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13 February 2018

FIREARMS AMENDMENT ACT 2018

1. Last week, the Victorian Parliament passed the Firearms Amendment Bill 2017 (the **Bill**), which contained a series of significant amendments to the *Firearms Act 1986* (the **Act**).
2. The aspect of the Bill of most concern to civil liberties and human rights is the introduction of Firearm Prohibition Orders (**FPO**).
3. While Liberty Victoria recognises the need for effective and appropriate laws to regulate and control the use and possession of firearms, we are of the view that the laws introduced by the Bill are:
 - unwarranted and unnecessary, in that the existing state of the law, including the existing regime under the Act, was adequate; and
 - inappropriate and undesirable, in that they undermine fundamental civil liberties and human rights.

4. Indeed, the Government itself acknowledged in the Statement of Compatibility to the Bill that it was incompatible with the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (the Charter).¹

What is a FPO?

5. Under the new amendments, s 112D of the Act gives the Chief Commissioner of Police the power to make an order prohibiting an individual from doing the following:
 - Acquiring a firearm or firearm related item (which is defined broadly to include, for example, part of a firearm or an accessory for a firearm); and
 - Possessing, carrying or using a firearm or firearm related item.
6. An FPO may be made in respect of any person aged 14 or older (s 112D(2)). An FPO may be made in relation to a person who has never acquired, possessed, carried or used a firearm or a firearm related item (s 112(D2)).
7. Once subject to a FPO, the individual must surrender any firearm or firearm related item in their possession (s 112P), and during the period of the FPO, it is an offence for the individual to be present on certain types of premises, such as shooting ranges or shooting clubs (s 112O).

What is the duration of a FPO?

8. For adults, a FPO remains in force for 10 years from the day on which it is served on the individual. For children, a FPO remains in force for five years (s 112J).

What powers do police have in respect of individuals who are subject to a FPO?

9. The police are given very broad powers under the new FPO regime. For example, for the purpose of determining whether an individual subject to a FPO has acquired, possesses, or is carrying or using a firearm or firearm related item, any police officer may, without warrant or consent:

¹ Hansard, Statement of Compatibility to the Firearms Amendment Bill 2017, 21 September 2017, p 2955.

- enter or search any premises in the care, control or management of the individual (s 112Q(2)(a));
- search any vehicle which is in the charge of the individual, or in which the individual is a passenger (s 112Q(2)(b));
- stop and detain the vehicle being searched for as long as necessary to conduct the search (s 112Q(4));
- search the individual person and anything in their possession (s 112R(3));
- stop and detain the person being searched for as long as necessary to conduct the search (s 112R(5)).

10. The police are also given the power to search any person who is in the company of an individual subject to a FPO, if it is reasonably suspected that the person is committing an offence against the Act or is in possession of a firearm or firearm related item (s 112S).

On what basis may a FPO be made?

11. The new law provides that the Chief Commissioner may make a FPO if “satisfied” that it is in the “public interest” to do so:

- because of the criminal history of the individual; or
- because of the “behaviour” of the individual; or
- because of the people of with whom the individual associates; or
- because, based on information known to the Chief Commissioner, the individual *may* pose a threat or risk to public safety (s 112E).

Can a FPO be revoked or reviewed?

12. The Chief Commissioner may revoke a FPO, but whether to do so is solely in their discretion, and application may not be made by another person for the Chief Commissioner to exercise that power (s 112K).
13. An individual to whom a FPO applies may apply to VCAT for review of the Chief Commissioner's decision to make the order (ss 112L-112M). The order can only be further reviewed at VCAT if more than half the time for which the order is in force has expired (after five years for adults, and after two and a half years for children), and only once.
14. The Bill also sets up a scheme whereby IBAC is required to review the FPO regime, by, for example, reviewing a sample of FPOs on a quarterly basis (ss 174E-174I).

How do FPOs undermine civil liberties?

15. In Liberty Victoria's view, the introduction of the FPO regime unjustifiably interferes with civil liberties and human rights in several ways.

Broad criteria

16. First, the criteria for making an order are too broad. As set out above, the Chief Commissioner must be satisfied that "it is in the public interest to do so" based on any one of four very general grounds, including because of "the behaviour of the individual" (which is undefined) or because of "the people with whom the individual associates", being terms that are undefined in the Act. The general and broad nature of the provision leaves it susceptible to the risk of misuse, and inconsistent practices and interpretation by police. In reality, it may be used as an anti-consorting law.

Right to privacy

17. Secondly, in Liberty Victoria's view, the exceptionally broad and highly intrusive search and seizure powers introduced in ss 112Q-112S, as set out above, unjustifiably undermine the right to privacy (see s 13 of the Charter).
18. As the Minister recognised in the Statement of Compatibility, ordinarily the starting point with search and seizure powers is that, in order to be compatible with the right

to privacy, there must be reasonable belief or suspicion that an offence has been committed, and the search and seizure must be authorised by an impartial judicial officer (usually in the form of a warrant).

19. However, the Bill introduces a much lower threshold, concerned with the concept of “reasonably required”, in order to engage the search powers under s 112Q and 112R. This represents a departure from the more common “reasonable belief” or “reasonable suspicion” basis for the conduct of searches without warrant (see, eg, s 149 of the Act, and s 82 of the *Drugs, Poisons and Controlled Substances Act 1981*). There is no good reason to lower the threshold in this way.
20. Moreover, the laws introduced by the Bill give police extraordinary powers to enter and search property, search persons, and detain persons, *without* consent or warrant. In Liberty Victoria’s view, unless there is consent, police should have to obtain a warrant obtained from a court in order to exercise the search and seizure powers. This would ensure independent judicial oversight concerning the use of such significant powers.
21. Section 13(a) of the Charter provides that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with. As the Minister recognised in the Statement of Compatibility:²

I acknowledge that the privacy of an individual subject to a FPO may be significantly interfered with due to the person being subject to discretionary search powers. A FPO is a discretionary order made by the chief commissioner, and an order may be made on the grounds of very broad criteria, including on the basis of 'the behaviour of the individual'. Following the making of an order, an individual can then be subject to the exercise of search powers that may result in frequent and intrusive searches of persons subject to FPOs (but not including strip searches), in circumstances where there would ordinarily be a high expectation of privacy, such as searches of their person, home or vehicle ... Given this significant interference, coupled with the discretionary nature of the power to order an FPO, and the fact that an FPO may be made on the grounds of very broad criteria, including on the basis of 'the behaviour of the individual', in my view there are likely less restrictive measures that could arguably be adopted. Consequently, I conclude that these powers are incompatible with the right to privacy in the charter.

² Hansard, Statement of Compatibility to the Firearms Amendment Bill 2017, 21 September 2017, p 2959-60.

22. In Liberty Victoria's view, if there are less restrictive measures that could have been adopted, as the Minister concedes, then they should have been attempted prior to the introduction of measures which infringe upon fundamental rights.

Risk of misuse

23. The risk of misuse of these powers has already been demonstrated in NSW, where a similar scheme operates. In 2016, as part of a review of the NSW scheme, the NSW Ombudsman reported as follows:³

... [W]e also found that police conducted searches on over 200 people who were not subject to an FPO at the time of the search (a total of 269 person searches). Police conducted those searches on what appears to be an erroneous application of the new FPO search powers and, as such, the searches may have been unlawful. We also found a lack of clarity in police understanding of when they may conduct an FPO search on an FPO subject. In 14% of search events, police conducted a search on the basis of their apparent understanding that a search can be conducted for the reason alone that the person is an FPO subject. We do not consider this is correct. A search can be conducted only when 'reasonably required' to determine if an FPO offence has been committed. It is not a roving search power to be used randomly on FPO subjects, but a power to be used in a targeted way to examine if firearms control legislation is being properly observed.

Protection of children

24. Fourthly, given that a FPO can be made in a respect of a child aged 14 or over, these powers are also incompatible with the right to protection of children. This too was expressly conceded by the Minister in the Statement of Compatibility.

Right to a fair hearing

25. Fifthly, the provisions introduced by the Bill which facilitate a VCAT review are insufficient and inappropriate in that they do not adequately protect the right to a fair hearing. To only allow a single further review to VCAT after the expiry of half the order is unreasonable – there should have been a standing right of review with new facts or circumstances.

26. As the Minister acknowledged in the Statement of Compatibility, the right to a fair hearing will likely be limited by the potential for a FPO review to be heard and

³ Review of police use of the firearms prohibition order search powers, August 2016, p iv.

determined on information that is subject to Crown privilege and not disclosed to the applicant. That would, in some cases, prevent full disclosure to a party of all relevant and admissible evidence necessary to defend their own interests in a hearing. It may also prevent the release of adequate and transparent reasons. It may mean that the hearing must be conducted in closed court, even in the absence of the party. It may limit the capacity for a party to be able to properly test the case against them if, for example, they were not permitted to cross-examine witnesses on material matters. In Liberty Victoria's opinion, all of these matters substantially undermine the right to a fair hearing.

27. To have avoided such issues, the Bill could have included less restrictive measures such as the appointment of special counsel to represent an applicant's interests at a closed hearing, or provided for the limited disclosure of protected information to an affected party without prejudicing confidentiality, such as by providing a summary of relevant information to the affected person. These options were noted by the Minister in the Statement of Compatibility, but not employed.

28. Some comfort can be taken by the fact that the Bill provides for a review process to be conducted by IBAC. However, as noted by the Minister in the Statement of Compatibility, the IBAC review process is merely an assurance or reporting process; there is no power, for example, for IBAC to overturn the Chief Commissioner's decision in a particular case, and only a small sample of orders will receive proper scrutiny.

Incompatibility with the Charter

29. The Government has acknowledged that the new laws do not meet the proportionality test pursuant to s 7(2) of the Charter, which provides:

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) *the nature and extent of the limitation; and*

(d) *the relationship between the limitation and its purpose; and*

(e) *any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

30. This does not prevent the legislation from taking effect, but as part of the “dialogue” model is supposed to alert the public that the Government is enacting legislation that is incompatible with human rights.

31. Despite very limited amendments to the Bill proposed by the Coalition opposition and the Reason Party, the Government issued a press release suggesting that the opposition to the Bill was because the Coalition supported gangs and organised crime.⁴ Ultimately the opposition supported the Bill without amendments.

32. Such an emotive approach to legislation that the Government acknowledges breaches fundamental human rights is deeply concerning. It should not be a badge of honour to support legislation that has been admitted to constitute a disproportionate restriction of human rights because less restrictive alternatives were available. Proposed amendments should be considered on their merits, not caricatured for political gain.

33. Both major parties no doubt want to appear “tough on crime” this election year, but all sides of politics have a heavy responsibility to ensure that only appropriate and proportionate legislation is enacted, where limitations to human rights are justifiable.⁵

⁴ Internet reference, <<https://www.premier.vic.gov.au/mobsters-mate-ignores-police-to-water-down-gun-laws/>> at 12 February 2018.

⁵ As Dickson CJ observed in the celebrated judgment of *R v Oakes* [1986] 1 SCR 10, [70]:

There are... three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.”

34. Liberty Victoria is deeply concerned that this signals the start of a lengthy election campaign where all political parties will be judging proposed legislation, not on its merits, but on its ability to wedge the opposing party for short term political gain. That is a true race to the bottom.

Contacts

35. Any questions with regard to this comment can be directed to Liberty Victoria President Jessie Taylor, Liberty Victoria Senior Vice President, Michael Stanton, or the Liberty Victoria office on 9670 6422 or info@libertyvictoria.org.au.



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