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'Now They're Extraordinary Powers': Firearms Prohibition Orders and Warrantless Search Powers in New South Wales

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Abstract

In November 2013 the *Firearms Act 1996* was amended to provide police in New South Wales with new powers to allow them to search for firearms, firearms parts and ammunition without obtaining a warrant. The New South Wales Government's ostensible aim in introducing these new search powers was to assist police in ensuring that individuals who had been issued with a Firearms Prohibition Order were complying with the terms of their order, with a broader view to reducing firearms-related crime in New South Wales. However, the exercise of these powers has not always aligned with the apparent rationale for introducing them, and firearms, firearm parts and ammunition were found in just two per cent of the searches conducted by police in the two years following the amendment of the *Firearms Act*. In this period police also conducted more than 200 unlawful searches of people who were not subject to an Order. This comment will question the extent to which Firearms Prohibition Order search powers can be justified as an effective and necessary law enforcement tool.

Keywords:

Firearms Act – firearms prohibition orders – firearms – police – police powers – search powers – New South Wales

Introduction: What are Firearms Prohibition Orders?

... police [now have] the right to stop, to search, to enter premises to ensure that [subjects of a firearms prohibition order] don't have a firearm, they haven't got ammunition or parts of a firearm. All of that without a warrant. Now they're extraordinary powers.

Andrew Scipione, New South Wales Police Commissioner, 2014

Since 1973, the New South Wales ('NSW') Police Commissioner has been empowered to make a Firearms Prohibition Order ('FPO') against any person who he or she believes is unfit to possess a firearm 'in the public interest' (*Firearms and Dangerous Weapons Act 1973*, s 69(1); *Firearms Act 1989*, s 39(1); *Firearms Act 1996* s 73(1)). Prior to 2013, the effect of an FPO was to prohibit any FPO subject from owning or using a firearm. However, since the introduction of the *Firearms and Criminal Groups Legislation Amendment Act 2013* ('the amendment Act') by the O'Farrell Liberal Government, the scope of FPOs has been broadened. It is now an offence for an FPO subject to possess a firearm or firearms parts, subject to a maximum penalty of 14 years' imprisonment. It is also an offence for an FPO subject to possess ammunition, subject to a maximum penalty of 5

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years' imprisonment (*Firearms Act* s 74). The amendment Act also introduced broad new police search powers (*Firearms and Criminal Groups Legislation Act 2013*). This comment will focus on those powers.

The police's new search powers are contained in section 74A of the *Firearms Act*, and are ostensibly intended to help police ensure that FPO subjects are complying with the terms of their Order. In short, FPO search powers enable police to search a person subject to an FPO, or any vehicle or premises that the person occupies, controls or manages, 'as reasonably required', without a warrant (*Firearms Act* s 74A(1)). The amendment Act also stipulated that the NSW Ombudsman would review these new powers during the first two years of their operation (*Firearms Act* s 74B(1)).

Drawing on the findings reported by the Ombudsman at the conclusion of the review period, this comment will critique the police's new powers. It will be argued that these powers are not properly constrained by accepted legal thresholds, meaning that police are not prevented from searching FPO subjects and their associates arbitrarily. On the contrary, given the lack of such constraints, police have developed a practice of exercising their FPO search powers pre-emptively to 'target emerging crime figures' (Benny-Morrison 2016). It is also apparent that the police do not always properly understand when they can discharge their FPO search powers. Police searched 233 people who were not subject to an FPO using their FPO search powers during the review period (NSW Ombudsman 2016:74). Despite the extensive use of these new powers, firearms, firearm parts and ammunition were seized in only 2 per cent of all FPO search events in the review period (NSW Ombudsman 2016:34). As such, this comment will argue that FPO search powers cannot be justified as a necessary tool to prevent firearms-related crime in NSW.

Parliament's Intent in Introducing FPO Search Powers

Drive-by shootings and other firearms-related crimes have been the subject of extensive media coverage in NSW in the last two decades. Reporting has tended to focus on 'gun crime' in Sydney's west and south-west (Collins et al. 2000; Cuneo et al. 2012; Bashan 2013). In 2012, the NSW Bureau of Crime Statistics and Research ('BOCSAR') stated that the incidence of drive-by shootings in NSW had doubled between 1995 and 2011 (Birdsey 2012:8). However, BOCSAR later corrected this information and reported that there had not actually been a statistically significant increase in the number of shootings. Rather, the shootings tended to occur in close succession, giving the false impression that they were happening more frequently (Fitzgerald 2013:6).

Nevertheless, in October 2013 then-Premier Barry O'Farrell sought to legislatively address the alleged upturn in shootings in NSW. When introducing the Firearms and Criminal Groups Legislation Amendment Bill to the Legislative Assembly, O'Farrell asserted the need for enhanced police powers to address firearms-related crime in NSW:

This legislation has been put together with the advice of the NSW Police Force to ensure that police have the power, the resources and the new weapons to help tackle criminals with guns... Nothing in this legislation should concern innocent citizens of this State. This legislation will concern those who are involved in criminal activities involving guns (O'Farrell 2013:23564).

The proposed amendments passed through Parliament largely unopposed, though one Independent member of Parliament expressed concern that the Bill was rushed through the House, preventing members from taking the time to consult experts and their constituents about the proposed changes to the *Firearms Act* (Greenwich 2013:23680). As a result of the amendments, a police officer in NSW may now:

- (a) detain a person who is subject to a firearms prohibition order, or
 - (b) enter any premises occupied by or under the control or management of such a person, or
 - (c) stop and detain any vehicle, vessel or aircraft occupied by or under the control or management of such a person,
- and conduct a search of the person, or of the premises, vehicle, vessel or aircraft, for any firearms, firearm parts or ammunition (*Firearms Act* s 74A(2)).

These search powers are subject to just one condition:

The powers of a police officer under this section may be exercised as reasonably required for the purposes of determining whether a person who is subject to a firearms prohibition order has committed an offence under section 74A(1), (2) or (3) (*Firearms Act* s 74A(1)).

The criminal offences created by section 74 are that the FPO subject must not acquire, possess or use a firearm, a firearm part or ammunition, and must not use a firearm (*Firearms Act* pt 7).

As will be discussed below, these new FPO search powers can be categorised as ‘suspicionless’ search powers, as they do not require the police to first have a reasonable suspicion that an individual has committed, or is about to commit, an offence. Rather, FPO search powers have been executed as a roving search power, which is not subject to established checks and balances. The use of the powers in this way is contrary to Parliament’s ostensible intention for the powers to be used to determine whether FPO subjects are complying with the Orders that have been made against them. However, the use of FPO search powers in this way also stems, in part, from the poor formulation of the amendment Act.

The Exercise of FPO Search Powers by the NSW Police Force

Between 1 November 2013 and 31 October 2015, 1317 people in NSW were served with an FPO (NSW Ombudsman 2016:5). Meanwhile, in the first 22 months of the Ombudsman’s review period, police used their FPO search powers to conduct 2571 searches of 634 people: 233 of whom were not subject to an FPO. These searches could be grouped into 1343 separate interactions, which were termed ‘search events’ by the police and the Ombudsman. More than half of these search events took place in Sydney’s south-west (NSW Ombudsman 2016:6). Despite conducting over 2500 searches using their FPO search powers in the two year review period, police seized 35 firearms, 9 firearm parts, and 26 lots of ammunition: meaning that police found a firearm, part of a firearm or ammunition in just 2 per cent of all FPO searches (NSW Ombudsman 2016:113). While these seizures are important, the small proportion of firearms, firearm parts and ammunition found in the FPO searches does not lend much credibility to the notion that these powers are an effective mechanism to disarm those people who are committing firearms-related crime in NSW; unless FPO search powers are reconceptualised as a deterrent, pre-emptive and ‘disruptive’ policing strategy.

Though O'Farrell's asserted that FPO search powers should only concern those people engaged in criminal activities involving guns, the most commonly seized item during the review period was small quantities of illicit drugs. Other seized items included knives, mobile phones, computers and money (NSW Ombudsman 2016:34). It is somewhat unsurprising that only 84 of the 1343 search events in the review period resulted in a charge being laid, and that the majority of these charges were not related to offences against an FPO (NSW Ombudsman 2016:35). Indeed, the Ombudsman found that only 15 of the 1343 search events conducted in the review period resulted in a charge for committing a firearms-related offence, while the charges laid were proven for just 8 of these search events (NSW Ombudsman 2016:36).

One of the most common reasons for issuing an FPO was because the FPO subject had alleged links with an organised crime group or 'gang': most of which were Outlaw Motor Cycle Gangs ('OMCGs') or 'Middle Eastern organised crime groups' (NSW Ombudsman 2016:44). In fact, Detective Chief Superintendent Ken Finch rationalised the issuing of FPOs as a 'deliberate strategy' to target 'bikies' and Middle Eastern background crime targets, providing an explanation for the 200 per cent increase in the number of FPOs issued between 2014 and 2015 (Benny-Morrison 2016). As rationalised by Finch, FPOs give police:

...tools we can actually utilise to try and disrupt and prevent gun-related violence...
[However] notwithstanding the extraordinary nature of the powers... We exercise them judiciously and responsibly (Benny-Morrison 2016).

Despite Finch's confidence in the ability of police to use their FPO search powers judiciously, the potential for their misuse has drawn concern from legal groups and politicians alike.

As noted in a submission from the NSW Bar Association, the criteria for issuing an FPO does not hinge on a person actually having a firearm; FPOs are regularly issued based on untested police intelligence, and allegations that an individual is fraternising with members of criminal organisations (NSW Ombudsman 2016:73). An individual may find it difficult to avoid associating with reputed members of crime groups or by virtue of the family or environment that he or she is born into. Similar criticisms have been made of consorting laws, with commentators observing that individuals keeping 'undesirable company' may be pulled into the ambit of the criminal justice system merely because they have associated with certain people, and not because they are actually guilty of any substantive wrongdoing (*Jan v Fingleton*; McNamara 2014; Brown et al. 2015:1211-1223). Issuing somebody with an FPO because they are alleged to be involved with an organised crime group places unfair limits on their freedom of association, and, as will be discussed in the next section of this comment, makes them vulnerable to being arbitrarily searched by police.

Further to this, a Member of the Legislative Council argued that using FPO search powers can legitimate the impingement of a person's civil liberties by the police:

Nothing stops them [police] from searching a person's home in the morning, their vehicle and work premises in the afternoon, then their homes again that night – and doing that around the clock, day in and day out (Shoebridge 2013:23903).

There is evidence to support these concerns about police repeatedly searching FPO subjects. The FPO search powers Issues Paper published by the NSW Ombudsman in July 2015 contains a case study concerning a Torres Strait Islander man given the pseudonym 'Alan', whose only gun-related conviction was for using an imitation firearm to commit an armed robbery. 14 years later, in 2014, Alan was issued with an FPO. Though police did not record any information about Alan possessing a firearm or attempting to acquire one, Alan was searched using FPO search powers on 21 separate occasions over a seven-month period. Most searches were instigated because Alan was begging, loitering or suspected to be under the influence of drugs outside of a busy suburban railway station (NSW Ombudsman 2015:17). These searches were completely unrelated to any attempt to curb gun crime in NSW, but do provide further evidence of police targeting Aboriginal and Torres Strait Islander Australians for minor public order offences, under the guise of serious crime prevention (NSW Ombudsman 2016a). Police narratives also showed that on more than one occasion Alan was searched owing entirely to the fact that he was an FPO subject, and not because of any 'reasonable requirement' to determine whether he had acted in contravention of the terms of his FPO (NSW Ombudsman 2015:17).

The Ambiguity Inherent in Conducting Searches 'As Reasonably Required'

It is important to acknowledge that FPO search powers are not the only powers that police officers in NSW can use to search for firearms, firearms parts and ammunition. In the event that police obtain information that a person may be in possession of a firearm they can apply for a search warrant. So long as police are able to provide sufficient information or evidence ('reasonable grounds') to support their belief that 'things' associated with an offence will be found on a premises, a Magistrate, registrar of the Local Court or an employee of the Attorney General's Department can issue police with a search warrant. The warrant then authorises police to enter, search and seize relevant property on that premises (*Law Enforcement (Powers and Responsibilities) Act 2002 s 47*). Searches under a warrant are subject to several safeguards under the *Law Enforcement (Powers and Responsibilities) Act 2002* ('LEPRA'), which aim to prevent police from conducting arbitrary or oppressive searches. For example, police are only empowered by a warrant to search a premises for a designated period of time (ordinarily 72 hours) (*LEPRA s 73(3)*). Additionally, police can only seize things described in the warrant, unless they have reasonable grounds to believe that an additional item relates to an offence (*LEPRA s 49(1)*). However, FPO search powers are not subject to these same checks and balances (*Firearms Act pt 7*).

Police can also search for firearms, firearm parts and ammunition without a warrant in a range of circumstances. These search powers are codified in *LEPRA*, which dictates that searches can be conducted as a result of arrest, reasonable suspicion or consent. If police reasonably suspect that a person is in possession of a firearm, firearm part or ammunition, and that person is under arrest, they can conduct a person search (*LEPRA s 23*). If the individual is not under arrest but is in a public place, or is in a vehicle in a public place, police can also conduct a person search or a search of the vehicle (*LEPRA s 21(1)(c), s 35*). The only circumstance under which police do not require reasonable suspicion to conduct a search using the powers contained in *LEPRA* is if an individual consents to a search of their person, premises or vehicle (*LEPRA s 34A*). A 'reasonable suspicion' is '...less than a reasonable belief but more than a possibility... A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence' (*R v Rondo* at [53]).

Though the powers already described in this section can only be exercised when police form reasonable suspicion, s74A(1) contains the unusual stipulation that FPO search powers can be discharged by police 'as reasonably required' (*Firearms Act*). However, police currently have no policies or guidelines in place to assist them in determining whether an FPO search is 'reasonably required' (NSW Ombudsman 2016:49). During the review period the NSW Ombudsman welcomed submissions from key stakeholders about the meaning of 'reasonably required'. While some stakeholders held that an FPO search could only be 'reasonable' if an FPO subject had done something to arouse the police's suspicion, others felt it necessary for the police's suspicion to relate directly to firearms offences to justify the use of FPO search powers (NSW Ombudsman 2016:48). In any case, in the view of these stakeholders, some element of suspicion is still required to necessitate the use of FPO search powers.

The Ombudsman reviewed police records and spoke to operational police about their understanding of the meaning of 'reasonably required', and found a wide range of interpretations about when FPO search powers should be exercised. Some police concurred with the above view that a reasonable requirement to search a person using FPO search powers should be grounded in some level of suspicion that an offence had been committed, though this suspicion need not amount to 'a reasonable suspicion'. However, other police believed that they are empowered by the *Firearms Act* to search a person entirely on the grounds that they are subject to an FPO (NSW Ombudsman 2016:49). One significant concern about the use of the FPO search powers in this way is that FPO subjects may become vulnerable to frequent and repeat searches that cannot be justified on other grounds.

The extent of the ambiguity in s74A(1) is such that police mistakenly exercised their FPO search powers to search 233 people who were not subject to an FPO in the first 22 months of the Ombudsman's review period. Most of these were person searches, conducted on individuals who were in the company of FPO subjects at the time that they were searched (NSW Ombudsman 2016:74). The application of the FPO search powers in this way is erroneous, unlawful, and wholly unacceptable, as no provision is made in the *Firearms Act* for FPO search powers to be exercised against individuals who are not subject to an FPO. If police have reasonable grounds to suspect that the associates of FPO subjects are engaged in criminal behaviour they should exercise their powers under *LEPRA* to conduct a search.

Challenging an FPO

Concerns about FPO search powers being used incorrectly and oppressively are compounded by the fact that FPOs do not expire. Avenues to appeal an Order are also very limited. Once served with an FPO, an individual has 28 days to request that the Police Force review the decision (*Administrative Decisions Review Act 1997* s 53(2)(d)). If this review process is not favourable to the FPO subject, some subjects are eligible to apply to the NSW Civil Administrative Tribunal ('NCAT') and request a further review (*Firearms Act* s 75(1)(f)). However, a broad range of individuals are exempt from this option. An individual cannot apply for an NCAT review if they are under 18 years of age, or if they have been: convicted of certain prescribed offences including firearms offences, drug offences, fraud, robbery, dishonesty or stealing; subject to an Apprehended Violence Order ('AVO') within the last ten years, unless the AVO was revoked; or if they are subject to a good behaviour bond for certain offences, which are similar to those described above (*Firearms Regulation 2006* cl 5(1), (2)).

After this 28 day period an individual can appeal to the Commissioner to revoke the FPO (*Firearms Act* s 73(3)), but it is impossible to estimate the likelihood of the Commissioner doing so upon the basis of the data that is currently available.

In addition, no protocol exists to ensure that FPOs are reviewed, and based on current information or intelligence (NSW Ombudsman 2016:86). In effect, this means that an FPO subject and his or her home or vehicle can be searched whenever police decide that their FPO search powers have been enlivened. However, in contrast, firearms licences expire, and will never be in force for more than a five year period before the Commissioner is required to reconsider whether a person is still fit to possess a firearm (*Firearms Act* s 21(1); NSW Ombudsman 2016: 103). This requirement recognises that an individual's circumstances may change. However, this recognition is unidirectional; while the need to review firearms licences indicates that an individual may cease to be a fit to possess a firearm, the perpetual nature of FPOs implies that FPO subjects cannot change for the better.

Conclusion

Though FPO search powers were created with the stated aim of helping police to reduce firearms-related crime in NSW, police only made very small seizures of firearms, firearm parts and ammunition in the two years after the powers were introduced. Police have also tended to use their new powers in a way that is incongruous with Parliament's intent in amending the *Firearms Act*. Though the misuse of these powers is attributable, in part, to the poor wording of the amending Act, the fact remains that police conducted over 200 unlawful searches of persons not subject to an FPO during the Ombudsman's two-year review period. Further to this, those individuals who are actually subject to an FPO are vulnerable to arbitrary and frequent searches.

Cases

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R v Rondo [2001] NSWCCA 540

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Firearms Act 1989 (NSW)

Firearms Act 1996 (NSW)

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