

Coversheet: Firearms Prohibition Orders

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|---------------------|---|
| Advising agencies | New Zealand Police |
| Decision sought | To approve in principle the development of a Firearms Prohibition Order regime for New Zealand, based on the proposed model |
| Proposing Ministers | Minister of Police |

Summary: Problem and Proposed Approach

Problem Definition

What problem or opportunity does this proposal seek to address? Why is Government intervention required?

Currently, people whose behaviour and actions represent a high-risk of violence, or reflect an underlying threat or risk of violence, are able to lawfully access and use firearms.

The current controls under the Arms Act 1983 and associated regulations are insufficient to prevent access to firearms for these high-risk individuals. While such individuals may not be regarded as a 'fit and proper' person under the Arms Act 1983 to hold a firearms licence, it does not make it unlawful for them to access firearms, associate with people who are in possession of firearms, or reside at, or visit locations where firearms are held.

While the firearms licensing and regulatory regime has recently been strengthened, the misuse of firearms continues to be a challenge in New Zealand, and the illegal use or possession of firearms is prevalent. For instance,

- from January to April 2020, there were 902 separate proceedings relating to firearm possession or carriage offences, of which 816 resulted in court action
- between 1 March 2019 and 16 March 2020 2,277 firearms were seized, recovered, or collected by Police during routine policing activities.

Summary of Preferred Option or Conclusion (if no preferred option)

How will the agency's preferred approach work to bring about the desired change? Why is this the preferred option? Why is it feasible? Is the preferred approach likely to be reflected in the Cabinet paper?

Firearms Prohibition Orders are a tool that can support public safety and reduce the risk of harm by prohibiting high-risk people – those people whose behaviour and actions represent a high-risk of violence, or reflect an underlying threat or risk of violence – from being around, accessing, or using firearms.

Firearms Prohibition Orders work by setting out:

- the conditions that people subject to a Firearms Prohibition Order are required to meet
- penalties for breaching the imposed conditions.

The table below sets out the proposed model.

| Four Parameters | Proposed Model |
|------------------------|---|
| Eligibility | <ul style="list-style-type: none"> conviction-based orders for firearm-related offences, serious violent offences, criminal harassment, or breaches of protection orders or restraining orders (and imposed as part of sentencing at the discretion of the decision-maker) preventative (civil) orders: where person considered high-risk based on prior behaviour and activity age of eligibility – 16 years and older |
| Conditions | <ul style="list-style-type: none"> one broad condition prohibiting obtaining, purchasing, possessing, accessing, manufacturing or using firearms, parts, magazines, and ammunition standard conditions that can be modified by decision-maker as per the needs of the subject person: <ul style="list-style-type: none"> not associating with people with firearms on or about their person or under their control not residing at premises where there are firearms not visiting locations or premises where there are firearms duration – 10 years, or five years in relation to 16 and 17 year olds |
| Decision-making | <ul style="list-style-type: none"> judicial decision-maker with orders made by either a sentencing court (conviction-based orders) or District Court (preventative civil orders) |
| Compliance | <ul style="list-style-type: none"> current search powers (no change) penalty – up to five years' imprisonment for breach of order, or seven years' imprisonment if the breach related to a prohibited firearm additional offence to supply someone subject to an order with a firearm, part or ammunition – penalty to mirror breach of order reverse onus – persuasive burden level (no change with existing Arms Act 1983 reverse onus provisions) |

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

The main benefit of Firearms Prohibition Orders is improved public safety by preventing high-risk people from having access to firearms.

The New Zealand public will be the primary beneficiary, including those who might otherwise have been victims (or repeat victims).

Where do the costs fall?

The overall likely cost of Firearms Prohibition Orders, which may be significant, is unknown as the modelling and costing will be done once there is in-principle approval from Cabinet to proceed. This is due to the large number of potential design options available, and the work involved in costing all potential models.

The direct costs of administering the Firearms Prohibition Order regime will fall on government, primarily the New Zealand Police. There will also be costs to other parts of the justice system including:

- *Courts* – time required to consider applications, appeal processes, and in dealing with breaches
- *Legal aid* – for preventative orders and appeals
- *Corrections* – breaches may result in an increase in the prison population.

People subject to a Firearms Prohibition Order will also bear some costs, mostly non-monetised, as a result of conditions imposed. However:

- firearm possession and use is a privilege and not a right
- limiting such people's access to firearms is important to reducing the risk to the safety of New Zealanders
- Courts will be able to modify the standard conditions where appropriate to support a person's rehabilitation and reintegration needs. This includes recognising their employment and cultural needs.

What are the likely risks and unintended impacts? How significant are they and how will they be minimised or mitigated?

There is a risk that Firearms Prohibition Orders may disproportionately impact on Māori given the overrepresentation of Māori at all stages in the criminal justice system. Māori men in particular are likely to be overrepresented in the cohort of offenders potentially eligible for a convictions-based Firearms Prohibition Order.

The ability to modify standard conditions will mean that the needs of both the subject person, and their broader whānau, hapū and iwi will be able to be considered as part of setting the conditions for a Firearm Prohibition Order.

At the same time, Māori are also overrepresented as victims (and repeat victims) within the criminal justice system. Deterring and preventing high-risk people's access to firearms would also benefit Māori.

A further risk is the potential number and location of Firearms Prohibition Orders that may be made per year, and the impact that monitoring compliance of these orders may have on Police resources. There will also be downstream effects of non-compliance on the wider Justice sector.

While most of the monitoring of compliance with orders will be on a normal risk and information / knowledge basis, New Zealand Police will also monitor the volume and fluctuations to identify whether additional funding or resourcing is required. The impact on the wider Justice sector will also need to be monitored.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?

Medium. While firearm crime may be relatively low in New Zealand, firearms are used in a broad range of offences. Moreover, the illegal use or possession of firearms is prevalent. For instance,

- from January to April 2020, there were 902 separate proceedings relating to firearm possession or carriage offences, of which 816 resulted in court action

- between 1 March 2019 and 16 March 2020 2,277 firearms were seized, recovered, or collected by Police during routine policing activities.

The impact of firearms misuse is high, potentially resulting in serious or fatal injury.

All overseas Firearms Prohibition regimes are aimed at improving public safety / reducing the risks of harm. However, most of the available evidence for effectiveness is anecdotal (based on their experiences) that Firearms Prohibition Orders help to reduce firearm crime.

Two reviews or inquiries into aspects of particular Firearms Prohibition Order regimes have informed this design. While both of these reviews had limited scope, and applicability to the proposed New Zealand model, the outcomes indicate that Firearms Prohibition Orders can be an important tool in removing unlawful firearms (and other weapons) from the community.

- In 2016, the New South Wales Ombudsman reviewed 22 months of the operation of the new broad warrantless search powers for the New South Wales regime. While firearms were found in only two percent of search events, those searches revealed 25 firearms, nine firearms parts, and 26 lots of ammunition. Moreover, the searches as a whole resulted in 416 items, including 51 other weapons, being seized.
- In 2019, the Victoria Legal and Social Issues Committee conducted an inquiry into the Victoria legislation approximately 16 months after its introduction in the context of the first successful appeal from the issuing of an order (subsequently reinstated on appeal). Over that period, 54 firearms-related charges were laid, and 12 firearms were seized, along with a range of firearm parts, ammunition, and other weapons.

To be completed by quality assurers:

Quality Assurance Reviewing Agency:

A Quality Assurance Panel with representatives from the Ministry of Justice and the New Zealand Police has reviewed the Regulatory Impact Assessment "Firearms Prohibition Orders" produced by the New Zealand Police and dated July 2020. The Quality Assurance panel considers that it partially meets the Quality Assurance criteria.

Quality Assurance Assessment:

The RIA is clear and logical in presenting the need and design of a Firearms Prevention Order (FPO) legislative framework. The objectives and decision criteria describe the desired outcome. Whilst the impact analysis is generally convincing, the RIA suffers from an incomplete evidence base including that financial modelling has not been undertaken, quality research of overseas FPO schemes is limited and the true impacts of implementing an FPO regime are unknown.

Reviewer Comments and Recommendations:

NZ Police has undertaken extensive consultation, including a public consultation process and with key stakeholders within government. The implementation risks and mitigation steps have been identified and explained.

Impact Statement: Firearms Prohibition Orders

Section 1: General information

1.1. Purpose

The New Zealand Police is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated.

The analysis and advice has been produced to inform in-principle policy decisions to be taken by Cabinet.

1.2. Key Limitations or Constraints on Analysis

There are two key limitations or constraints on analysis:

- Existing reviews of Firearms Prohibition Orders have been relatively limited in scope.
- Modelling and costing work will be conducted once an in-principle model has been approved.

Existing reviews of Firearms Prohibition Orders have been relatively limited in scope

Anecdotal evidence exists from other jurisdictions, based on their experiences of firearms prohibitions, but there is little systematic evidence of their effectiveness. This is partly because many jurisdictions have had Firearms Prohibition regimes for some time (and therefore they have not been reviewed), while those with newer regimes (for instance, Victoria and the Northern Territory) are still too new to be able to assess effectiveness.

Although there have been no formal evaluations, there have been two reviews / inquiries into aspects of particular Firearms Prohibition Order regimes. A summary of these reports was set out previously in Section C.

While the percentage of searches finding firearms were relatively low, both regimes involved relatively broad search powers – broader than those that currently exist within New Zealand. The Victoria regime, in particular, also allows for searches of associates of the person subject to the prohibition order. These differences are important when considering the effectiveness of the regime, and the use of valuable policing resources.

Overall, despite the above caveats, the outcomes indicate that Firearms Prohibition Orders can be an important tool in removing firearms (and other weapons) from the community. The outcomes of these reviews were considered as part of developing options and will also be considered as the specific policy and legislative process continues.

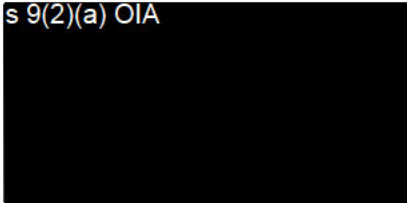
Modelling and costing work will be conducted once the model has in-principle approved

The second limitation and constraint is that the overall likely cost of Firearms Prohibition Orders is unknown. While this Regulatory Impact Assessment proposes a model for

Firearms Prohibition Orders, the modelling and costing will be done once there is in-principle approval from Cabinet to proceed. This is due to the large number of potential design options still available, and the work involved in costing all potential models.

1.3. Responsible Manager (signature and date):

s 9(2)(a) OIA



Gillian Ferguson

(Acting) Director, Policy and Partnerships

New Zealand Police

22 July 2020

Proactive release

Section 2: Problem definition and objectives

2.1. What is the current state within which action is proposed?

Currently, people whose behaviour and actions represent a high-risk of violence, or reflect an underlying threat or risk of violence, are able to lawfully access and use firearms.

The current controls under the Arms Act 1983 and associated regulations are insufficient to prevent access to firearms for these high-risk individuals. While such individuals may not be regarded as a 'fit and proper' person under the Arms Act 1983 to hold a firearms licence, this does not prevent them from being able to lawfully access firearms, associate with people who are in possession of firearms, or from residing at or visiting locations where firearms are held.

In 2017, as part of an inquiry into the illegal possession of firearms in New Zealand, the Law and Order Select Committee noted that firearms prohibition orders were used in Australia to proactively manage high-risk individuals and their possession of, use of, and association with firearms. The Committee recommended that Firearms Prohibition Orders be implemented in New Zealand.

While firearm crime may be relatively low in New Zealand, firearms are used in a wide range of crime, a subset of which is shown in Table One below.

Table One: Firearms-related selected violence offences

| | 2015 / 16 | | 2016 / 17 | | 2017 / 18 | | 2018 / 19 | | 2019 / 20* | |
|--|-----------|------------|-----------|------------|-----------|------------|-----------|------------|------------|------------|
| | # | % of total | # | % of total | # | % of total | # | % of total | # | % of total |
| Murder | 6 | 9.7 | 7 | 15.9 | 13 | 32.5 | 58 | 50.4 | 11 | 16.18 |
| Attempted murder | 9 | 34.6 | 3 | 17.7 | 10 | 43.5 | 49 | 80.3 | 2 | 20.0 |
| Aggravated robbery | 223 | 10.1 | 300 | 11.6 | 233 | 9.7 | 175 | 8.9 | 196 | 10.0 |
| Other acts intended to cause injury | 19 | 38.0 | 25 | 40.3 | 36 | 43.3 | 22 | 30.1 | 31 | 49.2 |
| Total of the above offences | 257 | 10.9 | 335 | 12.3 | 292 | 11.4 | 304 | 13.7 | 240 | 11.4 |

* Up to 11 June 2020. Source: New Zealand Police Crime Statistics, using ANZSOC categories

The unlawful use of firearms is also prevalent:

- over the period from January to April 2020, there were 902 separate proceedings relating to possession or carriage offences (including possession of a prohibited weapon), of which 816 resulted in court action
- between 1 March 2019 and 16 March 2020 2,277 firearms were seized, recovered, or collected by Police during routine policing activities.

2.2. What regulatory system(s) are already in place?

The Arms Act 1983 promotes the safe use and control of firearms and other weapons. In doing so, it sets out the parameters for who may lawfully hold a firearms licence, including the 'fit and proper' person test. There are also a range of offences under the Arms Act 1983 relating to the unlawful carrying or possession of firearms.

However, none of these existing controls or offences involve the ability to place conditions on a non-licensed person who is 'high-risk', preventing them from being able to be around, access, or use firearms.

While work on developing a Firearms Prohibition Order regime in New Zealand began before the Christchurch terror attack in March 2019, Firearms Prohibition Orders can be seen as a third phase of reducing harms associated with firearms:

- *Phase One:* addressing the immediate need by prohibiting dangerous firearms through the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019
- *Phase Two:* strengthening and improving the existing licensing and regulatory system through the Arms Legislation Act 2020
- *Phase Three:* preventing dangerous ('high-risk') people from having access to firearms by introducing Firearms Prohibition Orders.

2.3. What is the policy problem or opportunity?

Firearm-related crime represents a real risk to community safety. While the firearms licensing and regulatory regime has recently been strengthened, the misuse of firearms continues to be a challenge in New Zealand.

Someone who is not a fit and proper person under the Arms Act 1983 is not able to obtain a firearms licence, or legally own a firearm. However, they are still able to lawfully access and use firearms if under the immediate supervision of a licensed firearms holder. This means that a person whose behaviour and actions represents a high-risk of violence, or reflect an underlying threat or risk of violence, is still able to lawfully access and use firearms.

Moreover, they are able to lawfully associate with people who have possession of firearms, and are able to reside at or visit locations where firearms are held. In other words, they are still able to be around, access and use firearms.

Introducing a Firearms Prohibition Order regime would address these gaps, and reduce the risk of such individuals accessing and misusing firearms. Introducing a Firearms Prohibition Order regime will therefore help to reduce the risk of firearms-related harm.

2.4. What do stakeholders think about the problem?

Public consultation

A public consultation process was conducted for eight weeks from 11 November 2019 to 13 January 2020. A total of 41 submissions were received during the consultation period. Thirty submissions were from individuals and 11 were made on behalf of groups or organisations including Amnesty International Aotearoa New Zealand, Council of Licensed Firearms Owners, Gun Control New Zealand, New Zealand Law Society, New

Zealand Police Association, the Office of the Privacy Commissioner, and Victim Support New Zealand.

Not every submitter answered every question. Of the submissions received:

- 35 submitters expressed a position on the criminal use of firearms in New Zealand, with 24 submitters (69 percent) considering the criminal use of firearms in New Zealand to be a problem, while 11 submitters (31 percent) did not. Submitters generally noted that firearm crime was low in New Zealand compared to other countries. However, submitters highlighted firearm crime in relation to gangs / criminal groups, and the broader harms caused by firearms.
- 34 submitters expressed a position on Firearms Prohibition Orders, with 21 submitters (62 percent) supporting the concept, while 13 submitters (38 percent) did not. Submitters who supported the concept of Firearms Prohibition Orders mostly did so on the basis of tightening firearm control, disarming criminals and reducing firearm-related harm. Those that did not support the concept of Firearms Prohibition Orders raised concerns about human rights and privacy, the need for checks and balances, the impact on firearms owners, and fear that the regime could be abused.
- 35 submitters expressed a position on whether Firearms Prohibition Orders would reduce the risk of harm caused by criminal use of firearms, with 17 submitters (49 percent) considering they would, while 18 submitters (51 percent) were of the view they would not. Submitters who answered yes varied between those who supported tighter arms control, those who considered limitations on individual rights to be justified in the context of firearm harm, and those who considered the regime needed to avoid unduly impacting on human rights. Submitters who answered indicated that criminals did not follow law, that firearms would still end up leaking into the black market, and that proper enforcement was needed.

The outcomes indicate general support for the introduction of a Firearms Prohibition Order regime, although recognising concerns that some submitters felt it would not reduce the risk of harm.

Agency consultation

Agencies' feedback reflected a range of views, similar to those expressed during the public consultation process. For instance, there were agencies strongly supportive of the concept of Firearms Prohibition Orders, and others that were less supportive. There were similarly a range of views around the various elements making up the proposed model, including preventative (civil) orders, and the range and extent of the standard (modifiable) conditions. These views will be further considered as part of the detailed development work.

Agencies also noted the lack of costing information within the paper. That work will be done once there is in-principle approval from Cabinet to proceed. This is due to the large number of potential design options still available, and the work involved in costing all potential models.

Finally, agencies noted that more work was required to meet Treaty of Waitangi commitments. Firearms Prohibition Orders are likely to impact on Māori because Māori are overrepresented in the criminal justice system. At the same time, they are also overrepresented as victims of crime. Making the standard conditions modifiable will help

ensure that the rehabilitative and reintegration needs of subject people are taken into account. We will also continue working on final policy design proposals that will reduce the disproportionate impact on Māori, particularly Māori in rural communities.

2.5. What are the objectives sought in relation to the identified problem?

The objective of introducing Firearms Prohibition Orders is to improve public safety by preventing high-risk people from having access to firearms.

Section 3: Design proposals

3.0. Introduction to design proposals

Section 3 is divided into four sections:

- Section 3.1 considers whether or not to introduce a Firearms Prohibition Order regime.
- Section 3.2 considers what a Firearms Prohibition Order regime could look like, in the context of the four key parameters: Eligibility, Conditions, Decision-making, and Compliance. It also sets out the criteria for assessing the elements that sit under each parameter.
- Section 3.3 outlines the relationships between the four design parameters.
- Section 3.4 sets out the other options that were considered but ruled out of scope, and why.

Section 3.1: Whether or not to introduce a Firearms Prohibition Order regime

3.1. Whether or not to introduce a Firearms Prohibition Order regime?

The first decision is whether or not to introduce a Firearms Prohibition Order regime.

International Context

Many of our jurisdictional comparators have some form of firearm prohibition regime, including Canada, the United Kingdom, New South Wales, South Australia, Tasmania, Victoria and the Northern Territory.

Views of submitters

Thirty-four submitters expressed a position on Firearms Prohibition Orders. Twenty-one of these submitters (62 percent) supported the concept of Firearms Prohibition Orders, while 13 (38 percent) did not.

- Submitters who supported the concept of Firearms Prohibition Orders did so on the basis of tightening firearm control, disarming criminals, and reducing firearm-related harm. Some submitters provided provisional support, depending on final design, the target group, or the regime being part of broader work looking into criminal firearm use.

- Submitters who did not support the concept of Firearms Prohibition Orders raised concerns about human rights and privacy, the need for checks and balances, the impact on firearms owners, and fear that the regime could be abused. Two were of the view that they were not applicable to New Zealand, while one considered focus should be on illegally imported and manufactured firearms.

3.1.1. Criteria for whether or not to implement a Firearms Prohibition Order regime

The criteria for the consideration of whether or not to implement a Firearms Prohibition Order regime were:

- Public safety / effectiveness of the regime in reducing the risk to the public
- Human rights / impairment of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (NZBORA).

The criteria are not mutually exclusive although they may involve a trade-off against each other. That is, a limit on a right may be justified under NZBORA.

Rights and freedoms that could potentially be impacted by a Firearms Prohibition Order regime include the freedom of association (section 17), freedom of movement (section 18), the right to be secure from unreasonable search (section 21) and the right to be presumed innocent (section 25(c))

While the public safety objective of the Firearms Prohibition Orders warrants some limitations on some rights and freedoms, the design of the regime would need to ensure the impairment is the least intrusive possible to achieve the public safety objectives of Firearms Prohibition Orders.

3.1.2. Impact assessment – whether to implement a Firearms Prohibition Order regime

| | Public safety | Human Rights | Overall assessment |
|--|--|--|----------------------------|
| Do not implement Firearms Prohibition Order (status quo) | 0 (status quo – no change) | 0 (status quo – no change) | 0 (status quo – no change) |
| Implement Firearms Prohibition Order (preferred) | ++ (Firearms Prohibition Orders would limit high-risk people's ability to access, possess or use firearms) | - (while Firearms Prohibition Orders may impact on NZBORA rights, the regime can be designed to limit impairments on rights to that which is reasonable) | + |

3.1.3. Preferred option on implementing a Firearms Prohibition Order regime

The preferred option is to develop a Firearms Prohibition Order regime for New Zealand.

Retaining the status quo position (no Firearms Prohibition Orders) would mean the issue identified would continue – that is, high-risk people would continue to be able to lawfully access and use firearms, reside in or visit locations where there are firearms. This poses a risk to the safety of New Zealanders.

We note that:

- while firearm crime is relatively low in New Zealand, firearms are used in a wide range of crime
- firearms, or the threat of accessing firearms, are often used to intimidate and control victims in family violence situations, and also increase the risk of harm to the victim
- a significant number of firearms are being seized, recovered, or collected by Police during routine policing activity, while firearms are also being presented at Police officers
- feedback from other jurisdictions indicate that Firearms Prohibition Orders are an important tool for improving public safety, and combatting firearm-related crime.

However, while there are public safety considerations for introducing a Firearms Prohibition Order regime in New Zealand, any regime would need to balance human rights considerations with the opportunity to improve public safety.

Section 3.2: Design parameters

3.2. Introduction to the four design parameters

Section 3.2 sets out the four design parameters for Firearms Prohibition Orders: Eligibility, Conditions, Decision-making, and Compliance, and the elements considered under each of those parameters.

- Section 3.2.1 sets out the criteria for assessing the elements under the four design parameters
- Sections 3.2.2-3.2.5 set out the elements under the four design parameters. This also includes the assessment of each element against the criteria.

3.2.1. Criteria for assessing the elements under the design parameters

The criteria for the various elements underneath each of the four design parameters were similar, although with an added criteria of efficiency to reflect the need for options to be implementable and effective in achieving goals of the Firearms Prohibition Order.

- Public safety / reducing the risk to the public
- Human rights / impairment of the rights and freedoms contained in NZBORA
- Efficiency (efficiency of a proposed regime and ease / complexity in implementation).

The criteria are not mutually exclusive and may involve a trade-off against each other. What may make the most efficient and administratively simple regime may not represent the least intrusive possible option, nor be the most effective in reducing the risk to the public.

3.2.2. Eligibility

Eligibility relates to the requirements for qualifying for a Firearms Prohibition Order. Under this parameter, there were two elements for consideration:

- *Target group*: based on conviction or membership of a gang.
- *Age group*: from the age of 16 years (i.e. include young people aged 16 and 17) or only adults (18 years or over).

3.2.2.1. Target Group

The decision relating to target group was the defining of 'high-risk' in the context of Firearms Prohibition Orders. This largely depended on:

- *conviction-based*: whether orders should be based on a person's convictions, such as convictions for serious violence, firearms offences, criminal harassment or breaches of protection orders or restraining orders.
- *gang membership / association*: whether orders should be based on a person's membership of, or association with, a 'gang' (either with or without a conviction requirement).

An add-on to either of the above options was a *preventative option*, based on a person's high-risk activities and behaviour, which may or may not include prior convictions.

International Context

Different jurisdictions have different eligibility models. The United Kingdom model is a legislative prohibition that occurs automatically following sentencing.

The Canadian model is largely conviction based, where some offences (such as using, threatening or attempting to use violence against an intimate partner) result in a mandatory 10-year prohibition order while other offences (such as offences involving a firearm or prohibited weapon) would result in a discretionary prohibition order of up to 10 years. The Canadian regime also includes preventative orders, which last for up to five years, and can be made when a Court is satisfied that a person should be prohibited from possessing firearms in the interests of public safety.

The Australian regimes are mostly 'preventative' models in that the Firearms Prohibition Orders are made by the Police on the basis of factors such as the subject person's behaviour and activities, membership of (or association with) an organised crime group, or other information known to Police. The exception is South Australia where, as well as Police, the Court is able to make Firearms Prohibition Orders.

Views of submitters

In the public consultation process, the majority of submitters (23 out of 33 who answered the question) supported the use of previous convictions, although a significant number

(18 out of 31 submitters who answered the question) also supported gang membership as an additional criterion.

Issues with focusing on members of gangs

The Attorney-General, in his section 7 NZBORA reports on two Private Member's Bills on Firearms Prohibition Orders considered that it 'may' be justifiable to limit freedom of association (section 17 of the NZBORA) in the context of gangs and firearms. However, the regime proposed in those Private Member's Bills were overall, held to be inconsistent with section 17 of NZBORA.

Focusing on gangs and gang members would have some benefit in that many members would have relevant convictions, or exhibit high-risk activities or behaviours. However, focusing on gang members would potentially exclude a number of people, potentially more high risk, simply because they are not gang members. There would also be practical issues, such as defining a 'gang member' (i.e. would it be based on the wearing or displaying of gang insignia; someone on the 'gang list'). Moreover, while over 40 percent of members and prospects of New Zealand adult gangs have been charged with an offence involving a firearm during their lifetime, this does not indicate whether the two aspects (gang membership and conviction) occurred concurrently.

Preventative option (civil)

During the consultation, some submitters suggested a preventative approach would better recognise that some people are high-risk despite not having a relevant conviction, and that these people should not have access to firearms despite not having a relevant conviction history.

Most Australian regimes are 'preventative' in that they do not necessarily depend on convictions. Likewise, the Canadian approach also includes a preventative order on the basis of public safety.

A preventative option would also provide ways for synergy with the Arms Legislation Act 2020, which sets out the grounds for disqualification from holding or applying for a Firearms Licence. By creating a civil preventative order option, similar factors could be taken into account by decision-maker.

A preventative option would need to be carefully designed to ensure that it was not, in effect, a penalty. While it would consist of some punitive components, it would mostly be about prevention and public safety. Moreover, the Crown would bear the burden of proof (to the civil standard).

The Terrorism Suppression (Control Orders) Act 2019 provides an example as to how a civil preventative order could be implemented, based on a person's past behaviour and activity.

Assessment of each option against criteria

| Target Group | Public safety | Human Rights | Efficiency | Overall assessment |
|--|--|---|--|--------------------|
| Target convictions (preferred) | ++ (convictions indicate proven risk) | 0 (based on conviction history and therefore justifiable) | 0 (relatively easy to implement as based on convictions; - volumes may impact on resourcing) | ++ |
| Target gang members | 0 (likely to target some high risk people but will miss out a large number who are not gang members) | - (regime proposed in Private Member's Bills found to impair section 17 of NZBORA – freedom of association) | - (would need to be clear on definition of 'gang' member, and whether any required convictions coincided with gang membership) | - |
| Preventative option (preferred) | + (would incorporate high risk people without convictions) | - (potential to impact on NZBORA rights, unless carefully managed) | + (more complex administratively however allows information and intelligence to be used) | + |

Preferred option

Our preferred option is for there to be two types of Firearms Prohibition Orders:

- *Conviction-based orders*, based on convictions for qualifying offences
- *Preventative orders*, based on a person being deemed 'high-risk' based on their prior behaviour and activity.

The conviction-based regime is preferred as it is likely to be justifiable under the NZBORA, and would better meet the public safety criterion. While a conviction-based regime would be simpler to administer than a gang-based regime, it also poses the potential (i.e. numbers of convictions per year) to overwhelm the available resourcing. This would be partly mitigated by the fact that the decision-maker would still have the discretion as to whether or not to make a Firearms Prohibition Order.

The preventative order is also preferred, as this would also enable the public safety criterion to be met. Careful design would be needed to ensure that it was not seen as a penalty, particularly as either an additional or retrospective penalty should prior convictions be able to be included as part of the person's behaviour and activity.

3.2.2.2. Age

The second element under eligibility related to the eligible 'age' for Firearms Prohibition Orders. There were two options:

- young people and adults (i.e. from the age of 16 years)
- adults only (i.e. from the age of 18 years).

New Zealand context

The question of age was not asked in the consultation process, although the consultation document noted the potential impacts on young people.

While most offenders prosecuted for serious offences in New Zealand are 18 years or older, people can be respondents to, and breach, protection orders from the age of 16 years. Control Orders, on the other hand, can only be made in respect of people aged 18 years and over.

Assessment of each option against criteria

| Age group | Public safety | Human Rights | Efficiency | Overall assessment |
|-------------------|--|---|---|--------------------|
| 16+ (preferred) | + (offers better public safety protections) | 0 (young people can already be convicted in adult courts, i.e. for breaches of protection orders) | - (may increase administrative and implementation complexity) | 0 |
| 18+ (adults only) | - (slightly reduces public safety as excludes some high risk people) | + (more consistent with youth justice principles) | 0 (unlikely to be significant changes in administrative considerations) | 0 |

Preferred option

In considering whether or not to include youth offenders, a balance is needed between public safety, and youth justice principles. The imposition of a Firearms Prohibition Order could deepen a young person's involvement in the criminal justice system. However, at the same time, limiting to only adults (i.e. from the age of 18 years), may leave a gap in the ability to address the risk associated with those offenders.

Therefore, our preferred option is that Firearms Prohibition Orders could be made in relation to young people and adults, from the age of 16 years.

3.2.3. Conditions

This parameter relates to what conditions would be part of a Firearms Prohibition Order, and how long (duration) an order would last for:

- *Conditions:* prohibition on possession of firearms or more strict prohibitions (limiting association with people with firearms and where a person can live / visit).

- *Order duration*: options ranged from five years to 15 years, indeterminate or lifetime.

3.2.3.1. Conditions

There are four conditions for consideration as part of a Firearms Prohibition Order:

- *no access to firearms*: prohibiting the person from obtaining, purchasing, possessing, accessing, manufacturing, or using firearms (including parts, magazines and ammunition)
- *no association with people with firearms*: prohibiting the person from associating with people who have firearms on them or under their immediate control
- *no residing where there are firearms*: prohibiting the person from residing at premises where there are firearms
- *no visiting places where there are firearms*: prohibiting the person from visiting locations or premises where firearms are or would normally be. This would include locations such as gun shops, arms fairs or gun clubs, as well as places specific to the person, such as a gang pad or other specific locations.

International context

All overseas models prohibit possession of firearms but the existence (and extent) of other conditions vary. Most of the Australian regimes have stricter prohibitions (i.e. include the non-association or non-residing / visiting conditions).

New South Wales and South Australia both have the ability to modify conditions, although these powers are not used often. The Legal and Social Issues Committee in Victoria noted this ability as part of their review into how to strengthen the Victoria legislation, and recommended that the Chief Commissioner be empowered to grant exemptions (with or without conditions) from certain requirements of a Firearms Prohibition Order.

The Canadian regime allows modification of prohibition on possession of firearms where firearms are needed for employment or sustenance reasons (note, recreational hunting is not enough). While the Canadian regime does not specifically prohibit a subject person from residing or visiting places where there is firearms, the Court can impose an order on a weapon owner to limit a subject person's access to a weapon in such situations.

Views of submitters

A small majority of submitters supported the stricter prohibitions (16 out of 27 submitters). However, submitters also identified a range of issues including human rights and privacy concerns, the impact on rural New Zealand and the impact on rehabilitation and reintegration

Assessment of each option against criteria

| Conditions on order | Public safety | Human Rights | Efficiency | Overall assessment |
|--|--|--|---|--------------------|
| No access to firearms (preferred) | ++ (promotes public safety as subject unable to be around firearms) | + (no right to possess or own firearms under New Zealand law) | ++ (easy to implement) | ++ |
| No association with people with firearms (preferred) | + (promotes public safety - ability to modify may create risk as person could associated with person with firearm) | 0 (ability to modify reduces level of impairment on NZBORA rights, such as section 17 – freedom of association) | + (easy to implement; ability to modify condition may create some administrative complexity) | + |
| No visiting places where there are firearms (preferred) | + (promotes public safety - ability to modify may create risk person could visit place where there are firearms) | 0 (ability to modify reduces level of impairment on NZBORA rights such as section 18 – freedom of movement) | + (easy to implement; ability to modify condition may create some administrative complexity) | + |
| No residing where there are firearms (preferred) | + (promotes public safety - ability to modify may create risk person could reside where there are firearms) | 0 (ability to modify reduces level of impairment on NZBORA rights, such as sections 17 or 18 – freedoms of association and movement) | 0 (the ability to modify condition may some create administrative complexity in relation to subject person's living arrangements) | + |

Preferred option

Our preferred option is to include all conditions within the Firearms Prohibition Order framework as this would have added benefits in limiting a person's access to firearms.

We considered whether all or only some of the conditions should be modifiable. We do not consider the 'no access to firearms' condition should be modifiable as this would impact on the purpose and rationale of making a Firearms Prohibition Order. This is also consistent with the fact that access to firearms is a privilege not a right, and people who are subject to a Firearms Prohibition Order would have lost that privilege. This is referred to in the model as the 'broad condition' and would not be modifiable.

However, adopting an approach where the other conditions (non-association / non-residing, non-visiting conditions) are modifiable would allow the orders to reflect the rehabilitative and reintegration needs of the person. This would allow any undue impact of such prohibitions to be mitigated. These are referred to in the model as 'standard conditions', and would be modifiable.

3.2.3.2. Duration

This element relates to the duration of orders, and included the following options:

- short (up to 5 years)
- medium (up to 10 years)
- long (up to 15 years)
- indeterminate (no specified end date)
- lifetime.

International context

New South Wales, South Australia and Tasmania have indeterminate orders.

Canada and the United Kingdom have orders that vary with type of offence, sentence length, and / or sentence number. While both have orders that last for five years, they also have orders with a lifetime duration.

Victoria and Northern Territory have order durations that vary with age (five years for subjects under 18 years, and 10 years for subjects 18 years and over).

Views of submitters

Only a minority of submitters (five out of 25 submitters who answered the question) preferred a lifetime order. Of those who answered the specific question about order duration (24 submitters), there was a slight preference for 15 years (11 submitters) compared to 10 years (five submitters) and five years (eight submitters).

New Zealand context

There are a range of existing orders in New Zealand, including control orders (two years), extended supervision orders (10 years), and public protection orders (indeterminate). Control orders and public protection orders are civil orders while extended supervision orders are criminal orders.

Separately, the Arms Legislation Act 2020 introduces a 10-year disqualification period for people with certain convictions (or with a final protection order against them) from applying for or holding a firearms licence.

In considering the two Private Member's Bills on Firearms Prohibition Orders, the Attorney-General considered that a time limit would reduce the impairment on fundamental rights and freedoms.

Assessment of each option against criteria

| Duration of order | Public safety | Human Rights | Efficiency | Overall assessment |
|-------------------|---------------------------------|--|---|--------------------|
| 5 years duration | + (provides some public safety) | + (short-term duration means lesser impact on NZBORA rights) | 0 (shorter term reduces number of orders) | + |

| | | | | |
|---|--|---|---|----|
| 10 years duration | ++ (would provide relatively good public safety) | 0 (mid impact on human rights – better than longer term / indeterminate) | + (easy to implement and likely to result in efficient regime) | ++ |
| 10 years duration (adults) and five years (16-17 year olds (preferred)) | ++ (would provide relatively good public safety) | + (mid impact on human rights – and recognises youth justice principles) | - (increased administrative and implementation complexity) | ++ |
| 15 years duration | ++ (would provide relatively good public safety) | - (more potential for impact on rights) | 0 (easy to implement for majority but will increase volume of orders) | 0 |
| Indeterminate | ++ (would provide relatively good public safety) | -- (Attorney-General has previously held that a time limit would reduce impairment on NZBORA rights and freedoms) | -- (more difficult to implement – would need additional mechanisms around reviews etc.) | -- |
| Lifetime | ++ (provides most public safety) | -- (likely to unjustly impact on NZBORA rights and freedoms - although Canada also has lifetime orders) | 0 (simplest to implement but would significant increase volume burden of orders) | 0 |

Preferred option

A 10-year duration period would provide some consistency with the 10-year disqualification period in the Arms Legislation Act 2020, and is our preferred option. A 10-year duration also recognises that people's circumstances and risk profiles may change over time.

A shorter duration period (i.e. five years) for orders made in relation to 16 and 17 year olds would provide a balance between public safety considerations and youth justice principles.

3.2.4. Decision-making

Decision-making primarily relates to how the decision to issue a Firearms Prohibition Order should be made, for instance:

- automatically (i.e. legislative prohibition)
- judicial decision-maker

- Police decision-maker (i.e. Commissioner of Police).

International context

The United Kingdom model is a legislative prohibition that occurs automatically following a relevant sentence. The Canadian regime is based around the Court as decision maker (even in relation to 'mandatory' orders), while the South Australian regime features both the judiciary and Police as decision-makers. The other Australian jurisdictions (New South Wales, Victoria, Tasmania and the Northern Territory) all feature Police as the decision-maker.

Views of submitters

We did not consult on the automatic / legislative prohibition option. However, we consulted on three options; two involved the Court as decision-maker (applications made at time of sentencing; applications made at time of release / after sentencing) and one involved Police as decision-maker. Twenty-four people responded to this question, with 10 supporting applications at time of sentencing, nine supporting applications at time of release / after sentencing, and only five supporting Police as the decision-maker.

Assessment of each option against criteria

| Decision-maker | Public safety | Human Rights | Efficiency | Overall assessment |
|--------------------|---|---|---|--------------------|
| Police | ++ (enhances public safety by enabling quick making of orders) | -- (does not provide judicial involvement in decision-making process) | 0 (implementation of system likely to be complex although overall administration may be easier) | 0 |
| Courts (preferred) | 0 (may result in delays in decision making however judicial oversight may create more protection in long run) | ++ (provides judicial involvement in decision-making process) | 0 (most likely to occur at sentencing so very efficient - could be delays in civil / preventative orders process) | ++ |

Preferred option

When considering the two Private Member's Bills on Firearms Prohibition Orders, the Attorney-General considered that judicial oversight was needed. The lack of such oversight was one factor that influenced the finding that the regimes proposed in those two Bills were inconsistent with the NZBORA. Given this, our preferred option is for the Courts to be the primary decision-maker, with the decision to be made at sentencing (for conviction-based orders) or following a civil application (for preventative orders).

3.2.5. Compliance

Compliance relates to how compliance with a Firearms Prohibition Order would be monitored and enforced:

- *Search powers*: current search powers or warrantless 'without cause' search powers
- *Penalty for breaching*: varying from short (i.e. two to three years' imprisonment) to long (14 to 15 years' imprisonment)
- *Reverse onus element of offence*: evidential onus or persuasive burden.

Another item for consideration is whether there should be *supply offences* – that is, offences for someone knowingly supplying a firearm, part, ammunition to a prohibited person.

3.2.5.1. Search powers

There are two options under the search powers available to police under Firearms Prohibition Orders:

- current search powers (status quo, no change)
- warrantless 'without cause' search powers.

International context

Canada, United Kingdom and Tasmania do not provide any additional powers with their regimes.

The other Australian regimes (New South Wales, South Australia, Victoria and the Northern Territory) theoretically have the equivalent to warrantless 'without cause' search powers. However:

- South Australia has advised their warrantless search powers are effectively 'with cause' powers
- the New South Wales Ombudsman, in the report 'Review of police use of the firearms prohibition order search powers' (2016), stated that searches could only be conducted when "reasonably required" to determine if a Firearms Prohibition Order offence had been committed, and the power was "not a roving search power to be used randomly on FPO [Firearms Prohibition Order] subjects".

Neither Victoria nor the Northern Territory regimes have been in force long enough for the legislation to be reviewed or the search powers tested. The Victoria Legal and Social Issues Committee, in its report 'Inquiry into firearms prohibition legislation' (2019), found it was "difficult to draw any concrete conclusions either in relation to the effectiveness of search powers under the legislation, or the impact of searches on individual subjects" due to the regime being in place for only a short period of time.

Views of submitters

In the public consultation process, submitters were divided between whether there should be only the existing search powers or whether a new warrantless without cause power.

New Zealand context

In considering the two Private Member's Bills on Firearms Prohibition Orders, the Attorney-General expressed strong concerns about the concept of warrantless without cause powers. The Attorney-General stated that such powers "would constitute a significant intrusion on the rights affirmed by s 21 of the Bill of Rights Act" and "it is difficult to see how such a power could be justified".

New Zealand Police already has broad search powers in relation to firearms – for instance, section 18 of the Search and Surveillance Act 2012 provides for warrantless search powers where someone is suspected of having a firearm or being in control of a firearm, in breach of the Arms Act 1983.

Assessment of each option against criteria

| Search powers | Public safety | Human Rights | Efficiency | Overall assessment |
|--|---|---|--|--------------------|
| Current search powers (preferred) | 0 (would offer some protections due to current warrantless 'with cause' powers) | ++ (upholds human rights) | 0 (no change to current system) | ++ |
| Warrantless without cause search powers | ++ (very strong public safety protections) | -- (Attorney-General considered would significantly intrude on rights affirmed by section 21 of NZBORA) | -- (administratively simple but likely to be additional monitoring and reporting requirements) | -- |

Preferred option

While consultation feedback was mixed, the strong opposition expressed by the Attorney-General, and the existing search powers in relation to firearms all support the status quo arrangements.

3.2.5.2. Penalty

There is a broad range of possible options associated with the penalty for breaching a Firearm Prohibition Order, ranging from short (i.e. two to three years' imprisonment) to long (14 to 15 years' imprisonment)

International context

Penalties for breaching firearms prohibition orders in the Australian jurisdictions range from imprisonment for two years (Tasmania) to 15 years (South Australia). In Canada, the penalty is up to 10 years' imprisonment for breaching a mandatory prohibition order, while in the United Kingdom, the penalty could be up to five years' imprisonment.

Views of submitters

There was no clear preference in consultation. Twenty-four submitters answered this question, and the options with most support were two years' imprisonment (seven submitters), five years' imprisonment (six submitters) and 10 years' imprisonment (seven submitters).

New Zealand context

Existing penalties for breaches of orders in New Zealand tend to be relatively short: control orders (one year), extended supervision orders (two years), and protection orders (three years).

At the same time, the penalties for current possession offences include:

- possession of a firearm without a firearms licence – one year imprisonment
- possession of a firearm, prohibited magazine or part after revocation of a firearms licence – one year imprisonment
- carrying or possessing firearms except for lawful reason – four years' imprisonment
- unlawful possession of pistol or restricted weapon – three years' imprisonment
- unlawful possession of prohibited firearm – five years' imprisonment.

The current maximum penalty in the Arms Act 1983 is 10 years' imprisonment for using a prohibited firearm in an attempt to escape custody. Ten years is also the penalty for illegal trafficking or manufacturing of firearms under the Arms Legislation Act 2020.

Assessment of each option against criteria

| Penalty | Public safety | Human Rights | Efficiency | Overall assessment |
|---|--|---|--|--------------------|
| Penalty of 0-2 years imprisonment | - (while any penalty will increase public safety, short term nature reduces this) | ++ (shortest penalty – likely to have least impairment on human rights) | - (shorter penalties may impact efficiency of regime) | 0 |
| Penalty 3 years | 0 (short-term penalty but would provide some public safety) | + (short penalties likely to reduce impact of regime on human rights) | 0 (likely to result in efficient regime) | + |
| Penalty 5 years | + (penalty length provides public safety) | 0 (mid length penalty – likely to be balanced impact on human rights) | 0 (likely to result in efficient regime) | + |
| Penalty 5 years with uplift to 7 years for breaches involving prohibited firearms (preferred) | ++ (penalty length provides public safety, and also recognises increased risk associated with prohibited firearms) | 0 (mid length penalty – likely to be balanced impact on human rights) | 0 (will add some administrative complexity, however Courts well versed in such provisions) | ++ |

| | | | | |
|-----------------------|--|--|---|----|
| Penalty 10 years | ++ (longer penalties = stronger protections) | - (penalty of 10 years likely to be inconsistent with other penalties in Arms Act 1983) | - (longer penalty likely to have some impact on Corrections system) | 0 |
| Penalty 14 / 15 years | ++ (longer penalties = stronger protections) | -- (Attorney-General considered sentence of this length for breaching Firearms Prohibition Order would be "disproportionately severe") | -- (longer term penalties likely to have more impact on Corrections system) | -- |

Preferred option

The Member's Bill proposed up to 14 years' imprisonment for breaching a Firearms Prohibition Order, which the Attorney-General considered to be "disproportionately severe".

Penalties for breaches of Firearms Prohibition Orders need to:

- be consistent with other Arms Act 1983 offences and penalties; the maximum penalty in which is 10 years' imprisonment
- reflect an increased penalty than existing penalties for unlawful possession / carriage offences to reflect the fact that the person is a prohibited person.

Our preferred option would be the option that includes a penalty of up to five years' imprisonment, with an uplift to seven years should the breach involve a prohibited firearm. Five years would reflect an increased penalty for unlawful possession offences, while the increased penalty in relation to prohibited firearms would reflect the increased risk of harm associated with such weapons.

3.2.5.3. Reverse onus

Not every offence involves a reverse onus element, however if an offence does, then there are two options:

- *Evidential onus*: this requires defendant to satisfy the Court that there is enough evidence for the matter to be an issue for determination, and then the burden of proof shifts to prosecution
- *Persuasive onus*: this requires the defendant to satisfy the Court, to the required standard of proof required, that they were not in possession of the firearm.

International context

Many of the Australian models include reverse onus provisions at a persuasive burden. New South Wales has indicated that having this level of reverse onus proof has been useful in removing the "the gun isn't mine" defence.

New Zealand context

Section 66 of the Arms Act 1983 creates a rebuttable presumption that, once the prosecution has proved that a person was in occupation of any land or building (or car) where a firearm has been found, the defendant is presumed to have been possession of that firearm. It is then up to the defendant to show otherwise.

However, the Attorney-General has indicated that reverse onus provisions, such as that set out in section 66 of the Arms Act 1983, raise a prima facie issue of inconsistency with section 25(c) – the right to be presumed innocent – under the NZBORA.

In considering two Private Member's Bills on Firearms Prohibition Orders, the Attorney-General considered the right to be presumed innocent was impaired more than reasonably necessary to achieve the objective. In part, this was because of the application of section 66 to the offence, as well as the proposed penalties (up to 14 years) being viewed as disproportionately severe.

The Attorney-General considered that a lesser impairment on the right to be presumed innocent was required. He suggested that an evidential onus *may* be more appropriate.

However, reducing the level to evidential onus for Firearms Prohibition Orders (as opposed to using the persuasive burden set out in section 66 of the Arms Act 1983) would create a perverse situation where a person subject to a Firearms Prohibition Order would have a lower burden on them than someone else, in the identical situation, but who is not subject to a Firearms Prohibition Order.

Assessment of each option against criteria

| Reverse onus | Public safety | Human Rights | Efficiency | Overall assessment |
|--|--|--|--|--------------------|
| Reverse onus – persuasive burden (preferred) | ++ (promotes public safety) | -- (impact on human rights) | ++ (administratively simple and efficient, and avoids perverse outcomes) | ++ |
| Reverse onus – evidential onus | 0 (lower protection as more onus placed on Crown and potentially results in perverse outcomes) | + (Attorney-General suggested evidential onus may be more acceptable – but this leaves it open to doubt) | - (likely to be more complex to implement and operate and may result in perverse outcomes) | 0 |

Preferred option

Having a reverse onus provision helps remove “the gun isn’t mine” defence, because if a firearm is found on property or in a vehicle, it is assumed to be in the person’s possession unless they can show otherwise.

Given the perverse outcomes of having a different reverse onus level for Firearms Prohibition Orders offences than other offences in the Arms Act 1983, our preferred

option is to retain the current reverse onus burden (persuasive burden level). This would also provide consistency with other firearms-relating offending.

While this position has implications for the right to be presumed innocent under section 25(c) of NZBORA, the person would still be able to defend themselves if they can show they were not aware of the existence of the firearm.

3.2.5.4. Supply offences

A final aspect is whether there should be a mirror offence of supplying a firearm to someone who is subject to a Firearms Prohibition Order.

International context

Canada's general firearms law makes it an offence to provide a firearm to someone who is prohibited or unauthorised, while the United Kingdom's firearms law also makes it an offence to sell or transfer a firearm or ammunition to someone who is prohibited from having these items in their possession.

Most Australian models also include supply offences in their regimes, with penalties mirroring those of the primary offence. South Australia also has an additional offence of bringing a firearm, part or ammunition onto the property where a person subject to a firearms prohibition order resides.

New Zealand context

There are a range of existing offences relating to the supply or sale of a firearm to someone who is not licensed or does not have a permit to possess, such as:

- selling or supplying firearm to unlicensed person – two years' imprisonment
- selling or supplying pistol or restricted weapon to person who does not have a permit to possess – three years' imprisonment
- selling or supplying a prohibited firearm to person who does not have a permit to possess – five years' imprisonment.

Assessment of each option against criteria

| | Public safety | Human Rights | Efficiency | Overall assessment |
|------------------------------------|--|---|--|--------------------|
| Supply offences (preferred) | ++ (including would promote public safety) | 0 (any impact in line with other penalties for breaching Firearms Prohibition Orders) | + (relatively simple to administer) | ++ |
| No supply offences | - (not criminalising the provision of firearms to a prohibited person reduces public safety) | 0 (no offence therefore no impact on human rights) | - (would reduce the effectiveness of the regime) | - |

Preferred option

There would be synergy in also having an additional offence where someone knows or reasonably believes that the person is subject to a prohibition order. Such an offence should be slightly higher than existing offences given the risk associated with a prohibited person having access to a firearm. Our preferred option is have such an offence, with penalties that mirror that of the primary breach offence.

Section 3.3: Relationship between the four design parameters

3.3. Relationship between the four design parameters

Overall, the preferred model for Firearms Prohibition Orders is:

| Four Parameters | Proposed model |
|------------------------|---|
| Eligibility | <ul style="list-style-type: none">conviction-based orders for firearm-related offences, serious violent offences, criminal harassment, or breaches of protection orders or restraining orders (and imposed as part of sentencing at the discretion of the decision-maker)preventative (civil) orders where person considered high-risk based on behaviour and activityage of eligibility – 16 years and older |
| Conditions | <ul style="list-style-type: none">one broad condition prohibiting obtaining, purchasing, possessing, accessing, manufacturing or using firearms, parts, magazines, and ammunitionstandard conditions that can be modified by decision-maker as per the needs of the subject person:<ul style="list-style-type: none">not associating with people with firearms on or about their person or under their controlnot residing at premises where there are firearmsnot visiting locations or premises where there are firearmsduration – 10 years, or five years in relation to 16 and 17 year olds |
| Decision-making | <ul style="list-style-type: none">judicial decision-maker with orders made by either a sentencing court (conviction-based orders) or District Court (preventative civil orders) |
| Compliance | <ul style="list-style-type: none">current search powers (no change)penalty – up to five years' imprisonment for breach of order, or seven years' imprisonment if the breach related to a prohibited firearmadditional offence to supply someone subject to an order with a firearm, part or ammunition – penalty to mirror breach of orderreverse onus – persuasive burden level (no change with existing Arms Act 1983 reverse onus provisions) |

The design parameters, and the elements under them, need to be considered in relation to each other given the interaction between parameters and elements, and the impact of that interaction – both in terms of their effectiveness, but also in relation to the potential impact on human rights. For instance, in relation to the two Private Member's Bills on Firearms Prohibition Orders, the Attorney-General considered a number of elements of the proposed regime before deciding that the legislative proposal was inconsistent with

section 17 (freedom of association) and section 25(c) (right to be presumed innocent) of NZBORA.

Section 3.4: Other options ruled out of scope

3.4. Other options ruled out of scope, or not considered, and why

Section 3.2 sets out the four design parameters and the range of elements considered as part of the analysis work.

In addition to these elements, early thinking considered a cumulative threshold or matrix of eligibility options, based on numbers, types and timeframe of convictions. These options were not progressed due to the complexity and potential uncertainty involved as to whether someone would be eligible for a Firearms Prohibition Order or not. Using specific convictions for qualifying offences for the conviction-based form of Firearms Prohibition Orders is clearer, while allowing a civil 'preventative' option enables applications to be made when someone's behaviour and activity is such that they pose a high-risk.

We also considered an option where Courts would issue a monitoring plan, which required regular reporting to Police, and the ability for Police to undertake searches of the subject person, their premises, properties and vehicles, as well as any premise, property and vehicle regularly visited by the subject person. However, depending on how the regime is implemented, such a regime could potentially be viewed as enabling without cause search powers on a broad range of people and properties. It could also create significant implementation complexity if each order had slightly different monitoring plans in place. The potential impact on Police operational practices (i.e. limiting the ability to search when needed as the approved number of searches had already been carried out) also meant that this option was not progressed.

The concept of retrospective application was also considered – that is, application to qualifying convictions before the regime came into force. Retrospective application in the criminal law is generally not acceptable, and section 26 of NZBORA provides for a freedom from retrospective penalty or double jeopardy. Moreover, the concept of retrospective penalty was the main reason for the High Court issuing a declaration of inconsistency in relation to extended supervision orders (see *Chisnall v The Chief Executive of the Department of Corrections* [2019] NZHC 3126; *Chisnall*). However, while a person's prior convictions are an important predictor of future behaviour, the *Chisnall* case indicates that prior convictions cannot be the only factor considered as part of an application for a preventative (civil) order.

We also considered whether there should be an option for an interim or temporary Firearms Prohibition Order that could be issued by Police. The South Australian model enables Police Officers to make interim orders that expire after 28 days where the person is not a fit and proper person to possess firearms, or possession of firearms is likely to result in undue danger to life or property. While there appears to be value in having this sort of order, and any NZBORA implications (i.e. freedom of association or movement) would be for a short timeframe, more work is required to develop this aspect if needed.

A final matter considered was whether or not the concept of a Firearms Prohibition Order regime should be broadened to a weapons prohibition order regime, either by adding a

condition prohibiting access to 'weapons', or by making it a fundamental part of the regime (i.e. a combined firearms and other weapons prohibition regime). While there is value in broadening the concept to recognise that 'high-risk' people can use a variety of weapons, it would change the underlying rationale for Firearms Prohibition Orders (i.e. reducing the risk of harm from firearms). There would also need to be consideration of what weapons, particularly knives, would be within scope of any prohibition regime. Given these outstanding issues, we decided not to progress with the concept of a weapons prohibition order regime at this stage.

Proactive release

Section 4: Conclusions

4.1. What option, or combination of options is likely to best address the problem, meet the policy objectives and deliver the highest net benefits?

Firearm crime may be relatively low in New Zealand, however firearms are used in a broad range of offences and the illegal use or possession of firearms is prevalent.

During public consultation (conducted between November 2019 and January 2020):

- 69 percent of submitters who answered considered the criminal use of firearms to be a problem in New Zealand
- 62 percent of submitters who answered supported the concept of Firearms Prohibition Orders
- Only half (49 percent) of submitters who answered considered that Firearms Prohibition Orders would reduce the risk of harm.

Agencies' feedback also reflected a range of views, with some agencies indicating strong support, and other agencies indicating less support for Firearms Prohibition Orders.

Most of the evidence of effectiveness of Firearms Prohibition Orders is anecdotal evidence (based on the experiences of other jurisdictions). The limited available evidence indicates that Firearms Prohibition Orders can be an important tool in removing firearms from the community.

Our preferred approach is to develop a Firearms Prohibition Order regime, based on the following model:

| Four Parameters | Proposed Model |
|------------------------|---|
| Eligibility | <ul style="list-style-type: none"> • conviction-based orders for firearm-related offences, serious violent offences, criminal harassment, or breaches of protection orders or restraining orders (and imposed as part of sentencing at the discretion of the decision-maker) • preventative (civil) orders where person considered high-risk based on behaviour and activity • age of eligibility – 16 years and older |
| Conditions | <ul style="list-style-type: none"> • one broad condition prohibiting obtaining, purchasing, possessing, accessing, manufacturing or using firearms, parts, magazines, and ammunition • standard conditions that can be modified by decision-maker as per the needs of the subject person: <ul style="list-style-type: none"> ○ not associating with people with firearms on or about their person or under their control ○ not residing at premises where there are firearms ○ not visiting locations or premises where there are firearms • duration – 10 years, or five years in relation to 16 and 17 year olds |
| Decision-making | <ul style="list-style-type: none"> • judicial decision-maker with orders made by either a sentencing court (conviction-based orders) or District Court (preventative civil orders) |
| Compliance | <ul style="list-style-type: none"> • current search powers (no change) • penalty – up to five years' imprisonment for breach of order, or seven years' imprisonment if the breach related to a prohibited firearm • additional offence to supply someone subject to an order with a firearm, part or ammunition – penalty to mirror breach of order • reverse onus – persuasive burden level (no change with existing Arms Act 1983 reverse onus provisions) |

The proposed model has been developed following consideration of:

- the outcomes of the public consultation process
- the Attorney-General's section 7 NZBORA reports on two Private Member's Bills on Firearms Prohibition Orders
- overseas models, and reports into those models – New South Wales Ombudsman report into the use of search powers under the New South Wales regime (2016).and the more recent Legal and Social Issues Committee review into Firearms Prohibition legislation in Victoria (2019)
- the judgment in *Chisnall*, where the High Court issued a declaration of inconsistency in relation to extended supervision orders.

We also considered how the proposal would relate to existing provisions, specifically section 66 of the Arms Act 1983, and the existing offences regime under that Act.

The proposed model would provide for a Firearms Prohibition Order regime that would achieve its public safety objectives by limiting the access to firearms by high-risk individuals. At the same time, it also protects, where possible, individual human rights and freedoms. While there is some additional implementation complexity imposed by some of the balances struck, the regime would retain its overall effectiveness.

There is a risk that Firearms Prohibition Orders may disproportionately impact on Māori given the overrepresentation of Māori at all stages in the criminal justice system. At the same time, Māori are also overrepresented as victims within the system, and Firearms Prohibition Orders may help to prevent victimisation and repeat victimisation.

4.2. Summary table of costs and benefits of the preferred approach

This Regulatory Impact Assessment proposes a model for Firearms Prohibition Orders for in-principle approval.

The overall likely cost of Firearms Prohibition Orders is unknown. This is due to the large number of potential design options available. This includes costs directly relating to characteristics of the regime yet to be fully defined or assumptions that need to be worked through, for instance:

- the number of orders made by courts following convictions for eligible offences, or via a preventative model
- the type and breadth of conditions imposed
- the number of breaches of orders.

The full policy design, modelling and costing process will be conducted once in-principle approval to proceed is obtained.

The table below provides an indication of the type of costs, but does not provide detail as to the monetary benefits or impacts.

| Affected parties (identify) | Comment: nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks | Impact \$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts. | Evidence certainty (High, medium or low) |
|-----------------------------|--|--|--|
|-----------------------------|--|--|--|

Additional costs of proposed approach compared to taking no action

| | | | |
|--|---|---------------------|-------------|
| Individuals subject to Firearms Prohibition Orders | Some non-monetised costs following from the standard conditions of a Firearms Prohibition Order. The Court would be able to modify these standard conditions where needed to support a person's rehabilitative and reintegration (such as employment, education or training). | Low (non-monetised) | Low-Medium |
| Families of the subject person | There may be some non-monetised costs as a result of the imposition of conditions. However, these conditions are modifiable to support the subject person's rehabilitation and reintegration. | Low | Medium-High |
| New Zealand Police | Cost of applying for, monitoring and enforcing Firearms Prohibition Orders. Cost of preparing and making each application, any appeal costs, and legal representation. | High | Medium |
| Corrections | Cost associated with managing sentences for breaching Firearms Prohibition Order. It should be noted that some of the breaches would relate to activity (i.e. illegal possession / illegal supply) that are already offences. | Low-Medium | Medium |
| Court costs | May be some additional costs for considering Firearms Prohibition Orders as part of sentencing. Will be additional Court costs associated with applications for civil preventative Firearms Prohibition Orders. | Medium | Medium |

| | | | |
|-----------------------------|---|-------------------|------------|
| Justice | <p>Costs of legal aid</p> <p>Conviction-based orders will be covered as part of existing criminal legal aid when sought as part of sentencing for trigger offence.</p> <p>Preventative (civil) orders will likely incur civil legal aid costs (note, estimated average provided in relation to Control Orders; likely to be similar costs for a preventative Firearms Prohibition Order).</p> | s 9(2)(f)(iv) OIA | Medium |
| General public | The costs of the Firearms Prohibition Orders regime will be borne by the Government. These costs have been incorporated as part of the Government costs, and can be balanced against the higher costs (including human costs) of firearms harm. | Medium | Medium |
| Total Monetised Cost | | Medium | Low-Medium |
| Non-monetised costs | | Low | Medium |

Expected benefits of proposed approach compared to taking no action

| | | | |
|--|---|-------------|--------|
| Individuals subject to Firearms Prohibition Orders | There may be benefits for the subject person by helping to remove them from people and circles in which they may be more likely to reoffend. | Low | Low |
| Families of the subject person | There may be benefits to families of subject person, for instance, reduced risk of harm associated with the subject person's access to firearms, especially in family violence situations | Medium-High | Medium |
| New Zealand Police | Greater ability to monitor those considered high-risk and subject to a Firearms Prohibition Orders, and take action in case of breach. | High | Medium |
| Wider Government | The proposals are aimed at reducing firearms-related harm. Any reduction in firearms-related harm will reduce the actual and resource costs of responding to | Medium | Medium |

| | | | |
|--------------------------------|---|--------|--------|
| | that harm (i.e. health care, ACC costs, etc.). | | |
| Victim facing NGO sector | The proposals are aimed at reducing firearms-related harm. Any reduction in firearms-related harm will reduce the actual and resource costs of responding to that harm. | Medium | Medium |
| General public | Increased public safety and reduced risk of harm, particularly firearms-related harm. | High | Medium |
| Total monetised benefit | | Medium | Medium |
| Non-monetised benefits | | Medium | Medium |

4.3. What other impacts is this approach likely to have?

A risk is the potential number of Firearms Prohibition Orders that may be made per year, and the impact that monitoring compliance may have on Police resources, and those of other agencies. Once the modelling and costing work is completed, Police and other agencies will be in a better position to provide further analysis on resourcing implications.

There is also a risk that someone subject to Firearm Prohibition Order, unlawfully obtains a firearm and uses it. Apart from the potential harm caused, there is likely to be additional scrutiny on the regime, and how it is managed, should such an event occur.

A final risk is that, given the potential to impact on NZBORA rights and freedoms, an application for a declaration of inconsistency may be made. **§ 9(2)(f)(iv) OIA**

Section 5: Implementation and operation

5.1. How will the new arrangements work in practice?

The proposal is to amend the Arms Act 1983 by introducing a Firearms Prohibition Order regime. Once implemented, Police would largely be responsible for the ongoing operation and enforcement of the Firearms Prohibition Order regime.

As the judiciary would be the decision-maker within the regime, we would need to work with Courts / the Ministry of Justice as part of implementation.

The arrangements would be expected to come into force during 2021 or 2022 depending on the timing of the legislative process.

5.2. What are the implementation risks?

As the specific policy and legislative development process is ongoing, the full range of implementation risks are yet to be identified. However, risks in implementation relate to the potential for the regime to impact disproportionately on Māori, and on an offender's rehabilitation and reintegration.

Impact on Māori

Māori are overrepresented at all stages in the criminal justice system, including as victims.

Māori, and Māori men in particular, are likely to be overrepresented in the cohort of offenders potentially eligible for a conviction-based Firearms Prohibition Order. The ability to modify standard conditions will mean that the needs of the subject person will be able to be considered as part of setting the conditions for a Firearm Prohibition Order. This may also involve consideration of the needs of their broader whānau, hapū and iwi.

However, at the same time, the regime will also need to consider the needs of Māori as victims. Māori are also overrepresented as victims (and repeat victims) within the criminal justice system. Firearms Prohibition Orders may also benefit Māori by reducing both victimisation and revictimisation.

Impact on rehabilitation / reintegration

While the detail is still to be developed, it is likely (based on overseas models), that Firearms Prohibition Orders will come into effect when a person transitions from prison into the community. Having a Firearms Prohibition Order may impact on their ability to reintegrate, for instance, if firearms were present at their proposed place of residence or employment.

Having modifiable standard conditions supports the subject person's rehabilitation and reintegration back into the law-abiding community. The specifics of how this could be done for someone transitioning from prison would need to be worked through. There would also need to be good data exchange between Police and Corrections to ensure that a person's release address was appropriate, and would not lead them to unintentionally breach their Firearms Prohibition Order.

Impact on Courts / the Judiciary

A third implementation risk is that if the Firearms Prohibition Order regime is too restrictive, the Judiciary may not impose them.

While the regime has been designed to find an appropriate balance between individual rights and public safety, ultimately, it is up to the Courts to decide whether to impose an order or not, and what conditions to impose.

While Firearms Prohibition Orders will be a new concept, the Judiciary is well versed in the issuing of different types of sentences, and civil / preventative orders. Moreover, the concept of modifiable conditions is also not a new concept for the judiciary as such already exists under the Family Violence Act 2018, as well as control orders, and most bail proceedings.

Police would work with the Ministry of Justice, courts, and the Judiciary during implementation around any training and process changes needed.

Proactive release

Section 6: Monitoring, evaluation and review

6.1. How will the impact of the new arrangements be monitored?

The New Zealand Police is currently responsible for administering the Arms Act 1983, and would therefore be responsible for administering the Firearms Prohibition Orders regime.

The New Zealand Police would monitor the numbers of Firearms Prohibition Orders being made, as well as relevant information relating to those orders (i.e. proceedings related to breaching orders, etc.).

The orders would be reviewable through normal Court mechanisms.

6.2. When and how will the new arrangements be reviewed?

Firearms Prohibition Orders will be reviewed after five years of operation. This would be a non-statutory review conducted as part of New Zealand Police's stewardship of the Arms Act 1983.

Five years has been chosen as the evidence from both Victoria (after 18 months) and New South Wales (after 22 months with warrantless search powers) indicates that two years will be too soon to review the operation and impact of the regime.

Proactive release