

Privacy Commissioner's submission to the Justice Committee on the Criminal Activity Intervention Legislation Bill (166-1)

1. The Criminal Activity Intervention Legislation Bill (the Bill) has been introduced to address gang harm. The Bill seeks to provide law and order measures to respond to criminal activities carried out by gangs by:
 - creating a new warrant power to search for and seize weapons during a gang conflict;
 - creating a new seizure power for cash found in suspicious circumstances and over a certain threshold;
 - creating a new offence of discharging a firearm with intent to intimidate;
 - prohibiting cash payments over a specified value for certain high value goods;
 - extending the circumstances where vehicles involved in a gang convoy can be impounded.

The role of the Privacy Commissioner

2. The functions of the Privacy Commissioner include examining new legislation for its possible impact 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 expansion of search powers.
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 necessarily justified in certain circumstances.

Gang harm in New Zealand

4. I recognise that gang harm is a significant problem for families, businesses, and the wider community, and I support Government's intent to ensure Police have 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. But gangs are an intransigent problem in New Zealand society. I agree with the Government position as stated in the *Resilience to Organised Crime in Communities* programme that 'organised crime is a complex social, economic, criminal, and community issue'¹, and that the harms caused by gangs is not one that can be solved simply through

¹ <https://www.police.govt.nz/sites/default/files/publications/cabinet-paper-addressing-the-wellbeing-harms-of-organised-crime.pdf>

enforcement. As the then-Minister of Police wrote at the time: 'We cannot arrest our way out of this problem'².

7. The Ministry of Justice's Supplementary Analysis Report for the Bill similarly notes that: 'Evidence shows that focusing on early interventions, rehabilitation and re-integration is the most effective route to sustained improvements in public safety over the long term'.
8. It is in this context that I have considered the proposed expansions of Police's powers, and the potential privacy impacts of these proposals including for whānau, friends, and flatmates. Evidence of effectiveness in addressing the stubborn issue of gang harm is essential to justify the privacy intrusions posed by any expansion of powers.

Summary of key privacy concerns

9. The provisions in this Bill are designed to enhance Police's powers to prevent and disrupt harmful gang activity and to take enforcement action. This is expected to have a positive impact on community safety and perceptions of safety.
10. The Bill has a number of provisions with privacy implications, including the new warrant power, the new firearm offence and the prohibition on cash payments for certain high value goods.
11. The main focus of my submission is the expansion of Police's search warrant powers in the form of a new warrant to search for and seize weapons during a gang conflict. I acknowledge the intent is to disrupt gang conflict situations as a preventative and public safety measure. However, as the Supplementary Analysis Report (the SAR) acknowledges, these are broad powers that pose limits on rights³ and will disproportionately affect Māori.⁴
12. The exercise of search powers is intrinsically privacy invasive. It is my role as Privacy Commissioner to comment on the case for broader law enforcement search powers, and where the case is made, whether there are adequate checks and balances in place.
13. The initial question is whether the new warrant power in the Bill will be effective in enabling Police to prevent and respond to gang harm. Without the necessary evidence to demonstrate the power will be effective, this raises an issue as to whether a case has been made for expanded search warrant powers, given the privacy implications. The new warrant power in the Bill may well be effective in enabling Police to prevent and respond to gang harm, however, the SAR acknowledges there is a lack of evidence to support this.⁵ The risk of proceeding without this evidence is that there could be unintended consequences and the search powers may be framed more broadly than necessary.
14. I am concerned that due to the very tight timeframes for developing the draft legislation, there has not been adequate time for policy development, for a consideration of alternative options, or for consultation on the impact of the proposals and unintended consequences.⁶

² <https://www.police.govt.nz/sites/default/files/publications/cabinet-paper-addressing-the-wellbeing-harms-of-organised-crime.pdf>

³ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* para 105.

⁴ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* para 107.

⁵ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* para 98.

⁶ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* pages 4-5.

Nor has there been adequate time for officials to provide more detailed advice on the privacy implications.⁷

15. I also note that Police already have considerable search powers under the Search and Surveillance Act 2012, including warrantless search powers to enable constables to carry out searches in relation to arms offences. It is not clear to me what evidence there is for an expansion of these powers at this time. Further, the Search and Surveillance Act 2012 is currently under review by the Ministry of Justice⁸. It would seem more appropriate to consider a specific expansion of search powers as part of this more holistic review, taking account of the wide range of different perspectives of stakeholders on these issues.
16. Given the lack of evidence of effectiveness, and the lack of adequate policy consideration and consultation, I do not consider the case for Part 3 of the Bill has yet been made, given in particular the potentially significant privacy impacts on third parties other than gang members (whānau, and especially, tamariki and rangatahi).
17. As such, **I do not support the passage of Part 3 of the Bill** and recommend that further policy work be undertaken to determine the case for the expanded powers or identify an effective alternative.
18. Should Part 3 of the Bill proceed, my second consideration is whether Part 3 has the necessary checks and balances to protect the privacy of individuals, and ensure that use of the power is reasonable and justifiable to respond to the problem identified.
19. My primary concern is that the proposal is assessed to have adverse impacts on privacy and on section 21 of the NZ BORA, and that only some of the risk of an unreasonable search is mitigated by the requirement for judicial authorisation.⁹ I therefore consider there is room for improving the checks and balances to further address this risk.
20. In light of these concerns and the breadth of the proposed new search powers, **if Part 3 of the Bill were to proceed, I recommend changes to this part of Bill** to provide appropriate safeguards and future review of the effectiveness of this intervention (those changes are detailed in the body of this submission).

Detailed analysis of the proposals and their privacy implications

New warrant power to search for and seize weapons during gang conflict

21. A new broad search warrant power is included in the Bill to prevent and respond to gang conflict and the problem of the mobility of weapons within gangs.¹⁰ The SAR identifies that access to weapons (particularly firearms) within the context of escalating gang conflicts poses a significant risk of harm to our communities.¹¹
22. The Bill amends the Search and Surveillance Act 2012 to provide a new warrant power to search for and seize weapons during a gang conflict. This is to respond to gang conflicts that pose a risk to the public when firearms and other weapons are used. The identified

⁷ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* para 95.

⁸ <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/ssa/>

⁹ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* page 23.

¹⁰ Part 3.

¹¹ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* para 79.

policy problem is that when gang conflicts are occurring violence may be committed by any member of the gang and weapons are frequently moved between locations.¹² This presents a challenge for Police to locate gang weapons during periods of gang conflict, and the new search warrant power is proposed to respond to this mobility of weapons with gangs.

23. Under the proposed provisions, a judge may grant a search warrant to Police if they are satisfied that (a) a gang conflict exists; (b) one or more of the gangs involved are in a specified area; and (c) the issue of the warrant may reduce the risk of harm to people or property.¹³
24. The warrant will authorise Police to search any places or vehicles in that area reasonably suspected to be owned, occupied or used by gang members.¹⁴ Non-gang members homes and vehicles may also be searched if the non-gang members are reasonably believed to be encouraging or assisting the gang conflict.

The case has not been made that existing powers are inadequate to achieve the policy objective

25. A number of existing legislative provisions appear to already cover similar circumstances to those envisaged by the new warrant power. The SAR notes that the harmful behaviours being addressed are for the most part already prohibited under existing provisions, and that Police and other enforcement powers have a range of powers under the Search and Surveillance Act.¹⁵
26. In particular, Police have existing warrantless search powers under section 18(3) of the Search and Surveillance Act that enable constables to carry out searches in relation to arms offences. Police may carry out a search if there are reasonable grounds to suspect that someone is carrying, in possession of, or in control of arms, and is in breach of the Arms Act; or there are arms in a place or vehicle, and that a serious offence has been committed, is being committed, or is about to be committed.
27. Further, Police may apply for a search warrant under section 6 of the Search and Surveillance Act where they can show they have reasonable grounds to suspect an offence has been, is being, or will be committed.
28. While search and seizure powers are a necessary mechanism to enable Police to respond to criminal activity, it is appropriate that there are proportionate limitations on these powers, to reflect the right to be free from unreasonable searches and expectations of privacy affirmed in BORA and the Privacy Act.
29. Little analysis is available to demonstrate why and how the existing search powers in the Search and Surveillance Act are not effective or adequate to allow Police to carry out searches where necessary. The SAR comments briefly on how the status quo is expected to develop and concludes that without legislative change, tensions between gangs and the negative impact on the public will continue.¹⁶ However it does not provide estimates

¹² *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* para 78.

¹³ Clause 18D(1).

¹⁴ Clause 18D.

¹⁵ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* para 14.

¹⁶ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* para 18.

to indicate how many of the new warrants may be used, whether the new warrant power will replace the need for other warrants, or the number or type of weapons that may be seized.

30. The only operational example used in the SAR is Operation Bloodhound, which was, in fact, a successful response to gang conflict in 2022 carried out under existing search warrant provisions and resulted in the seizure of 30 firearms.¹⁷
31. However, the resourcing in applying for the new form of warrant may preclude it being utilised often.¹⁸
32. The Ministry of Justice is currently leading a review of the Search and Surveillance Act 2012¹⁹. This review was, in part, driven by the recommendations of the Law Commission and the Ministry of Justice in their 2016/17 review of the Act, which the Government has not yet formally considered. It would seem more appropriate to consider a specific expansion of search powers as part of this more holistic review, taking account of the wide range of different perspectives of stakeholders on these issues, and the recommendations previously made.

Insufficient policy rationale for warrant power without suspicion of offending

33. The new warrant power appears to be a significant departure from the established approach to the exercise of search and warrant powers under the Search and Surveillance Act. The Search and Surveillance Act requires Police to have a reasonable degree of suspicion or reasonable belief²⁰ that a criminal act is occurring or will occur.
34. Under the new warrant power, to be authorised to search any relevant homes or vehicles in a specific area, Police will only need to demonstrate that a gang conflict exists in that area, that a search warrant to seize weapons may reduce risk of harm to people or property, and that the home or vehicle is reasonably suspected to be owned, used, or occupied by a gang member.
35. This appears to be the first time that search powers attach to a large group (gang members) primarily based on group membership. The shift from requiring reasonable suspicion of offending to a lower threshold of association with a group carries a higher level of privacy risk. As it currently stands, the new search powers will capture the homes and vehicles of gang members who may not be involved in arms offending.
36. Reasonable suspicion of offending is a fundamental underpinning for policing in a modern democratic society. The main value of this requirement is not that it sets a high threshold before Police may carry out a search, but rather demands that Police direct their attention to whether there are objective facts which gives rise to a reason to carry out a search.²¹

¹⁷ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* para 90.

¹⁸ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* para 118.

¹⁹ Review of the Search and Surveillance Act; <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/ssa/>

²⁰ Section 6 of the Search and Surveillance Act 2012

²¹ Thomas Crofts “Stop and search without reasonable suspicion – Is WA becoming a police state?” (2010) AltLJ 35(4).

37. The SAR states there are no comparable search powers in international policing jurisdictions, and therefore no ability to draw on evidence in support of the power or analyse how it may work in New Zealand.²² The SAR notes that a partial comparison may be made with the section 60 stop and search powers in the United Kingdom which also removed the requirement for reasonable suspicion. Evaluation of the use of these powers found no evidence to demonstrate that they led to a reduction in violent crime.²³ The powers have been used disproportionately, and the vast majority of searches do not lead to any weapons being found.²⁴
38. The requirement to have objective grounds to suspect offending is an appropriate legal safeguard to protect individuals against unreasonable interference with their right to privacy.
39. To justify departure from the usual legal safeguard on Police search warrant powers,²⁵ a robust policy case is needed showing that the benefits (in terms of a demonstrated, evidence-based, reduction in gang related harm) outweigh the privacy intrusion in order to justify the intrusion as a reasonable one. Based on the information available to me through consultation, in my view, this case has not yet been satisfactorily made.

Potential privacy impacts on third parties (whānau, friends, flatmates)

40. The new warrant power enables Police to search places and vehicles that are occupied, used, or owned by gang members, or non-gang members if they are believed to be encouraging or assisting in the gang conflict. However, it is likely that gang members will not be the only individuals present or residing in these search locations.
41. I am concerned about the potential privacy impacts on the whānau of gang members residing or present in the search locations, as well as friends and flatmates. There is a risk that the broader search powers may result in searches of numerous locations to hunt for a small number of weapons (the 'needle in the haystack'). Where search powers are exercised in family homes or in relation to shared properties, the rights of non-gang members will be affected, including particularly vulnerable groups such as tamariki and rangatahi.
42. Tamariki and rangatahi are particularly vulnerable to the distress and intrusion caused by Police searches in their homes and neighbourhoods, and this may have long-lasting effects on perceived views of Police, erode trust in Police, and damage relationships with community workers.
43. I am not aware of analysis considering the unintended adverse consequences of these privacy-invasive search powers, for example, intensified gang cohesiveness, animosity towards the police, or the displacement of violent gang activity to areas outside the area specified by the warrant.

²² *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* para 98.

²³ Crofts (2010).

²⁴ The Guardian "[Black people nine times more likely to face stop and search than white people](#)" 27 October 2020.

²⁵ See clause 19 of the Bill that disapplies section 6 of the Search and Surveillance Act.

44. Given the new warrant power will likely affect privacy rights and may lead to significant adverse consequences, it would need to be demonstrated that the benefits of the warrant power outweigh the consequences. Again, in my view, this case has not been made.

Concerns about the accuracy of personal information

45. It is not clear how Police will ensure the information they provide in an application for the new warrant will be based on accurate and up to date personal information. It is vital to the exercise of these new search powers that Police have robust processes to ensure its information on gang membership is accurate.
46. A judge may issue a warrant under section 18D authorising the searches of places or vehicles reasonably suspected to be owned, occupied, or used by *gang members*.
47. The Bill sets out how gang membership will be established and uses the definition of 'gang' in the Prohibition of Gang Insignia in Government Premise Act 2013. Prospective and nominee gang members are also captured, as are individuals wearing gang insignia and individuals involved in gang affairs for the likely purpose of participating in criminal activity.
48. The need for accuracy in this context is high given the significant impacts of these warrants and intrusion into privacy. I understand there may be inaccuracies in the National Gang List. There are also system biases, for example, individuals are much more likely to be put on the National Gang List than they are to be removed from it.
49. It is not apparent how Police will ensure the accuracy of personal information used to inform which individuals are considered gang members, prospective members, or nominees.

Broad scope of search powers

50. The search powers under the new warrant are broad in scope. The search powers under the warrant may be exercised for a period of up to 14 days from issue. Multiple homes, vehicles and public places may be searched under one warrant, and each place may be searched on more than one occasion in the period the warrant is applicable.
51. The warrant may only apply to places or vehicles in a 'specified area'; however, 'specified area' has a potentially wide definition and includes an area *different* to the area where the gang conflict exists. A gang conflict does not need to be between multiple gangs but includes conflict between factions in one gang.
52. Not only does the warrant power depart from the usual threshold of 'reasonable suspicion of offending' but the search powers given to Police under the warrant are broad. Police will have the power to conduct searches of any places and vehicles able to be linked to gang members, prospective members, nominees or others believed to be involved in a gang conflict, in any specified geographical area.
53. The wide nature of the warrant power increases the likelihood of significant privacy intrusions on third parties caught up in the exercise of these searches (whānau, tamariki and rangatahi).

Further targeting of warrant power

54. I recognise that the intent is to target the issue of the new warrant power in the Bill to its intended objective. A judge may only issue a gang conflict warrant where satisfied its issue “may reduce the risk of harm to people or property” (new section 18D(1)(c)).
55. However, that threshold appears to be set too low to meet the stated policy objective. It is unlikely that any warrant applications would fail to meet a threshold that essentially requires the ‘possibility’ of a reduction of risk of harm of any extent. I recommend this threshold is strengthened. The threshold should be proportionate so that the search warrant is authorised where the risk of harm is sufficiently high to justify the intrusion on rights.

New offence for discharging a firearm with intent to intimidate

56. The Bill creates a new firearms offence to criminalise the discharging of a firearm for the purpose of intimidation with a penalty of imprisonment up to a maximum of 5 years.
57. The Bill amends the Criminal Investigations (Bodily Samples) Act 1995 (CIBSA) in relation to this offence. The amendment provides that a person detained for committing or being suspected of committing this new firearm offence may be requested or required to give a bodily sample for the purpose of confirming or disproving their involvement.
58. While I do not have particular concerns about the offence being included in CIBSA, I note that the broader CIBSA framework has been identified by the Law Commission as problematic and long overdue for review.²⁶

Prohibiting cash payments for high value goods

59. The Bill would prohibit cash payments for certain high value goods, including watches, jewellery, and cars, over a certain threshold to be set in regulation.
60. This proposal imposes on transaction privacy. It will impact on many individuals in New Zealand who choose to use cash for legitimate reasons, including rural and migrant populations and older people.
61. I am encouraged to see some targeting has been built into this provision, by subjecting only certain high value goods to the prohibition. I would expect robust evidence to guide where the threshold is set and what goods are subject to the prohibition to target the policy to capture money laundering and minimise the impact on individuals using cash for legitimate transactions.

²⁶ See also Government Response to Law Commission Report: The Use of DNA in Criminal Investigations (May 2021).

If Part 3 of the Bill relating to search powers is to proceed, further safeguards are needed

62. While I do not support Part 3 of the Bill proceeding, if this is the case, I **recommend** amendments be made to this part of the Bill. The proposed amendments are set out below.

Sunset clause

63. Firstly, I recommend that the Committee might consider including a sunset or review clause for the legislative framework as an opportunity to check that this part of the Bill proves to be effective and operating as intended (in the absence of an available evidence base). That review could assess the reporting information made available under new section 171A.

Breadth of the new search warrant power

64. The privacy impact of the proposal is acknowledged in the Ministry's regulatory analysis:²⁷

New warranted search powers to address and respond to gang conflict would have a privacy impact on gang members and their whānau including tamariki, as it allows entry into homes. The warrant would cover multiple homes and vehicles based on gang membership. This incursion into privacy to search for firearms and weapons is deemed necessary to more effectively disrupt and prevent violence during a period of gang conflict. The requirement for judicial oversight is intended to ensure that the use of the warrant power is **justified and reasonable**.

65. The Ministry's regulatory analysis on the Bill of Rights Act (BORA) implications of the new search powers are that they a significant imposition into personal privacy because of the ability to search private places and vehicles:²⁸

Existing search powers require Police to have a reasonable degree of suspicion or belief that a **criminal act** is occurring or will occur. This [proposed] search power **only requires Police to believe or suspect the person is a member of a gang that is involved in a conflict**. This has the potential to place a higher limitation on the right not to be subjected to unreasonable search and seizure than existing powers, and is more likely to result in searches of people not involved in the conflict.

However, lower thresholds may be justified where there is a **significantly increased risk** that future violence may be committed or aided by any member of the gang. Current search powers are not broad enough to prevent this anticipated activity that would cause harm to the public.

66. The Crown Law BORA advice²⁹ considers there is justification for the additional search warrant power: while usually the justification for a search power is the investigation and

²⁷ Para 36, 113-119.

²⁸ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* paras 110-112.

²⁹ Criminal Activity Intervention Bill: compliance with the Bill of Rights Act

<https://www.justice.govt.nz/assets/Documents/Publications/20220914-Criminal-Activity-Intervention-Legislation-Bill-Consistency-with-NZBORA-as-amended.pdf>

detection of **offending**, it can also be justified for the **protection of public safety** where weapons are involved.

67. Crown Law is satisfied that there is a compelling public interest as gang conflicts frequently involve the discharge of firearms in public, raising an immediate concern for public safety on the basis that (a) the power become available only when such a conflict has occurred; and (b) it is confined to the search for and seizure of weapons.
68. In my view, the drafting of Part 3 could be improved to address the broad nature of the new search warrant power. While this would not eliminate my concerns, they would reduce some of the risk posed by this new search warrant.
69. I suggest that the first question is whether it is necessary to take a novel approach to the threshold for application for the warrant in not requiring any suspicion of criminal conduct or that evidential material of offending will be located by exercise of the search power. In my view, a search warrant threshold that includes an element of gang offending is to be preferred to the framing of the search warrant power in Part 3 that does not rely on offending, or the existence of evidential material.
70. The policy materials indicate that the intent is to protect public safety in circumstances where there is gang conflict or intimidation involving weapons. In my view it should be possible to rely on usual thresholds of offending or evidential material to justify the search warrant power to seize weapons that are at risk of being used in a gang conflict. The nature of gang conflict involving weapons is clearly criminal in nature. Part 1 of the Bill includes the additional offence of intimidating discharge of a firearm.
71. The limited gap analysis suggests that the issue with the standard approach to search warrants in a gang conflict context is the challenge for Police of demonstrating to a judicial officer that each gang member is reasonably suspected of being involved in criminal activity, that multiple warrants are needed to search property and vehicles and that some property and vehicles may not be able to be searched, despite the heightened risk of violence across the gang membership and the movement of illegal weapons between gang locations.³⁰
72. If there are technical difficulties with obtaining warrants that encompass gang locations suspected of potentially housing weapons, an alternative option would be to clarify the factors that can establish a reasonable suspicion such as gang membership.
73. If the threshold is not amended, the application for the warrant could include an explanation for seeking this form of broad warrant rather than a standard search warrant (or available warrantless power) to search for gang weapons (in new section 18C(1)). In my view, using the standard warrant process is to be preferred, where that is available, with recourse to broader search warrant powers only where that is demonstrated to be necessary to address the risk to public safety.
74. The second question is whether the Part 3 drafting aligns with the policy intent to enable the Police to respond to gang conflict that poses a risk to public safety. The policy

³⁰ *Supplementary Analysis Report: Criminal Activity Intervention Legislation Bill* para 89.

materials indicate the intent that the search warrant power is available to respond to gang behaviour that poses such a risk.

75. The Crown Law BORA advice anticipates that there will be a real risk to public safety from the use of weapons in gang conflicts to provide the policy justification for this type of warrant.
76. In my view, the reliance on public safety as the threshold for the search warrant power, requires a further degree of proportionality.
77. I have considered the threshold definition of 'gang conflict' – this is broadly defined as ongoing dissension between gangs involving the use or likely use of weapons that presents a risk of harm to persons or property. The broad nature of the definition means it is possible that the search warrant power could be used where there is a limited public safety risk. For example, a verbal argument or intimidating behaviour that has not involved weapons and where there is limited information to predict that it will escalate to the use of weapons. This does not appear consistent with the policy intent, nor does this provide the necessary element that the search warrant power (i.e. the need to intervene) is proportionate to the risk to public safety.
78. I therefore recommend that new section 18C should include further particulars:
 - the seriousness of the gang conflict and the nature of the suspected criminal offending or potential gang offending that involves weapons; or the basis on which the use of weapons is predicted.
 - the seriousness of the risk to public safety or "harm".
79. I also recommend that the new section 18D(2) should include that the Judge is satisfied that the scope of the search warrant is proportionate to the risk of harm presented by the gang conflict and the available intelligence relating to the escalation of the conflict.

Additional checks and balances

80. I have considered whether any further additional checks and balances should be included in Part 3.
81. Part 3 includes a departure from section 98(5) of the Search and Surveillance Act that provides for the judge to authorise the number of occasions on which the warrant may be executed. New section 18E provides for a statutory default authority for this new search warrant to be executed on multiple occasions subject to any conditions the judge considers reasonable.
82. In my view, the case has not been clearly made for departing from section 98(5). In light of the broad nature of the search power, it is appropriate for the judge to consider and authorise multiple executions of the search warrant and this is a necessary limit on the search power.
83. Provision could instead be made for the applicant to return to the judge to authorise further execution of the warrant as may be necessary in the relevant circumstances, or at least to report to the judge following multiple executions of the warrant.

84. Alternatively, provision should at least be made for conditions on multiple executions to be included as an example in new section 18F(4)(b).

Recommendations

85. I do not support Part 3 of the Bill proceeding in its current drafting and **recommend** that further policy work be undertaken to determine the case of the expanded powers, or any effective alternative identified.
86. Should Part 3 of the Bill proceed, I **recommend** that amendments are made to it. Given that these are significant, wide-ranging and privacy intrusive powers, the inclusion of further safeguards would be appropriate, for example:
- adding a sunset or review clause to the legislative framework as an opportunity to check that the legislation proves to be effective and operating as intended (in the absence of an available evidence base);
 - adding a presumption that existing search powers should be exhausted before making an application under the new warrant power;
 - specifying additional content to be included in the application for the new warrant power:
 - the seriousness of the gang conflict and the nature of the suspected criminal offending or potential gang offending that involves weapons; or the basis on which the use of weapons is predicted;
 - the seriousness of the risk to public safety or risk of other harm.
 - strengthening the legislative test for the issue of the new warrant and targeting it to the risk of harm to the public by providing the judge must be satisfied that issue of the search warrant is proportionate to risk of harm presented by gang conflict;
 - requiring the judge to specify if the warrant is to be executed on more than one occasion.

Conclusion

87. I trust my comments are of use to the Committee. I seek to present this submission to the Committee in person and be available to answer any questions.



Michael Webster
Privacy Commissioner

26 October 2022