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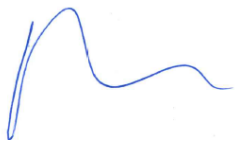
Submissions on the Gangs Legislation Amendment Bill

TO: The Chairperson of the Justice Committee

This submission is from the Criminal Bar Association.

I can be contacted at president@criminalbar.org.nz.

Yours faithfully,



Adam Simperingham
President
Criminal Bar Association

Submission

1. The New Zealand Criminal Bar Association[1] opposes the intent of this omnibus Bill — passed under urgency. The CBA view is that it is poorly drafted, inconsistent with fundamental rights and freedoms, and will not achieve its policy objectives.

2. This proposed legislation, if enacted in its current form, will keep criminal defence lawyers even more busy than they currently are. Even a cursory review of it shows how easy it will be to pick apart this legislation. It will be defence lawyers dealing with the difficulties that it will inevitably create.

3. It would be unlikely that any criminal defence lawyer would advise or encourage a guilty plea to any offense laid under this legislation. Lawyers would likely seek a review of a dispersal notice or the discharge of a non-consorting order.

4. The extra burdens that this legislation will put on the already-stretched legal aid budget are obvious, to say nothing of the workloads for prosecutors and judges.

Regulatory Impact Statement

5. In terms of criticisms and concerns about the Bill, the CBA refers to the Regulatory Impact Statement ("RIS"). The RIS notes that there is only evidence showing proposals can reduce the public visibility of gangs, although only in certain places, and for a time. There is no evidence to suggest that a suppression approach works to reduce long-term offending behavior that gangs demonstrate, or that it would eliminate gangs altogether. The RIS further notes that the Bill could make it more difficult for people to exit or disengage from gangs and desist from crime, could undermine relationships between gang and law enforcement or other agencies, could undercut efforts to cultivate pro-social activities within gang communities and make it harder for whanau experiencing violence, particularly domestic violence, to seek help.

6. The departmental disclosure statement makes the point that compliance with the insignia ban could make it harder to enforce the dispersal notices, whereas defiance of the ban may lead to more prosecutions. It notes that the police's own priorities and how police use the powers will affect compliance with the law more than anything else. This is discouraging.

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[1] The NZCBA is an incorporated society. Its objectives include reform of the criminal law. Its members are defence and prosecuting lawyers, working privately and for government agencies. Current members of the NZCBA prepared these submissions, which were circulated in advance as a draft to ensure they reflect the views of the executive committee. The undersigned has the authority to represent the NZCBA and to make submissions on its behalf.

7. The “anti-gang patch” clause creates a strict liability offence that could lead to the deprivation of a person’s liberty. This is a circumvention of the usual requirement for a crime to have a mental and physical element occurring at the same time.

8. Even so, it is difficult to see how enforcing minor violations of the anti-gang patch law would ever meet the Police’s own TENR - Operational Threat Assessment Policies. How would stopping a gang member wearing a patch while on the way to the dairy to buy milk be anything other than an opportunity cost for any constable proposing to enforce this legislation?

9. Fundamentally, this legislation seems geared toward allowing constables in specific circumstances to make it easier to give a person a failing grade on the “police attitude test”. Is this legislation really simply aimed at is reducing the strain on police resources that “ride outs” cause? If that is the case, surely the existing laws are sufficient to address those police resourcing concerns, perhaps under the Summary Offences Act or local government legislation.

Specific concerns

10. In terms of specific concerns:

    Interpretation

    “Consort” includes to associate and communicate – this is a wide definition and has consequences for the offence of breaching a non-consorting order. If the purpose of the Bill is to prevent that ability of gang members to, inter alia, intimidate and disrupt the public, limiting “consorting” to being together in public is sufficient.

    “Gang Insignia” includes any item to which a gang sign, symbol or representation is affixed. The definition includes vehicles if a gang insignia is attached. The definition therefore enables, pursuant to s.7(3), gang property to be forfeited to the Crown upon conviction. While this may not be particularly objectionable in relation to clothing (gang members generally destroy patches if the police had them for a time), by extending this power to forfeit to more valuable objects – vehicles or perhaps even fences / houses – the Bill creates a power for the state to gain the benefit of valuable property without the oversight of the High Court as is required under the Criminal Proceeds (Recovery) Act.

“Gang member” is exceptionally broad, including a member, prospect of nominee, anyone demonstrating an affiliation by displaying insignia and any person said to be involved in the affairs of a gang for the purpose of participating in criminal activity. The Bill is silent on how an allegation of gang membership is able to be proved which pursuant to the current clause 27 is only on the balance of probabilities. The combination of such a broad definition and low standard of proof could conceivably mean that this definition covers a very large sector of the community. Defining a gang member or associate itself is problematic. The Police database NIA does not appear to be updated to remove gang associations if, for instance, an individual was associated with a particular gang in his youth but as he matures has broken those ties. The Department of Corrections IOMS system is more regularly updated but likely provides more accurate information on an individual’s gang association status for those in custody or who have recently served terms of imprisonment than those who have not been subject to such sentences.

“Immediate family” is also problematic as it excludes, inter alia, cousins and whangai siblings

“Serious offence” is defined by reference to s. 6 Criminal Procedure Act and is therefore an offence punishable by two years imprisonment or more. Convictions for assault on a person in a family relationship or third and subsequent driving offences under the Land Transport Act 1998 are therefore sufficient, combined with gang association, to define an individual as a ‘specified gang member” such that a non-consorting order can be issued under part two of the Bill. This is significantly too low and reference to an offence punishable by seven or more years’ imprisonment would be a far more appropriate yardstick

‘specified gang member” is discussed above and also includes an individual who has been made subject to a firearms protection order under the Arms Act which could potentially lower the convictions threshold to a gang member

Part 2

Clause 7 creates a strict liability offence punishable by up six months imprisonment to displays gang insignia in a public place. Strict liability means the prosecution does not have to prove a guilty mind. The Attorney General concluded that this clause is an unjustified limitation on freedom of expression.

In addition, subsection three of the clause in its current form is problematic because it does not provide for any exception to forfeiture to the Crown of any item of gang insignia. Subsection (b) appears to provide for a discretion for the Court to order destruction or disposal of the insignia but not return of the item which could conceivably be of both financial and sentimental value.

Part 3

Subpart one relates to dispersal notices which may be issued to a person if they are in the company of at least two other 'gang members' in a public place and the constable believes on reasonable grounds that the issuing of the notice is necessary to avoid disrupting activities of others. Such notices remain in force for seven days. That appears to be excessive. Presumably, a principal target of this subpart is to prevent gang funeral related activities. While not undermining the opposition to the process it is noted that a much shorter period – two to three days – would be ample, like with a Public Safety Order. The power to limit association of course is a serious limitation on the right to peaceful assembly.

Clause 15 provides some limitation on the effect of dispersal notices for immediate family members (see criticism of the definition above) or in certain situations including in custody, work, education or health-care purposes. It is noted that while health care presumably covers rehabilitative facilities the addition of such facilities to this clause would be of benefit for the avoidance of doubt. While there is a process for variation of a dispersal notice for specific purposes including tangi the Bill does not set out grounds upon which a variation should be made.

Clause 16 allows a person to apply to vary a dispersal notice providing that a response has to be received within 72 hours. It can be doubted whether that is enough time or whether the police have enough resources to deal with each application in a fair, lawful and reasonable way.

Clause 17 provides that it is an offence to breach a dispersal notice but there is a defence of reasonable excuse. What amounts to a reasonable excuse is often in the eye of the beholder. It remains to be seen whether a significant increase in judge alone trials will be a good use of prosecutorial or judicial resources but it seems inevitable that we will find out.

Clause 18 provides that a person can apply to the Commissioner of Police to review a dispersal notice if it not was not validly issued. Again, many gang members are litigious and not inclined to make things easy for the police. There are concerns around the Commissioner's office ability to cope with such applications.

Clauses 19-23 deal with non-consorting orders. The Commissioner of Police can apply to a District Court Judge for a non-consorting order. The District Court may make a non-consorting order in respect of a person if it has given notice of the application and the hearing to the person and is satisfied the person is a specified gang offender, the order would specify another specified gang offender or offenders with whom the person may not consort, and the order would assist in disrupting or restricting the capacity of the person to engage in conduct that amounts to a serious offence. The District Court may not make a non-consorting order in respect of a person if satisfied that the person has shown that its detrimental effects on the person outweigh its societal benefits. The orders last three years, have form requirements and built-in limits. It is an offence to knowingly breach the order without reasonable excuse, carrying a maximum penalty of five years' imprisonment or a fine not exceeding $15,000.

Exactly why the maximum penalty is five years is unclear but the CBA notes this is the same maximum penalty as a qualifying/triggering offence under the Criminal Proceeds Recovery Act 2009. It seems to be an unlikely coincidence and further evidence of Police powers being unjustifiably extended.

The District Court's power to vary or discharge a non-consorting order is a civil application that many gang members may struggle to pursue.

Finally, clause 36 seeks to amend s9(1)(hb) of the Sentencing Act 2002. Section 9(1)(hb) which currently provides that in sentencing an offender the court must take into account, as an aggravating factor to the extent that it is applicable in the case, the nature and extent of any connection between the offending and the offender's participation in an organised criminal group or involvement in any other form of organised criminal association.

The amended wording would mean that in sentencing an offender the court must take into account, as an aggravating factor, to the extent that it is applicable in the case, that the offender was, at the time of the offending, a

participant in an organised criminal group or involved in any other form of organised criminal association.

The removal of “the nature and extent of any connection between the offending”, the change in wording from “the offender’s participation” to “a participant” and “involvement in” to “involved in” must be meant to focus the Court’s consideration on whether or not the defendant is a gang member rather than whether the offending was gang connected.

However, that does not change the fact that s9 starts with a rider – an aggravating factor is only an aggravating factor *to the extent that it is applicable in the case*. Therefore, it would be highly unorthodox for the Court to consider gang membership to be an aggravating factor if the gang membership had nothing to do with the offending. Conversely, if the offending *does* have something to do with gang membership, it would have been an aggravating factor already.