

## **In Confidence**

Office of the Minister of Police

Chair, Cabinet Social Wellbeing Committee

### **FIREARMS PROHIBITION ORDERS: FINAL DESIGN PARAMETERS**

#### **Proposal**

- 1 This paper seeks agreement to the final design of a Firearms Prohibition Order regime.

#### **Relation to government priorities**

- 2 This proposal relates to the Government's priority outcome of supporting healthier, safer, and more connected communities.
- 3 Firearm-related crime represents a real risk to community safety. Firearms Prohibition Orders promote the safety of communities by prohibiting high-risk people from accessing, being around, or using firearms or restricted weapons.
- 4 Introducing Firearms Prohibition Order flows on from, and consolidates, the work to date aimed at improving public safety and reducing the harms associated with the illegal use of firearms.

#### **Executive Summary**

- 5 Firearms Prohibition Orders protect the public from harm by prohibiting 'high-risk' people from accessing, being around, or using firearms or restricted weapons. Firearms Prohibition Orders achieve this by setting out the conditions which people subject to an order are required to meet, and the penalties for breaching those conditions.
- 6 Firearms Prohibition Orders complement the firearms licensing system, which is aimed at ensuring that only those considered 'fit and proper' to possess firearms can gain a firearms licence. However, while someone who is not 'fit and proper' person cannot obtain a firearms licence, this does not prevent them from:
  - 6.1 legally accessing or using firearms, for instance, under the immediate supervision of a licensed firearms holder<sup>1</sup>

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<sup>1</sup> This may, though, have implications for the licensed firearm holder. Section 27(2)(c) of the Arms Act 1983 enables a licence to be revoked if a firearm or airgun in the licensed firearms owner's possession is reasonably likely to be accessed by a person who is not a fit and proper person. This means that should a licensed firearms owner allow a person who is not fit and proper to possess or use their firearms, they may end up having their firearms' licence revoked.

- 6.2 associating with people in physical possession of firearms, including people with firearms on or about their person
- 6.3 residing at, or visiting locations where firearms are held, including gun shops, arms fairs, or gun clubs.
- 7 This means there is a risk that someone whose behaviour and actions represent a high-risk of violence, or reflect an underlying threat or risk of violence, would still be able to legally access and use a firearm. Firearms Prohibition Orders close this gap.
- 8 In July 2020, Cabinet approved in principle a draft model for a Firearms Prohibition Order regime for New Zealand, subject to further policy design and costing information [SWC-20-MIN-0122; CAB-20-MIN-0359].
- 9 In this paper I now propose a finalised policy design and confirm:
- 9.1 *The types of convictions that would qualify for a Firearms Prohibition Order.* I propose to narrow the conviction types that would qualify for a Firearms Prohibition Order to ensure that these orders are focused tightly on higher-risk offenders, where there is a clear link between the nature of offending and firearm-related risk. However, this does involve some trade-offs, particularly in relation to family violence offending (for instance, offenders who breach protection orders).
- 9.2 *The breadth and nature of the standard conditions.* I propose to restrict aspects of the standard conditions to reduce the impact on the freedoms of association and movement, while still preventing the subject person from being able to legally access firearms or restricted weapons. I also propose to amend the broad and standard conditions to make it clear that they apply to all firearms, airguns, imitation firearms, pistols, and restricted weapons, as well as to any part, magazine, or ammunition.
- 9.3 *The inclusion of special conditions.* I propose including special conditions to the overall regime as these can provide more targeted prohibitions in specific circumstances that will help support the effectiveness of Firearms Prohibition Orders.
- 9.4 *Rights of appeal.* Appeal rights would exist as a result of Firearms Prohibition Orders being made as part of the conviction and sentencing process.
- 10 In addition, I propose reconfiguring the offences under the Firearms Prohibition Order regime to provide for a lower penalty of up to two years' imprisonment for breaches of standard or special conditions. This will bring these lower order breach offences in line with other breach offences, while still retaining the more serious offences and penalties for those offences that pose a more serious risk to public safety.
- 11 The detailed Firearms Prohibition Order design is set out in Appendix One to this paper. This paper also provides Cabinet with costing information for the regime. The costing and modelling indicates that the number of Firearms Prohibition Orders made per year at steady state can be estimated at 974 [REDACTED]
- s 9(2)(f)(iv) and s 9(2)(g)(i) OIA [REDACTED]

- 12 If agreed, a Bill will be drafted for introduction before the end of 2021 and a s 9(2)(f)(iv) and s 9(2)(g)(i) OIA

## Background and context

- 13 Firearm crime is relatively low in New Zealand compared to other jurisdictions. However, Police's experience demonstrates the illegal use of firearms is prevalent, with 2,981 unlawful firearms seized or recovered by Police during routine policing activities in 2020.
- 14 The Arms Act 1983 sets out the regulatory and licensing framework in relation to firearms. The firearms licensing system is aimed at ensuring that only those considered 'fit and proper' to possess firearms can gain a firearms licence.
- 15 While someone who is not a 'fit and proper' person cannot obtain a firearms licence, this does not prevent them from:
- 15.1 legally accessing or using firearms, for instance, under the immediate supervision of a licensed firearms holder<sup>2</sup>
  - 15.2 associating with people in physical possession of firearms, including people with firearms on or about their person
  - 15.3 residing at, or visiting locations where firearms are held, including gun shops, arms fairs, or gun clubs.
- 16 This means there is a risk that someone whose behaviour and actions represent a high-risk of violence or reflect an underlying threat or risk of violence, would still be able to legally access and use a firearm (even if only under the immediate supervision of a licensed person).
- 17 Firearms Prohibition Orders protect the public from harm by prohibiting 'high-risk' people from accessing, being around, or using firearms or restricted weapons. Firearms Prohibition Orders achieve this by setting out the conditions which people subject to an order are required to meet, and the penalties for breaching those conditions.
- 18 In July 2020, Cabinet gave in principle approval to a Firearms Prohibition Order (pending final policy detail and costing information [SWC-20-MIN-0122; CAB-20-MIN-0359]). This model is set out at Table One.

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<sup>2</sup> See footnote 1.

**Table One: Firearms Prohibition Order model approved in principle in July 2020**

Key Parameter	Proposed model – as at July 2020
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>conviction-based orders based on convictions 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)</li> <li>eligibility from the age of 18 years</li> </ul>
<b>Conditions</b>	<ul style="list-style-type: none"> <li>one broad condition prohibiting obtaining, purchasing, possessing, accessing (etc) of firearms, parts, magazines, and ammunition</li> <li>standard conditions that can be modified by the decision maker as per the needs of the subject person: <ul style="list-style-type: none"> <li>not associating with people with firearms or about their person or under their control</li> <li>not residing at premises where there are firearms</li> <li>not visiting locations or premises where there are firearms</li> <li>duration - 10 years</li> </ul> </li> </ul>
<b>Decision-making</b>	<ul style="list-style-type: none"> <li>judicial decision-maker</li> </ul>
<b>Compliance</b>	<ul style="list-style-type: none"> <li>current search powers (no change)</li> <li>penalty - up to five years' imprisonment for breach of order, or seven years' imprisonment if the breach involved a prohibited firearm</li> <li>offence to supply someone subject to an order with a firearm, part, or ammunition - penalty to mirror breach of order</li> <li>reverse onus - persuasive burden level (no change with existing Arms Act 1983 reverse onus provisions)</li> </ul>

### Structure of this paper

- 19 In this paper I outline the following key elements of the Firearms Prohibition Order regime:
- 19.1 the framing of the specific offences / types of qualifying offences
  - 19.2 the breadth and nature of standard conditions
  - 19.3 the nature of special conditions
  - 19.4 rights of appeal
  - 19.5 offences and penalties
  - 19.6 transitional and consequential changes
  - 19.7 the modelled costs and implications.
- 20 The final proposed design is set out in **Appendix One**. Additional information on the identified transitional and consequential changes is set out in **Appendix Two**.

## Types of convictions that would qualify for a Firearms Prohibition Order

- 21 The model, as approved in principle by Cabinet, proposed that convictions for the following offence categories would be qualifying offences:
- 21.1 firearms-related offences
  - 21.2 serious violent offences
  - 21.3 criminal harassment
  - 21.4 breaches of protection orders or restraining orders.

### *The impact of qualifying convictions*

- 22 The broader the list of qualifying convictions, the wider the coverage of the regime and the greater the public safety outcomes of Firearms Prohibition Orders. At the same time, the broader the list of qualifying convictions, the less targeted the regime may be as it may capture a large group of people who do not go on to commit further acts of serious offending.
- 23 Given this, I consider that a more limited list of conviction categories is needed to ensure that Firearms Prohibition Orders are tightly targeted to those whose offences are at the higher end of the harm spectrum. In doing so, I consider that the regime should be focused to capture the most serious Arms Act offences and those offences generally recognised as serious violent offences.<sup>3</sup>
- 24 This approach means that the Firearms Prohibition Order design will not cover the original proposed offence categories of criminal harassment or breaches of protection orders or restraining orders.
- 25 In making this decision, I have given careful consideration to the impact of family violence and harassment in our community, and the harm caused by repeated breaches of protection orders. I have also considered the safeguards already built into protection orders, recognising that the court already has the ability to consider the risks associated with firearms and restricted weapons when making a protection order.
- 26 Many protection orders include a standard condition about weapons that prohibits the respondent from possessing or having weapons under their control; and also requires the surrender of any weapon in the respondent's possession or under their control.<sup>4</sup>

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<sup>3</sup> While changes may occur in relation to the placement of the serious violent offences list (currently in section 86A of the Sentencing Act 2002), I consider that this change can be dealt with through the legislative process, or a consequential change, if changes to that list placement occurs.

<sup>4</sup> It should be noted that while this is a standard condition, it may be modified or removed by the court, and therefore, there will be some situations where a protection order would not include the standard condition about weapons, or will include a modified version of it.

27 I propose that qualifying offences for a Firearms Prohibition Orders would be:

**Firearms-related offences**

- Arms Act 1983 offences that disqualify someone from holding a firearms licence.

**Serious Violence offences**

- the Crimes Act 1961 offences currently defined as a 'serious violent offence' in section 86A of the Sentencing Act 2002
- an offence under section 98A of the Crimes Act 1961 (participation in an organised criminal group)
- an offence aimed at the suppression of terrorism under the Terrorism Suppression Act 2002.

*Considerations for making a Firearms Prohibition Order*

28 In considering whether or not to impose a Firearms Prohibition Order, I propose that the court would be able to consider the aspects of the offending (including its circumstances, nature and seriousness), and whether, in the interests of safety, a Firearms Prohibition Order should be imposed.

**Breadth and nature of the standard conditions**

29 The model approved in July 2020 consists of the following conditions:

- 29.1 One broad condition prohibiting obtaining, purchasing, possessing (etc) of firearms, parts, magazines, and ammunition.
- 29.2 Standard conditions that can be modified by the decision-maker covering:
  - 29.2.1 not associating with people with firearms on or about their person or under their control
  - 29.2.2 not visiting places where there are firearms
  - 29.2.3 not residing in premises where there are firearms
  - 29.2.4 duration of up to 10 years.

30 The conditions of a Firearms Prohibition Order are important to prevent the subject person from accessing or being able to access a firearm.

31 The broad condition is aimed at preventing the person from being able to directly access, possess or use firearms, while the standard conditions are aimed at removing or reducing the situations in which a subject person may be able to access firearms.

32 Under the proposed model, the broad condition would not be modifiable. But standard conditions would be modifiable to help meet the rehabilitation and reintegration needs of the subject person.

33 Making the standard conditions modifiable would also help to address concerns about the impact the conditions may have on individuals and communities: for instance, a person receiving a Firearm Prohibition Order would still be able to

live and work on a farm if that was considered to contribute to their rehabilitation, as long as they did not access or use firearms. As part of deciding whether to modify the condition, the court may need to consider the potential for the person to access a firearm, and what controls may need to be put in place to prevent access from occurring.

*Proposed modification to conditions*

34 I consider that some modifications are needed to improve the clarity and scope of the conditions. I propose that the scope of the:

34.1 Firearms Prohibition Order prohibitions includes the range of firearms and restricted weapons covered by Arms Act 1983, that is, to include 'firearms, airguns, imitation firearms, pistols, or restricted weapons, or any part, magazine, or ammunition'. Without this change Firearms Prohibition Orders would not cover all of these arms items, or restricted weapons (which include, for instance, grenades, tasers, rocket launchers etc).

34.2 non-associating condition be changed by removing the phrase 'under their control' as this phrase has a similar meaning to possession. This change is needed because this condition was not intended to prevent the subject person from associating with anyone simply because they were a firearms owner – especially when their firearms may be stored securely in another location.

34.3 non-associating condition be refined to confirm that non-association applies to unsecured firearms in vehicles (but not to firearms securely stored appropriately in vehicles). This reflects that there are rules around appropriate storage in vehicles. If a firearm is not appropriately stored, it would be easily accessed by the subject person and therefore, this should be a barrier to associating with someone.

34.4 non-visiting condition be determined by specifying the types of venues and places that a subject person would be prohibited from accessing. This is proposed on the basis that the original framing of the non-visiting condition could result in inadvertently breaching the order or limiting employment in locations where firearms are generally located (for instance, rural locations).

34.5 non-visiting condition be changed by adding a prohibition on the subject person being a member of a firearms club or similar. This is proposed to recognise that membership of such a club may involve heightened risk of being able to access firearms.

35 These changes are needed to ensure that Firearms Prohibition Orders:

35.1 apply to the range of firearms and restricted weapons covered within the Arms Act 1983

35.2 do not penalise someone for merely associating with a licensed firearms owner even where there is no risk of access to that person's firearms

- 35.3 reflect the places and locations where people may be most at risk of being able to access a firearm or restricted weapon.

*Consideration of a definition of the term 'residing' for the standard condition of not residing in places where there are firearms*

- 36 There is a need to define what 'residing' means in relation to the standard condition of not residing in locations where there are firearms.
- 37 I propose adopting a definition similar to that set out in section 16 of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 given that both the Registry and Firearms Prohibition Orders have underlying themes of protection and prevention. Using this precedent, the definition of 'resides' would set out that a subject person is considered as generally residing at a location if they resided at that location for at least two days (whether consecutive or not) in any 12-month period.

*Considerations for modifying the standard conditions*

- 38 In considering whether to modify the standard conditions, courts will be able to consider matters such as:
- 38.1 the circumstances, nature, and seriousness of the offences (or offences) that lead to the making of the order
  - 38.2 the public safety interest and purposes of making a Firearms Prohibition Order
  - 38.3 the effect that the standard conditions may have on the subject person
  - 38.4 the effects of modifying those standard conditions
    - 38.4.1 on the subject person, including their ability to stay within their community or their particular employment. This would involve considering the positive impact on rehabilitation and reintegration, and the positive impact of any modification on employment or living arrangements
    - 38.4.2 on the subject person's ability to access a firearm, airgun, imitation firearm, pistol, or restricted weapon, or part, magazine, or ammunition, and what additional mechanisms or controls may need to be imposed to ensure that such access cannot happen (including, for example, that in relation to a modification of the non-residing condition, Police would be able to work with the licensed firearms owner to address any concerns regarding access)
  - 38.5 the need to protect people from those who may pose a risk or threat of future violence, particularly (but not limited to) firearms-related violence, or
  - 38.6 any other matters the court considers relevant.



- 39 I note that in relation to the non-residing condition, the judicial modification of Firearms Prohibition Orders may have secondary implications for the administration of the revocation of firearms licences. Police's ability to revoke a firearms licence may be affected where a licensed firearms owner cannot ensure that a subject person cannot access their firearms, due to the nexus between the Firearms Prohibition Order reform and the provisions of the Arms Act 1983. I will seek further advice on these matters to inform drafting instructions to ensure that judicial modification of Firearms Prohibition Orders in this way aligns with the Arms Act 1983 licensing regime.

#### *Duration of orders*

- 40 The previous Cabinet paper proposed that Firearms Prohibition Orders would last for 10 years.
- 41 Due to a drafting error, the recommendations of that paper made it appear that the duration of Firearms Prohibition Orders could also be modifiable. This was never the intention.
- 42 I propose therefore to reinstate the proposal that Firearms Prohibition Orders last for 10 years once they take effect.

#### *When the order would take effect*

- 43 A Firearms Prohibition Order would either take effect once made by the court or, in the case of someone sentenced to a term of imprisonment, would take effect following the person's release from prison or custody.

#### **Inclusion of special conditions**

- 44 The July 2020 Cabinet paper noted I would further explore the concept of special conditions.
- 45 Special conditions enable the court to impose any other conditions that it considered reasonably necessary to prevent the person from being able to access, possess, or use a firearm (or reduce the risk of access or use happening).
- 46 I consider there is value in including special conditions. Special conditions enable the court to prohibit a subject person from visiting particular people (or classes of people), premises or specific locations. They are therefore important to reduce any residual risk that the subject person may be able to access a firearm (or restricted weapon).
- 47 The special conditions, in association with the modifiable standard conditions, would enable the Firearms Prohibition Order to be specifically and appropriately tailored to the person's specific circumstances and risks.

### *Courts may impose special conditions*

- 48 I proposed that courts be given a high level of discretion so that they will be able to impose any conditions that are considered reasonably necessary, in the court's opinion to:
- 48.1 prevent the subject person from obtaining, accessing, possessing, or using a firearm, airgun, imitation firearm, pistol, or restricted weapon, or any part, magazine, and ammunition, or
  - 48.2 reduce the risk of the subject person obtaining, accessing, possessing, or using a firearm, airgun, imitation firearm, pistol, or restricted weapon, or any part, magazine, and ammunition.
- 49 Examples of a special condition may include prohibiting the person from associating with a particular individual (for instance, a particular associate whom they have offended with) or class of individuals (for instance, members of a particular gang or group) or from visiting a particular location (such as a gang pad).
- 50 I would expect the court would use special conditions where the judge considered that the standard conditions were not sufficient to reduce the risk that the subject person could access a firearm or restricted weapon (for instance, continued involvement with a criminal group). This may be as a result of Police submissions, the person's criminal history, or some other risk factors (for instance, where the subject person has previously acquired or threatened to acquire firearms from a particular person / location).

### **Rights of appeal and review**

- 51 The July 2020 Cabinet paper noted that rights of appeal and review would also be considered.
- 52 I do not consider that additional appeal mechanisms are necessary given that the making (or not making) of an order as part of sentencing would be appealable through existing court mechanisms.<sup>5</sup> However, for the avoidance of doubt, I propose that a provision be included that specifies that an appeal against the decision to make or refuse to make a Firearms Prohibition Order is an appeal against sentence under subpart 4 of Part 6 of the Criminal Procedure Act 2011. This could be modelled on a similar provision in section 123H of the Sentencing Act 2002 in relation to appealing a decision to make or refuse to make a protection order a part of sentencing.
- 53 I have also considered whether additional rights of review are required. Given that Firearms Prohibition Orders are aimed at higher risk offenders, and will last for 10 years, I do not consider that additional tailored review rights are required.
- 54 I do not consider that a person should be able to be subject to two Firearms Prohibition Orders at the same time. Should a person, subject to a Firearms Prohibition Order, be convicted of a subsequent qualifying offence, the

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<sup>5</sup> Sentencing appeal processes under subparts 4 and 12 of Part 6 of the Criminal Procedure Act 2011 would apply for both offender and prosecution.

sentencing court would have the ability to either continue the existing Firearms Prohibition Order as it stood, or to substitute a new Firearms Prohibition Order in its place. In doing so, the court could continue with the same conditions, or could impose changed and / or new conditions. In doing so, the court would need to consider:

- 54.1 what conditions to impose (including special conditions)
- 54.2 whether there is good reason for modifying any conditions in the original Firearms Prohibition Order
- 54.3 whether any modified conditions should continue in their modified form
- 54.4 whether any special conditions should be continued (whether in the original or a modified form).

## **Offences and penalties**

- 55 I propose revising the offences agreed in July 2020 to provide for a lower penalty of up to two years' imprisonment for breaches relating to standard and special conditions. The existing proposed offences and penalties would apply to the broad condition, or the specific offence of supplying a firearms-related item to a subject person.
- 56 This tiered approach provides for a more tailored and proportionate set of sanctions.<sup>6</sup> Under this approach, the Firearms Prohibition Order arrangements will include the following offences, with adjusted penalties:
  - 56.1 a breach of the broad condition would have a penalty of up to five years' imprisonment, or seven years' imprisonment if the breach involved a prohibited firearm.
  - 56.2 an offence of breaching a standard or special condition would have a penalty of up to two years' imprisonment. This offence would have a defence if the person showed that they had a reasonable excuse for the breach
  - 56.3 an offence of supplying a firearm, airgun, imitation firearm, pistol, or restricted weapon, or any part, magazine, or ammunition to a person subject to a Firearms Prohibition Order, with a penalty of up to five years' imprisonment, or up to seven years' imprisonment if the breach involved a prohibited firearm). This offence would require knowledge of the fact the person was subject to a Firearms Prohibition Order.

## **Transitional and consequential changes**

- 57 Appendix Two sets out the identified transitional and consequential changes needed to support the implementation and operation of Firearms Prohibition Orders. These include:
  - 57.1 amending the Arms Act 1983 to ensure that any firearms licence is cancelled when a person becomes subject to a Firearms Prohibition

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<sup>6</sup> Breaches of the standard or special conditions would be consistent with breach offences under the Harassment Act 1997, but lower than breach offences relating to protection orders under the Family Violence Act 2018.

Order and that the making of an order can be taken into account for any subsequent application by that person for a firearms licence

- 57.2 amending the Arms Act 1983 so that having a Firearms Prohibition Order is also a ground for disqualification under section 22H of the Arms Act 1983
- 57.3 providing immunity for officers in relation to breach offences committed while acting as undercover officers
- 57.4 amending section 108 of the Evidence Act 2006 to include offences under the Firearms Prohibition Order regime
- 57.5 amending the Legal Services Act 2011 to ensure legal aid would be available for appeals from the making of a Firearms Prohibition Order
- 57.6 amending the Privacy Act 2020 to enable information about Firearms Prohibition Orders to be accessed where necessary, for instance, by Ara Poutama Aotearoa (the Department of Corrections)
- 57.7 adding any breach of a Firearms Prohibition Order to the list of exceptions set out in section 45 of the Search and Surveillance Act 2012 (which would allow an enforcement officer to undertake surveillance and use interception devices in order to obtain evidence in relation to the breach of a Firearm Prohibition Order)
- 57.8 adding the term 'part' to the definition of 'Arms' under the Search and Surveillance Act 2012.

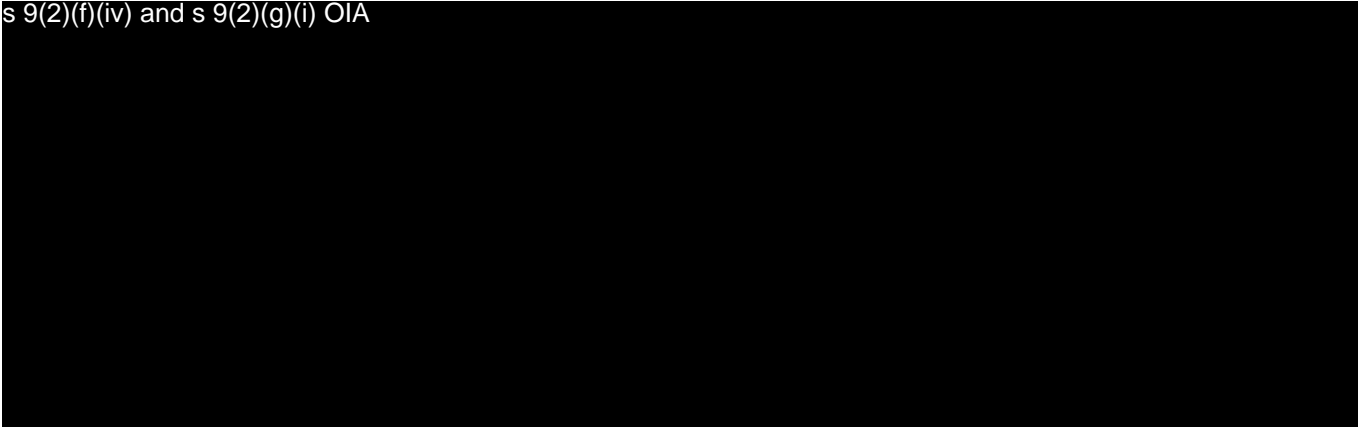
### **Modelling the cost impact of Firearms Prohibition Orders**

- 58 The resource and costs of Firearms Prohibition Orders will be impacted by:
  - 58.1 the number and nature of the qualifying offences
  - 58.2 the number of orders made by courts – and the number of appeals from the making of an order
  - 58.3 the number and seriousness of order breaches
  - 58.4 the conviction rates for breaches – and the percentage that result in a sentence of imprisonment.
- 59 The two key drivers of costs are the number of orders made by courts, which will largely be influenced by the number and nature of the of the qualifying offences, and the sentencing costs arising out of breaches. The proposed tightening of the qualifying offences, and the tiered approach to penalties, provides additional proportionality to the regime, while also helping to reduce the costs associated with it.
- 60 My officials have worked with the Sector Group at the Ministry of Justice to build a model for cost impact of Firearms Prohibition Orders consistent with other justice sector models. The assumptions and proxies underlying the model reflect the best information that Police, consulting with the Ministry of Justice

Sector Group and Ara Poutama Aotearoa had available and included national and international comparisons where appropriate.


- 61 This modelling indicates that costs will build over the first few years of the regime until a steady state is obtained, around year 16 of the regime. This reflects the growth over 10 years in the number of Firearms Prohibition Orders, and the growth over time of costs to the wider justice system, particularly the Corrections system.

s 9(2)(f)(iv) and s 9(2)(g)(i) OIA



- 63 In addition, at steady state, officials forecast that there would be approximately 28 people per year remanded in custody for breaches of a Firearms Prohibition Order and 19 people serving a breach-related sentence.

s 9(2)(f)(iv) and s 9(2)(g)(i) OIA



### **Legislative Implications**

- 68 Firearms Prohibition Orders will require amendments to the Arms Act 1983. The proposed Bill is currently on the legislative programme as a Category 4 priority with the Bill to be introduced before the end of 2021.
- 69 This Bill may need to be an omnibus bill to reflect that it will amend the Arms Act 1983 and that there will be consequential amendments to other Acts.

### **Impact Analysis / Regulatory Impact Statement**

- 70 The Ministry for the Environment has been consulted and confirms that the Climate Implications of Policy Assessment requirements do not apply to this proposal as the threshold for significance is not met.
- 71 The Regulatory Impact Analysis team at the Treasury has determined that the proposal on administrative costs to the Justice sector resulting from the establishment of the Firearms Prohibition Order is exempt from the requirement to provide a Regulatory Impact Statement on the basis that it has been addressed by existing impact analysis [SWC-20-MIN-0112; CAB-20-MIN-0359].

### **Population Implications**

- 72 Firearms Prohibition Orders may have mixed impact on Māori and Pacific people, and rural communities.

#### *Impact on Māori and Pacific people*

- 73 While Firearms Prohibition Orders are not designed to impact on any particular ethnic group or gender, Firearms Prohibition Orders may impact disproportionately on Māori and Pacific people, particularly Māori and Pacific men, because they are overrepresented in the criminal justice system and in particular in the qualifying offences for a Firearms Prohibition Order. As the Firearms Prohibition Order regime only applies to the highest risk offenders, convicted for a qualifying offence, the regime will not exacerbate the overrepresentation of Māori entering the criminal justice system for the first time.
- 74 The Firearms Prohibition Order regime creates new offences for breaching an order. The proposed penalty regime is tiered and is designed to provide a tailored and proportionate set of sanctions. The impact of these new offences will mean that some of the highest risk offenders will remain in the criminal justice system for a period, however this is appropriate given the seriousness of their offending and the seriousness of harm or potential harm to victims.

- 75 The ability of the court to modify the standard conditions of a Firearms Prohibition Order to meet the needs of the subject person will help enable rehabilitative and reintegration needs of Māori and Pacific people to be considered, including their employment needs. This approach enables the order to be specifically and appropriately tailored to the person's specific circumstances and risks, rather than applying a 'one size fits all' approach. This approach can therefore consider any specific cultural needs of Māori and Pacific people, and appropriately tailor the conditions to their circumstances and needs.
- 76 Firearms Prohibition Orders may also help to protect Māori, as the regime may help reduce firearms-related violence and threats of violence. Based on a sample of data, in 2018, Māori represented 29.6% of victims of firearms offences<sup>8</sup> where there was an identified victim whose ethnicity was known, and by 2020 this had increased to 37.3%.<sup>9</sup>

#### *Impact on rural communities*

- 77 Firearms Prohibition Orders may impact on rural communities as access to firearms in rural communities may be greater than in non-rural communities. This may also increase the impact on Māori given the rural nature of many Māori communities.
- 78 The standard conditions may also impact on rural communities as (due to the prevalence of firearms in rural communities) there may be limited alternatives for a subject person to live and work. The ability to modify standard conditions will help to reduce the impact on rural communities as this would enable a subject person to still be able to work and live within the community, as long as they do not access or use firearms. The inclusion of a reasonable excuse defence as part of the breach of standard condition offences may also help to mitigate these implications.
- 79 Firearms Prohibition Orders may also provide a protective element by protecting rural victims or potential victims from firearms-related violence or threats of violence.

### **Te Tiriti o Waitangi analysis**

#### *Protection*

- 80 In addition to Te Tiriti o Waitangi, the United Nations Declaration on the Rights of Indigenous Peoples states that indigenous peoples have the right to fully enjoy all human rights and fundamental freedoms as recognised in the Charter of the United Nations and the Universal Declaration of Human Rights. It emphasises the rights of indigenous peoples to live in dignity, to maintain and

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<sup>8</sup> This only includes a sample of Police data on firearms-related offences more likely to have an identified victim and does not include possession-only offences. Only offences where a victim was recorded, and the victim's ethnicity was known, have been included.

<sup>9</sup> In the 2018 census, Māori were recorded as 16.5% of the New Zealand population. Stats NZ estimates that this increased to 16.7% in 2020.

strengthen their own institutions, cultures, and traditions and to pursue their self-determined development, in keeping with their own needs and aspirations.

- 81 The proposals do not affect the protection of unique Māori values or Māori rights to make decisions over resources and taonga which they wish to retain. The principles in the Arms Act 1983 in relation to promoting the safe possession and use of firearms, and the ability to impose controls on the possession and use of firearms, apply to Māori and other New Zealanders equally. This includes the principle that the possession and use of arms is a privilege, not a right (s. 1A of the Arms Act 1983).
- 82 I recognise, however, that hunting for food is an important cultural practice for Māori, particularly on Māori land. It is a requirement that any person hunting using a firearm is either a licensed firearm owner or under the direct supervision of a licensed firearms holder. While a Firearms Prohibition Order may impact on the ability of a particular person to engage in the traditional hunting of food (using a firearm), it would not prevent the wider iwi, hapū or whānau from exercising the rights and obligations of kaitiaki over the land.
- 83 In this regard, I do not consider Firearms Prohibition Orders as impacting on cultural practices of hunting for food. Mātauranga Māori, the traditional concepts of knowledge and knowing that Māori ancestors brought with them to Aotearoa / New Zealand are wider than one individual or set of individuals that may be subject to prohibitions through the Firearms Prohibition Order regime.

#### *Participation*

- 84 The proposals could potentially impact different Māori groups differently. Māori groups that use firearms could be impacted by having a person in their whānau, hapū or iwi subject to a Firearms Prohibition Order, where that person is residing with that group or visiting that group. This could affect whanaungatanga, which provides people with a sense of belonging, and affect Māori whānau structures.
- 85 However, the ability to modify the standard conditions enables the decision-maker to consider the particular circumstances of the subject person, and their rehabilitation and reintegration needs. The court must consider, among other things, the effect of the standard conditions on the subject person, including the positive impact on rehabilitation and reintegration, and the positive impact on employment or living arrangements.
- 86 In addition, the Firearms Prohibition Order regime provides natural justice protections so that an independent decision-maker makes the decision on whether a Firearms Prohibition Order is an appropriate and proportionate response to the person's offending. The subject person would also be able to appeal the making of a Firearms Prohibition Order and its conditions.

#### *Partnership*

- 87 Specific consultation and engagement with Māori in a way that is culturally appropriate for Māori on the proposals has not been conducted to date. There was, however, an opportunity for Māori to submit on the proposals through the



public consultation process on Firearms Prohibition Orders that ran from 11 November 2019 to 13 January 2020. The document was also provided to a number of Māori organisations that Police considered might have an interest in the proposals. Feedback of submitters has been considered and has informed the development of the regime.

- 88 I propose that Police specifically consult with Māori on an exposure draft of the Bill and report back to me on the results of this engagement.

## Human Rights

- 89 Firearms Prohibition Orders are aimed at improving public safety and reducing harm by restricting high-risk people with a propensity to violence – as shown by convictions – from having access to firearms and restricted weapons. This is in a context where the use and ownership of firearms and other arms items in New Zealand is a privilege and people who have committed the offences in scope have lost that privilege.
- 90 While the regime design creates a criminal order imposed following conviction for a qualifying offence, the purpose of Firearms Prohibition Orders is largely preventative, aimed at reducing the risk of the person being able to access firearms, airguns, imitation firearms, pistol, and restricted weapons. This policy objective of Firearms Prohibition Orders constitutes a sufficiently important objective to warrant some limitation on rights and freedoms.
- 91 While the final assessment of the consistency of the proposals with the New Zealand Bill of Rights Act 1990 would be undertaken by the Attorney-General, the regime, proposed in this paper, has been designed to limit the impairment on rights and freedoms to no more than necessary to achieve the objectives of Firearms Prohibition Orders. Safeguards include:
- 91.1 a judicial decision-maker – thus providing judicial oversight
  - 91.2 orders based on current convictions for qualifying offences (as opposed to either group membership or the retrospective application of Firearms Prohibition Orders to prior convictions)
  - 91.3 orders having a set duration period (10 years), and the conditions being linked to the objective of preventing high-risk people from having access to firearms and related items
  - 91.4 tiered penalties that are in line for similar offences, such as unlawful possession offences<sup>10</sup> or breach offences.<sup>11</sup>
- 92 These design safeguards alleviate some of the human rights impacts of Firearms Prohibition Orders that are in place in other jurisdictions.
- 93 While the regime will place some restrictions on the freedom of association and movement, it is also worth noting that such restrictions (with appropriate

<sup>10</sup> For example, unlawful possession of a firearm penalty is up to four years' imprisonment and unlawful possession of a prohibited firearms is up to five years' imprisonment.

<sup>11</sup> For example, breach of restraining orders under the Harassment Act 1997 has a penalty of up to two years' imprisonment, and breach of protection orders has a penalty up to three years' imprisonment.

safeguards) are common in relation to other court-imposed orders, bail conditions and sentences. It is not unusual for someone to be prohibited from associating with certain people or visiting or residing in certain places through such orders, conditions, and sentences.

### *Potential impact on the presumption of innocence*

- 94 Section 25(c) of the New Zealand Bill of Rights Act 1990 provides for the right to be presumed innocent until proved guilty according to law.
- 95 The proposed Firearms Prohibition Order regime may place some restriction on the right to be presumed innocent. However, it is important to note that these restrictions are no more than that which already exists under section 66 of the Arms Act 1983.
- 96 Section 66 sets out a rebuttable presumption that, once the prosecution has proved beyond reasonable doubt that a person was in occupation of any land or building, or was the driver of a vehicle, where a firearm, airgun, pistol, imitation firearm, restricted weapon, prohibited magazine, or explosive was found, then that person is presumed to have been in possession of that item. It is then up to the defendant to show otherwise – but only to a balance of probabilities level. After that, the onus would shift back to the prosecution.
- 97 Section 66 of the Arms Act 1983 is an important component of arms control as it helps to remove the ‘gun isn’t mine’ defence and is an important part of ensuring that firearms and other items do not fall into the wrong hands.
- 98 I am aware that in relation to the Member’s Bill on Firearms Prohibition Orders, the Arms (Firearms Prohibition Orders) Amendment Bill (2018), the Attorney-General considered that the application of section 66 to the offences in the Bill meant that the Bill appeared to be inconsistent with the right to be presumed innocent.
- 99 In making that decision, the Attorney-General considered a range of aspects of the Firearms Prohibition Order design set out in that Member’s Bill, including, for instance, the proposed penalty of 14 years’ imprisonment, which he considered to be ‘highly disproportionate to similar offences’.
- 100 s 9(2)(g)(i) OIA [REDACTED] I do not consider the penalties in the regime proposed in this Cabinet paper to be disproportionate to similar offences. The relevant offences in this proposed Firearms Prohibition Order regime are comparable to the similar offences of unlawful possession offences, such as the unlawful possession of a firearm (up to four years’ imprisonment) and unlawful possession of a prohibited firearm (up to five years’ imprisonment).
- 101 I also note that in considering the Member’s Bill, the Attorney-General set out two levels of reverse onus: evidential onus and persuasive burden.<sup>12</sup> The

<sup>12</sup> An evidential onus requires the 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 the prosecution. The

Attorney-General considered that it may be more appropriate for the evidential onus to be applied to breaches of Firearms Prohibition Orders.

102 s 9(2)(g)(i) OIA Pursuit of the evidential onus level of reverse onus would, in my view, be inappropriate in relation to Firearms Prohibition Orders. This would create a situation where a person with a Firearms Prohibition Order who was found with a firearm would have a lower burden of proof on them than someone in identical circumstances who did not have a Firearms Prohibition Order.

103 Neither do I intend to change the current reverse onus provision in section 66 of the Arms Act 1983. To do so would significantly impact on Police's ability to keep our communities safe, remove firearms from our community, and ensure that people unlawfully possessing firearms face the consequences of their actions – particularly if they are subject to a Firearms Prohibition Order.

## Consultation

### *Public consultation*

104 Public consultation on Firearms Prohibition Orders was undertaken between 11 November 2019 and 13 January 2020. Police received 41 submissions. Of these, 34 submitters expressed a position on Firearms Prohibition Orders, with 21 submitters (62%) supporting the concept compared to 13 submitters (38%) who did not.

### *Agency consultation*

105 Ara Poutama Aotearoa, Crown Law Office, Department of Conservation, the Department of the Prime Minister and Cabinet, Inland Revenue, Ministry of Business, Innovation and Employment (Immigration; WorkSafe New Zealand), Ministry of Foreign Affairs and Trade, Ministry of Health, Ministry of Justice, Ministry of Primary Industries, Ministry of Social Development, Ministry of Transport, Ministry for Women, New Zealand Customs Service, New Zealand Defence Force, New Zealand Security Intelligence Service, Oranga Tamariki, Public Service Commission, the Parliamentary Counsel Office, Te Arawhiti, Te Puni Kōkiri, and the Treasury have been consulted on this paper.

## Communications

106 Officials will develop communications for this proposal, associated with any proactive release and as part of the legislative development and introduction of a bill processes.

## Proactive release

107 I intend to proactively release information relating to the public consultation material, including the summary of submissions document following public announcements on the final design for a Firearms Prohibition Orders Bill.

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persuasive burden requires the defendant to satisfy the court, to a balance of probabilities standard of proof.

- 108 Other material would be proactively released following the introduction of a Firearms Prohibition Orders Bill into the House.

## Recommendations

I recommend that the Committee:

### *Firearms Prohibition Order regime design*

- 1 **note** that, in July 2020, Cabinet approved in-principle the development of a Firearms Prohibition Order regime subject to policy design and costing;
- 2 **note** that this paper presents refinements to the Firearms Prohibition Order model approved in principle in July 2020, as set out in Appendix One of this paper;
- 3 **agree** to develop a Firearms Prohibition Order regime for New Zealand, based on the parameters set out in Appendix One;

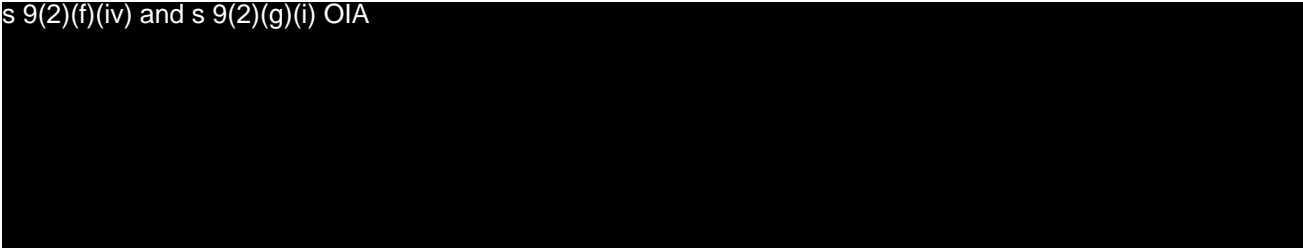
### *Transitional and consequential arrangements*

- 4 **agree** that the making of a Firearms Prohibition Order would:
  - 4.1 automatically cancel any firearms licence in the name of the subject person;
  - 4.2 be a ground for disqualification under section 22H of the Arms Act 1983;
  - 4.3 be a criterion (whether the order was current, expired or revoked) of the fit and proper person test under section 24A of the Arms Act 1983;
- 5 **agree** that any firearms or other items seized as part of a breach would be managed in accordance with current legislative provisions, including destruction provisions;
- 6 **agree** that there would be immunity for undercover officers in relation to offences under the Firearms Prohibition Order regime;
- 7 **agree** to amend section 108 of the Evidence Act 2006 to include offences under the Firearms Prohibition Order regime;
- 8 **agree** that legal aid would be available for appeals from the court's decision to make or not make a Firearms Prohibition Order;
- 9 **agree** that the Privacy Act 1993 would be amended to include Firearms Prohibition Orders to enable information on Firearms Prohibition Orders to be shared in relation to protection orders, restraining orders or victims' orders, and / or shared with Ara Poutama Aotearoa to enable post-sentence conditions to be managed in a manner consistent with Firearms Prohibition Orders;
- 10 **agree** to amend the Search and Surveillance Act 2012 to:
  - 10.1 include offences under the Firearms Prohibition Order regime;
  - 10.2 include firearms parts in the definition of 'arms';

### *Financial implications*

- 11 **note** the justice sector cost of the proposed Firearms Prohibition Order regime, will be incurred gradually from the 2023 enactment of the regime;

s 9(2)(f)(iv) and s 9(2)(g)(i) OIA



### *Publicity and proactive release*

- 14 **agree** to proactively release information relating to the public consultation, including the summary of submissions document, following announcement of a decision to progress legislation for a Firearms Prohibition Order regime;
- 15 **agree** to proactively release this paper, and other relevant papers, at the time the Bill is introduced into the House;

### *Legislative implications and drafting instructions*

- 16 **agree** to amend the Arms Act 1983 to introduce a Firearms Prohibition Order regime;
- 17 **invite** the Minister of Police to issue drafting instructions to the Parliamentary Counsel Office to amend the Arms Act 1983 to give effect to the decisions above;
- 18 **agree** that the Minister of Police has Power to Act on any minor and technical changes required, including any additional consequential impacts on the Arms Act 1983;
- 19 **agree** that the Arms (Firearms Prohibition Orders) Legislation Bill be assigned a Category 4 status for the 2021 Legislative Programme (to be introduced in 2021);
- 20 **agree** that the Minister of Police, at her discretion, may share text from drafts of the Arms (Firearms Prohibition Orders) Legislation Bill with targeted stakeholders and experts if the Minister of Police considers it would be useful;
- 21 **note** that the Minister of Police will instruct her officials to consult with Maori on the exposure draft of the Arms (Firearms Prohibition Orders) Legislation Bill and report back to her before legislation is introduced in the House.

Authorised for lodgement

Hon Poto Williams

Minister of Police

## Appendix One: Updated Firearms Prohibition Order regime design

Key Parameter	Design Arrangement
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>conviction-based orders based on convictions for firearm-related offences or serious violent offences (and imposed as part of sentencing at the discretion of the decision-maker) <ul style="list-style-type: none"> <li>Arms Act 1983 offences that disqualify someone from holding a firearms licence</li> <li>the Crimes Act 1961 offences currently defined as a serious violent offence in section 86A of the Sentencing Act 2002</li> <li>an offence under section 98A of the Crimes Act 1961 (participation in an organised criminal group)</li> <li>an offence aimed at the suppression of terrorism under the Terrorism Suppression Act 2002</li> </ul> </li> <li>eligibility from the age of 18 years</li> <li>the sentencing court would consider the aspects of offending when making an order, and be satisfied that, on the balance of probabilities, an order is reasonable, necessary and appropriate to assist in managing the public safety risks posed by the person for which an order is to be made</li> </ul>
<b>Conditions</b>	<ul style="list-style-type: none"> <li>one broad condition prohibiting the accessing, possessing and use of a firearm, airgun, imitation firearm, pistol, restricted weapon, or any part, magazine, or ammunition</li> <li>standard conditions that can be modified by the decision-maker as per the rehabilitation and reintegration needs of the subject person: <ul style="list-style-type: none"> <li>not associating with someone who has a firearm, airgun, imitation firearm, pistol, restricted weapon, or any part, magazine, or ammunition on or about their person, or unsecured in a vehicle they are traveling in</li> <li>non-residing condition at locations where there is a firearm, airgun, imitation firearm, pistol, restricted weapon, or any part, magazine, or ammunition <ul style="list-style-type: none"> <li>a definition of 'residing' based on section 16 of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016</li> </ul> </li> <li>not visiting: <ul style="list-style-type: none"> <li>arms fairs, firearm dealers, firearm manufacturers, firearms clubs (including a collector's club), shooting ranges or galleries, firearms repairers or armourers, airsoft or BB gun activities or venues, any business carrying out the previous activities, or a location where a shooting match is occurring, or being a member of a firearms club or similar</li> <li>any other location where activity or conduct that would require a dealer's licence (this would not apply to visiting a bona fide museum, or places that undertook the business of ammunition selling as part of a broad range of non-firearms related business, i.e. a service station in a rural area)</li> </ul> </li> </ul> </li> <li>in considering whether to vary or modify the standard conditions, the court would be able to consider matters such as: <ul style="list-style-type: none"> <li>the circumstances, nature, and seriousness of the offences (or offences) that lead to the making of the order</li> <li>the public safety interest and purposes of the original making of the order</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ the effects of modifying those standard conditions <ul style="list-style-type: none"> <li>▪ on the subject person, including their ability to stay within their community or their particular employment. This would involve considering the positive impact on rehabilitation and reintegration, and the positive impact on employment or living arrangements of any modification</li> <li>▪ on the subject person's ability to access a firearm, airgun, imitation firearm, pistol, or restricted weapon, or part, magazine, or ammunition</li> <li>▪ on the subject person's ability to access a firearm, airgun, imitation firearm, pistol, or restricted weapon, or part, magazine, or ammunition, and what additional mechanisms or controls may need to be imposed to ensure that such access cannot happen</li> </ul> </li> <li>○ the need to protect people from those who may pose a risk or threat of future violence, particularly (but not limited to) firearms-related violence, or</li> <li>○ any other matters the court considers relevant</li> <li>• special conditions that enable the court to impose other conditions where reasonably necessary to prevent a person from being able to access, possess or use a firearm, airgun, imitation firearm, pistol, or restricted weapon or any part, magazine, or ammunition (or reduce the risk of this happening)</li> <li>• duration – 10 years</li> </ul>
<b>Decision-making</b>	<ul style="list-style-type: none"> <li>• judicial decision-maker</li> <li>• standard appeal rights from the conviction and sentencing regarding the making or non-making of an order (with a provision to be included for the avoidance of doubt as to the applicability of relevant appeal processes)</li> <li>• a court, sentencing for a subsequent qualifying offence, would be able to substitute a new Firearms Prohibition Order in place of the original. In doing so, the court would need to consider what conditions should be imposed (including special conditions), whether there is good reason for modifying any conditions in the original Firearms Prohibition Order as part of the order, whether any modified conditions should continue in their modified form, and whether any special conditions should be continued</li> </ul>
<b>Compliance</b>	<ul style="list-style-type: none"> <li>• current search powers (no change)</li> <li>• penalty: <ul style="list-style-type: none"> <li>○ up to five years' imprisonment for breach of broad condition of order, or seven years' imprisonment if the breach involved a prohibited firearm</li> <li>○ up to two years' imprisonment for a breach of a standard or special condition. This offence would have a defence if the person showed that they had a reasonable excuse for the breach</li> </ul> </li> <li>• offence to supply someone subject to an order with a firearm, airgun, imitation firearm, pistol, or restricted weapon, or part, magazine, or ammunition – with a penalty of up to five years' imprisonment, or seven years' imprisonment if it involved a prohibited firearm. This offence would require knowledge of the fact the person was subject to a Firearms Prohibition Order</li> <li>• reverse onus - persuasive burden level (no change with existing Arms Act 1983 reverse onus provisions)</li> </ul>

## **Appendix Two: Transitional and consequential changes**

- 1 This Appendix sets out the identified transitional and consequential changes needed to support the implementation and operation of Firearms Prohibition Orders.

### *Consequential amendments to the Arms Act 1983*

- 2 The making of an order would automatically cancel any firearms licence (including any dealer's licence) that the subject person may have.
- 3 The making of an order would also be grounds for disqualification under section 22H of the Arms Act 1983. The fact that someone had or had had a prohibition order made against them at any point would also be a factor that could be considered as part of the fit and proper person test under section 24A of the Arms Act 1983
- 4 Any firearm or other item that was seized as part of a breach would be managed in accordance with current legislative provisions, including destruction provisions.

### *Immunity for undercover officers*

- 5 A prosecution for a breach offence would not be able to be commenced or continued against any constable in respect of any act committed by them at a time or during a period when they were acting as an undercover officer, except with leave of the Attorney-General.

### *Consequential amendment to the Evidence Act 2006*

- 6 To ensure undercover officers were protected, section 108 of the Evidence Act 2006 would also need to be amended to include the proposed Firearms Prohibition Order regime's offences.

### *Consequential amendments to the Legal Services Act 2011*

- 7 In accordance with existing criminal appeal processes, legal aid would be available for appeals from the making of a Firearms Prohibition Order.

### *Consequential amendment to the Privacy Act 2020*

- 8 The Privacy Act 2020 needs to be modified to ensure that information relating to Firearms Prohibition Orders can be accessed where necessary in relation to protection orders, restraining orders, victims' orders, and to enable the Ara Poutama Aotearoa to access information about the offender who is subject to a Firearms Prohibition Order while subject to a Corrections sentence or order to ensure that post-sentence conditions are managed in a manner consistent with any Firearms Prohibition Order. This amendment would be consistent with existing information sharing provisions in relation to other orders, including protection orders.



*Consequential amendment to the Search and Surveillance Act 2012*

- 9 A breach of a Firearms Prohibition Order would be included as one of the exceptions set out in section 45 of the Search and Surveillance Act 2012, regardless of the type of breach involved.
- 10 'Arms' under the Search and Surveillance Act 2012 is defined as meaning firearm, airgun, pistol, prohibited magazine, restricted weapon, imitation firearm, or explosive (as those terms are defined in the Arms Act 1983), or any ammunition. This definition does not include 'part' as defined by the Arms Act 1983.

Proactive release