.

More significantly, we think there should also be penalties for licensed firearms owner, who knowing that a person is subject to an FPO, allows that person to use firearms under their supervision. We believe that it is important for there to be penalties on LFOs because they have much stronger incentives to comply with the law than the subject of an FPO. The LFO is also much more likely (assuming that they are fit and proper) to seek to uphold the law.