

Privacy Commissioner's submission to the Justice Committee on the Gang Legislation Amendment Bill

1. I am pleased to provide a submission on the Gang Legislation Amendment Bill (the Bill). The key measures introduced by the Bill are:

- Creating a new offence prohibiting the public display of Gang Insignia
- Creating a new dispersal power to stop gang members gathering in public
- Creating a new non-consorting order to stop specified gang offenders from consorting, which requires specified people not to associate or communicate with each other for 3 years.
- Making gang membership an aggravating factor at sentencing.

The role of the Privacy Commissioner

2. The functions of the Privacy Commissioner include examining new legislation for its possible impacts on individual privacy. The Privacy Act 2020 is New Zealand's main privacy statute. It governs the collection, use, storage, and disclosure of personal information and provides a mandate for my Office to consider wider developments that affect personal privacy, such as the monitoring of communications.
3. Central to my examination of any proposed legislation is the principle that policy and legislation should be consistent with privacy rights unless there is a good reason (and evidence) to override those rights. Privacy is not an absolute right and limits on individual privacy are justified in certain circumstances.

Responding to harm from gangs

4. I recognise that gang offending causes significant harm in the community, and I support the Government's intent to ensure the New Zealand Police has the necessary tools to prevent and respond to criminal gang activity.
5. As noted above, privacy is not an absolute right: where criminal activity by gang members has been identified, or is reasonably suspected by Police, privacy is not a barrier to effective law enforcement. I support the use of effective enforcement to disrupt the harmful activities of gangs.
6. At the same time, the harms caused by gangs cannot be solved simply through enforcement. The causes of gang offending are complex, and evidence suggests that focusing solely on suppression, control, and enforcement approaches can cause alienation from communities and risks increasing gang membership and isolation.¹ The Regulatory Impact Statement for the Bill notes that there is no strong evidence that a

¹ Prime Minister's Chief Science Advisor, Towards an understanding of Aotearoa New Zealand's adult gang environment <https://www.pmcscsa.ac.nz/files/2023/06/Gang-Harms-Long-Report-V3-PDF.pdf>, page 6

suppression approach aimed at disincentivising gang membership, which is an aim of the Bill, will work to reduce offending by gang members in the long-term.²

Effects on Māori

7. Māori are more likely to be members of gangs,³ so Māori are likely to be disproportionately affected by this Bill.
8. It is important to recognise and consider Māori concepts of privacy and how they differ from western views.⁴ The privacy impacts introduced by certain provisions of the Bill may be different when looking through this lens.
9. I recommend that Māori perspectives on privacy are considered, along with other impacts on Māori, when assessing the impacts of the Bill and during implementation if the Bill passes.

Amending Gang List

10. Clause 30 introduces the ability to amend the list of gangs set out in Schedule 2 by an Order of Council made on recommendation by the Minister of Police.
11. I note that this is modelled on the existing section 5 Prohibition of Gang Insignia in Government Premises Act 2013. However, this Act has a much narrower focus on only prohibiting gang insignia in government buildings.
12. As this Bill will have a much wider scope and have a greater potential to infringe on privacy rights, I recommend that the bar for adding groups to the list be raised to ensure that groups that are not gangs do not become subject to the privacy intrusive provisions.
13. As currently drafted, the terms of clause 30 could arguably cover a group of animal rights activists whose members might 'encourage', or even directly engage in, raids on facilities where animals are believed to be mistreated. Defining these activists as a gang would seem to significantly overstep the intent of the Bill.
14. I **recommend** that the bar for adding groups to this list be raised. One way of doing this would be to tie the designation of gangs to definition of 'organised criminal group' in section 98A(2) Crimes Act. This seems to be a significantly higher bar to meet and should mitigate the risk from the Minister of Police being able to recommend amendments to schedule 2 without external scrutiny.

Non-consorting orders

15. The Bill (part 3, subpart 2) introduces powers for the District Court to issue non-consorting orders to gang members who, after the commencement of the Act, are made subject to a Firearms Prohibition Order under the Arms Act 1983 or are convicted of a serious offence. These orders will prohibit individuals subject to them from associating or communicating

² Responding to Gang Harm Regulatory Impact Statement at paras 55 to 57
https://www.justice.govt.nz/assets/Documents/Publications/RIS_Responding-to-Gang-Harms_FINAL.pdf

³ Responding to Gang Harm Regulatory Impact Statement at para 82

⁴ Kukutai, T., Cassim, S., Clark, V., Jones, N., Mika, J., Morar, R., Muru-Lanning, M., Pouwhare, R., Teague, V., Tuffery Huria, L., Watts, D. & Sterling, R., [Māori data sovereignty and privacy](#), Tikanga in Technology discussion paper, Hamilton: Te Ngira Institute for Population Research, 2023.

with those named on the order for a period of 3 years (unless discharged sooner by court order). Breach of an order is an offence punishable by imprisonment or a fine.

16. The provision is designed to suppress and disrupt gang violence by reducing the ability for specified gang offenders to coordinate and plan offences. To investigate possible breaches of the prohibition on communication, Police will presumably need to engage in some monitoring of communication channels of individuals who have been issued non-consorting orders. It is not clear how Police will operationalise this monitoring. Monitoring communications is a significant intrusion into privacy.
17. At present, Police rely on existing offences that prohibit individuals from associating or communicating for criminal purposes. Search and surveillance powers allow Police to search people or premises and to monitor communications, and are used by Police to gather evidence of offending. The focus of current powers is on responding to individuals associating or communicating for the purposes of committing an offence, differentiating between consorting that has a criminal purpose and that which does not.
18. I am particularly concerned about the potential privacy impacts on third parties. There is a risk that, by monitoring communication channels of individuals who have been issued a non-consorting order, Police will infringe the privacy of third parties not covered by the order, including communications with whānau and family members.
19. I am not satisfied there is evidence to illustrate that this power to issue non-consorting orders will be effective. The Regulatory Impact Assessment (RIS) acknowledges that Australian evidence indicates that the power may not have a discernible impact on general crime and will not realistically be able to reduce offending.⁵
20. Given the lack of evidence that this power will be effective, and the potential intrusiveness of monitoring of communications without good cause to believe that individuals are planning criminal activity, **I do not support** the non-consorting provisions.
21. If the non-consorting provisions are passed, Police will need to ensure that any monitoring of communication is only carried out to the extent that is necessary to ensure that individuals are not in breach of their non-consorting orders. My Office is available to support officials in the implementation process, which will need to include work to ensure privacy rights are appropriately safeguarded.

Dispersal Notices

22. Dispersal notices are introduced in part 3, subpart 1 of the Bill. These provisions will allow police officers to issue dispersal notices to a person if they have reasonable grounds to suspect that 3 or more gang members are gathering in public. There is no requirement for an offence to be taking place.
23. The notice would prohibit those who have been issued a notice from associating with one another in a public place for 7 days.
24. I have concerns over how Police will ensure that dispersal notices are issued based on accurate personal information, specifically about whether individuals are gang members.

⁵ Responding to Gang Harm Regulatory Impact Statement, at para 307-308

25. The Bill defines 'gang member' in clause 4 and sets out a list of gangs in schedule 2. Prospective and nominee gang members are included in the definition of 'gang member', as are individuals who are involved in gang affairs for purposes of participating in criminal activity.
26. The need for accuracy in this context is high given the significant impacts into freedom of peaceful assembly, association and movement. I understand that the Police considers the National Gang List to be the most comprehensive list of gang members in New Zealand but has stated that it was not appropriate for the purposes of operationalising dispersal notices.⁶
27. It is not apparent how Police will ensure the accuracy of personal information used to inform which individuals are considered gang members and I have concerns over how this will work in practice.

Conclusion

28. I **recommend** that the bar for designating a new gang be raised to ensure that groups that are not gangs do not become subject to the privacy intrusive provisions.
29. Given the lack of evidence that non-consorting orders will be effective at suppressing gang violence, I **do not support** the passing of the non-consorting provisions and recommend they be removed.
30. I trust my comments are of use to the Committee. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.



Michael Webster
Privacy Commissioner

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⁶ Responding to Gang Harm Regulatory Impact Statement at 185