PARLIAMENT OF VICTORIA

LEGISLATIVE COUNCIL
Legal and Social Issues Committee

Inquiry into firearms prohibition legislation

Parliament of Victoria
Legislative Council Legal and Social Issues Committee

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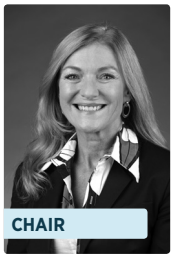

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About the committee

Functions

The Legislative Council Legal and Social Issues Committee's functions are to inquire into and report on any proposal, matter or thing concerned with community services, education, gaming, health, and law and justice.

Standing Committees may inquire into, hold public hearings, consider and report on any Bills or draft Bills, annual reports, estimates of expenditure or other documents laid before the Legislative Council in accordance with an Act, provided these are relevant to its functions.

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This report is available on the Committee's website.

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Terms of reference

Inquiry into firearms prohibition legislation

Self-referenced by the Committee on 28 May 2019.

That, pursuant to Sessional Order 22, The Legal and Social Issues Standing Committee is required to inquire into and report to the Legislative Council, by February 28, 2020, on the operation of the *Firearms Amendment Act 2018* in relation to Prohibition Orders and examine ways to further strengthen its effectiveness in reducing the incidence of illicit or illegally possessed firearms within the community, particularly illicit black-market handguns and long-arms possessed by criminal organisations. The Committee should consider the relevance of emerging technologies, such as 3D printing, on possession.

Chair's foreword

Legislative Council Committees have the capacity to self-reference an inquiry. In May this year the Committee resolved to conduct an inquiry into firearms prohibition legislation. We decided to look into the operation of the *Firearms Amendment Act 2018* particularly in relation to Part 4A of the Act relating to Firearms Prohibition Orders (FPOs), which was inserted into the Act last year and came into operation on 9 May 2018.

Firearms Prohibition Orders are issued by the police against individuals who police believe pose significant risk to the community. The purpose of FPOs is to ensure that members of criminal organisations are not able to possess firearms. Disrupting access to illicit firearms by these individuals and groups is without doubt an important element of the role of the police in promoting and upholding public safety.

In part, the inquiry was prompted by a decision of the Victorian Civil and Administrative Tribunal, the body that reviews decisions to make FPOs, to set aside an order made in respect of an individual known to have involvement in criminal organisations.

I was very pleased to chair this inquiry because it raised a number of issues that are fundamental to how we believe our legal system and policing should operate, and how we go about achieving the goals outlined above.

The first point I make is that when passing laws in the public interest we must ensure that we strike the right balance between upholding individual rights and ensuring public safety. If legislation infringes individual rights, we must ensure there is a sound and reasonable basis for doing so. We do of course need to ensure that Victoria Police are in the best possible position to maintain public safety, but we must always balance that power by ensuring that individual rights and freedoms are not interfered with in an arbitrary or unjustifiable way.

While some interference with a person's rights and liberties in order to protect community safety is acceptable in the context of the FPO scheme, these interferences are only reasonably justified if they are absolutely necessary to the effective operation of FPOs.

The second, related, point is that when the Government develops legislation it must do so with the utmost care and, in turn, the Parliament should exercise similar care when considering that legislation. Of course, as legislators we do our best to scrutinise and debate legislation and we often propose amendments to improve it. In the Legislative Council, where we spend a great deal of time forensically examining and questioning many aspects of bills, this is particularly true.

The FPO scheme was inserted into the *Firearms Act 1996* by the *Firearms Amendment Act 2018*. During the Legislative Council's consideration of the Bill amendments were proposed that I supported. These amendments were ultimately not accepted, but I believe they would have improved the Bill. This is borne out by the Committee's Report.

The Legal and Social Issues Committee's Report on the operation of FPOs has identified what the Government got right and what it got wrong in the scheme. The Committee's subsequent recommendations, if accepted by the Government would improve the scheme through legislative amendments and other measures.

The recommendations made unanimously by the Committee are well thought out and address the concerns I've expressed above and others that are outlined in the Report. I hope that the Government takes these recommendations on board and moves to amend the legislation to ensure that it is more fit for purpose, enforceable and ultimately achieves the goal we all share – to maintain the safety of our community.

I sincerely thank Victoria Police, the Law Institute of Victoria and the Department of Justice and Community Safety for providing information at a public hearing for this inquiry.

We also received submissions from the National Shooting Council, the Alannah and Madeline Foundation, Firearm Owners United, and Ambulance Victoria. I am grateful to these bodies for the issues they identified that intersect with the core concerns of the inquiry such as the use of firearms in family violence situations and the burden on the health system from firearms related crime.

I am grateful to New South Wales Police and the Australian Criminal Intelligence Commission who generously provided information from their jurisdictions that was very helpful for the Committee and assisted us in understanding our own scheme.

The Council Standing Committee's Secretariat gave the Committee excellent support as always. Thank you to Lilian Topic, Vivienne Bannan and Caitlin Connally for their work on this Report.

Finally, I would like to thank my colleagues on the Legislative Council's Standing Committee on Legal and Social Issues for their work. No matter our political differences we are all working to achieve worthwhile legislation, particularly when it contributes to keeping our community safe.

I commend this Report to the House.

Fiona Patten MLC
Chair

Findings and Recommendations

A note from the Committee

At the time of writing this Report a decision from the Court of Appeal on the inaugural VCAT review of a Firearms Prohibition Order was pending. The Court of Appeal decision is important and will determine whether the Firearms Prohibition Order challenged by a particular individual will be overturned or the case will return to VCAT to determine. This will have implications as to the interpretation and application of Firearms Prohibition Order legislation by Victoria Police and VCAT.

Nevertheless the Committee is of the view that whatever decision the Court comes to will not affect the findings and recommendations made in this Report. Rather, the Committee's findings and recommendations are focussed on broader issues relating to the construction and efficacy of this legislation and how it may be improved.

That the Committee considers this to be the case reinforces the principles that legislation should be targeted and fit for its intended purpose; it should not unnecessarily infringe on Charter rights; and it should include the appropriate safeguards to ensure its continuing effective and fair application.

1 Illicit firearms and firearms legislation in Victoria

FINDING 1: The availability of illicit firearms is of national concern. Grey-market weapons account for the majority of illicit firearms in the Australian market. However, it should be noted a significant number of illicit firearms are diverted into the market by unknown sources, and are difficult to monitor because of limited traceability. 6

3 Firearms Prohibition Orders in Practice

FINDING 2: Although Firearms Prohibition Order legislation has been in effect for 18 months there has been a slow rollout of the scheme to all Victoria Police regions. 33

FINDING 3: The decision by the Victorian Civil and Administrative Tribunal to overturn the Firearms Prohibition Order made against Colin Websdale, as the first test of the legislation, highlights the difficulty in defining public interest and determining the class of persons against whom an order can be made. 38

4 Issues raised with Firearms Prohibition Orders

FINDING 4: The broad application of public interest under the Firearms Prohibition Order scheme allows law enforcement to flexibly respond to the individual circumstances in each case when deciding to make a Firearms Prohibition Order application. However, the intentionally broad application of the criteria has the potential to invite a broad interpretation of what constitutes public interest. This may affect the operation and effectiveness of the scheme in disrupting access to and possession of illicit firearms, especially by organised crime or terrorist groups, and raises the risk that members of the community with little or no criminal involvement could be targeted. 43

FINDING 5: That in deciding to make a Firearms Prohibition Order, the Commissioner (or delegate) should determine if the public interest is met by weighing competing values of interest in the context of the section 112E criteria on which the order is based. In doing so, an appropriate balance should be struck between promoting public safety and protecting a subject individual's rights. The risk to public safety should be significant enough to satisfy the need for the reasonable limitation of those rights in order to prevent the arbitrary deprivation of an individual's rights and freedoms. 45

FINDING 6: The level of discretion exercisable by police in applying and enforcing Firearms Prohibition Orders may lead to inconsistent practice and confusion. 45

FINDING 7: The relative lack of data relating to Firearms Prohibition Orders in Victoria makes it difficult to draw any concrete conclusions either in relation to the effectiveness of the search powers under the legislation, or the impact of searches on individual subjects. The Committee notes that the scheme has been in effect for a short period of time. 53

FINDING 8: The Victorian Civil and Administrative Tribunal is the current forum for the review of a Firearms Prohibition Order because it is an administrative order. This was also reflected in other jurisdictions with comparable schemes where review mechanisms were established under VCAT-equivalent bodies. 56

5 Recommended changes and improvements to Firearms Prohibition Orders

6 Illicit firearms and emerging trends

What happens next?

There are several stages to a parliamentary committee inquiry.

The Committee conducts the Inquiry

This Report on the inquiry into Firearms Prohibition Legislation is the result of extensive research and community consultation by the Legislative Council's Standing Committee on Legal and Social Issues at the Parliament of Victoria.

We received written submissions, spoke with people at public hearings, reviewed research evidence and deliberated over a number of meetings. Experts, organisations and other stakeholders expressed their views directly to us as Members of Parliament.

A parliamentary committee is not part of the Government. Our Committee is a group of members from different political parties. In the case of this inquiry the Committee used its 'self-referencing' power to look at this issue. This process helps Parliament do its work by encouraging public debate and involvement on issues. We also examine government policies and the actions of the public service.

This Report is presented to Parliament

This Report was presented to Parliament and can be found on the Committee's website (https://parliament.vic.gov.au/lsic-lc/article/4248).

A response from the Government

The Government has 6 months to respond in writing to any recommendations we have made. The response is public and put on the inquiry page of Parliament's website when it is received (https://parliament.vic.gov.au/lsic-lc/article/4249).

In its response, the Government indicates whether it supports the Committee's recommendations. It can also outline actions it may take.

1 Illicit firearms and firearms legislation in Victoria

1.1 Overview: legislation and policing of illicit firearms and organised crime in Victoria

In 1996, following the mass shooting at Port Arthur in Tasmania, the Commonwealth and all other jurisdictions agreed to a uniform approach to firearms regulation. What followed was extensive firearms law reform. The National Firearms Agreement (1996) restricted the legal possession of automatic and semi-automatic firearms and the legal importation of prescribed firearms. Through the Agreement all jurisdictions committed to establishing a firearms registration and licensing scheme aimed to restrict access to firearms by 'unsuitable persons'.[1]

In Australia responsibilities under firearms legislation are divided between the Commonwealth and the States and Territories. The Commonwealth is responsible for regulating the import and export of firearms and related items as well as the investigation of trafficking offences under the *Criminal Code Act 1995* (Cth). The States and Territories are responsible for the administration and management of systems for licensing, registration, possession and use of firearms.[2]

1.1.1 *Firearms Act 1996*

As a result of the 1996 National Firearms Agreement, Victoria repealed the *Firearms Act 1958* and introduced the *Firearms Act 1996* (Firearms Act) with the purpose of:

- restricting possession, carriage, use, acquisition and disposal of firearms to ensure public safety and peace;
- establishing a licensing and registration scheme for the possession, carriage and use of firearms including in the carrying-out of business dealings; and
- establishing a system of disposing, storing, and acquiring firearms.[3]

The Firearms Act requires that an individual must be considered a 'fit and proper person' to be able to possess, carry, use, acquire and dispose of a firearm. If the Chief Commissioner of Victoria Police is not satisfied that an individual meets the threshold of

1 Australian Institute of Criminology, *Legislative reforms*, 3 November 2017, <https://aic.gov.au/publications/rpp/rpp116/legislative-reforms> accessed 17 September 2019.

2 Australian Criminal Intelligence Commission, *Submission 6*, p. 1.

3 *Firearms Act 1996* (Vic) s 1(a).

a 'fit and proper person' they may refuse to issue them a firearms license.[4] According to the Victoria Police website an individual cannot be considered a 'fit and proper person' if they:

- have a history of irresponsible firearms handling
- are a 'prohibited person'
- have been found guilty of violent offences
- are not of 'good character'
- have a criminal history related to firearms
- provided false or misleading information to police on a firearms matter
- have a record of physical or mental illness which suggests they should be excluded
- have a record of drug or alcohol misuse which suggests they should be excluded, or
- failed to possess sufficient knowledge or competency in the carriage and use of firearms (e.g. did not complete or failed the Victorian Firearms Safety Course).[5]

The definition of 'prohibited persons' is contained in s 3 of the Firearms Act and refers to individuals who must not be issued a firearms license or will not be allowed to retain a license or continue possessing, using or carrying a firearm.[6] A formal declaration is not required to designate someone a 'prohibited person', this status is automatically conferred on them if they meet the requirements specified in s 3 of the Act. The two key requirements that will make someone a 'prohibited person' are:

- findings of guilt for specific criminal offences in Victoria or other jurisdictions
- being issued a final intervention order under the *Family Violence Protection Act 2008* or *Personal Safety Intervention Order Act 2010* in Victoria, or under equivalent legislation in other jurisdictions[7]

Section 5 of the Firearms Act makes it an offence for prohibited persons to possess, carry or use a firearm. The offence carries a maximum of 1200 penalty units or 10 years imprisonment. It also includes an additional offence for possessing, carrying, or using a silencer or other prescribed items under the Act, which carries a maximum of 48 penalty units or 8 years imprisonment.[8]

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4 Ibid, s 17(1)(ba).

5 Victoria Police, *Firearms licensing: Current and prospective licence holders - Eligibility requirements*, 21 February 2019, <https://www.police.vic.gov.au/eligibility-requirements> accessed 17 September 2019.

6 *Firearms Act 1996* (Vic) s 3.

7 Ibid, s 3.

8 Ibid, s 5.

1.1.2 *Firearms Amendment Act 2018*

In May 2018, the Victorian Government amended the Firearms Act to establish the Firearms Prohibition Order (FPO) scheme to further protect community safety and reduce firearm-related crime by targeting possession, use or carriage for unlawful purposes.[9] The scheme is intended to complement the existing 'prohibited persons' scheme under the Firearms Act. It does so by empowering the Chief Commissioner, and conferred delegates, to make an order against an individual if it is not in the public interest for that person to possess, use or carry a firearm, despite not fitting the definition of 'prohibited person'.

The FPO legislation is the primary focus of this Report. It is discussed in detail in chapters 2–5.

1.1.3 Illicit firearms market in Australia: prevalence and diversion methods

In its submission to this inquiry, the Australian Criminal Intelligence Commission conservatively estimated that there were 260,000 firearms in the domestic illicit market. Of these, 250,000 were longarms[10] and the remaining 10,000 were handguns.[11] These figures are based on various intelligence sources, including importation figures and seizure trends over time. The Commission acknowledged that the exact numbers could not be determined because of the difficulties in traceability, intelligence limitations, and lack of historical data.[12] There is a significant gap in the statistics because of the difficulty in tracing all illegally obtained firearms. The figures discussed in this Report relate to firearms where the diversion method was known.

The Commission provided information on how firearms data is tracked using the National Firearm Trace Program. Operating since 2004, the Program is a database managed by the Commission containing consolidated information to create a national picture of the firearm types in the Australian illicit firearms market, and the diversion methods used for a firearm to reach that point.[13] Law enforcement partners can submit web-based requests to trace a firearm; according to the Commission Victoria has submitted 120 requests since September 2018.[14]

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9 Victoria Police, *Firearm prohibition orders*, 23 January 2019, <https://www.police.vic.gov.au/firearm-prohibition-orders> accessed 17 September 2019.

10 A longarm is defined as a firearm which does not fit the definition of a handgun.

11 A handgun is defined as a firearm which is reasonably capable of being concealed, raised by one hand and does not exceed 65 cm in length.

12 Australian Criminal Intelligence Commission, *Submission 6*, p. 4.

13 Ibid., p. 3.

14 Ibid., p. 4.

Law enforcement agencies have submitted 11,000 firearms for tracing to the Program. Of these 4,150 have been identified as handguns, 150 of which were manufactured in Australia. Trace data indicates the majority of illicit firearms in the Australian market were legally imported prior to the National Firearms Agreement.[15]

In relation to the Trace Program, the Commission makes the point:

> The tracing of illicit firearms does not solve crimes. The tracing builds a picture, over time, of the diversion methods used to moved 'once-licit' firearms to the illicit market. It is more about answering the question: *where did the gun come from?*[16]

There are a number of methods used to divert firearms into illicit markets, which the Commission categorises as either historical or contemporary methods.

Historical diversion methods include the grey market and legislative loopholes in firearms legislation.[17] Grey market firearms refer to illegally held firearms, which were not surrendered or registered under the National Firearms Agreement during the 1996–1997 buyback period. The Commission notes that 'although grey market firearms are not primarily held by people with criminal intent, these firearms can and do end up in the possession of people who use them for criminal purposes'.[18] This method of diversion accounts for the majority of illicit firearms in the Australian market (approximately 40%).[19]

'Legislative loopholes' refers to illicit firearms that were diverted through regulatory loopholes around deactivated firearms. For example Western Australian and South Australian legislation contained a potential loophole related to accountability for deactivated or inoperable firearms. As of October 2016, there were an estimated 5,000 handguns in the illicit market which were diverted in this way.[20] This accounts for less than 5% of illicit firearms in the domestic market.[21]

Contemporary diversion methods include theft, illicit manufacturing,[22] illegal importation, and failing to record or reconcile a transfer of firearms. Theft is the primary contemporary diversion method of firearms into the illicit market, accounting for 8.5% of firearms traced during 2015-16.[23] In comparison, both illicit manufacturing[24] and illegal importation[25] account for a very small percentage of illicit firearms in the market: 1.7% of illicit firearms during 2015-16 were traced to illicit manufacturing, and

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15 Ibid.

16 Ibid., p. 3.

17 Australian Criminal Intelligence Commission, *Illicit Firearms in Australia*, Commonwealth of Australia, 2016, p. 8.

18 Ibid., p. 5.

19 Ibid, p. 23.

20 Ibid, p. 9.

21 Ibid, p. 23.

22 Illicit manufacturing encompasses both home-made and factory produced firearms.

23 Australian Criminal Intelligence Commission, *Illicit Firearms in Australia*, p. 10.

24 Illicit manufacturing also includes firearms manufactured through emerging technologies such as 3D printing.

25 Some illegally imported firearms may remain undetected at the border, and therefore may contribute to illegal firearms diverted through unknown methods.

1% to illegal importation.[26] Another 1% is attributed to failure to record or reconcile a transfer[27] of firearms.[28]

The types of diversion methods used to move firearms into illicit markets was discussed by Detective Superintendent Peter Brigham, State Anti-Gangs Division of Crime Command, Victoria Police, at a public hearing for this inquiry. Mr Brigham told the Committee that:

> Illicit firearms are obtained, we say, from six different areas: illicit firearms are obtained through the grey markets, they are firearms that are pre-1996 – ones that were not handed in during the amnesty period post-Port Arthur; firearms thefts; illegal importations; corrupt dealers; illegal manufacturing; and the other category is legally registered and owned firearms that may be used illegally.[29]

Detective Superintendent Brigham expressed the view that one of the challenges around policing illicit firearms is their durability:

> The general challenges around illicit firearms – one of the observations I make about a firearm is it is an enduring commodity. It does not have a use-by date. It does not break down over time. Only last week I saw a report of a firearm that had been traced that was over a hundred years old that was taken off a criminal.[30]

The Australian Criminal Intelligence Commission (ACIC) similarly noted:

> Diversion of firearms to the illicit market is a major concern to law enforcement agencies in every jurisdiction, as firearms are an enduring commodity with an indefinite life-span. For example, the oldest unregistered firearm traced by the ACIC was manufactured in 1877 and was located in 2019 in working condition in the possession of an unlicensed person involved in illicit activity.[31]

This is exacerbated by gaps and inconsistencies in the various jurisdictional systems used for the tracking, transfer and receipt of firearms as they are moved interstate, in particular, between firearms dealers based in different jurisdictions.[32]

The domestic illicit firearms market is a national issue shared across all Australian jurisdictions. Available data suggests that the majority of illicit firearms in the market can be attributed to firearms that were not surrendered or registered under the National Firearms Agreement amnesty periods.[33] Manufacturing and importation contribute a small percentage of illicit firearms in Australian markets, however issues

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26 Australian Criminal Intelligence Commission, *Illicit Firearms in Australia*, pp. 10-1.

27 This refers to transferring a license to another Australian jurisdiction. Each jurisdiction has an individual registry and license holders are required to advise the appropriate registry when they receive or dispose of a firearm.

28 Australian Criminal Intelligence Commission, *Illicit Firearms in Australia*, p. 11.

29 Detective Superintendent Peter Brigham, Crime Command, State Anti-Gangs Division, Victoria Police, public hearing, Melbourne, 2 September 2019, *Transcript of evidence*, p. 1.

30 Ibid., p. 2.

31 Australian Criminal Intelligence Commission, *Submission 6*, pp. 4–5.

32 Ibid., p. 5.

33 Australian Criminal Intelligence Commission, *Illicit Firearms in Australia*, pp. 22–3.

with traceability and detectability mean these remain a concern for governments and law enforcement agencies. Furthermore, the durability of firearms over a long period of time means older firearms are not always less risky than recently manufactured ones. Therefore, it is important that jurisdictions, through government and law enforcement agencies, continue to collaborate on detecting and limiting the number of illicit firearms in the domestic market.

FINDING 1: The availability of illicit firearms is of national concern. Grey-market weapons account for the majority of illicit firearms in the Australian market. However, it should be noted a significant number of illicit firearms are diverted into the market by unknown sources, and are difficult to monitor because of limited traceability.

1.1.4 Illicit firearms: relationship with organised crime

A number of stakeholders throughout this inquiry, including Victoria Police,[34] indicated there was a significant connection to and engagement with the illicit firearms market from organised crime groups, such as outlaw motorcycle gangs and terrorist groups. This contention is also supported by contemporary studies and data on the prevalence of illicit firearms in organised crime groups.[35]

In 2012, the Australian Institute of Criminology published a report on *Firearm trafficking and serious and organised crime gangs*, which examined how illicit firearms were diverted into domestic markets and how they were being used by serious and organised crime gangs. In its report the Institute found that:

> Just under half of firearms found in the possession of serious and organised crime groups were models that were the subject of buybacks that accompanied the major firearms agreements in 1996 and 2002. The majority of these were semi-automatic rifles and semi-automatic pistols, supplemented by smaller quantities of pump-action shotguns, revolvers, semi-automatic shotguns, submachine guns and single shot pistols. Many of these restricted firearms were seized from entities involved in the illicit drug market and/ or firearm trafficking ventures or from members of outlaw motorcycle gangs – a criminal fraternity commonly connected to the sale and purchase of illicit firearms.[36]

The Institute also examined the prevalence of illicit firearms in outlaw motorcycle gangs (OMCGs) specifically, finding:

> OMCGs are involved in a variety of illicit markets, including the stockpiling and trafficking of illicit firearms. Just 218 of the illicit firearms recorded in the NFTD [National Firearm Trace Database] were recovered from OMCGs, 13 per cent of all SOCG [serious

34 Detective Superintendent Peter Brigham, *Transcript of evidence*, p. 2.

35 Australian Criminal Intelligence Commission, *Illicit Firearms in Australia*.; Samantha Bricknell, *Firearm trafficking and serious and organised crime gangs*, report for AIC Reports: Research and Public Policy Series, Australian Institute of Criminology, 2012.

36 Samantha Bricknell, *Firearm trafficking and serious and organised crime gangs*, p. iii.

> and organise crime group] firearms and eight per cent of all seized firearms recorded in the NFTD.
>
> Handguns were more common among OMCG-recovered firearms (55%) than among firearms recovered from SOCG in general (39%).[37]

Similarly, in a 2016 report, *Illicit Firearms in Australia*, the Australian Criminal Intelligence Commission found that there is an increasing number of outlaw motorcycle gangs and Middle Eastern organised crime groups driving the illicit firearms market:

> … intelligence has indicated that not only are serious and organised crime groups seeking access to firearms for criminal purposes, but an increasing number of groups are trafficking firearms. The illicit firearms market is driven in part by outlaw motorcycle gangs, Middle Eastern organised crime groups, and other groups engaged in trafficking illicit commodities such as drugs…No single organised crime group dominates the sale and supply of firearms in the Australian illicit market.[38]

The Commission further stated in its report that 'organised crime and firearms are inextricably linked, and law enforcement strategies must address both'.[39]

Stakeholders including the Law Institute of Victoria and the National Shooting Council asserted the purpose of FPOs was to target possession and use by organised crime groups such as outlaw motorcycle gangs.[40] The National Shooting Council recommended to the Committee that legislative reform is needed so that the intention to capture organised crime groups is 'expressly stated'.[41]

The Committee believes these crime groups pose a distinct threat to public safety and peace, and law enforcement agencies should continue monitoring and preventing individuals associated with these organisations from having access to firearms. The Committee recognises that the FPO scheme, particularly through its search powers, is an important proactive and preventative enforcement tool for Victoria Police in disrupting access to illicit firearms. This is discussed in section 4.1.4.

1.1.5 Firearm-related violence in Victoria

In May 2019, the Sentencing Advisory Council published a report which examined firearm offences in Victoria during 2012–2017. The report included data collected by the Crime Statistics Agency which showed that there has been an increase in the number of firearms offences recorded by Victoria Police in the 2012–2017 period. Figure 1.1 shows the number of firearm offences recorded over the reference period.

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37 Ibid., p. 40.

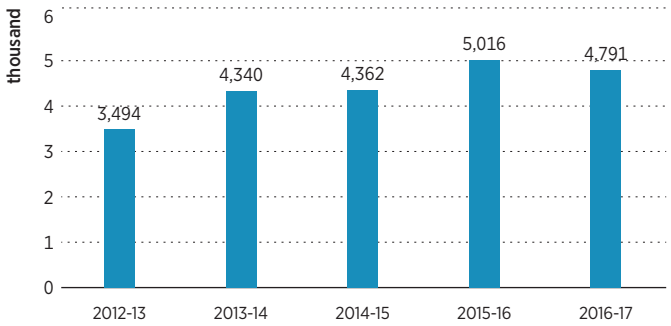
38 Australian Criminal Intelligence Commission, *Illicit Firearms in Australia*, p. 6.

39 Ibid.

40 Ms Melinda Walker, Co-Chair of Criminal Law Section, Law Institute of Victoria, public hearing, Melbourne, 2 September 2019, *Transcript of evidence*, p. 20.; National Shooting Council, *Submission 1*, pp. 2-3.

41 National Shooting Council, *Submission 1*, p. 3.

Figure 1.1 Number of firearms offences recorded by Victoria Police, 2012-13 to 2016-17.



Note: Firearm offences may be underreported therefore the data may underestimate the prevalence of offences in Victoria.

Source: Sentencing Advisory Council, Firearm Offences: *Current Sentencing Practices*, Victoria, 2019, pp. 13–14.

The data shows continued increases in the number of firearm offences in Victoria, noting that these statistics capture all firearm offences including incidences of offences where no violence was committed.

Recent media reports have also indicated there has been a steady increase in the number of instances of firearm-related violence in Victoria. From March to April 2019, there were at least nine people killed as a result of gun-related homicide across Victoria. This includes an April drive-by shooting incident at a Prahran nightclub which resulted in the deaths of three people.[42] Such events have prompted growing concern about the increasing number of drive-by shootings and their connection to organised crime or other criminal activities.

In the statement of compatibility with the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) on the Firearms Amendment Bill 2017 the Honourable Lisa Neville, Minister for Police, noted the growing incidence of drive-by shootings in Victoria:

> Firearms crime, particularly in the context of serious and organised crime groups, represents a serious threat to community safety. There is clear evidence of an increase in firearm-related violence across Victoria, with crime statistics illustrating a significant rise in various offending that involves the use of firearms. Of significant concern is the level of 'drive-by' shootings, referring to the discharge of firearms in public places frequented by the public (such as shopping centres, parks and residential streets) and non-fatal shootings, often linked to these organised crime groups, with Victoria Police data indicating that drive-by shootings have risen from 27 non-fatal shootings in 2014, to 67 in 2016 and already 47 to date in 2017. Additionally, I am advised that at-risk persons in the counter terrorism context have been actively seeking firearms to execute their criminal activities.[43]

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42 Craig Butt and Erin Pearson, 'Firearms offences hit 10-year high, new crime data reveals', *The Age*, 20 June 2019, <https://www.theage.com.au/national/victoria/rise-in-firearm-offences-crimes-committed-by-female-youths-new-data-reveals-20190620-p51zhp.html> accessed 01 October 2019.; Tamsin Rose, 'Police concerned as gun violence in Victoria doubles in five years', *Herald Sun*, 14 June 2019, <https://www.heraldsun.com.au/news/law-order/police-concerned-as-gun-violence-in-victoria-doubles-in-five-years/news-story/3f1c81a963af05088f78d96eb05486be> accessed 01 October 2019.

43 Victoria, Legislative Assembly, 21 September 2017, *Parliamentary debates*, vol. 3, Book 12, pp. 2955-6.

Ambulance Victoria provided statistics to this inquiry on the number of emergency incidents involving firearms during 2018-19. Ambulance Victoria attended 1,002 cases involving gun shots, accounting for 0.15% of total incidents responded to. In its submission to the Committee, Ambulance Victoria acknowledged that this represented a small proportion of total incidents, however, it expressed concern that:

> ... it still represents a portion of the community that have access to and utilise firearms resulting in harm and requiring a response from the paramedic workforce, resulting in an unsafe work environment.
>
> It is impossible to know for every case resulting from a gunshot, if there is further danger to staff in attendance from other firearms in situ at a particular location. Occupational violence is an increasing issue for our staff to manage on a daily basis.[44]

The Committee believes that Ambulance Victoria has raised important concerns regarding the danger posed to emergency workers by gun violence that must be taken into account.

The Alannah and Madeline Foundation addressed the use of firearms in a domestic and family violence context. In its submission to the Committee the Foundation discussed findings from the Royal Commission into Family Violence relating to firearms access, use and harm:

> The Royal Commission into Family Violence heard many harrowing examples of how firearms were used as threats and in causing harm. The Commission was informed that access to firearms is a 'major concern' in rural, regional and remote communities. Firearm ownership rates are higher in these communities and, Victoria Police pointed out, the high prevalence of firearms in such communities increases the risk of serious family violence.
>
> This concern was raised both in community consultations and in submissions. A concern about access to and the prevalence of home-made weapons in these communities was also identified.[45]

The Foundation also provided statistics to the Committee on the prevalence of firearms in domestic and family violence incidents, which showed:

- Gunshot wounds are the third most common cause of death in domestic homicide incidents in Australia.
- Violent intimate partners are more likely to engage in severe domestic violence if they have access to a firearm.
- Between 1989–2010, 18% (n= 272) of opposite-sex intimate partner homicide victims' cause of death was gunshot wounds.

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44 Ambulance Victoria, *Submission 4*, p. 1.

45 Alannah & Madeline Foundation, *Submission 2*, p. 4.

- A woman is 20 times more likely to be killed if their abuser has used or threatened to use a weapon.[46]

Whilst the purported focus of the current FPO legislation is policing access to firearms more broadly, especially in relation to criminal organisations and terrorist groups, the Committee expresses strong concern about the issue of gun violence in a domestic and family violence context. The Committee supports the Alannah and Madeline Foundation's position that research be conducted into the use of firearms in family violence incidents.

46 Ibid., p. 5.

2 Firearms Prohibition Orders

2.1 Background of the legislation

The Firearms Prohibition Order (FPO) scheme was inserted into the Firearms Act by the *Firearms Amendment Act 2018*. FPOs are provided for in Part 4A of the Firearms Act, which came into operation on 9 May 2018.

The Government's stated rationale for introducing FPOs was that statistical increases in firearms related violence, particularly drive-by and non-fatal shootings often linked to organised crime, have resulted in insufficient existing mechanisms and powers in the Firearms Act for police to deal with these types of firearms offending.[47]

In sponsoring its passage through Parliament, Minister Neville described the purpose of FPOs in her second reading speech:

> Illegal firearm use causes significant harm in our communities. Victoria Police has told the government that, operationally, the current tools that exist to address firearm-related offending are no longer sufficient to prevent emerging kinds of firearm crime. FPOs will be used in scenarios where no other appropriate mechanism exists to prevent a person from obtaining a firearm, but sufficient intelligence exists to indicate that it is contrary to the public interest for that person to possess a firearm.[48]

The Minister went on to say:

> The Victorian FPO scheme is modelled on the successful NSW scheme and takes into account the NSW Ombudsman's 2016 review of the NSW FPO search powers. The NSW FPO scheme has had significant impact on firearm crime. NSW Police advises that shooting incidents across NSW metropolitan and regional areas decreased by 45 per cent for the period of 2011 to 2016. NSW Police has informed Victoria Police that FPOs have been successfully issued in counter-terrorism cases, against outlaw motorcycle gangs and against other high-risk individuals. In other areas of the state, the NSW FPO scheme has been attributed to an 80 per cent reduction in firearm violence.[49]

FPOs have been in place in New South Wales since 1973[50] however, the current model (on which the Victorian legislation is based) was enacted in 2013. Significantly, this included the addition of warrantless search powers for police in relation to individuals who are subject to an FPO.[51]

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47 Victoria, Legislative Assembly, 21 September 2017, *Parliamentary debates*, vol. 3, Book 12, pp. 2962–63.

48 Ibid., p. 2963.

49 Ibid.

50 *Firearms and Dangerous Weapons Act 1973* (NSW) s 69(1); *Firearms Act 1989* (NSW) s 39(1); *Firearms Act 1996* (NSW) s 73(1).

51 Inserted by *Firearms and Criminal Groups Legislation Amendment Act 2013* (NSW) s 39.

Under the New South Wales legislation, the New South Wales Ombudsman was required to monitor and report on the exercise of these new search powers for a period of two years after commencement. The Ombudsman's report, a *Review of police use of the firearms prohibition order search powers*, handed down in August 2016, is discussed in more detail in sections 4.1.4 and 5.1.

The proposed new Part 4A of the Firearms Act was largely supported in its passage through Parliament, however some concerns were raised in relation to its operation and broad application. A number of amendments were proposed by the Opposition in relation to some of these concerns; the amendments were ultimately unsuccessful.[52]

2.2 Overview of Firearms Prohibition Orders

2.2.1 Firearms licensing and regulation

The purposes of the Firearms Act are expressed in s 1 in the context of an overarching intent 'to give effect to the principle that the possession, carriage, use, acquisition and disposal of firearms are conditional on the need to ensure public safety and peace'.

***Firearms Act 1996*—Section 1(a)(viia)**

1 Purpose

The purposes of this Act are—

(a) to give effect to the principle that the possession, carriage, use, acquisition and disposal of firearms are conditional on the need to ensure public safety and peace by—

...

(viia) providing for strict control on the possession, carriage, use, acquisition, disposal and storage of firearms; and

As noted in section 1.1.1, the Act provides for a system of licences and permits administered by Victoria Police to allow for the lawful possession, carriage, use, acquisition and disposal of firearms by individuals considered to be fit and proper persons, as well as prohibited persons who cannot hold a license or lawfully possess or use a firearm.

In addition, the Act empowers the Chief Commissioner to impose an FPO on someone who does not fall under the definition of 'prohibited person', but the Commissioner considers it would be contrary to the public interest for that person to possess a firearm.

52 Parliament of Victoria, *Minutes of the Proceedings (LC)*, nos. 161, 162 and 163, 6–8 February 2018, pp. 1049–50.

2.2.2 Making a Firearms Prohibition Order

Grounds for making an order

***Firearms Act 1996*—Sections 112D & 112E**

122D Making a firearm prohibition order

(1) The Chief Commissioner may make an order prohibiting an individual from doing all or any of the following—

(a) acquiring any firearm or firearm related item;

(b) possessing, carrying or using any firearm or any firearm related item.

(2) The Chief Commissioner must not make a firearm prohibition order in respect of a person who is under the age of 14 years.

(3) A firearm prohibition order may be made even though the individual to whom the order applies or is to apply has never acquired, possessed, carried or used a firearm or a firearm related item.

(4) A firearm prohibition order may be made that applies to an individual to whom a previous firearm prohibition order applied that has expired or been revoked.

122E Considerations for making a firearm prohibition order

The Chief Commissioner may make a firearm prohibition order only if the Chief Commissioner is satisfied that it is in the public interest to do so—

(a) because of the criminal history of the individual; or

(b) because of the behaviour of the individual; or

(c) because of the people with whom the individual associates; or

(d) because, on the basis of information known to the Chief Commissioner about the individual, the individual may pose a threat or risk to public safety

The Chief Commissioner can make an FPO in relation to any person aged 14 years or older[53] if satisfied that it is in the public interest to do so because of one or more of the following:[54]

- the person's criminal history
- the person's behaviour
- people with whom the person associates
- on the basis of police information about that person, the person may pose a threat or risk to public safety

Notably, an FPO can be made on grounds that do not include criminal history, meaning a person who is not a prohibited person under the Act and who otherwise has no recorded conviction could still be subject to an FPO.

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53 *Firearms Act 1996* (Vic) s 112D.

54 Ibid., s 112E.

In relation to the intended targets of FPOs the Minister responsible for the legislation during parliamentary debate in the Legislative Council, the Honourable Gayle Tierney, stated that 'police will be focussing on…outlaw motorcycle gangs, Middle Eastern organised crime groups and other high-risk individuals',[55] however the general and unqualified wording of the s 112E criteria means the potential application of this legislation is broad. This is further discussed in section 4.1.

Duration of order

***Firearms Act 1996*—Section 112J**

122J Duration of order

(1) A firearm prohibition order that applies to an individual who is of or over the age of 18 years remains in force for 10 years from the day on which it is served on the individual.

(2) A firearm prohibition order that applies to an individual who is under the age of 18 years remains in force for 5 years from the day on which it is served on the individual.

An FPO remains in force for 10 years from the day it is served on a person aged 18 years or older, and for 5 years from the day it is served on a person who is under 18 years of age.[56]

The rationale for including an automatic expiration was based on a recommendation in the New South Wales Ombudsman's review to provide for a five year expiry from date of service[57] (FPOs are currently open-ended under New South Wales legislation[58]). In explaining why the Government adopted a 10 year period in the Victorian scheme, Minister Tierney claimed the administrative burden and cost to Victoria Police would be significantly increased if (adult) FPOs were set at five years.[59]

In responding to a question at a public hearing about the appropriateness of the 10 year timeframe, Ms Melinda Walker, Co-chair of the Criminal Law Section, Law Institute of Victoria (LIV), told the Committee:

> I think it could probably be achieved in under 10 years—maybe even five years. I think five years is quite extensive for a child when you are looking at that distinction. Obviously the five years was brought in because it can be imposed from the age of 14 and then the child attains the age of 18, which we consider to be an adult under the law for prosecution at least. But the law institute would say that five years would be sufficient, and probably two to three years on a child would be sufficient.[60]

The duration of FPOs is discussed in more detail in section 5.1.

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55 Victoria, Legislative Council, 6 February 2018, *Parliamentary debates*, Book 1, p. 47.

56 *Firearms Act 1996* (Vic) s 112J.

57 Victoria, Legislative Council, 6 February 2018, *Parliamentary debates*, Book 1, p. 39.

58 *Firearms Act 1996* (NSW) pt 7.

59 Victoria, Legislative Council, 6 February 2018, *Parliamentary debates*, Book 1, p. 40.

60 Ms Melinda Walker, Co-Chair of Criminal Law Section, Law Institute of Victoria, public hearing, Melbourne, 2 September 2019, *Transcript of evidence*, p. 21.

Delegation by Commissioner

***Firearms Act 1996*—Section 112F**

122F Delegation of power to make order

(1) The Chief Commissioner, in writing, may delegate the power to make a firearm prohibition order to—

(a) Deputy Commissioner; or

(b) an Assistant Commissioner; or

(c) a person employed by the Chief Commissioner under Division 5 of Part 3 of the Public Administration Act 2004 at an executive level in the Victorian public service; or

(d) a person who has the rank of commander; or

(e) person who has the rank of chief superintendent or superintendent who has responsibility over one or more of the following portfolio types—

(i) crime;

(ii) transit and public safety;

(iii) intelligence and covert support;

(iv) licensing and regulation;

(v) family violence;

(vi) counter terrorism;

(vii) operational support.

(2) In this section, *Deputy Commissioner, Assistant Commissioner, commander, chief superintendent* and *superintendent* have the same meanings as in the *Victoria Police Act 2013*.

Section 112F permits the Chief Commissioner, in writing, to delegate the power to make an FPO to police officers of at least superintendent rank,[61] and to Victorian Public Service (VPS) executive employees of the Chief Commissioner.

Police informed the Committee that 83 people are currently eligible to be delegated the power to make an FPO by the Commissioner.[62] A breakdown of eligible roles is shown in Table 2.1. As at 26 August 2019, delegations had been made in respect of the following:[63]

- Deputy Commissioner (3 positions)
- Assistant Commissioner (15 positions)
- Commander (11 positions)
- Superintendent – Crime Command (6 positions)
- Superintendent – Counter Terrorism Command (2 positions)

61 Under s 112F(1)(e) delegation to chief superintendents and superintendents is limited only to those with responsibility over specific portfolios.

62 Ms Carol Degelo, Senior Policy and Project Advisor, National Policy Unit, Policy and Legislation Division, Capability Department, Victoria Police, correspondence, 28 August 2019, p. 2.

63 Ibid.

Police also advised that an amendment to expand this delegation to include the roles of Superintendent – Operational Support (4 positions) and Superintendent – Licensing and Regulation (1 position) was currently underway.[64]

Table 2.1 Roles eligible for delegation by Chief Commissioner under s 112F

Role	Number of positions
Deputy Commissioner	3
Assistant Commissioner	15
Executive VPS	28
Commander	11
Superintendent – Crime	6
Superintendent – Transit	7
Superintendent – Intelligence and Covert Support	5
Superintendent – Licensing and Regulation	1
Superintendent – Family Violence	1
Superintendent – Counter Terrorism	2
Superintendent – Operational Support	4
Total potential delegates	**83**

Source: Ms Carol Degelo, Senior Policy and Project Advisor, National Policy Unit, Policy and Legislation Division, Capability Department, Victoria Police, correspondence, 28 August 2019, p. 2.

In responding to concerns raised in Parliament regarding the breadth of potential delegates under s 112F, the Government noted:

> This group is the senior echelon of leadership in Victoria Police. Further reducing this number will substantially reduce the effectiveness of the bill, the government argues. The change will mean less timely issuing of FPOs and a reduced effectiveness. We believe it will have an impact on Victoria Police's operating model and their ability to keep the community safe. A reduced delegation will also limit the ability of Victoria Police to issue an FPO when a shooting occurs and parties are known to police but are not assisting.[65]

Ms Walker (LIV) agreed that delegation to superintendent rank was appropriate in order to meet the operational needs of police, but noted it should not be extended any lower, telling the Committee:

> I think that [superintendent] is the appropriate rank, absolutely. I would not go under that at all.
>
> ...
>
> I do not think it would be operative.[66]

64 Ibid.

65 Victoria, Legislative Council, 6 February 2018, *Parliamentary debates*, Book 1, p. 46.

66 Ms Melinda Walker, *Transcript of evidence*, p. 21.

2.2.3 Effect of a Firearms Prohibition Order

An FPO comes into effect when it is served, in person, by a police officer on the individual who is the subject of the order.[67]

A person subject to an FPO is prohibited from acquiring, possessing, carrying or using any firearm or firearm related item, with an attached penalty of 10 years imprisonment.[68] Offences also apply to any person who enables the subject of an FPO to carry, possess or use a firearm or firearm related item, penalised by 10 or 3 years imprisonment respectively.[69]

***Firearms Act 1996*—Sections 112B & 112C**

112B Offence to acquire, possess, carry or use a firearm or firearm related item in contravention of a firearm prohibition order

A person to whom a firearm prohibition order applies must not acquire, possess, carry or use a firearm or firearm related item.

Penalty: 10 years imprisonment.

112C Offence as to disposal of a firearm etc. to an individual to whom a firearm prohibition order applies

(1) A person must not, knowing that a firearm prohibition order applies to another person—

(a) dispose of or give possession of a firearm to the other person; or

(b) enable or permit the other person to possess, carry or use a firearm.

Penalty: 10 years imprisonment.

(2) A person must not, knowing that a firearm prohibition order applies to another person—

(a) dispose of or give possession of a firearm related item to the other person; or

(b) enable or permit the other person to possess, carry or use a firearm related item.

Penalty: 3 years imprisonment.

Upon an FPO being made, any licences, permits and approvals held by the person are immediately cancelled, which takes effect upon the order being served.[70] Once a person has been served with an FPO any firearm or firearm related item in his or her possession must be surrendered immediately, or within 24 hours in a manner as directed if immediate surrender is not possible (a penalty of 5 years imprisonment applies).[71]

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67 *Firearms Act 1996* (Vic) s 112I.

68 Ibid., s 112B.

69 Ibid., s 112C.

70 Ibid., s 112H.

71 Ibid., s 112P.

***Firearms Act 1996*—Sections 112H & 112P**

112H Cancellation of licences and permits

(1) All licences, permits and approvals under this Act (if any) held by an individual to whom a firearm prohibition order applies are cancelled by the making of the order and the cancellation has effect on the order being served on the individual.

(2) If a licence, permit or approval under this Act is held by a body corporate, an officer of which is an individual to whom a firearm prohibition order applies, the licence, permit or approval is cancelled by the making of the order and the cancellation has effect on the order being served on the individual.

112P Offence to fail to surrender firearms or firearm related items on service of order

(1) At the time a firearm prohibition order is served, the individual on whom the order is served must immediately surrender, to the police officer serving the order, or a police officer assisting that officer, any firearm or firearm related item—

(a) that is in the possession of that individual; or

(b) that the individual is carrying or using.

Penalty: 5 years imprisonment.

(2) If an individual is unable to surrender a firearm or firearm related item under subsection (1), the individual must surrender that firearm or firearm related item to a police officer in the manner directed by the police officer who serves the order, and no later than 24 hours after the order is served.

Penalty: 5 years imprisonment.

In addition to possess/carry/use offences, FPO subjects are restricted from entering or remaining on any premises specified in s 112O, being:

- a premises on which a person carries on the business of being a firearms dealer
- a shooting range
- a handgun target shooting club
- a firearms collectors club
- a shooting club
- a place where a handgun target shooting match is occurring
- a paintball range or place at which paintball activities are carried out
- a premises where firearms are stored
- a prescribed premises (eligible premises being where the presence of an FPO subject is a risk to public safety and order)

***Firearms Act 1996*—Section 112O**

112O Offence for individual to whom a firearm prohibition order applies to enter or remain on certain premises

(1) An individual to whom a firearm prohibition order applies must not enter or remain on any of the following—

(a) a premises on which a person carries on the business of being a firearms dealer (within the meaning of Part 3);

(b) a shooting range;

(c) a handgun target shooting club;

(d) a firearms collectors club;

(e) a shooting club;

(f) a place where a handgun target shooting match is occurring;

(g) a paintball range or place at which paintball activities are carried out;

(h) a premises where firearms are stored;

(i) a prescribed premises.

Penalty: 50 penalty units or 12 months imprisonment.

(2) Premises that may be prescribed for the purpose of subsection (1)(i) are premises where the presence of an individual to whom a firearm prohibition order applies is a risk to public safety and order.

2.2.4 Firearms Prohibition Order search powers

A significant aspect of the FPO regime is the expansion of police search powers to enable the conduct of certain searches without requiring a warrant or consent—

***Firearms Act 1996*—Sections 112Q(1)–(4), 112R(1)–(3), (5) & 112C(1)–(3), (5)**

112Q Search of premises, vehicles, vessels or aircraft without warrant or consent

(1) A police officer, without warrant or consent, may exercise any of the powers under subsection (2), if the exercise of the power is reasonably required to determne whether an individual to whom a firearm prohibition order applies has acquired, possesses or is carrying or using a firearm or firearm related item in contravention of section 112B or another provision of this Act.

(2) For the purposes of subsection (1), the police officer may exercise the following powers—

(a) enter and search any premises occupied by, in the care of or under the control or management of the individual, including any thing on the premises and including any vehicle, vessel or aircraft on the premises;

(b) search any vehicle, vessel or aircraft that is in the charge of the individual, or in which the individual is a passenger, wherever the vehicle, vessel or aircraft is located.

(3) A police officer may conduct an entry or a search under this section with the assistance of any other police officer.

(4) A police officer who conducts an entry or a search under this section may do the following—

(a) stop and detain the vehicle, vessel or aircraft being searched for so long as is reasonably necessary to conduct the search;

(b) seize any firearm or firearm related item found on the premises, vehicle, vessel or aircraft.

112R Search of individual to whom firearm prohibition order applies without warrant or consent

(1) A police officer, without warrant or consent, may exercise any of the powers set out in subsection (2), if the exercise of the power is reasonably required to determine whether an individual has acquired, possesses or is carrying or using a firearm or firearm related item in contravention of section 112B or another provision of this Act.

(2) For the purposes of subsection (1), the police officer may exercise the following powers—

(a) search the individual, other than by strip searching the individual;

(b) search any item, package or thing in the possession of the individual.

(3) A police officer who conducts a search under this section may do the following—

(a) stop and detain the individual being searched for so long as is reasonably necessary to conduct the search;

(b) seize any firearm or firearm related item—

(i) that is found on the individual or in any item, package or thing in the individual's possession; or

(ii) that the individual is carrying or using.

...

(5) A police officer may detain an individual for so long as is reasonably necessary to conduct a search under this section.

112S Search of an accompanying person without warrant or consent

(1) A police officer, without warrant or consent, may exercise any of the powers set out in subsection (2) with respect to a person who is in the company of an individual to whom a firearm prohibition order applies, if the police officer reasonably suspects that the person—

(a) is committing or is about to commit an offence against this Act; and

(b) has a firearm or firearm related item in the person's possession.

(2) For the purposes of subsection (1), the police officer may exercise the following powers—

(a) search the person, other than by strip searching the person;

(b) search any item, package or thing in the possession of the person.

(3) A police officer who conducts a search under this section may do the following—

(a) stop and detain the person being searched for so long as is reasonably necessary to conduct the search;

(b) seize any firearm or firearm related item—

(i) that is found on the person or in any item, package or thing in the person's possession; or

(ii) that the person is carrying or using.

...

(5) A police officer may detain a person for so long as is reasonably necessary to conduct a search under this section.

Search of a person subject to an FPO

Section 112R empowers a police officer, without warrant or consent, to conduct a search (other than a strip search) of a person, including anything in the person's possession, if reasonably required to determine whether the person is in contravention of the FPO or other provision of the Firearms Act.

Search of a premises, vehicle, vessel or aircraft

Section 112Q empowers a police officer, without warrant or consent, to enter and search any premises, vehicle, vessel or aircraft owned by, in the care of, under the control or management of, or occupied by an FPO subject, or in which they are a passenger, if reasonably required to determine whether the person is in contravention of the FPO or other provision of the Firearms Act.

Search of an accompanying person

Section 112S empowers a police officer, without warrant or consent, to conduct a search (other than a strip search) of a person, including anything in the person's possession, if that person is in the company of an FPO subject and the police officer *reasonably suspects* the person:

- is committing or is about to commit an offence against the Firearms Act; and
- has a firearm or firearm related item in his or her possession.

Under all of these search provisions, police may stop and detain a person or vehicle/vessel/aircraft for as long as is reasonably necessary to conduct a search and may seize any firearm or firearm related item found.

Of note are the different thresholds of 'reasonably required' in respect of searches under ss 112Q and 112R, and 'reasonable suspicion' for searches under s 112S. Reasonable suspicion is the usual basis for the conduct of searches without warrant; it is a standard that requires less than a reasonable belief, but more than a possibility and requires that there must be some factual basis for the suspicion.[72] Reasonably required, however, is a threshold that has not been considered by a court and is governed only by the interpretation and discretion exercised by a police officer in each circumstance.

Minister Neville, while acknowledging this lower-than-usual threshold in her second reading speech, stated that:

> as noted by the New South Wales Ombudsman, the search powers are a useful tool enabling police more flexibility to search in circumstances where previously they could not…Police will have robust documented policies and procedure to ensure there is a methodical approach to searches.[73]

The Committee considers this to be a somewhat selective representation of the New South Wales Ombudsman's commentary and recommendations in relation to the 'reasonably required' threshold in the New South Wales FPO scheme. This is discussed in greater detail at sections 4.1.4 and 5.1.

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72 *R v Rondo* [2001] NSWCCA 540, at 53.

73 Victoria, Legislative Assembly, 21 September 2017, *Parliamentary debates*, vol. 3, Book 12, p. 2963.

Victoria Police informed the Committee that:

> ... training and advice is available to police to assist with compliance and enforcement activity, including identifying appropriate situations where FPO [search] powers may be exercised in line with the 'reasonableness' test for both FPO subjects and persons in their company.[74]

Further discussion regarding the general operation and use of search powers appears at section 4.1.4.

2.2.5 Victorian Civil and Administrative Tribunal Review (appealing a Firearms Prohibition Order)

A person who has been served with an FPO may apply to the Victorian Civil and Administrative Tribunal (VCAT) for a review of the Chief Commissioner's decision to make the order[75] within 28 days of the decision having been made[76] (an initial review). An additional right to review by VCAT becomes available once more than half the duration of an FPO has passed[77] (a halfway mark review), which 'may enable a FPO subject to demonstrate the basis for making the order is no longer warranted'.[78]

***Firearms Act 1996*—Sections 112L(1) & 112M(1)–(4)**

112L Review of decision to make a firearm prohibition order

(1) An individual to whom a firearm prohibition order applies may apply to VCAT for a review of the Chief Commissioner's decision to make the order.

112M Further right to apply for review of decision to make firearm prohibition order

(1) Subject to subsection (2), during the operation of a firearm prohibition order, the individual to whom the order applies may apply to VCAT for a review of the decision to make the order.

(2) An application under subsection (1) may be made if more than half the time for which the order is in force under this Act has expired.

(3) An application under subsection (1) must not be made more than once in respect of an order.

(4) The right to apply for review under subsection (1)—

(a) is in addition to the right set out in section 112L; and

(b) may be exercised irrespective of whether a right under section 112L has been exercised.

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74 Ms Carol Degelo, Senior Policy/ Projects Advisor, National Policy Unit, Policy & Legislation Division, Capability Department, Victoria Police, correspondence, 25 September 2019, p. 5.

75 *Firearms Act 1996* (Vic) s 112L.

76 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 45.

77 *Firearms Act 1996* (Vic) s 112M.

78 Victoria, Legislative Assembly, 21 September 2017, *Parliamentary debates*, vol. 3, Book 12, p. 2964.

The relevant provisions of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) apply to FPO reviews generally with the following exceptions:

- VCAT's power to 'stay' a decision under s 50(3) of the VCAT Act is dis-applied,[79] meaning an FPO continues in force pending a review.
- The 28 day deadline imposed by s 45(2) of the VCAT Act is waived in respect of a halfway mark review,[80] meaning an FPO subject may still request the Chief Commissioner give a statement of reasons for his/her decision to make the order.

Section 54 of the VCAT Act applies to FPO reviews,[81] which enables crown privilege claims to be made over certain protected information. The effect of this provision was explained by Minister Neville in her seconding speech:

> These decisions [to make an FPO] may involve sensitive police information, such as the identity of informants, police investigative methods, or information related to an ongoing police investigation. The chief commissioner may rely on the existing mechanisms under the Victorian Civil and Administrative Tribunal Act 1998 where it is necessary to maintain the confidentiality of the information. Even where sensitive police information is the basis for issuing an FPO, VCAT may still have access to all relevant information when conducting the merits review. It also can adapt proceedings to the particular circumstances with regard to the public interest in maintaining the confidentiality of sensitive police information and the interest of the applicant.[82]

At the time of writing, VCAT had concluded one review where it set aside an FPO that had been made in respect of Colin Websdale. The details of this proceeding, the subsequent appeal of the Chief Commissioner, and the associated implications are discussed at section 3.3.

2.2.6 Repeal of Firearms Prohibition Order legislation

Sections 2 and 38 of the *Firearms Amendment Act 2018* provide for the repeal of the FPO scheme 10 years after it comes into operation. Once the repeal takes effect no new FPOs can be made. Any orders active at the time of repeal will not be affected and will continue to apply until their original expiration date as if the FPO legislation was still in effect, unless the order is earlier revoked by the Commissioner or set aside by VCAT on a review.[83]

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79 *Firearms Act 1996* (Vic) ss 112L(2), 112M(5).

80 Ibid., s 112M(5).

81 Ibid., s 112N.

82 Victoria, Legislative Assembly, 21 September 2017, *Parliamentary debates*, vol. 3, Book 12, p. 2964.

83 Per the *Interpretation of Legislation Act* 1974 s 14, the repeal of a provision of an Act shall not affect the previous operation of that provision or anything duly done or suffered under that provision unless the contrary intention expressly appears.

3 Firearms Prohibition Orders in Practice

3.1 Police implementation of Firearms Prohibition Orders

As at 26 August 2019 Victoria Police had issued 223 Firearms Prohibition Orders (FPOs), 199 of which had been served on the subject individual.[84] The State Anti-Gangs Division of Crime Command has had primary responsibility for the making and issue of FPOs since the legislation came into effect and is responsible for 'at least half' of the 223 FPOs issued.[85] The Division has led the development and refinement of the FPO application process within police,[86] and it is currently in the process of a roll-out of the FPO regime to Victoria Police regions, which is due to be finished by mid-2020.[87]

Representing Victoria Police at a public hearing for this inquiry Detective Superintendent Brigham told the Committee that:

> There is the increase in the use of FPOs as Victoria Police rolls this out to the regions; this is currently underway where we are rolling out FPOs to regions with training, and to two specific areas in the first and the next phase of this. So we believe there is certainly a number of people out there that are probably fitting and worthy subjects of FPOs. The application process—we have set ourselves a fairly high bar I believe in relation to that, and some of the applications can be 40 to 50 pages long. There is quite a considerable amount of preparation involved.[88]

Table 3.1 sets out the criteria (in the public interest) under s 112E of the Act on which the 223 FPO applications were based. Police informed the Committee that two FPOs had been issued that did not rely upon criminal history as a grounds for making the order.[89]

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84 Ms Carol Degelo, Senior Policy and Project Advisor, National Policy Unit, Policy and Legislation Division, Capability Department, Victoria Police, correspondence, 28 August 2019.

85 Detective Superintendent Peter Brigham, Crime Command, State Anti-Gangs Division, Victoria Police, public hearing, Melbourne, 2 September 2019, *Transcript of evidence*, p. 7.

86 Ibid., p. 1.

87 Ibid., p. 5.

88 Ibid., p. 3.

89 Ms Carol Degelo, Senior Policy/ Projects Advisor, National Policy Unit, Policy & Legislation Division, Capability Department, Victoria Police, correspondence, 25 September 2019.

Table 3.1 Criteria relied on for making an FPO

Criteria	Number of FPOs
Section 112E(a) Because of the criminal history of the individual	215
Section 112E(b) Because of the behaviour of the individual	137
Section 112E(c) Because of the people with whom the individual associates	99
Section 112E(d) Because, on the basis of information known to the Chief Commissioner about the individual, the individual may pose a threat or risk to public safety	40

Note: Because FPOs can be based on one or more of the four criteria under s 112E, the combined total of criteria relied on is greater than the 223 FPOs to which the figures relate

Source: Ms Carol Degelo, Senior Policy and Project Advisor, National Policy Unit, Policy and Legislation Division, Capability Department, Victoria Police, correspondence, 28 August 2019, p. 1.

In relation to training and guidelines provided to assist police officers in compiling an FPO application in line with the public interest test, Detective Superintendent Brigham explained:

> Really, the training of actually putting together an application, and the application is broken down into addressing the sections of 112E—
>
> ...
>
> (a), (b), (c) and (d). So how those applications are framed varies from case to case. But you know, what we see is that there are layers of supervision and management that occur in the workplace in any event. If a detective was to say, 'Look, I've decided I'm going to put in an FPO application on this particular individual', they may discuss that with their sergeant, and then the sergeant may say, 'Look, I don't think this one's got enough in it actually to progress this. I've had a fair bit of experience with these applications, and I don't actually think this one has enough'.
>
> ...
>
> Then it goes through to the inspector of the unit. At the moment we have the inspector who reviews all applications as well, and then of course the delegate has to be satisfied when the delegate reads it. And we have had quite a number[90] that have been rejected by the delegate.
>
> So, I think, in answer to your question, the public interest test is actually built into the consideration of all applications in weighing up the merit of an application.[91]

In addressing questions regarding the guidelines and processes adopted for the use of FPOs by police, Minister Tierney noted several times in Parliament that the FPO legislation would rely on the exercise of police discretion and underpinning procedures and policies developed by police to enable its effective operational use.[92]

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90 The exact number of rejected FPOs was not provided to the Committee for this inquiry.

91 Detective Superintendent Peter Brigham, *Transcript of evidence*, pp. 6–7.

92 Victoria, Legislative Council, 6 February 2018, *Parliamentary debates*, Book 1, pp. 30–1.

For example, the Committee notes that a police station or court house could be a premises where firearms are stored under s 112O(h), as well as a location where an FPO subject might be expected to attend from time-to-time. The Committee put this scenario to Victoria Police who agreed that it would be unreasonable to pursue charges under these circumstances, noting that officers are required to exercise discretion in applying this section of the Act. They further advised:

> Police have access to a number of guides and documents to assist in all aspects of the FPO Scheme, from drafting an application through to enforcing an active order. This includes for example, an applicants' guide, a delegates' guide and a FAQ that addresses many of the common situations encountered by members interacting with an FPO subject.
>
> Training is provided to work units involved with the FPO application process and to delegates. The FPO Registry supports applicants and delegates as required. Once an FPO is served, training and advice is available to police to assist with compliance and enforcement activity, including identifying appropriate situations where FPO powers may be exercised in line with the 'reasonableness' test for both FPO subjects and persons in their company.[93]

The Committee did not examine internal training material or guides and documents relating to internal processes as part of this inquiry.

3.2 Effectiveness of Firearms Prohibition Orders

As previously noted, 223 FPOs were made during the almost 16 months of the legislation being effect from 9 May 2018 to 26 August 2019. During parliamentary debate Minister Tierney indicated that this number could increase to 2,000.[94] By comparison, the New South Wales Ombudsman reported that 1,317 FPOs had been served in that State as at 31 October 2015 (after 24 months in operation),[95] although the Committee notes that the criteria for making an FPO under the New South Wales legislation is worded differently and is arguably more lenient compared to the Victorian equivalent.

The discrepancy between the number of FPOs actually issued in Victoria and the claimed potential 2,000 or more was discussed in a Public Accounts and Estimate Committee 2019–20 Budget Estimates hearing on 14 June 2019 (at which time 181 FPOs had been issued) where Minster Neville stated:

> … given the extent of the powers…[police] would attempt to do this in a systematic way and make sure their members were trained. So it has been limited to this point to crime command, and they have issued 181 of these, which I think is very public knowledge.

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93 Ms Carol Degelo, correspondence, 25 September 2019, p. 4.

94 Victoria, Legislative Council, 6 February 2018, *Parliamentary debates*, Book 1, p. 47.

95 NSW Ombudsman, *Review of police use of the firearms prohibition order search powers: Section 74A of the Firearms Act 1996*, NSW Ombudsman, 2016, p. 5.

> They are in the process now of rolling these out to the regional crime command teams in order to be able to reach those figures. But they are doing it in a systematic, careful way.[96]

Responding to a question on the seeming laggardness of Victoria in issuing FPOs compared to New South Wales the Minister went on to state:

> ...there was a decision taken by police, which I think is the right one—I do not want to question their expertise in this—the right decision to be able to make sure that their members were trained properly, that they were used properly, because as you may not be aware there are some VCAT hearings about this. People have challenged this. We have got one in fact where we lost the VCAT hearing and we are now having to appeal that decision, so we do not want to risk finding criminals thinking they can get away with this, so this is about making sure we have got the right procedures and that there will be significant uplift in that by this time next year, a year in—so unlike New South Wales.[97]

Detective Superintendent Brigham was also questioned on why only 223 FPOs had so far been issued at the public hearing for this inquiry on 2 September 2019. Mr Brigham conceded that the numbers were low, telling the Committee:

> The reason for that I think, firstly, is that it is a new process for us—the application process and working through preparing applications, submitting applications—and that largely has been occurring within Crime Command up until now. So it has not been rolled out regionally yet. And we are trying to set up a better regime actually for what we call person of interest management of FPO subjects. So before we go handing this over to the regions we want to make sure that we have got that right. So it is about: how do you manage a person who has got an FPO in place? What are the minimum things that you would need to do to keep an eye on that person?
>
> ...
>
> [The number of FPOs being issued] is likely to increase as we roll it out to the regions and we have more people actually submitting applications.
>
> ...
>
> Might I also say, though, that the New South Wales criteria is actually different; the wording is different. To satisfy the criteria that they have is arguably easier than in Victoria.
>
> ...
>
> I think to get up to numbers like [2,200] would depend on the allocation of resources within the regions once the rollout is done.[98]

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96 Hon. Lisa Neville, Minister for Police and Emergency Services, Public Accounts and Estimates Committee, public hearing, Melbourne, 14 June 2019, *Transcript of evidence*, p. 5.

97 Ibid.

98 Detective Superintendent Peter Brigham, *Transcript of evidence*, pp. 4–5.

On the subject of police resourcing of the FPO scheme, Wayne Gatt, Secretary of the Police Association, reportedly told the *Herald Sun* that 'the process of preparing and implementing the orders, then monitoring their subject, was a major drain on police'. He was also quoted as saying that 'demand for FPOs is exceeding the current staffing levels, which need to be increased in order to keep up'.[99]

In a live press conference on FPOs conducted by Victoria Police on 6 June 2018 Deputy Commissioner Shane Patton described FPOs as a 'game changer' in getting guns off the street and characterised the measure of success of FPOs as being not only the recovery of firearms, but also the effect of disrupting and denying access to firearms.[100]

Whether FPOs are the game changer police claim is difficult to determine based on the relatively low number of orders that have so far been issued. However, given the FPO legislation has been in effect for more than 18 months, the Committee notes the slow rollout of the FPO scheme to Victoria Police regions[101], and the potential impact this has had on the ability of police to issue FPOs.

The Committee further notes that of the charges laid as a result of FPO searches, fewer than half were for firearms offences. In relation to FPO searches conducted between 9 May 2018 and 30 June 2019 police advised the Committee that 134 searches were conducted under ss 112Q and/or 112R and 71 searches under s 112S. Of these, 120 searches detected an offence resulting in 139 individual charges being laid. In relation to the data, police clarified that:

> Several FPO subjects have been searched multiple times and each search [is] recorded separately. The method of recording also results in multiple searches being counted when a subject, and persons in their company are searched. I.e., if a search is conducted under 112R (search of an FPO subject), and 112S (a person in their company) during the same incident, this will count as two searches.[102]

Although the grounds for conducting a search under ss 112Q, 112R and 112S are framed in the context of determining whether a person is in contravention of an FPO or other provision of the Firearms Act, the charges resulting from FPO searches are not limited to offences against that Act. A detailed breakdown of charges resulting from FPO searches to 31 August 2019 is set out in Tables 3.2, 3.3 and 3.4.

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99 Mark Buttler James Dowling, 'Police in legal fight to stop bikies having guns', Herald Sun, 18 June 2019, <https://www.heraldsun.com.au/news/law-order/police-in-legal-fight-to-stop-bikies-having-guns/news-story/fd7e042fa89e2fec0e60913cc6fc0a28> accessed 3 September 2019.

100 Victoria Police, *Firearms Prohibition Orders commencing in Victoria*, video, 5 June 2018, 3:01, <https://www.facebook.com/victoriapolice/videos/were-here-live-with-deputy-commissioner-shane-patton-and-police-minister-lisa-ne/2033568096715316> accessed 4 October 2019.

101 'Victoria Police provides policing services to the Victorian community across 54 Police Service Areas (PSAs), within 21 divisions and four regions - North West Metro, Southern Metro, Eastern and Western.' <https://www.police.vic.gov.au/about-victoria-police#targetText=Victoria%20Police%20provides%20policing%20services,Southern%20Metro%2C%20Eastern%20and%20Western%3E>.

102 Ms Carol Degelo, correspondence, 28 August 2019, p. 3.

Table 3.2 Firearms Act charges resulting from FPO searches

Charges under the *Firearms Act 1996*	Number of charges laid	
	Sections 112Q or 112R	Section 112S
Carry cartridge ammunition in unsecured/dangerous manner	1	–
Fail to surrender a firearm related item—prohibition order subject	6	–
Fail to surrender firearm upon service of prohibition order	6	–
Prohibited person possess/carry/use a silencer	2	–
Possess a silencer without a permit	–	1
Possess two or more unregistered firearms (traffickable quantity)	1	–
Possess cartridge ammunition without licence	15	–
Possess unregistered general category handgun	1	–
Possess firearm—contravene prohibition order	2	–
Possess firearm related item—contravene prohibition order	6	–
Possess loaded firearm in a public place	1	–
Prohibited person possess a firearm	13	2
TOTAL	**54**	**3**

Source: Ms Carol Degelo, Senior Policy/ Projects Advisor, National Policy Unit, Policy & Legislation Division, Capability Department, Victoria Police, correspondence, 25 September 2019, pp. 2–4.

Table 3.3 Control of Weapons Act charges resulting from FPO searches

Charges under the *Control of Weapons Act 1990*	Number of charges laid	
	Sections 112Q or 112R	Section 112S
Possess controlled weapon without excuse	2	–
Possess imitation firearm without exemption/approval	3	–
Possess prohibited weapon without exemption/approval	17	4
TOTAL	**22**	**4**

Source: Ms Carol Degelo, Senior Policy/ Projects Advisor, National Policy Unit, Policy & Legislation Division, Capability Department, Victoria Police, correspondence, 25 September 2019, pp. 22–4.

Table 3.4 Other charges resulting from FPO searches

Charge	Number of charges laid	
	Sections 112Q or 112R	Section 112S
Commit indictable offence whilst on bail	9	–
Contravene a conduct condition of bail	4	–
Cultivate narcotic plant—Cannabis	1	–
Deal property suspected proceed of crime	11	–
Drive whilst disqualified	2	–
Drive without "L" plates displayed	1	–
Fail to provide information/assist	2	–
Handle/receive/retention of stolen goods	3	2
Knowingly deal with proceeds of crime	1	–
Learner driver drive vehicle w/o experienced driver	1	–
Negligently deal with proceeds of crime	1	–
Possess drug of dependence—prescription drug	3	–
Possess a schedule 4 poison	1	–
Possess alprazolam	1	–
Possess amphetamine	1	–
Possess steroids	2	1
Possess cannabis	5	1
Possess cocaine	3	–
Possess drug of dependence	7	2
Possess ecstasy	1	–
Possess GHB	3	–
Possess housebreaking implements	1	–
Possess methyl amphetamine	5	3
Possess testosterone	1	–
Resist police officer	2	–
Traffick cannabis	1	–
Traffick cocaine	2	–
Traffick commercial quantity - methyl amphetamine	3	–
Traffick methyl amphetamine	5	–
Unlicensed driving	1	–
Use GHB	1	–
TOTAL	**85**	**9**

Source: Ms Carol Degelo, Senior Policy/ Projects Advisor, National Policy Unit, Policy & Legislation Division, Capability Department, Victoria Police, correspondence, 25 September 2019, pp. 2–4.

In the Committee's view it is too early to know with any real certainty what this data indicates. Detective Superintendent Brigham told the Committee:

> FPOs assist police by providing a search power on premises, vehicles, individuals and their associates. If a person possesses an illicit firearm and are an FPO subject, this increases the likelihood that they will be detected committing relevant offences. An FPO, once in place, allows operational police to take immediate action in situations, for example, where they see a person suddenly make an attempt to avoid them. The extent to which FPOs prevent and disrupt offences is difficult to measure and will require significant research over time.[103]

The Committee was grateful to receive information from New South Wales Police for this inquiry. New South Wales Police supplied statistics on the number of legal actions taken as a result of FPO-related searches from 2013-14–2018-19. Table 3.5 shows the total number of legal actions from FPO searches, and the number of legal actions resulting in firearms offences (a subset of the total).

Table 3.5 FPO searches resulting in police taking legal action (NSW)

Financial Year	Total Legal Actions from FPO Searches	Legal Actions with Firearms Offences
2013-14	1	–
2014-15	56	19
2015-16	178	58
2016-17	307	110
2017-18	363	132
2018-19	690	232

Source: NSW Police Force, *Submission 5*, pp. 3-4.

The New South Wales Police submission did not indicate why there has been a steady increase in the number of legal actions taken as a result of FPO-related searches. The Committee notes the New South Wales scheme has been in effect longer than the Victorian scheme. The significant increases from 2013-14 to 2018-19 may have resulted from the longer period of operation and opportunity for development and improvement of search procedures.

Given the lack of sufficient accumulated data and research on the impact and effect of FPOs on firearms offending over time, the Committee notes that the statistics provided by police could be indicative of the success of FPOs in 'disrupting and denying access' and working as a deterrent,[104] or be equally reflective of FPOs not detecting the offences they are designed to target and symptomatic of legislation that is not fit for purpose.

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103 Detective Superintendent Peter Brigham, *Transcript of evidence*, pp. 2–3.

104 Ms Melinda Walker, Co-Chair of Criminal Law Section, Law Institute of Victoria, public hearing, Melbourne, 2 September 2019, *Transcript of evidence*, p. 18.

Despite the relative lack of data, the Committee is cognisant of the possibility that, given its significant interference with Charter rights, consideration of some amendments to the FPO scheme may lead to legislation that is better equipped to achieve its stated objectives. This is discussed in greater detail in section 4.1.3.

FINDING 2: Although Firearms Prohibition Order legislation has been in effect for 18 months there has been a slow rollout of the scheme to all Victoria Police regions.

3.3 Websdale v Chief Commissioner

As noted in section 2.2.5, VCAT has concluded one FPO review where it set aside an order made in respect of Colin Websdale. The Chief Commissioner subsequently appealed VCAT's decision, which was heard in the Court of Appeal on 10 October 2019 with a decision to be handed down at a later date.

3.3.1 Victorian Civil and Administrative Tribunal review

Background to proceeding

Colin Websdale, a current life member and former president of the Geelong chapter and Victorian branch of the Rebels outlaw motorcycle gang,[105] had an FPO served on him on 2 July 2018. Mr Websdale filed an application for review of the decision to make the order under s 112L of the Firearms Act at VCAT on 17 July 2019. A subsequent hearing was conducted before Judge Felicity Hampel, Acting President of VCAT, on 1–2 April 2019.[106]

The Commissioner's case at VCAT for making an FPO in respect of Mr Websdale relied on the grounds of s 112E(a) and (c) of the Firearms Act, namely that it was in the public interest because of—

- the criminal history of Mr Websdale; and
- the people with whom Mr Websdale associates.[107]

Colin Websdale

During the proceedings, VCAT heard that Mr Websdale was a member of standing in the Rebels outlaw motorcycle gang with authority to direct activities within the Rebels and a person who maintained active communication with other Rebels members. VCAT further heard that the Rebels are prominent in many aspects of serious and

105 *Colin Websdale v Chief Commissioner of Police* [2019] VCAT 666, at 42.

106 Ibid.

107 Ibid., at 41.

organised criminal activity, including drive-by shootings and offences relating to firearms possession.[108]

VCAT also heard that Mr Websdale has a history of criminal activity that commenced in 1981, his most recent recorded conviction being in 2012. Judge Hampel noted that he had been convicted of and sentenced for a total of 20 offences across a wide spectrum of behaviour including:

- minor street and dishonesty offences
- minor drug offences
- a single charge of failure to answer bail
- two charges trafficking in amphetamines
- offences of violence, and
- firearms and other weapons offences.[109]

Mr Websdale argued that since 2012 he has lived a changed lifestyle revolving around his family and long hours as a construction worker and his only connection with the Rebels was occasional attendance at the clubhouse to catch up and socialise with his friends.[110] He also produced witnesses who attested to his good character and the inconvenience and hardship he had experienced as a result of the FPO being imposed on him.[111] In particular, he stated that the restrictions on his ability to attend certain premises have prevented him from visiting his parents-in-law or greyhound trainer (a common aspect of his daily life prior to the FPO) as they live on rural properties where firearms are stored.[112]

Judge Hampel did not accept that the absence of a conviction since 2012 equated to a demonstration of good character. In addressing this point in her decision she stated:

> The Applicant is entitled to have the absence of conviction since 2012 taken into account in his favour when considering whether, by reason only of his convictions, or associations, it is in the public interest to subject him to a firearm prohibition order. However, based on the evidence I have canvassed above, I am not satisfied the evidence supports an affirmative conclusion in the Applicant's favour that he has led a law abiding life since 2012.[113]

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108 Ibid., at 71–2.

109 Ibid., at 85.

110 Ibid., at 88–9.

111 Ibid., at 34.

112 Ibid., at 35–6.

113 Ibid., at 91.

Determining the public interest

Judge Hampel framed her review of the Commissioner's decision to make an FPO as an assessment on the basis of public interest specifically and strictly in the context of the two criteria on which it was based (i.e. criminal history and associates).[114]

In considering how to approach her determination of what is in the public interest Judge Hampel was guided by the following statements of principle:

- Public interest embraces standards of conduct acknowledged to be for the good order of society and the well-being of its members.
- It is the interests of the public, as distinct from the interests of individuals, which must be considered.
- There is a difference between mere individual interest which does not involve a public interest, and individual interests which do involve a public interest.
- A broader range of circumstances than those that are of immediate consequence to the person affected must be considered.
- Consideration of what is in the public interest requires a discretionary value judgment to be made by reference to undefined factual matters.
- Public interest requires consideration of 'fact/value complexes', not merely facts.
- The scope and purpose of the Act are to be taken into account when considering what matters are relevant to the exercise of the discretion.
- Public interest will seldom be seen as one dimensional—a number of competing arguments about, or features of, the public interest will likely need to be considered.
- When human rights are engaged, public interest considerations extend to human rights considerations.[115]

In essence, Judge Hampel ultimately noted that the public interest in this case would be determined by weighing the risks to public safety against undue restriction of individual freedoms, stating:

> In considering whether it is in the public interest to make an order, the consequences, not only of the prohibition on acquiring, possessing, carrying or using a firearm itself and the significant maximum sentence available for breach, but also of the restrictions on freedom of movement and association and the power to search without warrant or consent, are relevant. That is, although it is the interests of the public, and not the private interests of the individual against whom a firearm prohibition order has been made, which must be considered, the public interest, in my view, is not limited to protecting the public against the escalating and changing nature of firearm related violence and other firearm related crimes. The public interest includes subjecting people

114 Ibid., at 105–7.

115 Ibid., at 25.

> to no greater restriction on their freedom of movement and association and from search without warrant or consent than is reasonably necessary to give efficacy to protecting the public from firearm related crime which might occur if that individual were not prohibited from acquiring, possessing, carrying or using a firearm.[116]

VCAT's decision

Judge Hampel accepted that Mr Websdale posed an ongoing risk to public safety by reason of his association with Rebels members and adherence to the Rebels code of conduct.[117] However Judge Hampel went on to note that the question for determination was not whether the Rebels generally or Mr Websdale specifically posed a risk to public safety, nor whether Mr Websdale posed a threat to public safety by reason of his associates or criminal history.[118] Rather, as the Judge stated in relation to s 112E(c)—

> … the question is whether it is in the public interest, because, and only because of the people with whom the Applicant associates, to prohibit him from acquiring, possessing, carrying or using a firearm and, as a result, subjecting him to a significant curtailment of his freedom of movement and association, and subjecting him, any person who is with him, and any place he is, or anything he has with him, to search without warrant or consent.[119]

In summary, Judge Hampel's decision to set aside the order was based on her view that the existence of an FPO over Mr Websdale would not materially abate any risk to public safety posed by him and it was therefore not in the public interest to subject him to an unreasonable interference of his rights. This conclusion was based on the following reasoning:

- On the grounds of criminal history under s 112E(a):[120]
  - There was no evidence of a nexus between the risk to public safety posed by Mr Websdale by reason only of his criminal history and his ability to acquire, possess, carry or use a firearm or firearm related item.
  - The evidence did not support the conclusion that the risk to public safety would be abated only by prohibiting him from the acquisition, possession, carriage or use of a firearm or firearm related item.
- On the grounds of association under s 112E(c):[121]
  - Mr Websdale as a person of authority in the Rebels was able and likely to distance himself from direct involvement in criminal activity; subjecting him to an FPO would not likely prevent him from directing or sanctioning illegal activity by reason of the FPO being in place.

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116 Ibid., at 31.

117 Ibid., at 103–4.

118 Ibid., at 105–6.

119 Ibid., at 107.

120 Ibid., at 116–20.

121 Ibid., at 112–115

– There was no evidence of a nexus between the threat or risk to public safety posed by him by reason only of the people with whom he associates and his ability to acquire, possess, carry or use a firearm or firearm related item.

Impact of VCAT decision on making FPOs

Despite media reports that VCAT's decision had resulted in FPOs effectively being put on hold,[122] when questioned at a public hearing about whether the decision had affected the continued making and issue of FPOs by police, Detective Superintendent Brigham told the Committee this was not the case. He stated:

> … that decision has not really changed anything we do. We still continue to issue FPOs and that is ongoing, so there are new FPOs issued every week at this point.[123]

Notwithstanding this claim, according to a report in The Age, The Committee notes that the decision by VCAT to overturn the FPO made against Mr Websdale, as the first test of the legislation, has potential concerns around defining public interest and determining the class of persons against which orders can be made. This is discussed in greater detail in Chapter 4.

3.3.2 Court of Appeal

The Chief Commissioner lodged an appeal against VCAT's decision, which was heard by the Court of Appeal on 10 October 2019. The Court reserved its decision and, at the time of writing, a judgment had not yet been handed down.

A stay of VCAT's decision to set aside the FPO pending appeal was heard by the Court of Appeal on 24 July 2019. The Court restored the order in respect of Mr Websdale pending the appeal on the basis that:

> The requirement of special or exceptional circumstances is met because Mr Websdale has been found to represent a continuing risk to public safety, and it is arguable that a stay of the Tribunal's decision will ameliorate that risk pending appeal, in circumstances where it appears to us that no serious hardship will be caused to Mr Websdale as a result. We accept Dr Freckelton's submission that it is sufficiently arguable that the existence of the FPO has had, and is apt to continue to have, the effect of abating the risk found by the Tribunal in the ways he identified to outweigh the adverse impact of the order upon Mr Websdale.[124]

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122 John Silvester, 'Weathering the storm: Victoria's police chief on a rough year', The Age, 22 June 2019, <https://www.theage.com.au/national/victoria/weathering-the-storm-victoria-s-police-chief-on-a-rough-year-20190620-p51zo4.html> accessed 29 August 2019; Genevieve Alison, 'Rebels bikie banned from using guns', Herald Sun, 24 July 2019, <https://www.heraldsun.com.au/news/law-order/rebels-bikie-banned-from-using-guns/news-story/d59e30fa27d6177420846ee5e3cd397c> accessed 29 August 2019; James Dowling, 'Police in legal fight to stop bikies having guns'.

123 Detective Superintendent Peter Brigham, *Transcript of evidence*, p. 3.

124 *Chief Commissioner of Police v Colin Websdale* [2019] VSCA 165, at 27.

The Committee notes with interest that the Court of Appeal reinstated the FPO pending appeal on the basis it would arguably reduce the risk to public safety without unduly subjecting Mr Websdale to serious hardship. This is a contrasting view to that taken by Judge Hampel at VCAT. However the Committee is cognisant that determining the balance between public safety and rights restrictions for a temporary reinstatement of an FPO is a different issue for the Court in comparison to balancing these matters in relation to an order over a 10 year duration.

The Committee notes that the full impact on the operation of FPOs as a result of the *Websdale* review will not be known until the Court of Appeal hands down its decision.

FINDING 3: The decision by the Victorian Civil and Administrative Tribunal to overturn the Firearms Prohibition Order made against Colin Websdale, as the first test of the legislation, highlights the difficulty in defining public interest and determining the class of persons against whom an order can be made.

4 Issues raised with Firearms Prohibition Orders

4.1 Issues and concerns with Firearms Prohibition Orders

Throughout the course of this inquiry, the Committee received evidence identifying certain issues with the Firearms Prohibition Order (FPO) scheme that may affect its operation, implementation, and effectiveness in preventing access to illicit firearms. This section examines concerns raised by stakeholders about the FPO scheme. The issues discussed are:

- the broad application of FPOs and public interest
- the discretionary nature of the scheme
- potential arbitrary interferences with rights and freedoms
- the implementation and effectiveness of search procedures under the scheme

4.1.1 Broad application of Firearms Prohibition Orders and public interest

Section 112E of the Firearms Act stipulates that when the Chief Commissioner, or delegate, makes an order against someone they must consider whether it is in the public interest to do based on the criteria in s 112E (a)–(d) (refer to section 2.2.2 for more information). 'Public interest' is not defined in the Act and it therefore takes on its ordinary legal meaning, which invites a broad interpretation and application of public interest under the FPO scheme.

The Committee received evidence that discussed the effect the broad application of public interest has on the implementation, operation, and effectiveness of the scheme. This includes in relation to its interpretation by Judge Hampel in the *Websdale* review. Several stakeholders questioned how effective a broad-based public interest test was to the scheme, expressing concern that the lack of a statutory definition that must be met in applying the public interest test may lead to arbitrary interference with a person's rights.

The Department of Justice and Community Safety, Victoria Police and the Law Institute of Victoria (LIV), however, believed that not defining public interest was a key factor in the ability of the scheme to reflexively respond to individual cases. This was considered important in providing law enforcement with the proper scope to apply FPOs to individuals without unnecessarily impeding their capacity to protect community safety and interests.

In a response to a question on notice Victoria Police told the Committee that public interest is a necessarily broad concept to enable the police to flexibly respond to the circumstances of specific cases:

> Victoria Police considers the 'public interest' in issuing FPOs in terms of the threat and risk that the subject person may pose to the public in terms of the core function of policing identified as preserving the peace, protecting life and property, preventing the commission of offences, and detecting and apprehending offenders.
>
> 'Public interest' is a broad concept that is flexible enough to respond to the facts and circumstances of any particular case.[125]

At a public hearing Ms Walker (LIV) told the Committee that by not defining public interest explicitly in the legislation the Chief Commissioner, or delegate, is able to respond fluidly to situations based on individual facts and circumstances:

> It [public interest] is not in the statute at the moment, and we say that it should not be. The term 'public interest' derives its content from the subject matter and the scope and purpose of the enactment in which it appears. It is a broad concept that is flexible enough to respond to the facts and circumstances of every case, giving the decision-maker – the commissioner or reviewer – the ability to have regard to a wider variety of factors in choosing whether to exercise a discretion adversely to an individual.[126]

At a public hearing Ms Corri McKenzie, Deputy Secretary of Police, Fines, and Crime Prevention at the Department of Justice and Community Safety stated that this was consistent with the approach taken in other jurisdictions:

> I would say that the public interest test, in that sense, reflects the legislation in other jurisdictions too. It is also present in the New South Wales legislation, for example. It is a term fairly widely used in and across the legislative framework for providing a judicial reference point for decision-making, and it is obviously also the chief commissioner's reference point for decision-making in the deployment of orders. But I think the other component that is specific in the FPO components is the connection between the public interest test and the terms which are set out, so it is really because of the criminal history of the individual – because of the behaviour of the individual, because of the people with whom an individual associates. So it is a defined public interest test the way this legislation is currently drafted. Again, that is set within the broader piece.[127]

This was echoed by Detective Superintendent Brigham who told the Committee that when making an application for an FPO an assessment of public interest is built into the consideration of the criteria set out in s 112E(a)–(d).[128]

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125 Ms Carol Degelo, Senior Policy/ Projects Advisor, National Policy Unit, Policy & Legislation Division, Capability Department, Victoria Police, Inquiry into Firearms Prohibtion legislation hearing, response to questions on notice received 25 September 2019, p. 1.

126 Ms Melinda Walker, Co-Chair of Criminal Law Section, Law Institute of Victoria, public hearing, Melbourne, 2 September 2019, *Transcript of evidence*, p. 17.

127 Ms Corri McKenzie, Deputy Secretary, Police, Fines and Crime Prevention, Department of Justice and Community Safety, public hearing, Melbourne, 2 September 2019, *Transcript of evidence*, pp. 13-4.

128 Detective Superintendent Peter Brigham, Crime Command, State Anti-Gangs Division, Victoria Police, public hearing, Melbourne, 2 September 2019, *Transcript of evidence*, pp. 6-7.

The assessment of public interest against the s 112E criteria is also undertaken by the Victorian Civil and Administrative Tribunal (VCAT) when reviewing an FPO as explained by Ms Walker (LIV) in relation to the approach taken by Judge Hampel in *Websdale*:

> The decision of Judge Hampel sets out an approach guided by statements of principle[129] in determining what is in the public interest under section 112E of the Act. Her Honour drew from the Court of Appeal and the High Court of Australia and assessed nine main principles as relevant to that determination. Her Honour also considered the purposes and consequences of the Act and the making of an order in citing the purpose of the Act, which can be found in section 1(a):
>
> that the possession, carriage, use, acquisition and disposal of firearms are conditional on the need to ensure public safety and peace…

Her Honour referred to the pre-existing restrictions as being inadequate and gives rise to consideration of the making of the order. In the second-reading speech, the Minister, Ms Neville, referred to powers being complementary:

> for Victoria Police to proactively and quickly disrupt serious criminal activity associated with the illicit use of firearms.

Her Honour determined that the public interest test can only be satisfied if one of the four considerations contained in 112E (a) through (d) are present and are causally connected to public interest.

> …
>
> Now, whether that was the correct approach is a matter for an appellate court if a review of her decision is initiated by the Commissioner. Otherwise it is not sought to undertake a critical analysis of her findings, necessarily, except to say that the Law Institute agrees with the approach that was taken by Her Honour to define public interest in the context of making an FPO.[130]

Despite the inclusion of the public interest threshold, both Liberty Victoria and the National Shooting Council suggested that the discretionary use of such broad criteria means the scheme does not effectively meet its intended use to disrupt access to illicit firearms by organised crime groups.[131]

The National Shooting Council criticised the broad application of the s 112E criteria, asserting that it undermined the scheme's purported intention to target members of criminal organisations and risked adversely affecting individuals who engaged in legitimate firearms activities. In its submission to this inquiry the Council expressed a concern regarding the ability to use s 112E(b) of the Firearms Act to inform public interest 'in isolation' of other considerations:

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129 Section 3.3.1 includes discussion on Judge Hampel's decision and the nine statements of principle she applied in *Websdale*.

130 Ms Melinda Walker, *Transcript of evidence*, p. 18.

131 Liberty Victoria, *Libery Victoria's comments on the Firearms Amendment Act 2018*, 2018, p. 4.; National Shooting Council, *Submission 1*, p. 4.

> Section 112E of the Act, which reflects what was in the bill, sets out considerations that the Chief Commissioner must take into account in deciding whether to issue an FPO. Among them is subclause (e) *(sic)* which can be considered in isolation. It states that an FPO can be issued:
>
> "because of the behaviour of the individual; or"
>
> This means an FPO can be issued because the Chief Commissioner's delegate is satisfied it is in the public interest to issue because of the way that individual is behaving. There is no qualification or limitation to what this means.
>
> This broadens the reach of the regime to beyond criminal and bikie activities and could be applied to those engaged in legitimate activities...[132]

Liberty Victoria, in response to the passage of the *Firearms Amendment Act 2018*, also argued that the broad criteria and application of public interest could arbitrarily interfere with a person's civil liberties and human rights:

> ... the criteria for making an order are too broad...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.[133]

Ms Walker (LIV) noted that any potential interferences with an individual's rights when considering the public interest in the context of the s 112E criteria must be 'seriously scrutinised' when considering whether to impose an FPO.[134]

The issue of potential interference with rights and freedoms under the FPO scheme is discussed in more detail in section 4.1.3.

The Committee acknowledges the importance of ensuring the concept of public interest is sufficiently flexible to enable police to effectively respond to the individual circumstances of a potential subject when making an FPO application. The scheme's intent is to prevent or minimise risks to public safety from myriad high risk individuals and this should not be limited by a narrow application of public interest. However, the Committee notes that the breadth of the s 112E criteria may invite differing interpretations of how it is applied by the police and VCAT. The fact that there is no guidance as to how public interest should be construed under the Firearms Act this could lead to issues with the operation of the scheme. This may affect the capacity of law enforcement to effectively disrupt access to and possession of illicit firearms by high risk individuals, especially those involved in criminal organisations.

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132 National Shooting Council, *Submission 1*, pp. 2-3.

133 Liberty Victoria, *Libery Victoria's comments on the Firearms Amendment Act 2018*, p. 4.

134 Ms Melinda Walker, *Transcript of evidence*, p. 23.

FINDING 4: The broad application of public interest under the Firearms Prohibition Order scheme allows law enforcement to flexibly respond to the individual circumstances in each case when deciding to make a Firearms Prohibition Order application. However, the intentionally broad application of the criteria has the potential to invite a broad interpretation of what constitutes public interest. This may affect the operation and effectiveness of the scheme in disrupting access to and possession of illicit firearms, especially by organised crime or terrorist groups, and raises the risk that members of the community with little or no criminal involvement could be targeted.

4.1.2 Police and judicial interpretation: is the scheme too discretionary?

As the grounds on which an FPO may be made under s 112E are broadly constructed, determining if the criteria satisfies the public interest threshold is at the discretion of the person making the order. It was indicated to the Committee that when compiling an FPO application, police rely on internal guidelines to establish whether the criteria for the order is in the public interest. However, there were concerns that the lack of clarity surrounding the s 112E criteria and public interest meant that the necessary interpretation of this section was too discretionary. In particular, the lack of external or regulatory guidelines on how the criteria should satisfy the public interest threshold could result in differing and contradictory interpretations, inconsistent practice and operational issues.

Victoria Police told the Committee that officers have access to numerous internal guidelines to assist them with enforcement of FPOs. This includes training and advice on identifying what situations met the 'reasonableness' test under the scheme's search powers (see section 3.1 for Victoria Police's comments on its internal FPO policy and guidelines).[135] The Committee did not review the guidelines referred to by Victoria Police in its correspondence and therefore cannot comment on the nature of their content. However, the Committee does note these are internal materials and received no indication that they were shared with any other body outside of Victoria Police, including VCAT. In the Committee's view, the lack of widely accessible regulatory guidance may result in Victoria Police and VCAT applying differing interpretations of the scheme. This could lead to potential operational issues as a result of inconsistent practices when making, revoking, or reviewing an order.

The level of police discretion built into many aspects of the scheme was acknowledged by numerous stakeholders, including Victoria Police and the LIV, when discussing the purpose of a broadly construed concept of public interest under the Act.

As discussed in sections 2.2.2, 3.3.1 and 4.1.1, public interest is determined based on the risk to public safety an individual poses. The criteria are used to determine whether the risk to public safety is significant enough (and causal) for it to be in the public

135 Ms Carol Degelo, Senior Policy/ Projects Advisor, National Policy Unit, Policy & Legislation Division, Capability Department, Victoria Police, correspondence, 25 September 2019, pp. 4-5.

interest that an individual has an order imposed on them. However, the Act does not regulate the determining basis on which public interest is set (i.e. balancing the risk to public safety against a competing value such as protection from arbitrary interference of a person's rights). As shown in VCAT's decision in *Websdale*, the lack of a clear determining basis of what is public interest under the scheme can result in conflicting interpretations by different parties.

When considering to issue an FPO, Victoria Police deliberate on the threat and risk a person may pose to community safety. Detective Superintendent Brigham told the Committee that applications are broken down by addressing the criteria and determining whether the evidence meets the public interest threshold. He explained to the Committee that each application varies and is determined on the judgement of police at each level of management throughout the process.[136]

It was not clear to the Committee how or if the police balanced a public risk assessment against any competing values in determining whether an order was in the public interest. However, the implication that a person *may* pose a risk suggests that an order is made when the criteria in s 112E indicates a probability of risk. This is in contrast to the approach taken by Judge Hampel who determined that an order should be made on the basis that it would sufficiently abate the risk an individual poses only by reason of the ground(s) on which the order was made.

Ms Walker (LIV) explained that Judge Hampel applied the public interest test in *Websdale* by balancing the risk to public safety against the consequences of an order to a person's liberty and rights.[137] Ultimately, when deciding in the public interest whether to make an FPO, the Chief Commissioner (or delegate) should consider whether the risk to public safety would be adequately abated by the order.[138]

When there is conflict in determining whether Victoria Police has appropriately applied the public interest test in issuing an FPO, VCAT and the courts will be required to provide guidance on the appropriate application of the test and the Act. This was the case for the *Websdale* review at VCAT. By leaving public interest broadly defined—namely, against what values it is determined—to reflexively respond to individual matters and circumstances has contributed to confusing and differing interpretations. This is exacerbated by the deliberately broad criteria in s 112E(a)–(d) forming the basis on which the police assess whether an order meets the threshold of being in the public interest.

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136 Detective Superintendent Peter Brigham, *Transcript of evidence*, pp. 6-7.

137 Ms Melinda Walker, *Transcript of evidence*, p. 18.

138 Ibid.

FINDING 5: That in deciding to make a Firearms Prohibition Order, the Commissioner (or delegate) should determine if the public interest is met by weighing competing values of interest in the context of the section 112E criteria on which the order is based. In doing so, an appropriate balance should be struck between promoting public safety and protecting a subject individual's rights. The risk to public safety should be significant enough to satisfy the need for the reasonable limitation of those rights in order to prevent the arbitrary deprivation of an individual's rights and freedoms.

FINDING 6: The level of discretion exercisable by police in applying and enforcing Firearms Prohibition Orders may lead to inconsistent practice and confusion.

4.1.3 Interferences with rights and freedoms

The *Charter of Human Rights and Responsibilities Act 2006* (the Charter) is designed to protect and promote the human rights of all Victorians through ensuring that when the government makes laws and regulations it does so with the civil and political rights of the community in mind. The Charter contains 20 rights which reflect four basic principles of:

- freedom
- respect
- equality, and
- dignity.[139]

The Committee received evidence during this inquiry which questioned the ways the FPO scheme may interfere with an individual's rights and freedoms, and whether these interferences were arbitrary or justified. It was suggested that the conditions of an FPO may restrict an individual's:

- right to privacy (through the scheme's search powers)
- right to protect children
- freedom of movement and association
- right to property, and
- right to a fair hearing.

While the effective operation and intent of the scheme necessarily interferes with a subject person's rights to a point, the Committee considers it is important to examine whether the scheme arbitrarily interferes with those rights.

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139 Victorian Ombudsman, *Fact Sheet 15 - Charter of Human Rights and Responsibilities Act 2006*, September 2016, <https://www.ombudsman.vic.gov.au/Fact-Sheets/For-Complainants/Fact-Sheet-15-Charter-of-Human-Rights-and-Responsi> accessed 19 September 2019.

Section 7(2) of the Charter provides that a right is justifiably limited if there are no 'less restrictive measures' available to achieve the purpose of the limitation—

> ***Charter of Human Rights and Responsibilities Act 2006*—Section 7(2)–(3)**
>
> **7 Human rights—what they are when they may be limited**
>
> ...
>
> (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 important of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
>
> (3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

Ms Walker (LIV) told the Committee that in examining the effectiveness of the FPO scheme, a consideration of whether it achieved the right balance between promoting public safety and protecting individual rights was important:

> ... does the FPO scheme strike an effective balance between the individual rights, public safety and effective policing? The Bill was partially incompatible with the right of privacy and the right of children to such protection as is his or her best interest, but it was nevertheless considered necessary to protect the community from the risk of harm associated with firearm-related offending. The Minister acknowledged a number of rights that were directly affected by this legislation, including that the decision of the Commissioner to make an FPO affects the right to protection against arbitrary interferences with privacy and that the right is further limited by the potential for a review to be heard on information subject to Crown privilege, and they are the [public interest immunity] claims. The Act prevents the full disclosure to individuals seeking to challenge a decision made pursuant to 112E and the restrictions on full reasons being published – closed hearings, ex parte, limiting the ability of cross examination of certain witnesses and precluding the stay of an order pending review. Obviously the Minister gave consideration to the Charter and considered that a human right may be subjected under only such reasonable limits as can be demonstrably justified.[140]

Ms Walker went on to explain the approach taken by the Minister in assessing whether rights interferences under the scheme could be considered arbitrary. This evaluation used the 'reasonably justified' principle to determine if an individual's rights could be unnecessarily interfered with. Ms Walker stated:

> The further rights that are affected, being the right of freedom of association and a right to privacy, and the limitation of these rights are said to be justified given the limitations of the then-current powers of the Act to protect the community from firearm-related

140 Ms Melinda Walker, *Transcript of evidence*, p. 18.

> offending. The rights of review and merits of the order are the further justification for the limit of that right to freedom of association. That was the balancing act that the Minister had considered – and rightly so.
>
> The right to privacy: it was acknowledged that this right is interfered with due to a person being subjected to discretionary search powers which may result in infrequent and intrusive searches.[141]

Ms Walker further explained the Minister's evaluation of whether rights interferences under the scheme were reasonable:

> The rights of third persons not subject to FPOs is also interfered with and not considered to constitute an arbitrary or unlawful interference. I think one of the oversights of that was specifically placed into the Act to ensure, because that is a fairly significant right that is being impinged on a third person.
>
> The right to protect children, although it is acknowledged that the Act only affects a small cohort of children between the ages of 14 and 18, the Minister held it to be both essential and appropriate to provide these powers to police.
>
> The right to freedom of movement and the right to property are all affected by the provisions of the Act when an FPO is made against an individual. The scheme, from the LIV's perspective, strikes an effective balance.
>
> The effect upon the individual's rights, the powers extended to police – powers which were sought by them as being powers needed to work effectively – promote public safety. Our position is that any further tightening of the test, increase in powers or restrictions on reviews would exceed what is reasonably necessary to achieve public safety and peace and would be dangerously oppressive.[142]

Liberty Victoria takes the view that the scheme 'unjustifiably interferes with civil liberties and human rights in several ways.'[143] It pointed to interferences with the:

- right to privacy
- right to protection of children, and
- right to a fair hearing.

Liberty Victoria noted that the Minister's statement of compatibility under the Charter acknowledged that the scheme does not meet the reasonable limitation threshold under s 7(2) for all rights considerations. It expressed concern that despite this acknowledgment less restrictive measures were not considered, therefore constituting an arbitrary interference with an individual's rights and freedoms.[144]

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141 Ibid.

142 Ibid., pp 18-19.

143 Liberty Victoria, *Libery Victoria's comments on the Firearms Amendment Act 2018*, p. 4.

144 Ibid., pp 7-8.

The issue of interference with human rights was also considered by the Scrutiny of Acts and Regulations Committee (SARC) in 2017 in its alert digest on the Firearms Amendment Bill 2017. That Committee noted that the FPO legislation potentially infringed the rights and freedoms of individuals as follows:

- Section 112O(1)(h), which prohibits a subject from living with a person who lawfully stores firearms, potentially interferes with the freedom to choose where to live.[145]
- Firearms surrendered under s 112P may be evidence of possession of that firearm and subsequently be used to prosecute an offence under the Act, potentially interfering with the privilege against self-incrimination.[146]
- Warrantless search provisions under ss 112Q, 112R and 112S potentially interfere with the right to privacy of a person subject to an FPO and a person in the company of a person subject to an order.[147]
- A person subject to an FPO must forfeit any firearm/firearm related item to the Crown without provision to enable its lawful sale to another licensed person, potentially interfering with a person's right to not be deprived of their property.[148]

SARC wrote to the Minister for Police on these matters in order to determine whether the potential interferences could be considered arbitrary or were reasonably justified.

Minister Neville responded to SARC that all matters of interference raised by the Committee were 'reasonably justified' under s 7(2) of the Charter.[149] However, the Minister did not clarify in her correspondence to SARC the basis of her claim. Of interest to this Committee was the acknowledgement by the Minister that search powers under s 112Q 'may inevitably lead to an interference with a third party's privacy'.[150]

The operation and effectiveness of search powers, including interferences with rights and freedoms, is discussed in more detail in sections 3.2 and 4.1.4.

The Committee accepts that the FPO scheme necessarily requires some interference with a person's rights and liberties in order to protect community safety from the threat an individual may pose through access to firearms. The Committee notes in particular, the warrantless search powers under the scheme may result in an ongoing interference with a person's privacy for the duration of an order. However, the Committee believes that in the context of the FPO scheme, these interferences are only reasonably justified if they are absolutely necessary to the effective operation of an FPO. It is paramount that the Chief Commissioner (or delegate) takes care to consider when making an FPO if an individual's circumstances warrant a corresponding intrusion of their rights and liberties.

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145 Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Alert Digest No. 14 of 2017*, October 2017 p. 9.

146 Ibid., p 11.

147 Ibid., p 15.

148 Ibid., pp 16-17.

149 Hon. Lisa Neville, Minister for Police, Parliament of Victoria, correspondence, 28 October 2017.

150 Ibid.

4.1.4 Firearms Prohibition Order search procedures

As described in section 2.2.4, under the FPO scheme police have extensive search powers to conduct warrantless searches of both the subject of an order and anyone in the company of the subject at the time of a search. During this inquiry the Committee received evidence regarding the effectiveness and operational concerns of the FPO search powers, including their capacity to detect various offences and their potential misuse.

Offences detected under the FPO scheme

Correspondence received by the Committee from Victoria Police disclosed that, from 9 May 2018 to 30 June 2019,[151] 205 searches were conducted under the FPO search provisions. Of these 205 search events, 134 were conducted against an individual who was the subject of an order under ss 112Q or 112R, and the remaining 71 were conducted against an individual in the company of an FPO subject under s 112S. From these search events, 139 individual charges were laid,[152] which were not limited to offences against the Firearms Act. [153]

At a public hearing, Detective Superintendent Brigham clarified that the 139 individual charges included seizure of 12 firearms, and many of the other charges related to the detection of drugs, drug paraphernalia and stolen property.[154]

When commenting on these statistics to the Committee, Ms Walker (LIV) said this was an encouraging sign that the numbers reflected the scheme may be operating as a deterrent from subjects accessing firearms and related parts:

> As to whether or not there are 12 firearms offences, one would like to say that it is working. As to 139 other charges, I do not think you can get around that really. I do not think you can get around it. But look, 205 searches in almost 12 months does not seem to be too excessive.[155]

Correspondence received by Victoria Police provided a breakdown of offences detected during FPO searches from 9 May 2018 to 31 August 2019.

In relation to searches conducted under ss 112Q and 112R:

- 54 charges were laid for offences under the *Firearms Act 1996*
- 22 charges were laid for offences under the *Control of Weapons Act 1990*

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151 The time period used is based on the availability of the data in a pre-existing report prepared by Victoria Police Corporate Statistics as well as manually checked via the Firearms Prohibition Order registry (information provided by Victoria Police via 28 August 2019 correspondence).

152 Offences were detected at 120 search events.

153 Ms Carol Degelo, Senior Policy and Project Advisor, National Policy Unit, Policy and Legislation Division, Capability Department, Victoria Police, correspondence, 28 August 2019, p. 3.

154 Detective Superintendent Peter Brigham, *Transcript of evidence*, pp. 2, 8.

155 Ms Melinda Walker, *Transcript of evidence*, p. 20.

- 45 charges were laid for drug-related offences, including possession of traffickable quantities
- 40 charges were laid for other offences such as driving, theft, contravening bail conditions, and dealing with the proceeds of crime[156]

In relation to searches conducted under s 112S:

- 3 charges were laid for offences under the *Firearms Act 1996*
- 4 charges were laid for offences under the *Control of Weapons Act 1990*
- 7 charges were laid for drug-related offences
- 2 charges were laid for handling stolen goods[157]

When asked if the number of non-firearms-related charges that had arisen from FPO searches was of concern, Ms McKenzie (Department of Justice and Community Safety) was of the view that the scheme had not been in operation long enough to draw inferences about the effectiveness of FPOs based on detected offences:

> I think it hard to draw an inference without having operational information and detail of the way those charges were laid and how those, for example, drug-related offences might co-occur with weapons offences. We know that there is a prevalence of that in crime in statistics reporting, for example. It is hard to infer from the number alone for me how that actually applies in practice. I think we would certainly continue to monitor it to understand how the FPOs were being administered and how they were kind of being operated and what the operational implications of that might be in the longer term. But I think particularly on the numbers, both the fact that it has been 12 months, which in operational legislative times is not the longest period of time in the world, I think there is that to bear in mind. You would want to see a period of time to see a pattern of behaviour emerging to understand what that might actually look like.[158]

The Committee acknowledges that the current Victorian FPO scheme has not been in operation for a long period of time, which makes it difficult to draw inferences about the effectiveness of its search powers. The Committee notes that there has been a significant number of non-firearm related offences detected from searches under ss 112Q–112S, including drug and other weapon offences. Search powers under the scheme should be properly monitored to ensure they are being appropriately utilised in a manner that is consistent with the intent of the scheme. In particular, the Committee believes that ongoing assessment by Government and police as to whether search powers are being used properly, and to identify any opportunity for their improvement, is of considerable importance.

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156 Ms Carol Degelo, correspondence, 25 September 2019, pp. 2-3.

157 Ibid., p 4.

158 Ms Corri McKenzie, *Transcript of evidence*, p. 14.

Misuse of search powers

The Committee received evidence in this inquiry concerning the potential for misappropriating search powers under the FPO scheme. A number of stakeholders made reference to the 2016 report of the New South Wales Ombudsman who found there had been misuse of search powers by police officers in that State. Given Victoria has modelled significant components of its FPO scheme on the New South Wales legislation, including the search powers, the Committee considers there is potential for the scheme to be similarly vulnerable to such misappropriation.

The New South Wales Ombudsman noted various issues relating to the misuse of search powers by some police officers. Notably, and similar to the situation in Victoria, this included the observation that the search powers had not been in operation long enough to ascertain their level of effectiveness:

> The FPO search powers were introduced to give police additional tools to respond to, and prevent, gun crime. The power to search, as reasonably required, and without requiring a warrant, was intended to help police respond more nimbly. Police embraced the new FPO search powers, using them to conduct over 2,500 searches during the first 22 months of use.
>
> Although we are concerned to note the significant number of people whom police may have searched unlawfully, we are satisfied that situation arose from a misunderstanding about the scope of the FPO search powers. Setting aside that group, it appears that police have largely targeted the cohort of people Parliament intended when conducting searches under the FPO search powers.
>
> We noted in our review instances where police used the FPO search power in circumstances where the evidence was not sufficient to support the alternative of a warrant, but police nevertheless had reason to form a view that a search was reasonably required.
>
> ...
>
> Overall, we consider it too early to tell if the FPO search powers have operated as an effective tool in policing firearms-related crime.
>
> ...
>
> We recommend the efficacy of the FPO search powers be monitored and evaluated in the future. Any such evaluation should include examining the extent to which people have deterred from engaging in illicit firearms activity, firearms-related crime has been prevented, and the trade in illicit firearms has been disrupted.
>
> As the potential for the powers to be used arbitrarily remains, any future evaluation should include an examination of whether the powers are being used appropriately and reasonably.[159]

159 NSW Ombudsman, *Review of police use of the firearms prohibition order search powers: Section 74A of the Firearms Act 1996*, NSW Ombudsman, 2016, pp. 9-10.

The Ombudsman raised concerns that the search powers when misused could arbitrarily interfere with the rights of an individual because the intent of those powers was not being upheld (i.e. monitoring the risk an FPO subject poses to community safety).[160]

Liberty Victoria also noted the mismanagement of search powers under the New South Wales scheme reported by the Ombudsman and indicated that similar types of misuse could occur in Victoria.[161] It warned that the broad search powers under the Victorian scheme could result in an unnecessary interference against an individual's right to privacy:

> ... the exceptionally broad and highly intrusive search and seizure powers introduced in ss 112Q-112S...unjustifiably undermines the right to privacy (see s 13 of the Charter).
>
> ...
>
> ... the Bill introduces a much lower threshold, concerned with the concept of "reasonably required", in order to engage the search powers under s112Q and 112R. This represents a departure from the more common "reasonable belief" or "reasonable suspicion" basis for the conduct of searches without warrant (see, e.g., 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.
>
> 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.
>
> ...
>
> 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.[162]

These concerns were echoed by Firearm Owners United, which also considered that the results of the New South Wales Ombudsman's review could be replicated in Victoria.[163]

Ms Walker (LIV) told the Committee at a public hearing that the Victorian scheme had review provisions in place, which would provide necessary oversight to the operation of search powers:

> The New South Wales Ombudsman review was specifically in relation to those searches and most specifically about those third individuals, or third parties, who were being caught up in that. The Minister appears to have considered that when she has introduced the Bill, in putting those oversights through IBAC [Independent Broad-based

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160 Ibid., p. 103.

161 Liberty Victoria, *Libery Victoria's comments on the Firearms Amendment Act 2018*, p. 6.

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163 Firearm Owners United, *Submission 3*, p. 1.

> Anti-corruption Commission] the review halfway through an order and also the review process through VCAT. So there are some protections there to see how it is going, and obviously there are other states who have had it for far longer than what we have, and most of ours have been designed.[164]

Monitoring and review of the FPO scheme by IBAC is discussed in section 5.1.

The Committee is mindful that the similarities between the Victorian and New South Wales search provisions leave the Victorian scheme vulnerable to similar arbitrary use, as has been found under the New South Wales scheme. However, due to a lack of research or review of the exercise of search powers in Victoria to date, and the subsequent lack of data, it is difficult to draw inferences about the way police utilise these powers.

The Committee believes that the FPO search powers should be monitored by relevant authorities, including the Department of Justice and Community Safety, to ensure that they are used appropriately. In particular, to prevent similar misuse as has been the case in New South Wales, it should be assessed if, and to what extent, police might use FPO search powers to circumvent normal search procedures. The lower threshold of 'reasonably required' under ss 112Q and 112R may allow some officers to bypass the more usual and higher threshold of 'reasonable suspicion' in order to gain initial access to a subject, property or associate for a matter not connected with either an FPO or other offence against the Firearms Act. In the Committee's view this would constitute a misappropriation of the significant powers granted to the police under the scheme and appropriate steps should be taken to avoid such an occurrence.

Summary of searches conducted under Firearms Prohibition Order legislation as advised by Victoria Police

- A total of 205 searches (134 under sections 112Q and 112R and 71 under section 112S) were conducted between 9 May 2018 and 30 June 2019; of these, 120 searches resulted in 139 individual charges being laid (not limited to offences against the *Firearms Act 1996*).[165]
- 177 individual charges were laid as a result of searches conducted between 9 May 2018 and 31 August 2019 (161 from searches under sections 112Q and 112R and 16 from searches under section 112S).[166]
- Between 9 May 2018 and 2 September 2019, 12 firearms were seized as a result of searches conducted under sections 112Q, 112R and 112S.[167]

FINDING 7: The relative lack of data relating to Firearms Prohibition Orders in Victoria makes it difficult to draw any concrete conclusions either in relation to the effectiveness of the search powers under the legislation, or the impact of searches on individual subjects. The Committee notes that the scheme has been in effect for a short period of time.

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164 Ms Melinda Walker, *Transcript of evidence*, p. 19.

165 Ms Carol Degelo, correspondence, 28 August 2019, p. 3.

166 Ms Carol Degelo, correspondence, 25 September 2019, pp. 2–4.

167 Detective Superintendent Peter Brigham, *Transcript of evidence*, p. 2.

4.2 Review and Appeal Processes

4.2.1 Victorian Civil and Administrative Tribunal Reviews

As noted in section 2.2.5, a person subject to an FPO is entitled to apply to VCAT for a review of the decision to make the order.

During passage of the FPO legislation through Parliament concerns were raised as to whether VCAT was the best equipped forum for hearing FPO reviews given the likelihood they could be heavily based on matters of criminal law and police operations and intelligence.[168] Ms McKenzie (Department of Justice and Community Safety) explained[169] that VCAT was chosen as the preferred option for the following reasons:

- Consideration of other jurisdictional schemes, all of which can review FPOs at a VCAT-equivalent body, with the exception of Tasmania where reviews are heard by the Administrative Appeal Division of the Magistrates' Court as Tasmania does not have a civil and administrative tribunal.
- The benefits of jurisdictional alignment should cross-jurisdictional mutual recognition of FPOs be achieved in the future.
- Victoria's long-standing approach to administrative review matters: an FPO is an administrative decision of the Chief Commissioner or delegate; VCAT's core function is to review administrative decisions, it has the requisite legislative framework in place to do so.
- The Magistrate's Court rarely conducts administrative reviews and therefore lacks the appropriate laws and procedures setting out how it would undertake such reviews.
- The FPO review framework is consistent with the administrative review model under the Firearms Act in relation to licensing and permits.
- The ability to appeal a decision of VCAT to a higher court and the ability to request a judicial review are available for FPO reviews.

At a public hearing, Ms Walker (LIV) also expressed a view that VCAT was the appropriate body for FPO reviews, stating:

> … the LIV say that VCAT is the appropriate jurisdiction for that review. Every other state in Australia uses their civil and administrative equivalent for a tribunal to review an administrative decision—that is why they were set up and that is what they do. They are constituted by very experienced judges of the Supreme and County Courts and other

168 Victoria, Legislative Assembly, 1 November 2017, *Parliamentary debates*, Book 14, p. 3597; Victoria, Legislative Council, 30 November 2017, *Parliamentary debates*, Book 21, pp. 6556, 8; Victoria, Legislative Council, 6 February 2018, *Parliamentary debates*, Book 1, pp. 26, 40–2.

169 Corri McKenzie, Deputy Secretary, Police Fines & Crime Prevention, Department of Justice and Community Safety, Inquiry into Firearms Prohibition Legislation hearing, response to questions on notice received 18 September 2019, pp. 1–2.

> lawyers who are delegated in the tribunal. There are sufficient restrictions within the Act for these reviews to remain in the public interest when you are talking about police information or police integrity.[170]

An FPO review by VCAT is subject to the same appeal provisions under the VCAT Act that apply in respect of administrative reviews generally, that is, a party may appeal on a question of law to either the Court of Appeal or the Trial Division of the Supreme Court (dependent on who presided over the original proceeding) within 28 days after VCAT's decision.[171]

Liberty Victoria raised concerns regarding the lack of an ongoing right to review on the basis of new information or circumstances, and limitation of access to protected information subject to Crown Privilege. [172]

The Committee notes that while a standing right of review is not a typical feature of VCAT administrative reviews conducted under other statutes it is not an unheard of measure. The Committee received no direct evidence on this point, neither was it noted in the statement of compatibility nor raised by SARC in its review of the original Bill. Notwithstanding this, the Committee is of the view that provision in the FPO legislation for an ongoing right of review in respect of FPOs imposed on children (aged 14–17 years) has merit. the Committee urges the Government to consider amending the legislation accordingly.

The issue of protected information was addressed in the statement of compatibility:

> … the right [of review] will likely be limited by the potential for a FPO review to be heard and determined on information that is subject to Crown privilege and not 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 VCAT 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.[173]

The justification given for this restriction was the High Court's allowance of non-disclosure of criminal intelligence being contingent on the court having discretion to independently assess the protected information. Vesting in the court the power to decide whether it should be admitted and how much weight it is afforded in order to

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170 Ms Melinda Walker, *Transcript of evidence*, p. 19.

171 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148.

172 Liberty Victoria, *Libery Victoria's comments on the Firearms Amendment Act 2018*, pp. 6–7.

173 Victoria, Legislative Assembly, 21 September 2017, *Parliamentary debates*, vol. 3, Book 12, p. 2957.

strike a balance between the potential harm of disclosing the information against the impairment of the administration of justice caused by withholding it.[174] In applying this concept to VCAT reviews (including FPO reviews) the Minister noted:

> … that VCAT retains this independent discretion, including the power (with consent of the president of the VCAT) to grant access to any information subject to a Crown privilege certificate on any conditions the tribunal thinks fit (s 54(3) of the VCAT act), or direct a witness to answer a question that would disclose information subject to a Crown privilege certificate if the tribunal considers it would not be contrary to the public interest to do so (s 55(2) of the VCAT act).
>
> …
>
> Accordingly, while reviews of a FPO before VCAT may contain an element of unfairness which constitutes a limit on the right to fair hearing, I am satisfied that any such limits will be reasonably justified under section 7(2) of the charter and that VCAT retains sufficient discretion and powers to alleviate any such unfairness.[175]

The statement canvassed two measures that would have mitigated this limitation, namely:[176]

- the provision for the appointment of a special counsel to represent an applicant's interests in a closed hearing, and
- additional means to disclose protected information to an affected party without prejudicing confidentiality, such as providing them with a summary of credible, relevant and significant information.

On both of these points the Minister noted that such measures were 'not reasonably available' given the complex nature of police intelligence and the likely delays that would result from a special counsel appointment.[177] The Committee also notes that SARC did not offer any comment on this issue. Given existing provisions in the VCAT Act are consistent with the High Court's approach, the Committee makes no finding on this matter.

FINDING 8: The Victorian Civil and Administrative Tribunal is the current forum for the review of a Firearms Prohibition Order because it is an administrative order. This was also reflected in other jurisdictions with comparable schemes where review mechanisms were established under VCAT-equivalent bodies.

174 Ibid.

175 Ibid., pp 2957-58.

176 Ibid., p 2957.

177 Ibid., pp 2957-58.

4.3 Other jurisdictions

As noted in Chapter 2, FPOs in Victoria are modelled on the FPO legislation operating in New South Wales since 2013. As well as New South Wales, FPO schemes also operate in South Australia and Tasmania. On 1 May 2019 a private members bill with provision for FPOs was introduced in the Queensland Parliament; the Legal Affairs and Community Safety Committee of that State reported on the Bill on 1 November 2019.[178]

While the authorising legislation is structured and operates slightly differently across each of these jurisdictions, the Committee noted a number of specific provisions in the various interstate schemes that may be worthy of further consideration for use in Victoria as detailed below.

No public interest test

In addition to some form of public interest test, which is a common feature across all the FPO schemes, both South Australia and Queensland include specific criteria upon which an FPO may be based that do not require a public interest assessment, namely:

- In South Australia, a person who is/has been a member of/participant in a criminal organisation, or is the subject of a control order under the *Serious and Organised Crime (Control) Act 2008* (SA).[179]
- In Queensland, a person who is a participant in a criminal organisation or subject to a control order under the *Penalties and Sentences Act 1992* (Qld).[180]

Commissioner's exemptions

The FPO schemes in New South Wales and South Australia both empower their respective Commissioners to exempt a person subject to an FPO from one or more various restrictions imposed by the order either with or without conditions.[181]

The issue of Commissioner's exemptions is further discussed in section 5.5.

Notification of address and public register

South Australia requires a person who is subject to an FPO to notify the Commissioner of their address at the time the FPO is issued[182] as well as any change of address within 7 days while the FPO remains in force.[183]

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178 Parliament of Queensland, Legal Affairs and Community Safety Committee, *Weapons and Other Legislation (Firearms Offences) Amendment Bill 2019*, November 2019.

179 *Firearms Act 2015* (SA) s 44(1).

180 Section 141C as inserted by Weapons and Other Legislation (Firearms Offences) Amendment Bill 2019 (Qld) cl 14.

181 *Firearms Act 1996* (NSW) s 74(1); *Firearms Act 2015* (SA) s 45(17).

182 *Firearms Act 2015* (SA) s 43(7).

183 Ibid., s 45(15).

The Commissioner must also maintain a publicly available register of FPOs, which is available to view online and contains the name, date of birth, date of issue, and police reference number in respect of all FPOs issued in South Australia.[184]

Provision to require notification of address by persons subject to FPOs is further discussed in section 5.3.

Reasonable knowledge defence/reasonable steps/reasonable excuse provisions

In its review of the 2017 Bill, SARC noted the restrictions around entering, remaining on, or residing at certain premises were, in one respect, narrower in New South Wales and South Australia than is the case for Victoria.[185] The interstate provisions include a defence of reasonable knowledge.[186]

The inclusion of allowances for honest mistakes or taking reasonable steps also occurs variously throughout the New South Wales, South Australia and Queensland FPO schemes as set out in Table 4.1.

Table 4.1 Provision for allowance of reasonable knowledge, excuse or steps

		New South Wales	South Australia	Queensland
Must not enter, attend, remain on specified premises	Allowance for having a reasonable excuse	✓		✓
Must not reside in/be present at a premises at which a firearm is present/kept/found	Provision for defence of reasonable knowledge	✓	✓	✓
	Allowance for having taken reasonable steps	✓		✓
Must not be in the company of a person with physical possession or control of a firearm	Provision for defence of reasonable knowledge		✓	
An FPO subject on/in any private premises, vehicle, vessel, aircraft when (or was on/in immediately before) a firearm etc is on/in or in the immediate vicinity, is taken to be in possession of the item	Provision for defence of reasonable knowledge		✓	

Source: Compiled by the Legal and Social Issues Committee.

184 Ibid., s 50(1); Firearms Regulations 2017 (South Australia) reg 99.

185 *Firearms Act 1996* (Vic). s 112O.

186 Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Alert Digest No. 14 of 2017*, p. 9.

Review of operation

Both the New South Wales and Queensland FPO schemes include a public review mechanism in respect of certain elements of the scheme as follows:

- In New South Wales, the Ombudsman is required to monitor and scrutinise the exercise of powers conferred on police officers under s 74A of the *Firearms Act 1996* (NSW).[187]
- Under the Queensland Bill, the Public Interest Monitor must review the operation and effectiveness of the powers (to enter places and conduct warrantless searches) conferred on police officers under ss 19, 29 and 31 of the *Police Powers and Responsibilities Act 2000* (Qld).[188]

This is further discussed in section 5.1.

187 *Firearms Act 1996* (NSW) s 74B.

188 Section 808AA as inserted by Weapons and Other Legislation (Firearms Offences) Amendment Bill 2019 (Qld) cl 8.

5 Recommended changes and improvements to Firearms Prohibition Orders

5.1 Reviewing the operation of Firearms Prohibition Orders

***Firearms Act 1996*—Sections 172, 173 & 174**

172 Information to be included in annual reports

(1) The Chief Commissioner must provide to the Minister, for inclusion in the annual report of Victoria Police as a public body for a financial year under Part 7 of the **Financial Management Act 1994**, a report containing the following information—

(a) the number of firearm prohibition orders issued;

(b) the number of firearm prohibition orders in operation;

(c) the number of people under 18 years of age who are subject to firearm prohibition orders;

(d) the number of firearms and firearm related items seized during any exercise of powers under Part 4A;

(e) the number of charges laid for offences under this Act connected with searches under Part 4A;

(f) he number of charges laid for other offences connected with searches under Part 4A.

(2) The IBAC, in its annual report for a financial year under Part 7 of the **Financial Management Act 1994**, must include the following information—

(a) the number of firearm prohibition orders, the making of which it has reviewed;

(b) the number of cases of review for which recommendations have been made by the IBAC and the number of those recommendations that have been accepted by the Chief Commissioner

173 IBAC to monitor exercise of powers etc. under Part 4A and this Part

The IBAC may monitor any exercise of the powers of the Chief Commissioner or performance of the duties and functions of the Chief Commissioner under Part 4A or this Part, including monitoring any issue relating to—

(a) the administration by the Chief Commissioner of Part 4A and this Part; and

(b) an exercise of powers under Part 4A or this Part.

174 Reports to the Minister on monitoring

(1) The IBAC may at any time give the Minister a written report on any monitoring of any exercise of the powers of the Chief Commissioner or a performance of the duties and functions of the Chief Commissioner under Part 4A or this Part, including the results of any inspections carried out under Division 6.

(2) If requested by the Minister to do so, the IBAC must give the Minister a report under subsection (1) as soon as practicable after receiving the request.

(3) The IBAC must give a copy of any report under subsection (1) to the Chief Commissioner.

Oversight of Firearms Prohibition Orders (FPOs) by the Independent Broad-based Anti-corruption Commission (IBAC) is provided under Part 10A of the Firearms Act, which gives IBAC the power to monitor and review the exercise of powers under Part 4A. Specifically, under s 173 IBAC is empowered to monitor any exercise of powers, or performance of duties and functions, of the Chief Commissioner under Part 4A or Part 10A, including any issues relating to the administration by the Commissioner of either Part.

Annual reporting obligations are provided under s 172, which requires the Commissioner to report various statistics relating to FPOs issued each financial year. Also under s 172 IBAC must report annually on the number of FPOs it has reviewed, the number of reviews that resulted in IBAC making recommendations, and the number of recommendations accepted by the Commissioner.

Periodic reporting by IBAC to the Minister in relation to its monitoring of any exercise of powers, or performance of duties and functions by the Commissioner is also provided under s 174.

***Firearms Act 1996*—Sections 174B, 174C & 174D**

174B IBAC Ministerial report

(1) The IBAC, in accordance with section 174C, must report to the Minister on matters for or with respect to—

(a) the administration of Part 4A and this Part; and

(b) the exercise of the powers of the Chief Commissioner and the performance of the duties and functions of the Chief Commissioner under Part 4A and this Part; and

(c) the exercise of any other powers under Part 4A.

(2) In a report under this section the IBAC may identify and include recommendations to the Minister on possible amendments to Part 4A or this Part to improve the operation of the Parts.

174C Timing of IBAC Ministerial report

The IBAC must make an IBAC Ministerial report as soon as possible after the end of the first 2 year period from the commencement of this Division and as soon as possible after the end of each 2 year period after that.

174D Tabling IBAC Ministerial reports

(1) The Minister must cause an IBAC Ministerial report to be laid before each House of Parliament within 7 sitting days of that House after receiving the report.

(2) A report tabled under subsection (1) must not include any information that the Chief Commissioner identifies should not be included in the report.

(3) For the purpose of subsection (2), before the Minister tables the report the Chief Commissioner may advise the Minister that information in the report should not be included the tabled report because, in the Chief Commissioner's opinion, the information could reasonably be expected to—

(3) For the purpose of subsection (2), before the Minister tables the report the Chief Commissioner may advise the Minister that information in the report should not be included the tabled report because, in the Chief Commissioner's opinion, the information could reasonably be expected to—

(a) endanger a person's safety; or

(b) prejudice an investigation or prosecution; or

(c) *compromise operational activities or methodologies of*—

(i) Victoria Police; or

(ii) the IBAC; or

(iii) *a police force or police service of another State or a Territory of the Commonwealth; or*

(iv) the Australian Federal Police constituted under the Australian Federal Police Act 1979 of the Commonwealth; or

(v) any police force or police service (however described) in a place outside Australia; or

(vi) any other person or body responsible for the enforcement of laws in a place outside Australia; or

(d) disclose the identity of a person, where it is not in the public interest to do so.

Under ss 174B–174D, within two years of commencement, IBAC must provide a report to the Minister (the IBAC Ministerial Report) on matters in relation to:

- the administration of Parts 4A and 10A
- the exercise of powers and performance of duties and functions by the Commissioner under Parts 4A and 10A
- the exercise of any other powers under Part 4A

In making its report IBAC may identify and recommend possible amendments to improve the operation of Parts 4A and 10A. The IBAC Ministerial Report is due in the first half of 2020)[189] and, once finalised, it must be tabled in both Houses of Parliament.[190]

Section 174D exempts the publication of certain information in the IBAC Ministerial Report if the information could be reasonably expected to:

- endanger the safety of an individual
- prejudice an investigation or prosecution
- compromise operations and methodologies of—
  - Victoria Police
  - IBAC
  - the police force of another jurisdiction
  - the Australian Federal Police

189 *Firearms Act 1996* (Vic) s 174B.

190 Ibid., s 174D(1).

- a police force in a place outside Australia
- any other person or body responsible for law enforcement in a place outside of Australia

- disclose an individual's identity when it is not in the public interest to do so[191]

***Firearms Act 1996*—Sections 174E, 174F, 174G, 174H & 174I**

174E Chief Commissioner report on issued firearm prohibition orders

(1) As soon as possible after the end of each period of 3 months in any year the Chief Commissioner, in writing, must report to the IBAC listing the firearm prohibition orders issued in the period.

(2) For the purpose of subsection (1), the first period of 3 months in any year begins on 1 January.

(3) A report under subsection (1) must set out the following information—

(a) the number of orders issued in the period;

(b) in relation to each order—

(i) the name and age of the individual to whom the order applies; and

(ii) the grounds set out in section 112E that were relied on to issue the order; and

(iii) whether or not an application for VCAT review has been applied for.

174F The IBAC review of the issue of firearm prohibition orders

(1) The IBAC must review the making of firearm prohibition orders in accordance with this section.

(2) A review of the making of firearm prohibition orders must be conducted for each 3 month period of every year, with the first period commencing on 1 January.

(3) In each quarterly review the IBAC must review the making of a proportion of the orders made during the period under review.

(4) The IBAC must determine the proportion of orders to be reviewed having regard to the number of orders made during the period, the need to have a representative sample of orders made and any other relevant issues.

174G Preliminary processes

(1) Once the IBAC has determined the orders, the issue of which is to be reviewed, the IBAC, in writing, must give the Chief Commissioner notice of that information.

(2) (On receiving a notice under subsection (1), the Chief Commissioner must allow the IBAC to have access to all information on which the decision to make the order was based.

174H Conduct of review

(1) For each order under review, the IBAC must review whether or not the order should have been made having regard to the matters set out in section 112E(a), (b), (c) and (d).

(2) In a review, the information that the IBAC may consider is the information given to the IBAC under section 174G(2).

174I The IBAC may request that certain action be taken

(1) After reviewing the issue of an order, the IBAC, in writing, may recommend that the Chief Commissioner take any action that the IBAC considers appropriate.

(2) The Chief Commissioner must give a written response to the IBAC's recommendation within 45 days of receiving the recommendation.

(3) A recommendation under subsection (1) must be made in private.

191 Ibid., s 175D(3).

Further, s 174E of the Firearms Act provides that Chief Commissioner must provide in writing, every three months, a report to IBAC listing all FPOs made during the reporting period. The report must include:

- the number of orders made
- the name and age of individuals to whom each order applies
- the grounds on which each order was made
- the number of applications made to the Victorian Civil and Administrative Tribunal (VCAT) for a review[192]

Any recommendations made by IBAC after reviewing the issue of an FPO are made in private to the Chief Commissioner.[193]

Comparatively, New South Wales, following the introduction of warrantless search powers in 2013, required the Ombudsman of that State to publicly review the powers after two years in operation.[194] The purpose of this review was to assess the 'way police have exercised their FPO search powers, and make recommendations for any changes that [the Ombudsman] considers necessary'.[195] In describing its role and purpose in reviewing the search powers under the scheme the Ombudsman stated:

> As part of this scrutiny role, we examined whether police had used the powers in a manner and for the purpose intended by Parliament, whether the powers were implemented effectively (including whether guidance and training for police has been adequate), whether the powers have been exercised lawfully and reasonably, and whether the lawful exercise of the powers has or may result in unreasonable or unjust consequences that were unforeseen by the Parliament. Where appropriate, we make recommendations to amend the legislation or to improve police practices to ensure the powers operate reasonably and effectively.[196]

The Ombudsman's scrutiny of the search powers under the New South Wales FPO scheme provided useful insight into whether the powers were being misused by the police. The review provided a level of oversight of FPOs in New South Wales, especially the significant powers conferred on police, to ensure the intent of the scheme was being upheld without undue interferences of the rights and liberties of individuals. This was particularly important in relation to the ability of police to search a person who did not have an order against them, but was in the company of an FPO subject.

The Committee notes the similarities between the Victorian and New South Wales FPO search provisions leave Victoria similarly vulnerable to the types of misuses experienced under the New South Wales scheme. In particular, the potential for

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192 Ibid., s 174E.

193 Ibid., s 174I.

194 *Firearms Act 1996* (NSW) s 74B.

195 NSW Ombudsman, *Review of police use of the firearms prohibition order search powers: Section 74A of the Firearms Act 1996*, NSW Ombudsman, 2016, p. vi.

196 Ibid., p. 13.

unnecessary interference with a person's liberties and rights. The Committee further notes that, unlike New South Wales, there is no provision for a review of the operation of search powers in the Victorian legislation. The Committee therefore believes it is important for any public review to consider the operation of search powers by Victoria Police, including specific enquiry into whether the way in which searches are used by the police constitutes any misappropriation of those powers.

The Committee believes that because of the significant powers afforded to police under the FPO scheme, and the corresponding risk of arbitrary interferences with rights, it is important that the operation of the scheme be subject to review. While the Committee welcomes the safeguards provided by the IBAC review provisions, it notes they are limited in scope and are not conducted openly or subject to public input or consultation. Nor are detailed findings provided publicly. Given the nature of the IBAC review, the Committee believes an additional open and public review of the operation of the legislation is warranted. Further, the outcome of such a review should be made public to provide an additional layer of oversight to the FPO scheme. The Committee considers it is in the public interest to understand if the scheme is operating appropriately and successfully or, more importantly, how the scheme may be deficient.

In addition to concerns regarding oversight of search powers, the Committee has some concerns regarding the current 5 and 10 year FPO duration periods designated in the Act. Given the scheme is still in its infancy the Committee acknowledges it will be some time before there is sufficient data to determine if the timeframes are appropriate in order to best manage the public risk posed by subjects without subjecting them to the restrictions of an FPO for an unnecessarily extended duration. Or, especially as it relates to child-subjects, if the length of time an FPO remains in force is too punitive.

Concerns around 'unreasonable impact on individuals' was also raised by the New South Wales Ombudsman in its report on FPO search powers:

> A majority of the public submissions to this review raised serious concerns about the timeframe over which the FPO search powers can be exercised. As an FPO never expires, the FPO search powers can potentially be exercised over a person's lifetime unless the Commissioner revokes the FPO. The effectiveness of searches depends on the currency of the information about the risks posed by a person to be searched.[197]

As noted in section 2.2.2, Ms Walker (LIV) told the Committee that the current timeframes are too long. Ms Walker argued that the duration of FPOs under the Firearms Act are 'quite extensive' especially for children,[198] suggesting instead that FPOs should remain in place for:

- 5 years if the subject is an adult, and
- 2–3 years if the subject is a child.[199]

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197 Ibid., p. 8.

198 Ms Melinda Walker, Co-Chair of Criminal Law Section, Law Institute of Victoria, public hearing, Melbourne, 2 September 2019, *Transcript of evidence*, p. 21.

199 Ibid.

The Committee notes in comparison to FPO schemes in other jurisdictions, none of which provide for an expiration date of an order, that the Victorian scheme does include some measure of protection against undue lifelong restrictions. This is an important safeguard when considering the capacity for police officers to exercise the unique search powers of the scheme throughout an order's lifespan. However, in the Committee's view, the relative infancy of FPOs in Victoria makes it difficult to draw inferences about the impacts of an order's length on an individual, therefore any review of the operation of the FPO legislation should include consideration of the appropriateness of current timeframes.

The Committee recommends that the Victorian Government amend the legislation to provide for an additional mechanism to review the operation of Part 4A of the Firearms Act. This review should be undertaken by an appropriate authority (such as the Ombudsman) with capacity to conduct a public, open and consultative review. The review should be conducted two years after the commencement of the amendment, and consider the operation of the scheme since its inception in May 2018. The terms reference should include a review of the operation of search powers and consideration as to whether the current length of FPOs effectively upholds the scheme's intent to protect community safety without imposing undue and unreasonable restrictions on an individual.

RECOMMENDATION 1: That the Victorian Government amend the legislation to include an additional public, open and consultative review of the operation of Part 4A of the *Firearms Act 1996* to take place 2 years after commencement of the recommended amendment. When conducting this review the appointed body should consider the operation of search powers and the appropriateness of the timeframes for which orders are in force.

5.2 Cross-jurisdictional application and recognition

Australian jurisdictions have taken a largely collaborative and joint approach to gun reform legislation, particularly since the major gun reform changes during the mid-1990s. These changes focused on developing nationally consistent responses to gun control largely through the introduction of state-based gun license registries and 'prohibited person' categories, which are recognised across jurisdictions. However, the introduction of FPO schemes in various jurisdictions has not included a similar provision for cross-jurisdictional recognition.

At a public hearing Detective Superintendent Brigham recommended that a potential improvement to the FPO scheme would be the inclusion of mutual recognition of similar schemes in other jurisdictions.[200]

200 Detective Superintendent Peter Brigham, Crime Command, State Anti-Gangs Division, Victoria Police, public hearing, Melbourne, 2 September 2019, *Transcript of evidence*, p. 2.

Ms Walker (LIV) explained that lack of information sharing across jurisdictions could cause issues with the FPO scheme's operation, providing a comparative example of problems discussed during the Royal Commission into Family Violence:

> I think guidance could be taken from the Royal Commission into Family Violence where there was specifically that issue in relation to information sharing between jurisdictions and also the effects or otherwise of orders crossing over into other jurisdictions. From the reading here I cannot see that an FPO, similar to a family violence order, would be cross-jurisdictional, so I do not know if the commission would seek to look into something similar to that. But in relation to information sharing, there was a huge problem with the lack of information, the different systems that were being used by different jurisdictions: who is sharing the information, and what information do you want to share? I mean, you do not want to extend this or elevate an FPO to some kind of a control order. I think that if the police were that concerned about somebody, then they might want to look at some form of a control order rather than an FPO. I would have a bit of a look at the Royal Commission into Family Violence and the problems with information sharing...[201]

Information sharing between law enforcement bodies fosters improved intelligence gathering, which is essential to protecting community safety. The importance of data integrity in properly policing access to illicit firearms has been raised by the Australian Criminal Intelligence Commission:

> Details of firearm offences and those involved in them are often contained within individual incident reports in jurisdictional databases or reported to state and territory crime hotlines. While these are addressed in a variety of ways, the information is not collected in a consistent manner and the ability to interrogate this data to produce a national view is limited. Inconsistencies in the classification of firearms offences have hindered the standardisation of firearm incidents reported across jurisdictions. These inconsistencies have also prevented the cross-referencing of firearm registration and licensing records with firearm incident and offence data.[202]

The Commission recommended that all law enforcement should:

- ensure data and records are accurate, accessible and consistent through the development of an Australian Firearms Information Network, and
- consistently record and report data.[203]

In response to a question on notice, the Department of Justice and Community Safety explained that if there was to be national mutual recognition of FPO schemes then they should be as closely aligned as possible. This was part of the rationale in the decision to make VCAT the review body under the Victorian scheme (see section 4.2.1).[204]

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201 Ms Melinda Walker, *Transcript of evidence*, p. 20.

202 Australian Criminal Intelligence Commission, *Illicit Firearms in Australia*, Commonwealth of Australia, 2016, p. 20.

203 Ibid., p. 21.

204 Corri McKenzie, Deputy Secretary, Police Fines & Crime Prevention, Department of Justice and Community Safety, Inquiry into Firearms Prohibition Legislation hearing, response to questions on notice received 18 September 2019, p. 1.

In the Committee's view there are numerous benefits to cross-jurisdictional recognition of FPO schemes, such as:

- Increased capacity for policing access to firearms by high-risk individuals, especially as it relates to organised crime and terrorist groups.
- Better information sharing, which would assist with intelligence, data and policing of the illicit firearms market. Improved community safety across Australia.
- Prevention of risks to community safety because of time delays in completing applications for an FPO in a new jurisdiction.

The Committee believes mutual recognition of similar orders across all jurisdictions in Australia would enhance the operation of FPOs nationwide. The Committee urges the Victorian Government to take a lead role in championing the introduction of the necessary changes through the Council of Australian Governments (COAG) process. COAG as the peak intergovernmental forum in Australia is best equipped to develop the appropriate reforms to ensure consistency across all jurisdictions. This will serve to minimise discrepancies in recognition and enforcement of FPOs across jurisdictions by promoting a national approach whereby all jurisdictions collaborate to develop best practice regulation.

RECOMMENDATION 2: That the Victorian Government through the Council of Australian Governments work to introduce provision for cross-jurisdictional recognition of Firearms Prohibition Orders. This process should aim to achieve cross-jurisdictional alignment and address discrepancies between existing Firearms Prohibition Order schemes that could impede the operation of orders in any jurisdiction.

5.3 Notification of change of address

Under the current FPO scheme there is no provision which requires an FPO subject to notify the Chief Commissioner if they change their address. Stakeholders told the Committee this impedes the ability of law enforcement to effectively manage FPO subjects, and could interfere with the intended purpose of the scheme to protect community safety.

Detective Superintendent Brigham told the Committee that a key challenge for police in managing the scheme is the difficulty of locating subjects due to the lack of a requirement to notify police of change of address:

> ... some of the challenges I think that we face with FPOs are actually challenges in finding FPO subjects, and the ongoing challenge in relation to the fact that there is no requirement for that person to tell us they have changed address, so it is a bit of a cat-and-mouse game.[205]

205 Detective Superintendent Peter Brigham, *Transcript of evidence*, p. 3.

Detective Superintendent Brigham noted that an amendment to require notification of change of address could operate in a similar manner to the system in place for registered sex offenders, which requires a registered person to notify police within 24 hours of a change of address.[206]

Ms Walker (LIV) agreed that requiring subjects to notify change of address would enable more effective management of the scheme:

> ... it would certainly assist police to make sure that they know where these people are, and how otherwise do they search their houses and/or ensure that they are complying with the order? The operation of the order really sounds to me that if you are found on a premises from which you are prohibited, you are committing an offence...
>
> ...
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> And if they do find you there, then you are committing an offence. I suppose it does frustrate the order a bit if the police cannot locate the person.[207]

The purpose of the FPO scheme is to protect public safety by preventing access to firearms by individuals who pose a risk to this safety. The ability of the FPO scheme to fulfil this intent is undermined if law enforcement is unable to locate FPO subjects. This potentially increases the likelihood a subject could access, possess, use or carry a firearm without detection.

The Committee recommends that current legislation be amended to include a provision to require an FPO subject to notify Victoria Police of a change of address. This will better equip police officers to be more appropriately informed and capable of policing access to illicit firearms by improved monitoring of FPO subjects.

RECOMMENDATION 3: That the Victorian Government amend the legislation to include a requirement that a person subject to a Firearms Prohibition Order must provide notification of change of address to the Chief Commissioner.

5.4 Firearms Prohibition Orders as a condition of sentencing

The current FPO scheme provides for the Chief Commissioner or a delegate to issue an order against an individual. The Committee heard evidence which contemplated the extension of issuing powers to the courts. In particular, whether an amendment should be introduced to allow an FPO to be ordered at the time of sentencing for particular offences. Detective Superintendent Brigham recommended to the Committee that a potential improvement to the scheme would be the ability of a magistrate or judge to

206 Ibid., p. 9.

207 Ms Melinda Walker, *Transcript of evidence*, p. 20.

issue an order upon conviction for specific offences. Mr Brigham cited offences related to firearms trafficking as an example of the type of offences that could be considered.[208]

The Committee notes that this is not a feature of FPO schemes in other jurisdictions and considers significant groundwork would be required prior to the inclusion of any such provision in the Victorian scheme.

5.5 Exemptions from conditions under a Firearms Prohibition Order

Under the Victorian scheme the Chief Commissioner has no discretion to make specific exemptions to the conditions of an FPO in respect of any individual. This differs from the New South Wales and South Australian legislation, both of which enable the Commissioner to allow conditional or unconditional exemptions to specific provisions of an FPO.

***Firearms Act 1996* (NSW)—Section 74(10)**

74 Effect of firearms prohibition order

...

(10) Exemptions

The Commissioner may by order exempt a person, either unconditionally or subject to conditions, from a specified provision of this section.

***Firearms Act 2015* (SA)—Section 45(17)**

45 Effect of firearms prohibition order

(17) The Registrar may exempt a person, unconditionally or subject to conditions, from a specified provision of this section and may vary or revoke an exemption by notice in writing served personally or by registered post on the holder of the exemption.

Section 74(10) of the *Firearms Act 1996* (NSW) empowers the Commissioner of Police to make unconditional or conditional exemptions to specified provisions of the FPO scheme under section 74.[209] This means the Commissioner can allow a person subject to an order to be exempt from certain conditions, such as the prohibition against residing at a premises where there are firearms.[210] The purpose of this provision is to provide increased discretion to the Commissioner on the enforcement of an order based on unique or exceptional circumstances that may apply to a subject individual.

208 Detective Superintendent Peter Brigham, *Transcript of evidence*, p. 4.

209 *Firearms Act 1996* (NSW), s 74(10).

210 Ibid, s 74(6).

The New South Wales Ombudsman's review found that the exemption provision in the Act was being used by the Commissioner if there was reasonable satisfaction it was needed for a legitimate reason:

> This provision (section 74(10)) gives the Commissioner scope to allow an FPO subject to attend the premises of a firearms club on a particular occasion, for example, if the Commissioner was satisfied that there was a legitimate reason for the FPO subject to be there.[211]

The *Firearms Act 2015* (SA) includes a similar provision to allow the Commissioner of Police (the Registrar) to exempt, either conditionally or unconditionally, a person from specified provisions under the South Australian FPO scheme. This is provided under s 45(17) of that Act.

The Committee agrees that providing capacity for the Commissioner to exempt specific provisions of an FPO, where appropriate, would make for legislation that is more capable of responding to the individual circumstances of an order. This, in turn, could better serve to protect against the potential arbitrary interference with a person's liberties and rights by allowing for a more tailored response based on circumstances that are specific to that person. The Committee considers the inclusion of such a provision would serve to promote the overarching intent of the FPO legislation to protect the community from harm because of its discretionary nature: the Commissioner may decide (or not) if it is reasonably justified, based on the individual facts of an application, to grant one or more exemptions from specific conditions of an FPO. In the Committee's view, this would further support a proper balance between protecting public safety and not unduly interfering with a person's rights by alleviating potentially unreasonable or unnecessary restrictions.

The Committee recommends that the legislation be amended to include a provision to enable the Chief Commissioner to grant an exemption (either with or without conditions) from any of the requirements of an FPO that the Commissioner thinks fit. In doing so, the Committee notes this will also provide for greater consistency with other State jurisdictions, assisting with developments in cross-jurisdictional recognition as recommended by the Committee in section 5.2.

RECOMMENDATION 4: That the Victorian Government amend the Firearms Prohibition Order legislation to include a provision to enable the Chief Commissioner to grant an exemption (either with or without conditions) from certain requirements of a Firearms Prohibition Order to ensure its enforceability.

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211 NSW Ombudsman, *Review of police use of the firearms prohibition order search powers*, p. 27.

6 Illicit firearms and emerging trends

6.1 Emerging Trends and Technology

6.1.1 3D printed firearms

3D printing, or additive manufacturing, involves depositing layers of materials (such as plastic) to build an object. It was developed in the 1980s and has since been adopted by a number of manufacturing industries. In May 2013, instructions for assembling a single-shot handgun (the 'Liberator') from 3D printed components were posted online by US-based group Defense Distributed. The instructions and digital blueprint were downloaded approximately 100,000 times in the 48 hours after they were made publicly available.[212] The digital blueprints for the firearm are still widely available online where they are posted on a number of file sharing websites.

Dr Angela Daly and Dr Monique Mann, academics with expertise in 3D printing, have published on the potential policing and safety concerns around 3D printed firearms and parts. In a 2018 journal article examining '3D Printing, Policing and Crime' Dr Daly and Dr Mann explained the general component requirements of a 3D printed firearm and the impact it may have on security:

> As 3D printed firearms can be made mostly from plastic, they can be difficult to detect by metal detector screening procedures and technologies. However, 3D printed firearms do need to have at least two metal parts (a bullet and firing pin). The use of plastic firearms also allows for an easily disposable weapon in that evidence of the firearm can be melted and destroyed.
>
> ...
>
> 3D printed firearms may have negative impacts on the operation and efficacy of firearm registration and licensing schemes and ballistic databases used for police investigations, such as...the Australian Ballistic Information Network (ABIN).[213]

212 Andy Greenberg, '3D-Printed Gun's Blueprints Downloaded 100,000 Tmes in Two Days (with some help from Kim Dotcom)', *Forbes*, 8 May 2013, <https://www.forbes.com/sites/andygreenberg/2013/05/08/3d-printed-guns-blueprints-downloaded-100000-times-in-two-days-with-some-help-from-kim-dotcom/#743bbb3410b8> accessed 17 September 2019.

213 Angela Daly and Monique Mann, '3D Printing, Policing and Crime: Crime Justice and Social Democracy Research Centre', vol. 1, 2018, p. 3.

In its submission to the Committee the Australian Criminal Intelligence Commission (ACIC) stated that in Australia there has been no successful production of a fully functioning 3D printed firearm, despite documented attempts. The Commission explained:

> The production of operational, fully functioning handguns by 3D printing has not been observed in Australia, although there have been a few attempts to do so which have failed to complete a functioning firearm. [214]

The Commission further characterised the number of attempts to produce an operational 3D printed firearm as 'very small'.[215]

In its 2016 report, *Illicit Firearms in Australia*, the Commission found that the threat of 3D printed firearms is low because current technology is not commercially viable or effective:

> The ACIC and other law enforcement agencies have assessed the current threat of 3D printing of firearms as low. Currently, the technology does not commercially enable the mass production of printed components that match the reliability and cost-effectiveness of factory-produced firearms. Since instructions to produce a 3D printed firearm were published online, the ACIC has identified only three attempts to manufacture such firearms in Australia. Of those identified, none were functioning when detected by police. During the same period, the ACIC traced almost 1,000 factory-manufactured handguns, demonstrating that these firearms are more readily available at this time.[216]

The Commission reiterated this in its submission to this inquiry, explaining factory manufactured firearms pose a larger threat to Australia than 3D printed firearms:

> ACIC engagement with international law enforcement agencies in relation to 3D printing of firearms and their threat to the community has constantly resulted in commentary that, with so many factory manufactured handguns in the Australian illicit market, the pursuit of an unreliable 3D handgun is a moot exercise.[217]

At a public hearing for this inquiry Detective Superintendent Brigham told the Committee that the emergence of 3D printed firearms is being monitored nationwide by the National Illicit Firearms Strategy Advisory Group—Operation Athena—but the number of detections in this area has been low:

> It is certainly, through Operation Athena, something that we monitor around the country, the emergence of 3D printed firearms for example. We are not seeing an increase in detections around that; it is fairly low level by number. One of the things I believe, in response to that, is that the 3D firearm is only capable of firing one shot. And I think some people would not be confident to actually use it because they might be worried

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214 Australian Criminal Intelligence Commission, *Submission 6*, p. 5.

215 Ibid., p. 4.

216 Australian Criminal Intelligence Commission, *Illicit Firearms in Australia*, Commonwealth of Australia, 2016, pp. 10-11.

217 Australian Criminal Intelligence Commission, *Submission 6*, p. 5.

> that it might virtually blow up in their hands. And, you know, it is that balance with the availability of other firearms. So I think if other firearms became harder to get, then there may be a surge or an emergence of those manufactured and 3D-type firearms, but we are not seeing it at this point.[218]

Nevertheless, the Commission acknowledged that 'as technology improves and 3D printing becomes more affordable, the threat of this manufacturing method is likely to increase'.[219] Other stakeholders also believed that the threat of 3D printing of firearms will escalate as the technology becomes more advanced and accessible.

In its submission to this inquiry the Alannah and Madeleine Foundation expressed concern about the threat of 3D printed firearms, in particular the online availability of digital blueprints:

> It is not clear if the *Firearms Act 1996* considers penalties for the ownership of 3D firearms, or indeed the blueprints and methodologies to produce them.
>
> The Foundation believes the threat of 3D printed firearms is real. We know that blueprints are readily available on the internet when American gun-rights activists released the first entirely 3D printed operable firearm, the "Liberator", online in 2013.
>
> A 2014 United Nations report said it would probably be easier to steal a gun or buy one on the illicit market than to manufacture one using 3D printing. "But this could change once productions costs decrease and quality increases, 3D printing may become a lucrative alternative for small-scale illicit weapon manufacturing and scale in future."
>
> It is believed that currently the likelihood is that parts could be made with 3D technology rather than entire guns.[220]

In contrast, Firearm Owners United pointed out that conventionally manufactured firearms however, continue to pose a bigger threat to community safety than 3D printed firearms:

> At present, the developments in 3D printed guns seems to have plateaued in effectiveness. Three different classes of 3D printed firearms have emerged over the past few years. The first of these being those that are 3D printed without any firearm components and are the least effective of the available designs. Secondly, there are some designs where a significant amount of the design is 3D printed and otherwise improvised, but utilises conventional firearm components such as barrels and magazines. Finally, we see some that utilise a 3D printed receiver/frame to replace a conventional receiver with factory made parts that are not as tightly regulated being used to assemble a working firearm.

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218 Detective Superintendent Peter Brigham, Crime Command, State Anti-Gangs Division, Victoria Police, public hearing, Melbourne, 2 September 2019, *Transcript of evidence*, pp. 5-6.

219 Australian Criminal Intelligence Commission, *Illicit Firearms in Australia*, p. 11.

220 Alannah & Madeline Foundation, *Submission 2*, p. 2.

> Conventionally manufactured improvised firearms in contrast seem to rarely utilise factory made firearm components outside of some limited exceptions. These designs and technologies present a significantly greater challenge to community safety as they can provide significantly greater firepower without any requirement for sourcing regulated firearm parts.[221]

Firearm Owners United put forward an example of the type of conventionally manufactured firearm that is a more significant threat than 3D printed firearms:

> ... by using conventional manufacturing technologies it is relatively easy to construct a single shot firearm, and this can be done in a matter of minutes by someone with only basic knowledge and skills. The most simple and lethal single shot firearm able to be constructed in this manner is the slam-fire shotgun. This firearm can be readily assembled from two suitable pieces of standard imperial diameter pipe, end cap and a screw or nail. Whilst unconventional in appearance without being fitted with a shoulder stock or forend, the reality is this simple assembly is capable of repeatedly discharging 12 gauge shotgun shells. This is a significantly more lethal weapon than any of the basic 3D printed firearms and can be manufactured with less expensive equipment and in less time using readily available materials. We are not aware of firearms of this nature being seized particularly often within Australia. Given the simple nature of these firearms this suggests unsurprisingly that criminal circles are readily able to obtain firearms of superior capabilities.[222]

In its submission the Commission believed that it is unlikely a criminal, or criminal organisation, would manufacture or seek out 3D printed firearms when there are factory-manufactured firearms available in the illicit market:

> The ACIC is aware of a large number of handguns that remain in the Australian illicit market, which were diverted from the licit market through means that are now closed by legislative reform. It is the view of the ACIC that it is very unlikely that a criminal with the available funds will seek out a 3D printed firearm when many reliable factory-manufactured handguns exist in the illicit market.[223]

The Committee is of the view that current firearms regulation, where possible, should be framed to appropriately address the threat of emerging technologies in firearms manufacturing. The Committee recognises that the Firearms Act includes some flexibility to respond to emerging threats through s 112A(f) (prescribed firearm related items).

At a public hearing Ms McKenzie (Department of Justice and Community Safet)y told the Committee how the Firearms Act functions to respond to emerging technology and changes to firearms manufacturing:

> ... in the Act the definition of 'Firearm' and 'Firearm related item' are two separate definitions. Both are designed to describe the action of a firearm rather than the specific nature of a firearm. Specifically for the purpose of the question that you raised, which is

221 Firearm Owners United, *Submission 3*, p. 2.

222 Ibid., p. 4.

223 Australian Criminal Intelligence Commission, *Submission 6*, p. 5.

> that we are always seeing an evolution – 3D printing is obviously an immediate one that is very current in public discourse at the moment – but there is always the emergence of different mechanisms and manufacturing processes or practices. So the two definitions are really designed to reflect the function of the item rather than to describe the item in itself, and that is really because the function is what causes any potential harm rather than the fact of an instrument or an object in itself.
>
> ...
>
> ... that is exactly the purpose, which is that there is a particular kind of function of an object which would cause harm. This is what is sought to be described in the act, really, to pick up that evolution and the changing nature of firearms, but then also the kind of adjacent, related items that might be developed.[224]

The Committee acknowledges that the current threat of 3D printed firearms is low in Victoria, and Australia, because current technology is not commercially viable or user-friendly. However, the Committee believes it is important that law enforcement agencies continually monitor and assess the risk 3D printed firearms and other emerging technologies pose to community safety, especially as this technology becomes more sophisticated and accessible.

Other jurisdictions have introduced, or are considering, specific regulations to police the manufacturing of 3D printed firearms. In 2015, New South Wales inserted s 51F into the *Firearms Act 1996* (NSW), which makes possession of a digital blueprint to manufacture a firearm using a 3D printer an offence.225 The Weapons and Other Legislation (Firearms Offences) Amendment Bill 2019, which was before the Queensland Parliament at the time of writing, proposes to insert s 67A 'Possession of digital blueprint and device for manufacture of firearms' and s 67B 'Defences for offences against 67A' into the *Weapons Act 1990* (Qld). If passed, these changes would provide for an offence against an individual possessing a blueprint for the manufacture of firearms using a 3D printer.[226]

In the Committee's view, it is important to recognise and engage with the threat posed by 3D printed firearms through regulation. The Committee believes that this is an opportunity for the Government and law enforcement agencies to respond to a growing threat in firearms manufacturing by introducing regulations to deal with the risk of 3D printed firearms before they become more commercially viable and accessible. It is often the case that governments and law enforcement are reactive to threats rather than proactive. The low, but existing, threat of 3D printed firearms means authorities are in a position to establish appropriate protections before this issue emerges as a concerted threat to community safety.

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224 Ms Corri McKenzie, Deputy Secretary, Police, Fines and Crime Prevention, Department of Justice and Community Safety, public hearing, Melbourne, 2 September 2019, *Transcript of evidence*, p. 12.

225 *Firearms Act 1996* (NSW) s 51F(1).

226 Weapons and Other Legislation (Firearms Offences) Amendment Bill 2019 (Qld).

The Committee is particularly concerned about the potential dangers of the significant accessibility of digital blueprints online. The Committee recommends that the possession of digital blueprints and necessary components for manufacturing 3D printed firearms be prohibited under the *Firearms Act 1996* where there is a corresponding intent to use them to manufacture firearms.

RECOMMENDATION 5: That the Victorian Government regulate the possession of digital blueprints and necessary parts for the manufacture of 3D printed firearms under the *Firearms Act 1996* including outlawing the possession of this material where there is a corresponding intent to use them to manufacture firearms.

6.1.2 Online markets

In its 2016 report the Australian Criminal Intelligence Commission also expressed concern about the use of global online markets to facilitate the illicit firearms trade in Australia. The Commission found that:

> Encrypted websites are used as virtual marketplaces to trade in various illicit commodities, including firearms. Such sites are concealed within hidden networks collectively known as the Darknet. Encryption and routing technologies, and the use of virtual currencies on the Darknet, allow users to obscure their identity and their location.
>
> Globally, law enforcement agencies have succeeded in dismantling a number of Darknet sites including Silk Road and the Armory, which specialised in the trade of firearms, firearm components and other illicit commodities. However, because the Darknet is difficult to monitor, it is not known how deeply embedded organised crime is in this market.
>
> Many illicit commodity shipments are detected at the Australian border as a direct result of intelligence-led interventions across a number of law enforcement agencies. Increased international cooperation has resulted in enhanced intelligence collection, sharing and detection.[227]

The Committee notes with concern the ongoing availability of illicit firearms on global markets, in particular their accessibly on the Darknet. However, in the Committee's view, this is an issue that is best facilitated at the federal level. The Committee believes law enforcement agencies, including Victoria Police, should continue to collaborate with their State, Territory and Commonwealth counterparts in monitoring and dismantling online market places that sell illicit commodities such as firearms.

227 Australian Criminal Intelligence Commission, *Illicit Firearms in Australia*, p. 18.

6.1.3 Firearm components

Global studies and media investigations into online markets that trade illicit firearms—such as the Armory—have found that illicit firearms are often sent in component parts for buyers to self-assemble. In a 2012 investigation into illicit firearms market reporting, media outlet Gizmodo observed:

> ... buyers get each gun component shipped in shielded packages – disguised to look like other products – that then require self-assembly. You get your gun, the dealer gets his money. The Armory retains its secrecy, and the mail carrier doesn't realise it's part of an international weapons smuggling operation.[228]

In a 2015 report, the Senate Standing Committee on Legal and Constitutional Affairs examined the *Ability of Australian law enforcement authorities to eliminate gun-related violence in the community*. In the report Detective Superintendent De Santo APM of the Victoria Police explained how criminal organisations use specially-made components to avoid detection:

> Components can be separated, placed in cargo hold luggage and go through a lesser degree of screening than hand luggage. That is the way they are transported across border lines, other than being concealed in cars or about the person.[229]

However, Detective Superintendent Brigham told the Committee that while there were instances of illegal importation of firearm components, most firearms trafficking and importing involves whole weapons:

> I am aware of an [Australian Federal Police] investigation last year where they detected firearms parts being imported into Melbourne and subsequently were watching that person; they had a plan obviously of bringing in various parts so they could make up firearms. And ultimately that person was arrested. But the trade of firearms parts as such, it is not really something that we are seeing. We are seeing the movement of actual whole weapons that are concealed, but not the broken-down movement of them.[230]

The Committee is concerned about the risk of organised crime using unassembled firearm components in order to escape detection by law enforcement. The Committee received evidence during this inquiry that indicated that this has occurred and continues to occur in the Australian market, notwithstanding the majority of firearms trafficking involves assembled weapons.

In the Committee's view, there exists a risk that organised crime groups, and individuals, may trade in illicit firearm components in order to avoid detection at Australian borders. It is therefore important that law enforcement agencies are supported in their work in

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228 Sam Biddle, 'The Secret Online Weapons Store that will Sell Anything', *Gizmodo*, 20 July 2012, <https://www.gizmodo.com.au/2012/07/the-secret-online-weapons-store-that-will-sell-anyone-anything/> accessed 30 September 2019.

229 Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Ability of Australian law enforcement authorities to eliminate gun-related violence in the community*, April 2015, pp. 20-21.

230 Detective Superintendent Peter Brigham, *Transcript of evidence*, p. 6.

this area to ensure risks to public safety are minimised. Despite component trafficking accounting for a smaller percentage than assembled firearms trafficked in and around Australia it is incumbent on all relevant authorities, including the Victorian Government, to act appropriately to assist in protecting the community from illicit firearms. They should do so by continually improving intelligence, detection and prevention strategies in collaboration with police, State and Territory governments and the Commonwealth.

Appendix 1
Inquiry process

A1.1 Submissions

1	National Shooting Council
2	Alannah & Madeline Foundation
3	Firearm Owners United
4	Ambulance Victoria
5	NSW Police Force
6	Australian Criminal Intelligence Commission

A1.2 Public Hearing

Monday 2 September 2019

Legislative Council Committee Room, Parliament House, East Melbourne

Name	Title	Organisation
Detective Superintendent Peter Brigham	Crime Command, State Anti-Gangs Division	Victoria Police
Ms Corri McKenzie	Deputy Secretary, Police, Fines & Crime Prevention	Department of Justice and Community Safety
Ms Melinda Walker	Co-Chair, Criminal Law Section	Law Institute of Victoria

Appendix 2
Transcripts of evidence

T R A N S C R I P T

LEGISLATIVE COUNCIL
LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into Firearms Prohibition Legislation

Melbourne—Monday, 2 September 2019

MEMBERS

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Ms Melina Bath
Mr Rodney Barton
Ms Georgie Crozier
Dr Catherine Cumming
Mr Stuart Grimley
Mr David Limbrick
Mr Edward O'Donohue
Mr Tim Quilty

WITNESS

Detective Superintendent Peter Brigham, Crime Command, State Anti-Gangs Division, Victoria Police.

The CHAIR: I declare open the Standing Committee on Legal and Social Issues public hearing. Welcome to everyone who is here today for this hearing. The Committee is hearing evidence in relation to our Inquiry into Firearms Prohibition Legislation.

All evidence that is taken at this hearing is protected by parliamentary privilege by the *Constitution Act 1975* and further subject to provisions of the Legislative Council's standing orders, therefore the information you give today is protected by law. However, any comment repeated outside does not have that same protection. Any deliberately false evidence or misleading of the Committee will be considered a contempt of Parliament. All evidence is being recorded, and you will be provided with a proof version of the transcript in the next few days, which you can certainly make some changes to. Ultimately it will be made public on our website.

Thank you, Detective Superintendent Brigham, for making time for us today. Thank you for your patience this afternoon. If you would like to make some opening remarks, then we can open it up for the Committee's questions. We are conscious also of quite a bit of work being done on the other side of this wall, so if you can speak to the microphone, that would assist greatly Hansard.

Det. Supt BRIGHAM: To start off with, just an introduction of my background in policing. I have 38 years of policing experience, predominately in areas of criminal investigation. I hold a master of business administration degree, a graduate certificate in police management and a graduate certificate in fraud investigation. Between 2014 and February 2018 I was the superintendent in charge of the state intelligence division, which was part of Intelligence and Covert Support Command. During this period of time I oversaw the operations of the organised crime intelligence unit, the witness protection unit, the prison intelligence unit, the information collection liaison unit, the sporting integrity intelligence unit and Crime Stoppers.

In February 2018 I transferred to the detective superintendent role at the State Anti-Gangs Division of Crime Command. This is the current role that I occupy now. This division comprises the armed crime squad, which includes firearm trafficking teams; the vehicle crime squad; the Echo Taskforce, including the gangs crime unit; and the fugitive taskforce. At the time of my transfer of course I was briefed about the new legislation that was about to come in about firearms prohibition orders and the work that had already been done in preparation for that. My division carries the primary role in relation to the issue of the first applications, and in a way I suppose we were the ones that commenced the application processes. Those have been refined over the last 18 months. In this role I am regularly briefed in relation to current incidents and investigations and serious offences involving the use of illicit firearms.

In this role I also took over as the chair of Operation Athena, which is the National Illicit Firearms Strategy Advisory Group. It is a national group that meets quarterly. That group reports to the Serious and Organised Crime Coordination Committee, which is all the assistant commissioners of crime from around the country. The focus of Athena is in relation to illicit firearms—it is in relation to broader national strategy around that. In the serious and organised crime and illicit firearms environment the role of Victoria Police is mitigating the risk posed by the presence and use of firearms by organised crime groups and entities, network offenders and those considered a terrorist risk as a state and national priority.

Illicit firearms are obtained, we say, from six different areas: illicit firearms are obtained from grey markets, they are firearms that are pre-1996—ones that were not handed in during the amnesty period post-Port Arthur; firearms thefts; illegal importations; corrupt dealers; illegal manufacturing; and the other category is legally registered and owned firearms that may be used illegally.

Generally our approach in policing and the investigation of serious crime related to illicit firearms—the homicide squad deals with fatal shootings; the armed crime squad, or the Echo Taskforce, investigates what we call non-fatal shootings, which are shootings where someone has been injured but they have not been killed; and regional detectives investigate other shootings, such as what are commonly known as drive-by shootings. This is shootings of cars, shootings of houses that we hear about.

The general challenges around illicit firearms—one of the observations I make about a firearm is it is an enduring commodity. It does not have a use-by date. It does not break down over time. Only last week I saw a report of a firearm that had been traced that was over a hundred years old that was taken off a criminal. A firearm is basically an instrument for discharging a bullet. They may circulate around the country between criminals and between criminal groups. They may be stored in separate locations.

The next sort of category I call weapons of choice, and the challenges around the possession and locating of firearms. The challenge for law enforcement is to locate illicit firearms in circumstances where their possession can be attributed to an offender. I will give you an example of a case where a firearm was located in a toilet area of an OMCG clubhouse. In that situation the police seized the firearm but we were not able to prove any charges against any particular individual.

OMCGs and Middle Eastern organised crime groups have demonstrated a strong preference for the use of handguns, in particular semiautomatic handguns. These firearms are easily concealed and hidden. They are relatively simple to use and they are capable of firing multiple rounds in rapid succession. For example, handguns were used by the offenders in the Love Machine shooting this year and also in the Pavilion shooting earlier this year. During FPO service and searches conducted to date there have been 12 firearms located during the initial searches.

The next challenge that we face is cooperation of victims. Injury shootings are often first reported when victims attend at hospitals to obtain medical treatment. Often the victim is not cooperative or is untruthful when speaking to police—some of course will falsely claim that an injury is self-inflicted. In these types of incidents we actually do not know where the shooting occurred sometimes. A person has turned up to hospital, we do not know when it has happened, we do not know where it has happened, we do not know how it happened and we do not know who was responsible. Many victims of these types of shootings of course are known to police already. A lot of them actually know who the offender is. As a general observation, a common factor with shootings is a connection with illicit drug trafficking, so we find that some of these shootings involve non-payment of debts, extortion and blackmail in relation to that.

Intelligence is another key area of challenge. It is believed members of the community actually hold a lot of information in relation to illicit firearms, to their location, to people that have them and their movements. We are currently running a Crime Stoppers campaign in relation to illicit firearms that was launched on 25 July, and we regard that as being relatively successful to date. We have had some very good information that has come forward from the community.

The availability of illicit firearms is a key challenge. The Australian Criminal Intelligence Commission wrote a paper, which is publicly available, in relation to an assessment of illicit firearms in 2016. I am sure you have possibly seen that. They estimate there are around 260 000 grey market and black market illicit firearms in the community in Australia.

Firearms theft is the last challenge that I want to mention. Last year across Australia over 2200 firearms were stolen, around about 560 in Victoria. This has been increasing over time generally across Australia. Over Victoria it has been a bit up and down in their figures, but the challenge of course that we are left with in policing is to try and locate these stolen firearms and recover them. Otherwise they remain out there, they remain a risk out there in the community.

The firearms prohibition orders are a topic of discussion at the Athena committee meetings. New South Wales, South Australia, Victoria and Tasmania currently have FPO legislation. Other states have not yet been successful in achieving this, but the goal of obtaining FPO legislation is actually part of the national serious and organised crime strategy 2013–2018, I believe. Of note, the legislation that has been brought in between the states has variations. I would say there are currently no provisions that are exactly the same and there is no mutual recognition between jurisdictions.

FPOs assist police by providing a search power on premises, vehicles, individuals and their associates. If a person possesses an illicit firearm and are an FPO subject, this increases the likelihood that they will be detected committing relevant offences. An FPO, once in place, allows operational police to take immediate action in situations, for example, where they see a person suddenly make an attempt to avoid them. The extent

to which FPOs prevent and disrupt offences is difficult to measure and will require significant research over time.

Two examples I will give just briefly of application of FPOs: a recent FPO was issued to an offender who had repeatedly committed firearms thefts and burglaries. This offender by their behaviour was presenting challenges to the local police in so much as trying to actually detect their activities and their recidivist offending, and an FPO has been issued in relation to that subject. Part of that person's management plan actually to try and prevent them from committing further offences is having this FPO in place.

In another example an FPO was issued on a suspect for a non-fatal shooting in a situation where police had insufficient evidence to charge that person with the non-fatal shooting but certainly had other information that led to a successful application for a firearms prohibition order, thereby mitigating the future risk posed by that person.

Around other measures, some of the challenges I think that we face with FPOs are actually challenges in finding FPO subjects, and the ongoing challenge in relation to the fact that there is no requirement for that person to tell us they have changed address, so it is a bit of a cat-and-mouse game. There is the increase in the use of FPOs as Victoria Police rolls this out to the regions; this is currently underway where we are rolling out FPOs to regions with training, and to two specific areas in the first and the next phase of this. So we believe there is certainly a number of people out there that are probably fitting and worthy subjects of FPOs. The application process—we have set ourselves a fairly high bar I believe in relation to that, and some of the applications can be 40 to 50 pages long. There is quite a considerable amount of preparation involved. Having no mutual recognition of course means that if someone moves from New South Wales to Victoria, then we have to go through a whole fresh process of taking out an FPO against that person. That has happened. Managing protected information—so in cases where we have sensitive, protected information, in the current way that FPOs are managed we have to weigh up the risk of including that information in an application or not on the balance of whether that information could be at risk of exposure during a review process. Obviously we have a focus on reducing firearms thefts and there are other areas where we are actually working collaboratively with other agencies to reduce the number of illicit firearms in the community.

In relation to VCAT reviews, there are currently five I believe unresolved at this stage. There was one matter in which the person actually went through the process of receiving all the relevant paperwork and then decided to withdraw their application for review. There were two others who were associates of each other who had applied for a review and in the course of us assessing that material a decision was made to withdraw those FPOs against those two individuals. But the other matters remain live and it is fair to say some of the—

The CHAIR: Excuse me, Detective, could you just repeat what you have just said? There were a couple that had been withdrawn?

Det. Supt BRIGHAM: Two that were withdrawn, yes.

The CHAIR: Right.

Mr O'DONOHUE: Was that post the appeal?

Det. Supt BRIGHAM: No. It was a recommendation made to the assistant commissioner in relation to those two particular matters.

Mr O'DONOHUE: So it was not subsequent to Websdale?

Det. Supt BRIGHAM: No. The FPO was withdrawn, therefore making the review application cease.

So the Websdale matter, I would say, is due—the application for seeking leave to appeal—for hearing on 10 October 2019. A stay order was successfully made by Victoria Police in relation to that, and I would say really the impact of that decision has not really changed anything we do. We still continue to issue FPOs and that is ongoing, so there are new FPOs issued every week at this point. That is the closing of my introductory piece.

The CHAIR: Thank you. That was really fulsome information and is really helpful in getting, I guess, a picture of how this legislation operates on the ground. And thank you for just clarifying where we are up to with the Websdale appeal because I think that was something that was of interest to the Committee.

You have mentioned some of the limitations of the firearms protection orders and in particular I suppose it is the lack of reporting of things like change of details, such as change of address, and mutual recognition with the other states which would assist you in this. Are there any other ways that you think the scheme could be improved?

Det. Supt BRIGHAM: Look, there is potentially an opportunity to have FPOs issued on conviction for certain offences.

The CHAIR: Right, so I guess an analogy would be like the sex offender register that—

Det. Supt BRIGHAM: Yes. So for example if someone is convicted of trafficking firearms, an FPO is automatically issued.

The CHAIR: And I suppose that way it would be issued by a magistrate.

Det. Supt BRIGHAM: That is right, and it would require some—

The CHAIR: So it would be rather than by the police themselves. Yes, that is interesting. I have got some questions, but I will let my colleagues—

Mr O'DONOHUE: Detective Superintendent, thank you very much for your evidence today. I would just like to explore a bit further. You said that following the Websdale decision it has not impacted on Victoria Police's operations or approach to issuing FPOs. But I note that the Minister, on 5 June at the Public Accounts and Estimates Committee, said that 181 FPOs had been issued at that time, and now I think the information Victoria Police provided to the Committee is that there have been 223 FPOs issued since the scheme commenced. During the debate on the introduction of FPOs, during the second-reading debate it was said publicly by Deputy Commissioner Patton and by the Minister that there were around 2200 subjects who would be issued, or considered to be issued, with an FPO. So I suppose my first question is: if the decision of VCAT or Her Honour Justice Hampel has not impacted on the issuing of FPOs, why have only 223 been issued and not more?

Det. Supt BRIGHAM: The reason for that I think, firstly, is that it is a new process for us—the application process and working through preparing applications, submitting applications—and that largely has been occurring within Crime Command up until now. So it has not been rolled out regionally yet. And we are trying to set up a better regime actually for what we call person of interest management of FPO subjects. So before we go handing this over to the regions we want to make sure that we have got that right. So it is about: how do you manage a person who has got an FPO in place? What are the minimum things that you would need to do to keep an eye on that person?

The CHAIR: Can you give us an example of what that might be?

Det. Supt BRIGHAM: It is about maintaining a watchful eye in relation to: is that person still living where they are living? Who are they associating with? Have they had any interactions with police or authorities? Are there any opportunities to use the FPO powers? Is there any intelligence that has been received in relation to that particular individual?

Mr O'DONOHUE: I appreciate the answer, but to just go back to the second-reading debate at the end of 2017 and into early 2018, there was a lot of discussion about the need to pass the legislation as quickly as possible without amendment so that with all the work that had been done in identifying people who could be the subject of an FPO they could be served with an FPO. So it does seem curious that only 223 have been issued thus far, noting the five-year average in New South Wales up to 30 June last year was 730 FPOs, or their equivalent, per year. So are you confident that the decision of Her Honour Justice Hampel has not impacted on Victoria Police's determination of whether to—

Det. Supt BRIGHAM: No, that is right.

Mr O'DONOHUE: Okay, so the number of FPOs being issued currently, is that likely to remain roughly the same in coming months?

Det. Supt BRIGHAM: Well, it is likely to increase as we roll it out to the regions and we have more people actually submitting applications.

Mr O'DONOHUE: So how will—

Det. Supt BRIGHAM: Might I also say, though, that the New South Wales criteria is actually different; the wording is different. To satisfy the criteria that they have is arguably easier than in Victoria.

Mr O'DONOHUE: I suppose I just reference New South Wales because the Minister referenced New South Wales in her second-reading speech and in debate about the effect the FPO regime in New South Wales had had in tackling organised crime and driving down crime. And as we have seen in New South Wales, crime has actually been on a downward trend now for many years, arguably linked to their FPO regime. If I could ask one follow-up question, Chair: Deputy Commissioner Patton identified around 2200 people that could be the subject of an FPO prior to the legislation being passed. The Minister referred to that number publicly as well. When do you think the 2200 will be issued with an FPO—or the application for an FPO on those 2200 will be concluded?

Det. Supt BRIGHAM: I think to get up to numbers like that would depend on the allocation of resources within the regions once the rollout is done.

Mr O'DONOHUE: When is that likely to occur? When is the rollout likely to be—

Det. Supt BRIGHAM: Well, the rollout is occurring right at the moment, so—

Mr O'DONOHUE: When will it be finished?

Det. Supt BRIGHAM: It is due to be finished by mid next year.

Mr O'DONOHUE: Mid next year?

Det. Supt BRIGHAM: Yes.

Mr O'DONOHUE: Okay.

Dr KIEU: Thank you, Deputy Superintendent Brigham, for coming here and giving us some insight into the issue. I would like to come back to the use and availability of the illicit firearms. Do you have any concerns about, or have you seen any trends about, distributed components of firearms, so different parts of an organised crime ring—so one can have the barrel, the other one may have some other part of the gun and, when needed, they can reassemble it and use it, but individually each component is not illegal, or maybe hard to prove illegal, and also is meaningless if it just stands by itself? Do you see any trend of that? Is there any concern about that?

Det. Supt BRIGHAM: Well, I am aware of an AFP investigation last year where they detected firearms parts being imported into Melbourne and subsequently were watching that person; they had a plan obviously of bringing in various parts so they could make up firearms. And ultimately that person was arrested. But the trade of firearms parts as such, it is not really something that we are seeing. We are seeing the movement of actual whole weapons that are concealed, but not the broken-down movement of them.

Dr KIEU: Following that, do you have any insight about some of the new emerging technologies in producing or manufacturing firearms illegally, like 3D printing or some other means?

Det. Supt BRIGHAM: It is certainly, through Operation Athena, something that we monitor around the country, the emergence of 3D printed firearms for example. We are not seeing an increase in detections around that; it is fairly low level by number. One of the things I believe, in response to that, is that the 3D firearm is only capable of firing one shot. And I think some people would not be confident to actually use it because they

might be worried that it might virtually blow up in their hands. And, you know, it is that balance with the availability of other firearms. So I think if other firearms became harder to get, then there may be a surge or an emergence of those manufactured and 3D-type firearms, but we are not seeing it at this point.

Dr KIEU: Lastly, apart from the organised crime like the Middle East or the outlaw motorcycle gangs, have you seen any evidence of increased availability of firearms to a younger group of people or some others not classified as organised crime?

Det. Supt BRIGHAM: Probably within what we say are the Middle East crime groups are young male offenders—young men—that seek to get hold of firearms and that are involved in some of these fatal and non-fatal shootings, but mostly linked within those groups rather than others. But there are various detections of police just pulling over a car and finding a firearm in possession of a variety of different people.

Dr KIEU: But it is not an increased trend you can see?

Det. Supt BRIGHAM: Well, we are seeing an increase, I suppose, in possession of illicit firearms in relation to drug investigations. So people that are dealing in drugs, often we will receive information they also have firearms, or they may be selling drugs and selling firearms too.

Ms VAGHELA: You say that the challenge with the firearms is that there is no use-by date. So considering that in mind, in terms of the limitation of the current FPO scheme, what are the limitations? And would you change the current FPO scheme, and if you do, how would you change it?

Det. Supt BRIGHAM: Okay. I think with the FPO scheme it is really in its infancy at this point, so police are learning how to best leverage off that and incorporate that in their strategies. I think really for us it is a challenge of actually locating firearms, and in another way most of these people do not cooperate with us. They do not tell us where the firearm came from, how much they paid for it or when they bought it. So I suppose the scheme complementing schemes that are operating in other jurisdictions is an advantage, because we know that stolen firearms, for example, are moving from one side of Australia to the other. A lot of these networked offenders—these organised crime groups—are very proficient at moving these commodities around.

But as far as the scheme goes, I think only what I have already mentioned in so much as knowing where a person is actually living, for a start, because the way I see it is offenders will get used to the legislation, they will get used to finding ways around discovery. And searching for firearms is always challenging for police.

Ms VAGHELA: In relation to the Websdale case and VCAT's decision, do you think VCAT is the right body to hear the appeals?

Det. Supt BRIGHAM: Look, it is probably not something that I am in a position to answer, I do not think that question.

Ms VAGHELA: So what are the strengths and limitations of VCAT to hear such appeals? The decision that was given for Websdale, I understand that is going to be heard now at the Court of Appeal on 10 October.

Det. Supt BRIGHAM: Yes. Well, I think we will await the outcome of the Court of Appeal decision, and we will consider that carefully, whatever that decision actually is.

The CHAIR: Following on from Ms Vaghela's questions, one of the issues around VCAT was that section 4A of the legislation. In rolling this program out to the regional areas you mentioned that you were providing training and guidelines and preparing the processes in those regional areas. Could you assist us with what sort of guidelines you provide to police about 4A of the legislation? How do you, I suppose, explain 4A to police officers but also the public interest test in section 112? I am guessing that is the information you need to provide to police in the regions?

Det. Supt BRIGHAM: Yes. Really, the training of actually putting together an application, and the application is broken down into addressing the sections of 112E—

The CHAIR: Four sections, yes.

Det. Supt BRIGHAM: (a), (b), (c) and (d). So how those applications are framed varies from case to case. But you know, what we see is that there are layers of supervision and management that occur in the workplace in any event. If a detective was to say, 'Look, I've decided I'm going to put in an FPO application on this particular individual', they may discuss that with their sergeant, and then the sergeant may say, 'Look, I don't think this one's got enough in it actually to progress this. I've had a fair bit of experience with these applications, and I don't actually think this one has enough'.

The CHAIR: Yes.

Det. Supt BRIGHAM: Then it goes through to the inspector of the unit. At the moment we have the inspector who reviews all applications as well, and then of course the delegate has to be satisfied when the delegate reads it. And we have had quite a number that have been rejected by the delegate.

The CHAIR: Okay.

Det. Supt BRIGHAM: So, I think, in answer to your question, the public interest test is actually built into the consideration of all applications in weighing up the merit of an application.

The CHAIR: Right. And given that there is a delegate who needs to sign off on it—

Det. Supt BRIGHAM: Ultimately, yes.

The CHAIR: Ultimately. With the orders that have been issued so far—I think 223 orders—we have received the breakdown of the rank of the person who made the order. I am just wondering how many of those orders might have come out of your division, or have those 223 come across from a broad range of divisions?

Det. Supt BRIGHAM: At least half.

The CHAIR: Right. Yes.

Det. Supt BRIGHAM: I mean, that, I suppose, speaks for itself in so much as we are dealing with those people that are in that environment that are the greatest risk.

The CHAIR: Well, exactly. I mean, it was those gangs that this legislation was implemented to deal with.

Mr O'DONOHUE: Just a question again following previous questions. The decision of Justice Hampel you said basically has had no impact on the way Victoria Police is approaching the issuing of FPOs and preparing the issuing of FPOs. Whilst it is a hypothetical, with the leave for appeal and the appeal, if granted, now listed for early October, there is a very real prospect that Her Honour's decision will be upheld. Noting the chief commissioner has previously said he will ask the Government to redraft the laws if that indeed occurs, if you were starting this again, what different advice would Victoria Police provide to Government when it comes to drafting the FPO regime?

Det. Supt BRIGHAM: I really do not know that I can answer that question. I am not a legal expert in relation to that.

Mr O'DONOHUE: Maybe I can ask a different question. What flaws are in the legislation that led to the regime failing at its first test?

Det. Supt BRIGHAM: Again it is subject to appeal and we do not have a final outcome for that yet. I think the balance in Justice Hampel's decision related to the prospect of the subject person coming into possession of a firearm in the future. That is one of the things it came down, I believe. There is various information—the substantial evidence that was provided to VCAT—and it is a balance on that which is in a way a risk assessment when it comes down to it.

Mr O'DONOHUE: If I could take you back to the issue of the number of searches, you mentioned that there have been 12 guns seized from the searches that have been conducted. Can I ask: how many searches have been conducted in total? You did give some evidence to the Committee in response to the questions: '120 searches detected an offence, resulting in 139 individual charges being laid'. That is correct?

Det. Supt BRIGHAM: Yes.

Mr O'DONOHUE: Can I ask: in addition to the 12 guns, what else has been found, or what has been the general nature of the 139 charges that have been laid?

Det. Supt BRIGHAM: A lot of the things found relate to drugs—hydroponics set-up is one, various different drugs, other stolen property.

The CHAIR: Just adding on from Mr O'Donohue, the 12 firearms that were found in those searches, and we know that 139 individual charges have been laid—are those 12 the only firearm-related offences that—

Det. Supt BRIGHAM: That come out of it?

The CHAIR: come out of that?

Det. Supt BRIGHAM: Yes. I believe so.

The CHAIR: Yes. So the rest were drug offences and other offences.

Dr KIEU: Detective Superintendent, were you ever concerned about the fact that there is no cross-jurisdiction collaboration? That could, as you already mentioned, open the loophole for different organised crime gangs to cross the borders. But more than that, what about the terrorists, what about the extremists with the ability to access firearms, or something more cynical? Is there any step being taken between the police of different jurisdictions or is there anything that you think should be done in order to have perhaps a national approach? What do you think about the issue there? Is there anything that should be done?

Det. Supt BRIGHAM: Well, there is actually a national firearms and weapons policy working group. I am not a member of that working group, but I understand that that working group has that as an action item to look at—to look at ways of interoperability between jurisdictions and improving legislation and the alignment of legislation.

Dr KIEU: At the moment there are still a lot of loopholes and also a lot of uncertainties and potential for—

Det. Supt BRIGHAM: Well, it is a question around alignment being that the legislation has been issued in different jurisdictions and none of it looks exactly the same, so that is something to be considered.

Mr O'DONOHUE: Just further to my colleague Dr Kieu's point, did Victoria Police, in its advice to Government, consider adopting the New South Wales regime to mirror the New South Wales regime, given that 730 FPOs are being issued each year and given its proven success? Was that considered as part of the advice to Government?

Det. Supt BRIGHAM: I do not want to sound like I am avoiding your question, but I actually was not a party to all those steps that had taken place before I came into the role. So basically the legislation was at a point of finalisation and implementation in May, which was two or three months after I had actually commenced. I think all that actually occurred back in 2017.

Mr O'DONOHUE: Moving forward, would it be fair to say that more harmonisation with the FPO regimes in other states would assist Victoria Police in managing some of these offenders who obviously work across borders?

Det. Supt BRIGHAM: Yes.

The CHAIR: And in that, that would be also just that information sharing and that ability for mutual recognition of those protection orders?

Det. Supt BRIGHAM: Yes.

Ms VAGHELA: You talked about some of the general challenges you have faced in policing organised crimes. FPOs assist in policing those organised crimes. What measures could be put in place or introduced in addition to what you have to make those challenges a little bit easier?

Det. Supt BRIGHAM: I probably do not have anything I can add to what I have previously said in relation to that—just around having knowledge of where a person currently resides, similar to registered sex offenders that are required to advise police within 24 hours of a change of address. That would certainly assist us.

Mr O'DONOHUE: You mentioned that there are five VCAT reviews yet to be heard. Have they been listed for hearing, those matters?

Det. Supt BRIGHAM: Several of them, I know, are in October, and two of them are relatively new so they are just moving through the early stages of the process of the exchanging of relevant paperwork between parties.

Mr O'DONOHUE: Right, but there are at least a couple that are listed to have the actual hearing in October?

Det. Supt BRIGHAM: Yes.

Mr O'DONOHUE: After 10 October?

Det. Supt BRIGHAM: Yes.

Mr O'DONOHUE: So VCAT's determination may well be informed by the appeal listed for the 10th?

Det. Supt BRIGHAM: May.

Ms VAGHELA: The VCAT decision in early October, if it is not overturned, then the chief commissioner is saying that they will change the law. What sort of things will be included as part of the change of the law?

Det. Supt BRIGHAM: Again, I think it would be a matter of considering the actual decision that is made and clarifying the points that come out of that to look at what part of the law or what wording in the law could be altered to effectively make the application process fit into such a case. It is difficult to speculate at this point in time until a decision is actually made and that decision is read and understood.

The CHAIR: Can I just finish up on that section 112 and the public interest, because I guess that is the question that VCAT ultimately decided—that the test of public interest had not been met. In determining that are there some rules of thumb or some information you could provide to us as to how the police determine that public interest, understanding that we have got the main points of what that public interest test is? Given that VCAT found the balance between public interest and the freedoms of the individual did not meet, is there any other information you could provide the Committee on assessing that public interest?

Det. Supt BRIGHAM: I will take that on notice I think. I will have a look at our guidelines and see if there is something I can get to you.

The CHAIR: Thank you, Detective Superintendent Brigham. That has been really helpful for us.

Witness withdrew.

WITNESS

Ms Corri McKenzie, Deputy Secretary, Police, Fines and Crime Prevention, Department of Justice and Community Safety.

The CHAIR: As you know, this is an Inquiry into Firearms Prohibition Legislation, and the evidence taken at this hearing is protected by parliamentary privilege, so you are protected by law for anything you say today. Of course any comment repeated outside the hearing does not have the same protection, and any deliberately false evidence or misleading of the Committee may be considered a contempt of Parliament. As you can see, the evidence is being recorded, and you will be provided with a proof version of the transcript, which ultimately will end up on our website.

If I can ask, because on the other side of this wall we have quite a bit of action going on—

Ms McKENZIE: Of course. I passed through it, yes!

The CHAIR: It is like the harbour bridge—once we get to one end, we start again. So if I could ask that, for the assistance of Hansard, you speak into the microphone if you can. If we could hear some opening remarks and then open it up for questions, that would be great.

Ms McKENZIE: Absolutely. Thank you very much, and thank you very much to the Committee for providing the department with the opportunity to give evidence today. Just by way of introduction, I am the Deputy Secretary. I have responsibility within the Department of Justice and Community Safety for the portfolios of police, fines and crime prevention, so a fairly significant proportion of our policing responsibilities is about working with Victoria Police on the legislative and policy-setting environments for the purposes of operational policing. Obviously there are a number of operational policing questions which you have obviously just had the opportunity to speak about with Victoria Police, so I will defer to them. We obviously take significant advice from police on operational matters, and that includes in relation to the Minister's responsibilities and the department's responsibilities to support the Minister in the administration of the firearms legislation and how that relates. So that is the groundwork primarily.

Of course the department worked very closely with Victoria Police in preparing the original FPO amendment to the *Firearms Act*, and we have been continuing to work with them both at a state level and obviously it is also an issue of some significance nationally in the national intergovernmental arrangements as well, so we continue to be involved at that level too.

The CHAIR: Yes, great. Thank you. Again, thanks for making time, and as we heard from Detective Superintendent Brigham, there are probably areas that they would like to see improvement in. From the department's position, are you already starting to see some limitations to the scheme currently? Given that VCAT appeal and the decision that was made there, has that given the department time to—

Ms McKENZIE: Pause for thought?

The CHAIR: Yes, pause for thought.

Ms McKENZIE: Look, I should probably just draw on the fact that the firearms prohibition orders have been in place for only slightly longer than 12 months at this point, and without wanting to comment on the operational decisions of Victoria Police and their deployment at all, which is obviously a matter for the chief commissioner, I think the previous witness would have talked to you about taking quite a measured approach to the introduction so that the new orders can be understood in operation as well. So I would flag that. So I think from the department's perspective we are continuing to liaise with police about their operation in practice, and Victoria Police are continuing to issue orders. We are also obviously mindful of any impending court decisions. But given that a number of matters are currently before the courts, the department would not comment on those at this point.

The CHAIR: Could you explain, hopefully, the reasons for the appeal process going to VCAT rather than through the courts? The firearms prohibition order is a fairly important order. I must say, I think during the second-reading debate we were somewhat surprised that VCAT was the preferred appeal option.

Ms McKENZIE: I think each of these orders sits within a suite of existing legislative and regulatory activity, and so consistency with the broader regulatory activity of that Act is obviously an important consideration in informing the pathways for appeal mechanism. Obviously, as we are seeing at the moment, an administrative decision of VCAT is also able to be appealed to the Court of Appeal, so there are obviously also mechanisms by which that can be brought into the broader court system as well.

The CHAIR: In saying that, are there any other similar, I suppose, orders that go through VCAT that you drew from in recommending the VCAT pathway for these orders?

Ms McKENZIE: I would have to take that on notice, but I will come back to you on that.

Dr KIEU: Thank you for coming. Just to follow up the question from the Chair, the active appeal avenue that is with VCAT that you mentioned is within the larger regulatory framework. Would that mean that it would be very difficult to change that, if we need to change that, to another different judicial avenue, other than VCAT, if this need to be changed?

Ms McKENZIE: The legislation obviously prescribes the appeal avenues, so that would be a legislative change. So if there was to be any change to that appeal avenue, that would require a legislative amendment, and then all of the normal scrutiny that comes through a legislative amendment in terms of if there are budget resourcing implications arising, which we would normally do in the course of parliamentary consideration.

Dr KIEU: Just to follow on, the department was involved in drafting the last amendment, which has now become an Act.

Ms McKENZIE: Yes.

Dr KIEU: You mentioned that it has been in operation just more than 12 months. The previous witness for the police said there is a rolling out period and that is why the rate of serving FPOs is actually not there yet as compared to New South Wales or other jurisdictions. You also have been liaising with the police. This is difficult because this is still in an appeals process and the police have to wait and see what the outcome will be. But there is some concern—and also expressed concern—about the wideranging scripting of section 4A. For example, for a normal person on the street, a person would have to satisfy certain criteria before he or she was to be served with an FPO. Now an appeals officer would say because that would infringe on human rights like being able to see friends, family or go to the greyhounds or some other thing and it is not for a normal person, that is not a good enough reason to overturn that for people who have been to prison. But people have been in prison because of certain convictions, and they lose their rights to go outside and to go to nightclubs and see people. So in that sense the interpretation is open too much for certain decisions to be handed down and overturn the FPO. Would the department have any consideration of that?

Ms McKENZIE: I am sorry, just to clarify your question: consideration of the outcome of the appeal of the VCAT decision, is that your question?

Dr KIEU: Yes.

Ms McKENZIE: The department would not have any comments on matters before the court currently. Given that the particular VCAT decision that I think you are referring to is currently the subject of an appeal, and that there are a number of others in train, we would wait and see the outcome of those judicial hearings.

Dr KIEU: Okay, I understand that. In terms of the question raised earlier with the previous witness, with the rapidly changing landscape of new and emerging technologies—one is 3D, but there could be some other things. We know, for example, that 3D printing is not widespread yet, also it could only fire one single shot and also it is more likely than not to be harmful to the user because of the construction. Because of the rapidly changing adaptation of technology that could potentially be another channel for illicit firearms. Do you think that should be incorporated in order to move with the times?

Ms McKENZIE: I would say that we will obviously continue to take the advice of Victoria Police in terms of the emergence of particular weapons or weapon types. I would say that in the Act the definition of 'Firearm' and 'Firearm related item' are two separate definitions. Both are designed to describe the action of a firearm rather than the specific nature of a firearm. Specifically for the purpose of the question that you raised, which is that we are always seeing an evolution—3D printing is obviously an immediate one that is very current in public discourse at the moment—but there is always the emergence of different mechanisms and manufacturing processes or practices. So the two definitions are really designed to reflect the function of the item rather than to describe the item in itself, and that is really because the function is what causes any potential harm rather than the fact of an instrument or an object in itself.

Dr KIEU: The description of which could become obsolete very soon.

Ms McKENZIE: Yes, exactly, and so the way firearm is articulated in the Act to someone reading it on the street—I am not sure how many people pick up the *Firearms Act* on the street, but if they did, it does not seem necessarily immediate, but really that is exactly the purpose, which is that there is a particular kind of function of an object which would cause harm. That is what is sought to be described in the act, really, to pick up that evolution and the changing nature of firearms, but then also the kind of adjacent, related items that might be developed.

Mr O'DONOHUE: Thank you, Ms McKenzie, for being here today and for your evidence. You mentioned in your response to the Chair's question that the context of the appeal process, the initial appeal process to VCAT, needs to be considered as part of the administrative framework of the system and that VCAT considers administrative appeals. The FPOs deal with, according to the Minister and Victoria Police, some of the most dangerous offenders in Victoria. Can you name another list or another appeal process which deals at VCAT with some of the most dangerous criminals in Victoria?

Ms McKENZIE: I took the Chair's question on notice on a similar question, Mr O'Donohue, so I am very happy to come back to you on that.

Mr O'DONOHUE: I think it was a different—

Ms McKENZIE: Sorry.

Mr O'DONOHUE: You are not able to answer the question?

Ms McKENZIE: Not off the top of my head, but I am very happy to come back to you. I will take that on notice.

Mr O'DONOHUE: Okay, sure. As a follow up if I may, Chair, just a couple more questions. You mentioned in your earlier answers, as the Victoria Police did too, the need to work across jurisdictions and that there are intergovernmental agreements being worked on and that are in place in relation to these issues. As part of the department's advice to the Government, did it consider adopting the New South Wales legislation so that there was jurisdictional certainty between the two states?

Ms McKENZIE: I cannot comment specifically on the department's advice to the Government in the context of that in-confidence piece of advice. However, I would say that in preparing the legislation, what became the FPO amendments, the department and the scheme were broadly informed and were certainly drawn from the New South Wales scheme. I think the Minister referred to that in her second-reading speech. Then also of course the New South Wales scheme had been in operation for a couple of years prior to that too. The South Australian scheme was obviously an information point, as was the 2016 Ombudsman's review of the operation of the FPO scheme in New South Wales. So certainly the Victorian scheme drew very heavily on the New South Wales scheme and, as I said, that was reflected, but there are obviously a range of different information points that informed the particular design of the scheme itself.

Mr O'DONOHUE: Sure. Just one more follow-up, if I may. I noted that Detective Superintendent Brigham in his evidence just now said—well, in his view, anyway—that the Victorian scheme is more restrictive than the New South Wales scheme. Is the department surprised that there have only been 223 FPOs issued given that Deputy Commissioner Patton identified 2200 potential people who could be the subject of an FPO prior to the

legislation being passed, and given that New South Wales has issued 730 FPOs per year on average over the five-year period to 30 June 2018?

Ms McKENZIE: I think, without wanting to be cute about your question, Mr O'Donohue, the question of the number of FPOs issued is really a question about how Victoria Police operationalise the use of the order. So from the department's perspective we are obviously looking to understand how the scheme is operating in practice, and we will continue to take advice from Victoria Police, but in terms of the numbers issued we would really defer to Victoria Police on how the scheme itself is being operationalised and how they choose to deploy that as part of their ongoing and broader suite of operations.

Mr O'DONOHUE: Final question, Chair, if I can. Just noting that you will take advice from Victoria Police and work with Victoria Police, and the chief commissioner's public comments that if the appeal on 10 October is unsuccessful he will ask Government for amendments to the FPO legislation, has the department prepared or is the department preparing legislative change in the event that Justice Hampel's decision is upheld?

Ms McKENZIE: We have not been provided any formal request from Victoria Police to make any changes, and we would not comment on any matter before the courts.

Ms VAGHELA: Thank you, Ms McKenzie, for your time today. In your view, do you think FPOs are effective in preventing access to illicit firearms? And if the answer is yes or no, what do you think are the limitations of the FPO scheme?

Ms McKENZIE: Very good question. I will not offer a personal opinion on the effectiveness—

Ms VAGHELA: Department's.

Ms McKENZIE: I think there are a suite of tools available to Victoria Police, and that includes the range of licensing and regulation capabilities, including those set out in the *Firearms Act* and including FPOs to tackle the illegal use of both legal weapons and illegal weapons in Victoria in the interest of community safety. As Detective Superintendent Brigham referred to earlier, Victoria Police are issuing FPOs and there have been instances of both seizure and charge as a result of the use of those powers, and I would infer from that that they are one component of the suite of interventions available to curb the illegal use of weapons.

Ms VAGHELA: You mentioned that the department played a role in amendments. Would you come up with any amendments down the track if the department was involved? What sort of amendments would you come up with for the current FPO scheme?

Ms McKENZIE: The department would obviously take the advice of Victoria Police, particularly in the operations of the scheme and the need for those operations to inform any future amendments, which of course would be subject to the decision of Government.

Ms GARRETT: Just in terms of the current draft of the legislation—I have not read Hampel's entire decision—looking at the extracted quotes about it it appears there is a reference to perhaps somebody having a right, so to speak, to have the firearm unless it is proven otherwise. Do you think that needs to be strengthened, or do you have a view about that?

Ms McKENZIE: Obviously without wanting to comment on current judicial proceedings, of course.

Ms GARRETT: Yes, just the Act itself, the drafting—does it need to be tightened?

Ms McKENZIE: I think in terms of the operation of the Act, the Act is drafted clearly at present. This is the broader Act, not just in relation to the FPOs, to regulate the use and possession of weapons, of firearms, in Victoria. So I think it is important in considering the treatment of particularly that public interest test in the FPO amendments. I think it is important to consider the regulatory framework for the use and possession of firearms more broadly in the state. This is a sort of subset component being targeted, so a very specific set of circumstances. I think there has been some commentary on the public interest test component of the FPO scheme, and I think obviously I would say that the public interest test, in that sense, reflects the legislation in other jurisdictions too. It is also present in the New South Wales legislation, for example. It is a term fairly

widely used in and across the legislative framework for providing a judicial reference point for decision-making, and it is obviously also the chief commissioner's reference point for decision-making in the deployment of orders. But I think the other component that is specific in the FPO components is the connection between the public interest test and the terms which are set out, so it is really because of the criminal history of the individual—because of the behaviour of the individual, because of the people with whom an individual associates. So it is a defined public interest test the way this legislation is currently drafted. Again, that is set within the broader piece.

Ms GARRETT: Do you think that is strong enough in your view, in the department's view?

Ms McKENZIE: Certainly the department was informed of the development of the legislation and we were involved in the process. I think we would be informed by its operation, and obviously that is a consideration for courts at the moment.

Ms GARRETT: I understand you cannot comment on the specific case, but obviously the case has caused significant consternation about the way in which the Act is functioning.

Ms McKENZIE: I understand, yes.

Ms GARRETT: So, yes, we will wait for the outcome of the case, but I do not imagine people envisaged that that would be the outcome of the legislation. I assume we are all sitting here for a reason. Obviously you are not able to comment, but clearly if it needed to be tightened?

Ms McKENZIE: I think certainly, as I said before, we are continuing to liaise with police in relation to the operation of the legislation, and they are continuing to issue orders under the Act. That is certainly important for us in understanding the operation of the scheme independently of judicial considerations.

The CHAIR: Going on from that, I think it is interesting that the finding was that actually the restrictions placed were too onerous and that the limitations on a person's liberty and who they can associate with were too onerous. Is that a path that the department is alive to—the restrictions that the FPO places on the individual?

Ms McKENZIE: I think we will continue to monitor the operation of the Act in all of its guises. As I said before, obviously the FPOs are really significant and, as you said, Ms Garrett, subject to the attention of the Committee. They are obviously a very significant component of the Act, but the *Firearms Act* and its operation overall is a pretty significant component and part of our work is that we very actively monitor its use and application as well. That operationally, obviously, is informed by Victoria Police, but we will absolutely continue to do that in the context of FPOs and in the broader *Firearms Act* as well.

The CHAIR: There have been 205 searches of people with firearms protection orders and, out of that, 139 charges have occurred. The previous witness told us that 12 of those were firearms offences. Given that the whole purpose of this amendment and of this legislation was to address firearm offences, are you concerned how many charges are non-firearm-related charges as a result of firearm protection orders?

Ms McKENZIE: I think it is hard to draw an inference without having the operational information and detail of the way those charges were laid and how those, for example, drug-related offences might co-occur with weapons offences. We know that there is a prevalence of that in crime statistics reporting, for example. It is hard to infer from the numbers alone for me how that actually applies in practice. I think we would certainly continue to monitor it to understand how the FPOs were being administered and how they were kind of being operated and what the operational implications of that might be in the longer term. But I think particularly on the numbers, both the fact that it has been 12 months, which in operational legislative times is not the longest period of time in the world, I think there is that to bear in mind. You would want to see a period of time to see a pattern of behaviour emerging to understand what that might actually look like. But on that point I would say that the Crime Statistics Agency's information and data on some of the co-location of different offences and how they occurred together is important to reflect on in this setting.

The CHAIR: Yes. Well, the information provided to us by the police was 120 searches of the 205 searches detected an offence, and 139 individual charges were laid. We have just heard that only 12 of those related to firearms. Is the department collecting their own data on the effectiveness of the firearm protections orders?

Ms McKENZIE: The Crime Statistics Agency is our primary source, which comes directly from the police's database.

Dr KIEU: The department has been working in consultation with and receiving advice from the police, but another function of the department is also working in partnership with community. Have you, from the perspective of information from the department, seen any increase in infiltration or availability of firearms in the more general community as opposed to organised crime which is more a statistic kept by the police?

Ms McKENZIE: I think as a department we would not necessarily, outside Victoria Police—obviously the licensing and regulatory division of Victoria Police is the front line of that regulatory capability and licensing capability—see a prevalence of firearms beyond through the statistics that the Chair mentioned just earlier. Certainly our engagement on the issue of firearms and the regulation and licensing environment is broader than Victoria Police, as you say. We support a number of firearms engagements both with industry and with the sporting shooters, for example, and then with broader community as well in both legal and non-legal settings. There is a broad range of community engagement more broadly, but no data source that I am aware of that would add to the crime statistics and the licensing information from police.

Mr O'DONOHUE: Can I just first of all ask a follow-up question to Dr Kieu, talking about the engagement with the department: can you confirm that the department's firearms consultation committee has not been meeting in the last 18 months to two years?

Ms McKENZIE: I will have to take that on notice, but I think it has met. I will take it on notice; let me confirm for you, Mr O'Donohue.

Mr O'DONOHUE: Perhaps if you could confirm how many times it has met in the last two years, that would be great.

Is it the department's view that the delegation to superintendent or above for an FPO is appropriate?

Ms McKENZIE: Certainly that is what is reflected in the Act and that is how the practice seems to be occurring in a reasonable way, so I do not think there is a particular perspective the department would bring to that.

Mr O'DONOHUE: And similarly—noting the questions the Chair asked just in the previous set of questions—does the department view the issuing of FPOs for a 10-year period as an appropriate length, or do you think that is too long? Or conversely, too short?

Ms McKENZIE: I do not think the department would have a particular perspective on that beyond what is in the legislation currently.

The CHAIR: Thank you, Ms McKenzie. Just following up again from Dr Kieu and your response to other measures to control illicit firearms, and you were mentioning some of the community engagement, could you provide us with a couple of examples of those other measures that the department is rolling out?

Ms McKENZIE: Sorry; my apologies if I misspoke earlier. The consultation is not necessarily about the curbing of illegal or illicit firearms, though obviously there are a range of circumstances and engagements that the department undertakes where the issue may arise. We do undertake a range of consultations—Mr O'Donohue mentioned the firearms consultative committee earlier—so that there is a range of both standing and informal engagements with a really broad range of stakeholders and organisations with particular perspectives, and obviously firearms is an area of licensing and regulation which draws particular attention from a really diverse group of community members. So we will continue to do that in both, as I say, those formal and also informal settings. I am thinking about a lot of the community legal centres, for example, with whom we would engage on a fairly regular basis both informally and through other formal mechanisms who would have a perspective, but not necessarily through a formal mechanism like the firearms consultative committee.

Ms PATTEN: So on that, I suppose, I am just looking at what other measures the department is undertaking to control illicit firearms. Certainly we have got our licensing regulation, we have now got firearms protection orders and we have got a general Act. Are there any other measures that the department is undertaking?

Ms McKENZIE: The department also participates particularly in intergovernmental work and, as I think the superintendent mentioned before, there is obviously significant attention to cross-border and indeed international flow of weapons in the same way that there would be elsewhere. So the department particularly is continuing to engage with our colleagues in other jurisdictions about the ongoing monitoring—both the use of and inflow and various flows of weapons—and will continue to do so, particularly with a focus, given our areas of responsibility, on the kind of policy and legislative settings that would support improved community safety as a result of reducing illicit weapons.

Ms PATTEN: Any further questions? Thank you very much, Ms McKenzie, and I appreciate you taking some of those questions on notice.

Ms McKENZIE: Will do. I will follow up asap. Thanks very much.

Ms PATTEN: Thank you.

Witness withdrew.

WITNESS

Ms Melinda Walker, Co-Chair of Criminal Law Section, Law Institute of Victoria.

The CHAIR: Good afternoon. Thank you very much for coming to this hearing. We really appreciate it and are really looking forward to getting your feedback and your thoughts as part of this Inquiry.

Ms WALKER: Good afternoon, all.

The CHAIR: We have had a few apologies, but just to explain that the Committee is hearing evidence today in relation to the Inquiry into Firearms Prohibition Legislation. All evidence taken at this hearing is protected by parliamentary privilege, so anything you say here today will be protected. However, any comment that you make outside this hearing may not be protected. Any deliberately false evidence or misleading of the Committee may be considered a contempt of Parliament. As you can see, all evidence is being recorded. We will provide you with a proof transcript of that over the next few days, and ultimately the transcript will be posted up on the Committee's website. If you wanted to start with a few thoughts, then we will open it up to the Committee.

Ms WALKER: Thank you, and thank you again for inviting the Law Institute of Victoria to contribute to this Inquiry. I would first like to acknowledge the traditional owners of the land on which we are meeting today, the Wurundjeri people of the Kulin nation, and I would like to pay my respects to their elders past, present and emerging and any elders from other communities that may be present today.

I was given a number of questions that you may be interested in. I am using that as a guide, if I may, and I understand that there is scope for written submissions to be made. These are still being prepared, so there may be some questions that you have which I will take on notice. I will have those inquiries made and put into the submissions when they are done.

One of the first questions that was posed to me was how would the Law Institute determine public interest as it is articulated in the statute. It is not in the statute at the moment, and we say that it should not be. The term 'public interest' derives its content from the subject matter and the scope and purpose of the enactment in which it appears. It is a broad concept that is flexible enough to respond to the facts and circumstances of every case, giving the decision-maker—the commissioner or a reviewer—the ability to have regard to a wider variety of factors in choosing whether to exercise a discretion adversely to an individual.

Just to pause there, the Australian Law Reform Commission undertook an inquiry into serious invasions of privacy in the digital era, and their report is ALRC Report 123, from June 2014. Albeit that it was in the context of whether or not freedom of expression was being interfered with—with publication and media publication—there is an interesting recommendation by them, and I will just quote:

> 9.36 The ALRC recommends that the Act include a non-exhaustive list of public interest matters that a court may consider when considering whether an invasion of the plaintiff's privacy was justified, because it was in the public interest. The list would not be exhaustive, but may provide the parties and the court with useful guidance, making the cause of action more certain and predictable in scope …

So obviously public interest can take a number of different forms when it is being considered for different circumstances, and that can include: the dissemination of private information; the exclusion of evidence on the grounds of public interest immunity, which this Act has; the administration of justice and fair hearing; public interest in the proper administration of government; public health and safety; to ensure open justice; the freedom of expression; the freedom of the media, particularly to responsibly investigate and report matters of public concern and importance; national security; and probably the most important that we are talking about today, being the prevention of and detection of crime and fraud.

The decision of Her Honour Judge Hampel, and I am assuming that this is what has sparked this Inquiry—

The CHAIR: It has certainly been a catalyst, yes.

Ms WALKER: The decision of Judge Hampel sets out an approach guided by statements of principle in determining what is in the public interest under section 112E of the Act. Her Honour drew from the Court of Appeal and the High Court of Australia and assessed nine main principles as relevant to that determination. Her Honour also considered the purposes and consequences of the Act and the making of an order in citing the purpose of the Act, which can be found in section 1(a):

> that the possession, carriage, use, acquisition and disposal of firearms are conditional on the need to ensure public safety and peace …

Her Honour referred to the pre-existing restrictions as being inadequate and gives rise to consideration of the making of the order. In the second-reading speech, the Minister, Ms Neville, referred to the powers being complementary:

> for Victoria Police to proactively and quickly disrupt serious criminal activity associated with the illicit use of firearms.

Her Honour determined that the public interest test can only be satisfied if one of the four considerations contained in 112E (a) through (d) are present and are causally connected to the public interest. Her Honour further determined that the consequences not only of the prohibition order itself and the penalties for offences under the Act but the consequences of restrictions on freedom of movement association and exposure to searches without warrant or consent are also relevant—and that includes subjecting people to no greater restriction on their movement, association or exposure to searches than is reasonably necessary to give efficacy to protecting the public.

So the question for the tribunal, as Her Honour deemed, was: would the making of an FPO abate the risk to public safety by the prohibitions set out in the Act? Now, whether that was the correct approach is a matter for an appellate court if a review of her decision is initiated by the Commissioner. Otherwise it is not sought to undertake a critical analysis of her findings, necessarily, except to say that the Law Institute agrees with the approach that was taken by Her Honour to define the public interest in the context of making an FPO.

The next question that we were asked was: does the FPO scheme strike an effective balance between the individual rights, public safety and effective policing? The Bill was partially incompatible with the right of privacy and the right of children to such protection as is his or her best interest, but it was nevertheless considered necessary to protect the community from the risk of harm associated with firearm-related offending. The Minister acknowledged a number of rights that were directly affected by this legislation, including that the decision of the Commissioner to make an FPO affects the right to the protection against arbitrary interferences with privacy and that the right is further limited by the potential for a review to be heard on information subject to Crown privilege, and they are the PII claims. The Act prevents full disclosure to individuals seeking to challenge a decision made pursuant to 112E and the restrictions on full reasons being published—closed hearings, ex parte, limiting the ability of cross examination of certain witnesses and precluding the stay of an order pending a review. Obviously the Minister gave consideration to the charter and considered that a human right may be subjected under only to such reasonable limits as can be demonstrably justified.

So a person subject to an FPO has a merits review to VCAT, with respect to the making of an FPO, and a judicial review of that decision. The further rights that are affected, being the right of freedom of association and a right to privacy, and the limitation of these rights are said to be justified given the limitations of the then-current powers of the Act to protect the community from firearm-related offending. The rights of review and the merits of the order are the further justification for the limit of that right to the freedom of association. That was the balancing act that the Minister had considered—and rightly so.

The right to privacy: it was acknowledged that this right is interfered with due to a person being subjected to discretionary search powers which may result in infrequent and intrusive searches. And I have just heard the statistics that you were provided from Victoria Police.

The CHAIR: Yes.

Ms WALKER: As to what that says—whether or not there is a limited amount of offences related to firearms—one could say that the Act and the powers are working if it is certainly deterring people from carrying firearms in public places or in their homes. There is a range of measures which have been

implemented into this Act, which oversee the use of those powers, and periodic review and oversight. I am not privy to those reviews or those oversights, so I am sure that that is something that the Committee, hopefully, will have access to.

The rights of third persons not subject to FPOs is also interfered with and not considered to constitute an arbitrary or unlawful interference. I think one of the oversights of that was specifically placed into the Act to ensure, because that is a fairly significant right that is being impinged on a third person.

The right to protection of children, although it is acknowledged that the Act only affects a small cohort of children between the ages of 14 and 18, the Minister held it to be both essential and appropriate to provide these powers to police.

The right to freedom of movement and the right to property are all affected by provisions of the Act when an FPO is made against an individual. The scheme, from the LIV's perspective, strikes an effective balance.

The effect upon the individual's rights, the powers extended to police—powers which were sought by them as being powers needed to work effectively—promote public safety. Our position is that any further tightening of the test, increase in powers or restrictions on reviews would exceed what is reasonably necessary to achieve public safety and peace and would be dangerously oppressive.

'Will VCAT's finding in relation to Websdale affect the operation of the FPO scheme, and how?'. I think that remains to be seen. I am not sure if I can answer that question appropriately as to whether or not an appeal is being sought or considered. This decision certainly does not bind any other president or vice-president where a review of this type would come before it. It may be that the commissioner does seek a review from an appellate court to get some understanding or ruling as to what public interest in these circumstances really means.

'Is the right to review an FPO adequate?'. Yes. The LIV say yes, and the LIV say that VCAT is the appropriate jurisdiction for that review. Every other state in Australia uses their civil and administrative equivalent for a tribunal to review an administrative decision—that is why they were set up and that is what they do. They are constituted by very experienced judges of the Supreme and County courts and other lawyers who are delegated in the tribunal. There are sufficient restrictions within the Act for these reviews to remain in the public interest when you are talking about police information or police integrity. I think that is my 15 minutes.

Ms GARRETT: That was comprehensive.

The CHAIR: Yes, thank you.

Ms WALKER: I hope I am not just telling you something you know.

Ms GARRETT: You are obviously a very good lawyer.

Ms WALKER: Thank you.

The CHAIR: No, that was really fulsome and very helpful for us. It is interesting. The Law Institute of Victoria seems quite satisfied that the balance is right. Given those statistics that we heard—that there have been 223 orders made, under those orders there have been 205 searches, from these searches there have been 139 charges that have come out of those, and only 12 of those have been firearm charges. I suppose I was somewhat not troubled but surprised, because the objective was to really address firearms offences, that we had charged these people with so many other offences other than firearms.

Ms WALKER: I am actually encouraged by the fact that there are not as many, because I know that there was a lot of criticism as to how many orders had been made since the amendment to the Act to include the FPOs. The New South Wales Ombudsman review was specifically in relation to those searches and most specifically about those third individuals, or third parties, who were being caught up in that. The Minister appears to have considered that when she has introduced the Bill, in putting in those other oversights through IBAC the review halfway through an order and also the review process through VCAT. So there are some protections there to see how it is going, and obviously there are other states who have had it for far longer than what we have, and most of ours have been designed. Queensland are currently in the process; a Bill has been

introduced in May of this year. I am not sure where it is at at the moment, but it also loosely mirrors all of the other states as well.

The CHAIR: Right.

Ms WALKER: As to whether or not there are 12 firearms offences, one would like to say that it is working. As to 139 other charges, I do not think you can get around that really. I do not think you can get around it. But look, 205 searches in almost 12 months does not seem to be too excessive.

The CHAIR: Not alarming.

Ms WALKER: It is not alarming.

The CHAIR: No.

Ms WALKER: It is expected. I would have expected more.

The CHAIR: Yes. One of the improvements that the police were suggesting would be that—I suppose, using the analogy of a sex offender list—those on those orders must report any change of address. Do you think that that would be helpful in ensuring the operation of this legislation?

Ms WALKER: I suppose it would certainly assist police to make sure that they know where these people are, and how otherwise do they search their houses or ensure that they are complying with the order? The operation of the order really sounds to me that if you are found on a premises from which you are prohibited, you are committing an offence, rather than—

The CHAIR: Yes. So they probably know where they are not going to find you.

Ms WALKER: Yes. And if they do find you there, then you are committing an offence. I suppose it does frustrate the order a bit if the police cannot locate the person. However, those inquiries can be made through other avenues should the police be concerned. Most of the people who, I would suspect, are subject to these orders are also members of associations. It is really what the Act was targeting—organised crime associations or any terrorist-related organisations—so the cohort would be fairly confined, I would have thought.

The CHAIR: Yes, exactly. Thank you.

Dr KIEU: Thank you for coming in and giving a very comprehensive answer to all the questions that have been forwarded to you prior.

Ms WALKER: Thank you.

Dr KIEU: I have a question on the previous witness. The police were concerned, as we are, on the lack of sharing of information and the recognition and collaboration or otherwise between different jurisdictions across the borders. It is particularly very concerning because it could be organised crime, it could be extremists, it could be terrorists or it could be some other people that create harm for the general public associated with that. What would be the view of the law institute on this? What would you recommend, or is there anything that could be done in different jurisdictions, given that has been going on for a long time now?

Ms WALKER: I think guidance could be taken from the Royal Commission into Family Violence where there was specifically that issue in relation to information sharing between jurisdictions and also the effects or otherwise of orders crossing over into other jurisdictions. From the reading here I cannot see that an FPO, similar to a family violence order, would be cross-jurisdictional, so I do not know if the commission would seek to look into something similar to that. But in relation to information sharing, there was a huge problem with the lack of information, the different systems that were being used by different jurisdictions: who is sharing the information, and what information do you want to share? I mean, you do not want to extend this or elevate an FPO to some kind of a control order. I think that if the police were that concerned about somebody, then they might want to look at some form of a control order rather than an FPO. I would have a bit of a look at the Royal Commission into Family Violence and the problems with information sharing, which might I add are still happening now.

Dr KIEU: Yes. Just further on that, across the jurisdictions—for example, in New South Wales the scheme has been in operation for a few years now. There was a view that the New South Wales scheme is providing a lower bar for issuing an FPO. Do you think that is the case?

Ms WALKER: I did think about that because it was about whether you were a fit and proper person and it was in the interest. Victoria have got those four criteria that we look at in terms of the individual's prior convictions and associations. In New South Wales specifically it is:

> … if, in the opinion of the Commissioner, the person is not fit, in the public interest, to have possession …

It is a much wider gamut, and there are a lot more orders in New South Wales, though, than in Victoria and it may be because it is quite broad.

Mr O'DONOHUE: Thanks very much for your evidence today and coming in and giving the law institute's perspective and for that detailed sort of introduction, which has been very helpful. I just had one question, Ms Walker: do you think the 10-year time frame is an appropriate time frame for the issuing of an FPO?

Ms WALKER: I think it could probably be achieved in under 10 years—maybe even five years. I think five years is quite extensive for a child when you are looking at that distinction. Obviously the five years was brought in because it can be imposed from the age of 14 and then the child attains the age of 18, which we consider to be an adult under the law for prosecution at least. But the law institute would say that five years would be sufficient, and probably two to three years on a child would be sufficient.

Mr O'DONOHUE: The other question I had is: the delegation in the legislation is for a superintendent and above to be able to issue an FPO. Do you think that strikes the right balance between giving police the operational capacity to issue an FPO when things are moving quickly, as is intended by the Act, whilst being at sufficiently senior rank to give that, I suppose, oversight given the significant powers that flow from an FPO?

Ms WALKER: I think it should always be the higher rank who are making decisions to make these orders, as delegated by the commissioner if they are representing the commissioner. I do not think that it should be at a detective level. I do not think it should be a sergeant level at all.

Mr O'DONOHUE: Do you think superintendent is appropriate? From the material we received from Victoria Police, which I just cannot put my hands on straightaway, I think the majority of the FPOs have been issued by a superintendent, from memory; a couple by assistant commissioners.

The CHAIR: Yes.

Mr O'DONOHUE: Thank you, Chair. Yes, 104 by superintendents, 99 by acting superintendents, 13 by acting commanders, five by assistant commissioners and two by acting assistant commissioners.

Ms WALKER: Do I think that anybody under those ranks should be permitted to be delegated that power?

Mr O'DONOHUE: Do you think anyone under or anyone above? Should it be at a higher rank? I suppose, do you think that is the appropriate—

Ms WALKER: I think that is the appropriate rank, absolutely. I would not go under that at all.

Mr O'DONOHUE: Would you go higher or do you think that is—

Ms WALKER: I do not think it would be operative. I do not think that that is—I cannot think of the word now.

Mr O'DONOHUE: 'Operative' is a—

The CHAIR: Good enough.

Ms GARRETT: This is a bit lay person-y. I am legally trained too, so it is probably going to make my law professors squirm that I am going to ask it in this way.

The CHAIR: They are going to reassess the marks they gave you.

Ms GARRETT: Most people would go, 'How did this guy—if this guy doesn't fit the thing'—and I know we have had all these orders and everything, but this is the one that has come to the fore, so this guy—

Ms WALKER: If not this guy—

Ms GARRETT: If he doesn't fit the thing, there is something going not right.

The CHAIR: But is it more that he fits the thing—using those technical terms—but that the thing is too restrictive?

Ms GARRETT: Yes. Something, in my mind, has gone a bit wrong here that we have got a bloke who has had all of these issues able to successfully—and I am not having a crack at Hampel's judgement, a considered judgement; we are all working in a framework here, and we are all trying to get the balance right—but something has happened here which does not look quite right, so do you think there needs to be—

And I suppose my other point is that this is about guns. I get that we have to balance everybody's liberties, but this is not a man and his association issues or whatever; this is he will have access to guns. We are not in America, it is not a universal right; it is not a bill of rights issue. There is not much good that comes from guns really, except for people in the country. This is very long winded; I do apologise. If someone said, 'Okay, we're not happy with this', what would you need to tighten? What would you tighten? You may say, 'I don't want to answer that because I've got my view on it', but—

Ms WALKER: Yes. I do not think they should be tightened. Because we do believe in a charter of rights, because we do have an understanding of what we should all be privileged to—

Can I start with your first question actually, and then I will get to the last one? When you look at Mr Websdale and you say, 'If not him, who else?', I mean this Act is designed for either persons in outlaw motorcycle gangs, organised crime or terrorist associations, but there is a framework—there are considerations—and I think that in order for, certainly our state, not to fall into a trap of oppressive restrictions on persons simply by association, then there does need to be a considered assessment of that person, of the circumstances and whether or not this is the person that needs to have an FPO. There might be somebody else within that organised motorcycle gang that does. Why not then put one on every single member if you are going to go down that path?

The CHAIR: Yes.

Ms GARRETT: Indeed, why not? This is the question, isn't it? I do not know.

Ms WALKER: Well, the answer to that is that not all gun crimes are committed by organised motorcycle gangs. Some of the most recent gun-related crime has been completely organised crime absent.

Ms GARRETT: But where did they get the guns from?

Ms WALKER: Well, that is a good question. I think the police would probably be able to answer that a lot better than me, because they come from all places, I suspect. I think that we are really fortunate in Australia that we have such strict gun control. We do not have the incidents that America had two days ago, I think—or yesterday—

Ms GARRETT: Again.

Ms WALKER: and that says a lot. If we are talking about in order to maintain that privilege that we have in terms of our human rights, and coupled with the privilege to be safe as well by having very strict gun control, then I think that you need to have that balance between the two, and I think that this scheme does balance all of those different considerations.

I have forgotten the last part of your question now.

Ms GARRETT: I have too.

The CHAIR: Using my industrial design expertise rather than any legal expertise, I think it was looking at—

Websdale, you would think, met all of the conditions in the public interest given his criminal history, his behaviour as an individual, the people with whom he associates—he ticked pretty much all the boxes—but what was found was that the conditions of the FPO were considered too restrictive and that the restrictions were probably overreaching the public interest. But you would be of the opinion that in actual fact the restrictions that are imposed by those orders are reasonable?

Ms WALKER: Are they reasonable?

The CHAIR: Yes.

Ms WALKER: Well, I think in the scheme of things they are reasonable. They do not actually go as far as the sex offender register, but they are equally protecting different interests. The sex offenders registration is set up for a very specific reason, because of the ducking and weaving—if I could put it as bluntly as that. In terms of firearms, firearms can come and go, they can be brought into the state under cover—people can get access to them—so I think that if we have a very strict and very constrained control in terms of border control, in terms of detection—

Police have got significant powers in relation to FPOs, and from those numbers that you are giving me it sounds like it is working.

The CHAIR: I guess what seems to be in question or what has arisen in the VCAT decision is the breadth of the restrictions of the FPO on the rights of an individual.

Ms WALKER: Yes. And as I said, if we are permitted to enjoy those rights, then those rights have to be very seriously scrutinised if they are to be interfered with.

The CHAIR: Thanks. Sorry, I did not mean to look at the clock!

Ms WALKER: That means I go home early too.

The CHAIR: Ms Walker, thank you so much. That was really interesting, and it was really great to hear LIV's position. My understanding is that LIV will be submitting a submission.

Ms WALKER: Yes, as I understand it. I have been advised by the policy lawyers that they will be. I think it will be assisted by the transcript.

The CHAIR: Yes, great. Thank you.

Ms WALKER: Thank you for inviting us.

The CHAIR: I appreciate it. Thank you very much, Melinda.

Committee adjourned.

Appendix 3
Questions on notice

A3

Parliament of Victoria - Legal and Social Issues Standing Committee – Legislative Council

Inquiry into Firearms Prohibition Legislation

Department of Justice and Community Safety – Corri McKenzie, Deputy Secretary, Police, Fines and Crime Prevention

Public Hearing 2 September 2019 – Responses to questions taken on notice

1. With reference to the FPO review process going to VCAT, are there any other similar orders that go through VCAT that you drew from in recommending the VCAT pathway for these orders?

The VCAT review pathway was not based on consideration of similar orders that go through VCAT but was based on other important considerations.

Consideration was given to other jurisdictional schemes and the Victorian FPO scheme is modelled on the New South Wales (NSW) scheme. In NSW, a person who has been served with an FPO has 28 days in which to request that the NSW Police Force review the decision to make the FPO. If the internal review by the NSW Police Force is unsuccessful, some FPO subjects are eligible to apply to the NSW Civil and Administrative Tribunal (NCAT) for a review of the decision (see section 75 of the *Firearms Act 1996* (NSW)).

There is no information to suggest that NCAT has encountered any difficulties in handling FPO review matters. Like Victoria, NSW FPOs have been used for very serious cases. The NSW police informed Victoria Police that FPOs have been successfully issued in counter-terrorism cases, against outlaw motorcycle gangs and against other high-risk individuals.

Similarly, in South Australia FPO reviews are heard by the South Australian Civil and Administrative Tribunal (SACAT) (see section 47 of the *Firearms Act 2015* (SA)). Tasmania also has FPOs but as that jurisdiction is the only state in Australia that does not have a civil and administrative tribunal like VCAT, NCAT or SACAT, FPO reviews are heard by the Administrative Appeals Division of its Magistrates' Court. A Private Members Bill was introduced into the Queensland Parliament on 1 May 2019 to amend the *Weapons Act 1990* (QLD) to introduce an FPO scheme for that jurisdiction. The Bill includes an amendment to section 142 of the Weapons Act to provide for a right of review from FPO decisions to the Queensland Civil and Administrative Tribunal (QCAT).

If, in the future, agreement is reached on a National FPO mutual recognition approach, it would be preferable that jurisdictions' FPO schemes are as closely aligned as possible, including in relation to review mechanisms.

Victoria's long-standing approach to administrative review matters was also a key consideration. The decision to make an FPO is an administrative decision of the Chief Commissioner of Police or delegate in accordance with the *Firearms Act 1996* (the Act). VCAT's core function is to review administrative decisions. As a result, VCAT has a legislative framework in place which makes clear how reviews will be handled. By contrast, the Magistrates' Court, for example, is very rarely provided with the power to review administrative decisions and does not have laws and procedures in place setting out how they would be handled. For example, it would not be clear what type of review the Court would be expected to engage in, what evidence it could rely on and how it would handle confidential intelligence information.

Another consideration was to ensure a consistent framework for administrative reviews under the Act. The legislative review framework for FPOs is consistent with the long-established administrative review model available to persons affected by decisions of the Chief Commissioner of Police to cancel a firearms licence, refuse an application for a firearms licence, impose licence conditions or refuse to issue a permit to acquire. Being decisions of an administrative nature, they are not amenable to appeal to a court (such as the Magistrates' or County Court) but are subject to a merits review of an administrative decision. Those decisions are subject to review at first instance by the Firearms Appeals Committee (FAC) and then VCAT at second instance.

FPO review applications are made directly to VCAT because the FAC is not an appropriate body to hear and determine reviews of FPO decisions. Hearings of the FAC are convened by the Department of Justice and Community Safety, which provides secretariat services. It is a small statutory review body comprised of only 15 members with a limited remit. VCAT also has the benefit of a fully functioning court style registry, making it more appropriate to deal with sensitive, complex and confidential material.

Finally, providing for review by VCAT does not exclude the courts from reviewing FPO decisions. Review decisions by VCAT can be appealed to the Supreme Court, and judicial review is also available. Further, VCAT has the skills and expertise to appropriately deal with FPO reviews. The President of VCAT is a Supreme Court judge and thirteen County Court judges serve as VCAT Vice Presidents.

2. <u>The FPOs deal with, according to the Minister and Victoria Police, some of the most dangerous offenders in Victoria. Can you name another list or another appeal process which deals at VCAT with some of the most dangerous criminals in Victoria</u>?

VCAT deals with a wide range of matters affecting a broad cross section of the community including related to serious criminal matters. This can include disputes over goods and services, building and construction or planning matters, retail and commercial leases and rental disputes amongst many other types of matter. Other specific examples include Freedom of Information and discrimination proceedings which are sometimes brought by prisoners against Corrections Victoria.

As the Victorian Law Reform Commission identified in its '*Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries*' Final Report (February 2016), some lawful occupations and industries are prone to infiltration by organised crime groups seeking to support their illicit activities and to provide new opportunities for profit and influence. Where legislative schemes exist to licence participants in particular industries, they often involve administrative licensing decisions that are subject to review by VCAT.

Some examples include reviews of licensing refusals on the basis that a person is not fit and proper or it is not in the public interest that a person be licensed under the *Private Security Act 2004*, reviews from licensing decisions of the Professional Boxing and Combat Sports Board under the *Professional Boxing and Combat Sports Act 1985* and reviews of licensing decisions of the Business Licensing Authority under the *Sex Work Act 1994*.

Reviews of negative assessment notices in relation to sexual offending, amongst other reasons, are also undertaken by VCAT under the *Working with Children Act 2005* and reviews of case planning decisions in relation to some children in the child protection system are undertaken by VCAT and can involve cases where children have been sexually or violently abused by a parent or guardian.

3. Can you confirm that the department's firearms consultation committee has not been meeting in the last 18 months to two years?

I can confirm that the Victorian Firearms Consultative Committee (VFCC) has met in the last 18 months on three separate occasions.

In December 2018, the Minister for Police and Emergency Services formally appointed Mr Paul Edbrooke MP, Parliamentary Secretary for Police and Emergency services, as the new Chair of the VFCC. The first meeting of the reconvened VFCC took place on 20 December 2018.

The VFCC is a non-statutory expert advisory group for the Minister for Police and Emergency Services (as the Minister responsible for the *Firearms Act 1996*). The VFCC meets quarterly and two of the four scheduled meetings for 2019 have already taken place – on 12 March and 11 June 2019. The next scheduled meeting will take place on 24 September 2019. One final meeting for 2019 is scheduled to take place in December.

VFCC members include representatives from peak firearms bodies including Field and Game Victoria, the Shooting Sports Council of Victoria, the Australian Deer Association, the Firearms Traders Association, Firearm Safety Foundation, Sporting Shooters Association of Australia (Vic), the Victorian Amateur Pistol Association and the Victorian Clay Target Association. Other key members include the Police Association, the Law Institute of Victoria, the Australian Security Industry Association Limited and Melbourne and LaTrobe Universities.

Legislative Council Legal and Social Issues Committee
Inquiry into Firearms Prohibition Legislation

VICTORIA POLICE

Victoria Police - Detective Superintendent Peter Brigham
Public Hearing 2 September 2019 - Response to question taken on notice

Question:

Are there some rules of thumb or some information you could provide as to how the police determine public interest, beyond understanding the main points of that public interest test? Given that VCAT found the balance between public interest and the freedoms of the individual did not meet, is there any other information you could provide the Committee on assessing that public interest?

Response:

The words 'public interest' are part of the legislative provisions under s112E of *the Firearms Act 1996*.

The Chief Commissioner may make a firearm prohibition order only if the Chief Commissioner is satisfied that it is in the public interest to do so—

(a) because of the criminal history of the individual; or

(b) because of the behaviour of the individual; or

(c) because of the people with whom the individual associates; or

(d) because, on the basis of information known to the Chief Commissioner about the individual, the individual may pose a threat or risk to public safety.

Victoria Police considers the 'public interest' in issuing FPO's in terms of the threat and risk that the subject person may pose to the public in terms of the core functions of policing identified as preserving the peace, protecting life and property, preventing the commission of offences, and detecting and apprehending offenders.

'Public interest' is a broad concept that is flexible enough to respond to the facts and circumstances of any particular case.

Appendix 4
Correspondence

A4

Legislative Council Legal and Social Issues Committee
Inquiry into Firearms Prohibition Legislation

VICTORIA POLICE

Victoria Police's response to information requested on 22 August 2019

1. **How many FPOs have been made under s 112D?**
As at 26 August 2019, 223 FPOs have been issued. This figure does not include applications for a FPO that were declined, or those still under consideration.

Of these —

a. **How many have been served?**
As at 26 August 2019, 199 FPOs have been served. This figure includes six orders that have been served and subsequently revoked.

b. **What is the breakdown by rank/position of the person who made the order (Chief Commissioner, delegate etc)?**

Rank	Number of Orders Issued
A/Assistant Commissioner	2
Assistant Commissioner	5
A/Commander	13
A/Superintendent	99
Superintendent	104
Grand Total	**223**

c. **In each case, on what ground/s as set out in s 112E(a)–(d) was the FPO based?**
Of the 223 issued FPOs:

FPO Ground	Number of orders issued using this ground
112E (a) Because of the criminal history of the individual	215
112E (b) Because of the behaviour of the individual	137
112E (c) Because of the people with whom the individual associates	99
112E (d) Because, on the basis of information known to the Chief Commissioner about the individual, the individual may pose	40

These figures are based on each time a FPO has been issued on that ground as only one ground must be satisfied in order for a FPO to be issued. However, a FPO may be issued on one or more grounds, and FPOs have been granted in various combinations. For example, 14 orders have been issued where a FPO was granted on all four grounds.

2. **Are you aware of any applications that have been lodged with VCAT awaiting review under s 112M? If so, how many?**
There are currently four active VCAT reviews as at 27 August 2019. An additional review was to have been heard on 26 August 2019, however was struck-out due to the non-appearance of the applicant. It is unclear at this time if they will seek to continue this review.

One further application has progressed through VCAT and is currently waiting to be heard before the Court of Appeal.

Several additional VCAT matters have been finalised and are no longer under review. Please advise if you require figures.

3. In relation to the delegation power in s 112F, including a breakdown by rank/position—

a. How many persons are eligible to be delegated to?

Under s.112F(1), the following roles are able to make a FPO:

Role	Number of positions
Chief Commissioner of Victoria Police	1 position
Deputy Commissioner	3 positions
Assistant Commissioner	15 positions
Executive VPS	28 positions
Commander	11 positions
Superintendent – Crime	6 positions
Superintendent – Transit	7 positions
Superintendent - Intelligence and Covert Support	5 positions
Superintendent – Licensing and Regulation	1 position
Superintendent – Family Violence	1 position
Superintendent – Counter Terrorism	2 positions
Superintendent - Operational Support	4 positions

Total: 84 potential delegates.

b. How many delegations have been made?

Under the current Instrument of Delegation FA2, the authority to make an order has been limited to the below roles:

- Deputy Commissioner
- Assistant Commissioner
- Commander
- Superintendent – Crime Command
- Superintendent – Counter Terrorism Command

An amendment to this instrument is currently underway, which will expand the delegate cohort to include the below roles:

- Superintendent – Operational Support
- Superintendent – Licensing and Regulation

4. In relation to searches conducted under Division 5 of Part 4A —

The Search and Charge data below covers searches and charges resulting from searches between 9 May 2018 to 30 June 2019. This time period has been used due to the data being taken from a pre-existing report, prepared by Victoria Police Corporate Statistics and manually validated by the FPO Registry.

Search and Charge information currently relies upon frontline members accurately entering data into LEAP, which must then be extracted and manually verified to ensure that correct entry has been made. A number of projects are underway to assist in improving access to and reporting of this information, in order to meet reporting requirements.

It should also be noted that the below information relates to each record relating to a search. Several FPO subjects have been searched multiple times and each search will be recorded separately. The method of recording also results in multiple searches being counted when a subject, and persons in their company are searched.
I.e., if a search is conducted under 112R (search of a FPO subject), and 112S (a person in their company) during the same incident, this will count as two searches.

a. **How many searches have been conducted under each of sections 112Q, 112R and 112S?**
   s112Q & 112R: 134
   s 112S: 71
   This data cannot be broken down further without a manual review of each of the 205 records.

b. **On how many occasions has the conduct of a search resulted in charges being laid?**
   120 searches detected an offence, resulting in 139 individual charges being laid. These charges are not limited to offences against the *Firearms Act 1996*.

Legislative Council Legal and Social Issues Committee
Inquiry into Firearms Prohibition Legislation

VICTORIA POLICE

Victoria Police's response to information requested on 11 September 2019

1. **How many FPOs have been issued in relation to a person who did not have a criminal history or recorded conviction at the time of making?**
   Effective to 20 September 2019, two (2) FPO applications had been made that did not rely on s112E (a) – criminal history.

2. **In respect of question no. 2 in my letter of 22 August 2019 relating to applications awaiting review at VCAT, the answer provided by VicPol was (in part) that "several additional VCAT matters have been finalised and are no longer under review". Can you provide further details on the 'several additional VCAT matters'?**
   Seven (7) VCAT matters have been finalised. The outcomes of these matters vary, and are noted in the table below:

VCAT Lodgement	FPO Status as at 12-Sep-2019
21-Jun-2018	Active
16-Aug-2018	Revoked
30-Aug-2018	Revoked
18-Oct-2018	Active
10-Jan-2019	Active
17-Sep-2018	Revoked
11-Jun-2019	Active

3. **In relation to searches conducted under s112Q which resulted in the laying of charge/s, what is the breakdown of offences for which charges were laid?**
   Searches have been conducted under s112Q (search of premises, vehicles, vessels or aircraft without warrant or consent) and s112R (search of individual to whom firearm prohibition order applies without warrant or consent).

   It is not possible to distinguish offences under s112Q or s112R because charges laid on a FPO subject are recorded and compiled manually.

   This is in part because both sections of the *Firearms Act 1996* (the Act) rely upon the same reasonableness test, and both kinds of search relate to and are recorded against the FPO subject's personal record. A body of work is currently being undertaken to review options to assist with future reporting, part of which will seek to differentiate between these searches.

The following charges have been laid against FPO subjects following searches under either of these sections. This information is effective to 31-Aug-2019:

***Firearms Act 1996* Charges:**	**Number of Charges Laid**
Carry cartridge ammunition in unsecured/dangerous manner	1
Fail to surrender a firearm related item – prohibition order subject	6
Fail to surrender firearm upon service of prohibition order	6
Prohibited person possess/carry/use a silencer	2
Possess two or more unregistered firearms (trafficable quantity)	1
Possess cartridge ammunition without licence	15
Possess unregistered general category handgun	1
Possess firearm – Contravene prohibition order	2
Possess firearm related item – contravene prohibition order	6
Possess loaded firearm in a public place	1
Prohibited person possess a firearm	13
Total Charges Laid	**54**

***Control of Weapons Act 1990* Charges:**	**Number of Charges Laid**
Possess controlled weapon without excuse	2
Possess imitation firearm without exemption/approval	3
Possess prohibited weapon without exemption/approval	17
Total Charges Laid	**22**

All Other Charges:	**Number of Charges Laid**
Commit indictable offence whilst on bail	9
Contravene a conduct condition of bail	4
Cultivate narcotic plant – Cannabis	1
Deal property suspected proceed of crime	11
Drive whilst disqualified	2

All Other Charges:	Number of Charges Laid
Drive without "L" plates displayed	1
Fail to provide information/assist	2
Handle/receive/retention of stolen goods	3
Knowingly deal with proceeds of crime	1
Learner driver drive vehicle w/o experienced driver	1
Negligently deal with proceeds of crime	1
Possess drug of dependence – prescription drug	3
Possess a schedule 4 poison	1
Possess alprazolam	1
Possess amphetamine	1
Possess anabolic steroids	2
Possess cannabis	5
Possess cocaine	3
Possess drug of dependence	7
Possess ecstasy	1
Possess GHB	3
Possess housebreaking implements	1
Possess methyl amphetamine	5
Possess testosterone	1
Resist police officer	2
Traffick cannabis	1
Traffick cocaine	2
Traffick commercial quantity - methyl amphetamine	3
Traffick methyl amphetamine	5
Unlicensed driving	1
Use GHB	1
Total Charges Laid	**85**

4. **In relation to searches conducted under s112R which resulted in the laying of charge/s, what is the breakdown of offences for which charges were laid?**
   Refer to the response to question 3.

5. **In relation to searches conducted under s112S which resulted in the laying of charge/s, what is the breakdown of offences for which charges were laid?**
   The following charges have been laid on persons searched while in the company of a FPO subject. This information is effective to 31-Aug-2019.

***Firearms Act 1996* Charges:**	**Number of Charges Laid**
Possess a silencer without a permit	1
Prohibited person possess a firearm	2
Total Charges Laid	**3**

***Control of Weapons* Act 1990 Charges:**	**Number of Charges Laid**
Possess prohibited weapon without exemption/approval	4
Total Charges Laid	**4**

All other charges:	**Number of Charges Laid**
Handle stolen goods	2
Possess drug of dependence	2
Possess methyl amphetamine	3
Possess steroids	1
Possess cannabis	1
Total Charges Laid	**9**

6. **In respect of the prohibition to enter/remain on certain premises under s112O:**

   a. **On how many occasions has a FPO subject been cited/charged for breaching this requirement?**
      To date, no FPO subjects have been cited or charged for any offences related to entering or remaining on certain premises.

   b. **On each occasion in relation to (a), what was the type of premises?**
      Not applicable. Refer to the response to a. above.

   c. **What guidelines/training are given to police in determining how/whether to enforce this provision?**
      For example, a police station or a court house could be classed as a premises where firearms are stored under s112O(h), and also be a location where an FPO subject might reasonably be expected to attend from time-to-time. How do police exercise discretion in such circumstances?

Investigators currently involved with applying for and serving FPOs are familiar with this provision. As it is a legislative requirement that a FPO is served in person, all investigators involved with this process are continually reminded of each power and offence under FPO provisions when explaining these conditions to the subject.

In relation to the example noted in this question, members are required to exercise discretion when applying this section of the Act. It would be unreasonable to pursue charges under s112O when a FPO subject is required to attend a court premises or police station.
Victoria Police will progress changes to the Victoria Police Manual (VPM) to include instruction on this issue.

7. **What training and/or guidelines have been developed by police internally in relation to the making, issue and enforcement of FPOs?**
   Police have access to a number of guides and documents to assist in all aspects of the FPO Scheme, from drafting an application through to enforcing an active order. This includes for example, an applicants' guide, a delegates' guide and a FAQ that addresses many of the common situations encountered by members interacting with a FPO subject.

   Training is provided to work units involved with the FPO application process and to delegates. The FPO Registry supports applicants and delegates as required. Once a FPO is served, training and advice is available to police to assist with compliance and enforcement activity, including identifying appropriate situations where FPO powers may be exercised in line with the 'reasonableness' test for both FPO subjects and persons in their company.