

Statement of compatibility with human rights

Human rights implications

Prepared in accordance with the Thirteenth Assembly Sessional Orders (part 12.3) as adopted on 24 August 2017.

Firearms Legislation Amendment Bill 2019

This Bill is partially incompatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). Despite partial incompatibility, the Bill is necessary as firearm related violence is a real and present threat in the Northern Territory and the ability for Police to take preventative action will result in a safer community.

Overview of the Bill

The Bill amends the *Firearms Act 1997* (NT) (“the Act”) and the *Firearms Regulations 1997* (NT) (“the Regulations”) to provide for a new firearm prohibition order (FPO) scheme. It also creates offences for acquiring, possessing, and using firearms and firearm related items such as ammunitions, silencers, attachments and accessories.

A FPO is a discretionary order made by the Commissioner of Police (“the Commissioner”) prohibiting an individual from acquiring, having possession of, or using any firearm or firearm related item. The Commissioner may make an order only if satisfied that it is in the public interest that the person who will be subject to the FPO not acquire or use a firearm or a firearm related item.

After a FPO has been made, a person subject to a FPO will then be subject to various powers and offence provisions under the Act for the duration of the order. The search powers associated with a FPO allow a police officer to, without warrant or consent, search the person subject to the FPO, enter and search the premises of the person subject to the FPO, and to search any vehicle, vessel or aircraft that is in the charge of the person subject to the FPO or where they are a passenger thereof.

A person subject to a FPO can be detained as long as necessary in order for the search to be conducted. Persons (an associate) accompanying the person subject to the FPO can also be searched, in line with the Act’s existing warrantless search powers.

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Children aged 14 years of age or over can be subject to a FPO.

The necessity for the FPO scheme

Currently, the Act provides for a number of mechanisms to prevent firearm related crime. However, the current inability to take immediate action against both licensed firearms owners and those believed to be in possession of unlawful firearms is an ongoing concern for the Northern Territory Police Force (NTPF). The current process for revocation of licences, particularly when based on criminal intelligence holdings, is a lengthy process that cannot be facilitated outside of business hours. It is completely unsuitable for dynamic unfolding situations which require immediate intervention, based on criminal intelligence holdings which are often provided to police at short notice.

Firearm related violence is a real and present threat in the Northern Territory (NT). On 4 June 2019, a gunman opened fire at multiple locations around Darwin resulting in four deaths and one person being seriously injured. The mass shooting, referred to by police as Operation Moor, is cause for serious concern not only for police but all Territorians. Police submit that based on the gunman's violent background and criminal associations, it is more likely than not that he would have been subject to a FPO had the proposed legislation been in place.

In respect of organised crime, since 2010 there has been an increase in the number of outlaw motorcycle gang (OMCG) members in the NT. Internal police intelligence indicates that between 2014 and 2018 there has been a 10% increase in the membership of the four primary OMCGs and a 100% increase in persons associating with OMCGs in the NT. Current intelligence holdings indicate a number of OMCG members and associates possess licences or permits for handguns, have attempted to possess or are in possession of unlicensed or otherwise illegal firearms, and pose a significant risk to public safety. NT based OMCG members and associates currently have a combined total of 1897 convictions. OMCG members have also demonstrated a propensity to acquire firearms in the NT and traffic firearms across jurisdictional borders.

Other jurisdictions such as Victoria, New South Wales, South Australia and Tasmania have implemented similar schemes to target firearm violence in those states. These schemes have proven successful with their operation credited with reductions in organised crime related shootings and firearm-related violence.

The Bill will also increase the penalties for some existing offences under the Act to bring them into line with similar offences. The purpose of increasing the maximum penalties for offences under the

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Act is to increase the deterrent factor for each identified offence. The greater the maximum potential penalty for an offence, the less likely an individual will risk contravening that offence.

Human rights implications

This Bill does engage the following rights:

- Right to liberty of movement and freedom to choose his residence, contained in Article 12 of the International Covenant on Civil and Political Rights (ICCPR);
- Equality before the law, contained in Article 14 of the ICCPR;
- Privacy and reputation, contained in Article 17 of the ICCPR;
- Freedom of association, contained in Article 22 of the ICCPR;
- Best interests of the child, contained in Article 3 of the Convention on the Rights of the Child (CRC);
- Freedom of association, contained in Article 15 of the CRC; and
- Privacy and reputation, contained in Article 16 of the CRC.

Nature of the orders

Clause 6 inserts the new FPO scheme (Part 8A) into the Act. New section 49E of the Bill gives the Commissioner the power to make an FPO. New section 49F provides that the Commissioner may make an order prohibiting an individual from acquiring, possessing or using any firearm or firearm related item if the Commissioner is satisfied that it is in the public interest to do so because of any one or more of the following: the criminal history of the individual; the behaviour of the individual; the people with whom the individual associates; any criminal intelligence reports or other criminal information the Commissioner holds about the person or their associates, or based on the information known to the Commissioner, if the individual may pose a threat or risk to public safety if the person acquires, possesses or uses a firearm or firearm related item. The Commissioner cannot make a FPO in relation to a person who is under 14 years of age.

An FPO remains in force for 10 years from the day on which it is served on the individual (or, if the individual is under the age of 18 years when served with the FPO, remains in force for five years from the day on which it is served). An FPO may be revoked by the efficient and timely hearing and determination of reviews by the Northern Territory Civil Administrative Tribunal (NTCAT), especially as an order cannot be stayed while a review is underway or there is a high volume of reviews at a given time.

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New Division 4 of Part 8A provides for the key FPO offences which carry significant maximum penalties of imprisonment.

After being personally served with the order, it is an offence to:

- contravene the firearm prohibition order;
- be at prohibited premises;
- reside at premises where there are firearms or firearm related items; and
- be in the company of a person using a firearm or firearm related item.

It is also an offence if a person, knowing that another person is subject to an FPO, intentionally engages in conduct that results in that other person contravening their order.

New Division 5 also provides for new search powers in relation to premises, vehicles, vessels, aircrafts, persons subject to an FPO and associates, and resulting seizure and forfeiture powers relating to firearms or firearm-related items discovered under the powers.

New Division 6 provides for oversight arrangements in relation to reporting and monitoring on the exercise of police powers by the Northern Territory Ombudsman.

The making of FPOs

A FPO is made by the Commissioner after being satisfied that the making of the order is in the public interest in accordance with new section 49F. The bill does not require that a person be given advance notice of the decision or an opportunity to be heard prior to the FPO being made. A FPO must be personally served on the individual to whom it applies, and it then has immediate effect upon service.

Upon being served with a FPO, an individual may apply within 28 days to the Northern Territory Civil and Administrative Tribunal (NTCAT) for an independent review of the Commissioner's decision to make the order. The review will be conducted under the *Northern Territory Civil and Administrative Tribunal Act 2014* ("NTCAT Act").

New section 49M provides an adult served with a FPO an additional right to apply for review of the FPO at the point in time where more than half the duration of the order has expired. In other words, the person will be able to apply for a second review after 5 years has elapsed. In respect of a child who is served a FPO, the child will have the right to seek additional reviews of the order every 12 months.

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Section 49N also clarifies the interaction between the FPO scheme and NTCAT's procedural provisions relating to matters of privilege. Section 49N provides that in exercising its jurisdiction to review a reviewable decision, NTCAT must take steps to ensure that any criminal intelligence reports or other criminal information in relation to the applicant or the people with whom the applicant associates are not made available to the applicant or to the public.

The practical effect of this is that NTCAT will have appropriate access to confidential information in order to conduct an independent review of the Commissioner's decision while still ensuring that any confidential police intelligence remains confidential.

Equality before the law

Procedural fairness is an overarching concept that encompasses a bundle of diverse rights. This includes the right to a fair hearing, which requires that, prior to a decision being made that will affect a person's rights or interests, that the person be informed of the case against them and be given an opportunity to be heard. This right will not be fully afforded to the kind of administrative decision-making that will be undertaken by the Commissioner.

In relation to the review by NTCAT, classified information (information that the Commissioner classifies as criminal intelligence) will not be disclosed to the applicant. The nature of the limitation extends to preventing full disclosure to a party of all relevant and admissible evidence necessary to defend their own interests in a hearing, preventing the release of adequate and transparent reasons, providing for the hearing to be conducted in closed sessions in the absence of the party, limiting the ability to cross-examine certain witnesses and precluding the power of NTCAT to stay the operation of a FPO pending a review.

The need to protect police investigative techniques and intelligence has been accepted by courts as a legitimate and necessary objective justifying limits on the right to a fair hearing. The limitation is rationally connected to achieving the purpose of maintaining the confidentiality of criminal intelligence, which is essential to the proper discharge of police functions.

Under the current legislation, the Commissioner is not required to give reasons for refusing to grant a licence if the Commissioner is of the opinion, having regard to any criminal intelligence report or other criminal information that the applicant is a risk to public safety and the grant of the licence would be contrary to the public interest.

There is a complexity to police intelligence which makes it difficult to release details or provide summaries to affected parties without compromising that intelligence. Information comes from a

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variety of agencies (including federal and international sources) and has varying levels of classification and protection requirements regarding access and disclosure. Any inappropriate release of such information may place the community at imminent risk of danger, or impair the Northern Territory Police's ability to obtain similar intelligence in the future.

Accordingly, while these limitations on the right to a fair hearing during reviews of a FPO before NTCAT may contain an element of unfairness, these limitations would be reasonably and demonstrably justified as NTCAT retains sufficient discretion and powers to alleviate any such unfairness.

For example, if the tribunal considers that disclosure of the information would not be contrary to the public interest, NTCAT (if constituted by the President) has the power to revoke the certificate by the Minister certifying that disclosure of specified information would be contrary to the public interest (s39 of the NTCAT Act).

Further, a person's ability to have their legal rights heard and determined before a fair and impartial decision maker (NTCAT) is not affected. Ultimately, NTCAT will weigh the potential harm of disclosing privileged information against any frustration or impairment to the administration of justice.

Freedom of association

One of the specified considerations in new section 49F in determining whether it is in the public interest to make a FPO is on the basis of a person's associates. As a person's associations may render the person eligible to be made subject to an order affecting their rights and interests, this may limit a person's freedom to associate by having a 'chilling effect' on a person's enjoyment of the right. For example, a person may be discouraged or inhibited from exercising a legitimate right to associate with others for fear of the legal repercussions associated with a FPO.

New section 49Q creates an offence to engage in conduct resulting in another person contravening a FPO. This offence will also impact on a person's right to freedom of association with others.

These restrictions are reasonably justified as the scope of the right is primarily concerned with protecting freedom of association to pursue lawful interests in formal groups, and its scope does not extend to restrictions on associations between private individuals. The scheme is intended to target criminal groups. Northern Territory Police are particularly concerned with firearm possession and use amongst organised crime groups and persons considered a risk in the counter-terrorism context.

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An individual's associations with known offenders and persons of concern to police are directly relevant to evaluating a person's level of access to firearms and risk of committing firearm-related offending. As discussed above, given the limitations of the current powers in the Act to protect the community from firearm-related offending, basing a decision to make an FPO on associations relating to criminal groups is reasonably justified.

Further, as outlined above, the making of an FPO is subject to the right to apply for review of the order, where a tribunal has the power to revoke the order if not satisfied that it is in the public interest for the FPO to have been made.

Right to liberty of movement, freedom to choose his residence and privacy and reputation

New section 49R creates an offence to be at a prohibited premise. A prohibited premise is defined as any of the following:

- the premises of a firearms dealer;
- the premises of an armourer;
- a shooting range;
- a handgun target shooting club;
- a firearm collectors club;
- a shooting club;
- a place where a shooting match is occurring;
- a firearms fair;
- a shooting gallery;
- a paintball range or a place where paintball activities are carried out;
- a premises where firearms are stored; and
- any other premises prescribed by regulation.

The above offence provisions may have the effect of interfering with an individual's capacity to move through certain public premises or properties, engage in lawful sporting and community activities, undertake employment in the firearm industry or maintain relationships with persons who frequent these types of premises. Such resulting limitations on these rights will be reasonably justified on the grounds of upholding the effectiveness of the FPO scheme and protecting the community from harm.

The offence relates to places which provide access to firearms or are highly likely to have firearms stored on the premises. So the offence is focused on the risks of the particular place, not the

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association between the person subject to a FPO and other persons that may be on those premises. The offence only applies to persons who are subject to a FPO meaning it has been determined (with a right to NTCAT review) that it is in the public interest that such a person not acquire, possess or use any firearm or related items. In order to effectively limit such person's access to firearms, it is essential that such individuals be excluded from places that are likely to store firearms or related items or provide access to firearms or related items.

New section 49S creates an offence to reside at premises where there are firearms or firearm related items. This offence will impact on a person's right to choose his residence. Upon service of an FPO, a person's licence, permits and certificates of registration are automatically cancelled. The cancellation takes effect once the order is served on the person. Section 49S states that a person can only be charged 24 hours after the person was given the FPO. This provision provides a degree of fairness to persons who may unlawfully possess firearms or related items, by providing them with an opportunity to avoid liability for a FPO offence for 24 hours and thereby allowing the person ample opportunity to either surrender their firearms or make alternative living arrangements.

There are no less restrictive means reasonably available to ensure that the law does not operate unfairly to persons who abide by the law, without creating an opportunity for persons contravening the law to escape liability. This provision is based on recommendations by the New South Wales Ombudsman to provide a person with sufficient time to comply with the FPO.

Powers of search and seizure

Police are currently limited in their capacity to proactively respond to situations where sufficient intelligence exists to indicate that it is contrary to the public interest for an individual to possess a firearm or firearm related item. While the Act provides for existing search powers with a warrant, this does not provide a timely solution to address a threat that intelligence suggests is imminent, but does not enliven existing powers to search without a warrant.

Part 8A Division 5 provides for new search and seizure powers for police (see ss 49U, 49V, 49W, 49X).

New sections 49U and 49W

These powers permit a police officer to do any of the following without consent or warrant in relation to an individual subject to a FPO: enter and search any premises occupied by, or under the control or management of the individual; search any vehicle, aircraft or vessel that is in the charge of the individual or passenger thereof, including the power to stop and detain any vehicle, aircraft or

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vessel for so long as is reasonably necessary to conduct the search; search the individual and any item in their possession, including the power to stop and detain that person for so long as is reasonably necessary to conduct the search; and seize any firearm or firearm related item found as the result of a search.

The rationale for providing this power to police is to ensure that police are able to determine whether a person subject to an FPO is breaching their order by acquiring, possessing or using a firearm or firearm related item. Without this power, police would be unable to effectively detect breaches of FPOs, frustrating the intent of the scheme.

New sections 49V and 49X

This power 49V permits a police officer without consent or warrant to search an associate (a person in the company of a person subject to an FPO) and any item in their possession, including the power to stop and detain that person for so long as is reasonably necessary to conduct the search. This power is limited to situations where police believe on reasonable grounds that the associate is committing an offence against the Act or has a firearm or firearm related item in their possession. This power is again necessary for police to effectively detect the commission of FPO related offences by person who are not themselves subject to an FPO.

New section 49X

This power permits a police officer without consent or warrant to search a person who is present at a premises, vehicle, aircraft or vessel that is being searched under new section 49W. This is again included to ensure that the intention of the FPO scheme is not defeated by third parties. Without this power, an individual subject to a FPO would be able to frustrate the purpose of the scheme by using third parties in their presence to conceal firearms or render police searches unworkable. This concern is heightened in relation to the intended classes of persons to be targeted by this power, such as organised crime groups.

For example, a police officer is searching a vehicle belonging to a person subject to an FPO. The behaviour of a passenger of the vehicle causes police to believe that the passenger may have just been handed a firearm by the person subject to the FPO to hide under the passenger's clothing. This power will allow the police to search the passenger to detect FPO related offences and locate and seize the firearm.

In relation to the right to privacy, this right has internal limitations which affect the scope of the right, meaning that lawful and non-arbitrary interferences with a person's privacy will not limit this right.

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Relevant case law indicates that a search power will generally be arbitrary if it is considered to be unreasonable in the sense of not being proportionate to the legitimate aim sought to be achieved. In circumstances where it is impractical to seek a warrant, a search should be considered as reasonable.

It is acknowledged 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. To ensure that powers are not exercised arbitrarily, the Bill provides for a number of limits and safeguards to reduce the potential for these interferences.

Each of the powers identified above are subject to a threshold test. For sections 49U and 49W, police can only exercise the powers if they are reasonably required to determine whether an offence has been committed.

While this standard is lower than comparative thresholds commonly provided for police powers such as ‘reasonable grounds to believe’ or ‘reasonable grounds to suspect’, it does impose a requirement of ‘reasonableness’.

For section 49V, police can only exercise that power if they believe on reasonable grounds that the associate is committing or about to commit an offence and has a firearm or firearm related item in their possession.

For 49X, police can only exercise that power if they believe on reasonable grounds that the person has acquired, possesses or is using a firearm or firearm related item. It is not an unconditional search power. The NSW Ombudsman found that this was a real concern and suggested that the NSW legislation be amended to include this additional search power.

The Bill also provides that the search of an individual does not include a strip search. The new search powers are rationally connected to, and carefully designed to achieve, a reduction of the threat of firearm-related offending and unlawful access to firearms. While search and seizure powers are incompatible with the right to privacy, it is appropriate to proceed with these amendments in order to address an increase in firearm-related offending, where similar measures have proven effective in other jurisdictions and where existing law enforcement powers have proven inadequate. The discretionary nature of the powers is essential to providing the operational flexibility to reduce firearms related offending.

The evaluation of comparative FPO schemes in New South Wales, Victoria and South Australia does suggest that the Bill’s search powers can have a significant effect on reducing firearm-related

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crime. The New South Wales Ombudsman, in its 2016 review of police use of FPO powers in New South Wales, found that these powers provided a benefit to police which enabled them to respond in circumstances where their existing powers to search individuals for firearms and firearm parts could not be used. This was where police did not have sufficient information to obtain a search warrant or use their general powers, but nevertheless had sufficient information to form the view that a search was ‘reasonably required’.

The New South Wales Ombudsman did identify three factors in the structure of the New South Wales scheme that gave rise to a risk of the search powers being used arbitrarily and unreasonably, including that New South Wales FPOs did not contain an expiry date, there was inconsistency regarding police interpretation of the ‘reasonably required’ test, and there was no regulation regarding searches of third parties accompanying an individual subject to a FPO.

The Bill has adopted a range of measures to address such concerns. Unlike the NSW scheme, the Bill specifies a maximum duration of 10 years for a FPO (or five years for children), with a right to apply for review. This enhances NTCAT’s oversight of the scheme and allows for more scrutiny of FPOs to ensure that an FPO is appropriate and based on valid and current circumstances.

Further, in recognition of the fact that these powers are a significant expansion on current arrangements, new section 49ZB provides that the Ombudsman must review the exercise of police powers and must provide a copy of the report of the review to the Minister following the first 2 years of operation of the FPO scheme. This independent oversight will protect against inappropriate use of police powers.

Best interests of the child, freedom of association and privacy and reputation

In relation to the right to protection of children and right to privacy, the Bill’s potential application to children as young as 14 years of age is clearly incompatible with these rights. The Bill seeks to address this by limiting the FPO scheme in its application to children in several ways.

The maximum duration of a FPO is limited to five years in relation to a child, and there is a further right to apply for review every 12 months. Importantly, as mentioned, a FPO cannot be made in relation to a child under 14 years of age.

The new search and seizure powers will also apply. It is recognised that such powers will interfere with the child’s right to privacy more significantly due to the inherent vulnerability of children. Notwithstanding this incompatibility, amendments are necessary in order to address a pressing and substantial social concern relating to community protection. This is why the review provision in

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respect to a child allows for a review after 12 months as opposed to only allowing a subsequent review after more than half the time for which the order is in force has expired.

For this new scheme to achieve its aim to reduce firearm-related offending and violence, it is necessary and appropriate that the scheme apply equally to children. As gun violence becomes more prevalent, the risk to community safety posed by young people using firearms is as serious as that posed by adult offending.

The government is of the view that illicit firearm possession and use by young people should be deterred and prevented to the same extent as adults. While the scheme is likely to impact only a very small cohort of young people, limiting how FPOs apply to even this group would inhibit the police's ability to quickly respond to this type of serious offending. Further, by moving to proactively address the firearm threat posed by children, the government is also enhancing the rights of other children and families in the community to protection.

Therefore, although the Bill's application to children is incompatible with these rights, it is both essential and appropriate to provide police with these powers to address the community's concerns and the impact of firearm related offending.

Conclusion

This bill is partially incompatible with human rights but to the extent that it limits human rights, those limitations are reasonable, necessary and proportionate.