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# Criminal Activity Intervention Legislation Bill

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*25/10/2022*

## **Criminal Activity Intervention Legislation Bill**

### **1 Introduction**

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Criminal Activity Intervention Legislation Bill (the **Bill**).
- 1.2 In summary, the Law Society considers that the Bill could benefit from addressing the following matters:
- (a) provisions providing for the new gang conflict-focussed search warrant powers could be clarified, to ensure their availability properly reflects their intended purpose; and
  - (b) amendments should be made to the new power to seize cash amounts of over \$10,000 located in suspicious circumstances, so as to ensure people affected by the provisions are able to exercise their right to obtain legal advice and to clarify the intended application of these provisions.
- 1.3 This submission has been prepared with input from the Law Society’s Criminal Law Committee.<sup>1</sup>
- 1.4 The Law Society wishes to be heard.

### **2 Gang conflict search warrants**

- 2.1 Clause 20 inserts a new subpart 6A to the Search and Surveillance Act 2012 (the **SSA**), providing for a new type of search warrant focussed on addressing gang conflicts.
- 2.2 It is noted that the power under proposed section 18B to issue a warrant does not require that there be any suspicion as to criminal conduct by any individual, or a belief that evidential material of offending will be found by exercising powers. This is distinct from the general warrant thresholds that repeat throughout the SSA.<sup>2</sup> It is also novel in that it is aimed at preemptively preventing harm from occurring. That said, by way of general observation, it is apparent that the power is for a limited purpose only, namely to search for and seize weapons. The policy rationale for the provisions are clearly and firmly embedded in public safety.
- 2.3 Given that other provisions in the SSA could be used in circumstances involving the use of weapons, this power specifically operates to intrude on reasonable expectations of privacy where the relevant privacy rights are those of gang members. Given this, and given that power will disproportionately impact Māori, it is vital that the circumstances in which the power can be exercised are clear and unambiguous.
- 2.4 It is considered that the definition of “gang conflict” in the proposed section 18A is potentially problematic, as what amounts to “ongoing dissension” is unclear. A number of gangs that are active in New Zealand have longstanding rivalries which regularly manifest in violent incidents. It is not clear whether the definition is intended to be broad enough to capture such a constant state of tensions between two gangs.

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<sup>1</sup> More information regarding this committee is available on the Law Society’s website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

<sup>2</sup> For example, s 6 of the Search and Surveillance Act 2012.

- 2.5 Ultimately, the combination of the vagaries of what amounts to “gang conflict” and the potentially broad reach of the definition, creates a risk that the power could be abused, or at the very least generate uncertainty as to what would amount to a reasonable ground to believe that gang conflict exists. Any uncertainty will run counter to the intention that this new search power is to be used only in exceptional circumstances.<sup>3</sup> A suggested amendment would be to include examples for the sake of clarity (such as there being recent incidents of violence, or information from Police sources).
- 2.6 Further, the definition of “gang member” in proposed section 18A(b)(ii) includes those involved in gang affairs for the likely purpose of participating in a criminal activity. While this is arguably an important extension for the purpose of this search power, it has the risk of non-gang members being labelled gang members in different contexts. Accordingly, it is suggested that this definition is explicitly limited with the addition of the term “for the purposes of this Act”.
- 2.7 Finally, the grounds for issuing a warrant in proposed section 18D(1) are not consistent with the limitations in proposed s 18B. Proposed section 18D(1) sets out the overall requirement that the Judge must be satisfied there are reasonable grounds to believe that gang conflict exists, involving one or more gangs in a specified area, and that the issue of the warrant may reduce the harm to people or property. These grounds for issuing a warrant do not align with the limitations in proposed s 18B, namely that the purpose of such a warrant is for the purpose of searching for and seizing weapons.<sup>4</sup> Accordingly, in the interests of clarity, it is suggested that section 18D(1) include a reference to weapons.
- 2.8 The separation between the concepts of ‘gang conflict’ and ‘specified area’ used in the proposed s 18D also raises concerns. Under that section, in order to issue a warrant, a Judge must be satisfied that there are reasonable grounds to believe that a gang conflict exists and that at least one of the gangs is in the specified area the warrant would cover (among other prerequisites). However, subsection (6) notes that the specified area can be a different area to the area where the gang conflict exists. It follows that a gang conflict in one area could be relied upon to obtain a warrant in a separate part of the country, despite the specified area potentially having no relevance to this conflict. The Bill appears to treat gangs as a single entity with a consistent focus – however, while there is an overarching leadership, gangs generally act at a local level with different chapters acting towards their own goals and on their own behalf.
- 2.9 There can be good reason for the Bill to allow for warrants to be sought for areas away from where the gang conflict has arisen (for example, where Police suspect that firearms used in a drive-by have then been taken to a different city); however, the Law Society considers that there should be a nexus between the conflict and the specified area, beyond the mere fact that one of the gangs involved is active in the latter.
- 2.10 The Law Society also considers that proposed sections 18D(2) and (4) as drafted are ambiguous. It appears the intention is for subsections (a) and (b) to be alternatives – however, these subsections could also be interpreted as both (a) and (b) being prerequisites

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<sup>3</sup> (27 Sep 2022) Criminal Activity Intervention Legislation Bill – First reading, Kiritapu Allan).

<sup>4</sup> See by way of contrast, ss 6 (general warrant provision) and ss 71, 72 and 74 of the Search and Surveillance Act 2012.

that must be met before the Judge can issue the warrant. This could be clarified by including 'or' at the end of subsection (a).

### **3 New power to seize cash located in suspicious circumstances**

3.1 Clause 33 inserts new sections 123A to 123E into the SSA. This is an extension to the current plain view seizure provision (section 123 of the SSA), as it permits Police to seize cash in excess of the threshold amount of \$10,000, where:

- (a) the constable reasonably believes that the amount of cash is of or over the cash threshold amount; and
- (b) is not satisfied with the explanations given by the person from whom the cash was seized as to the origin and intended use of the cash; and
- (c) has reasonable grounds to suspect that the cash does not have lawful or legitimate origin, or is to be used for any illegal or dishonest purpose.

3.2 This new power will only be available when a constable is exercising a search power, is lawfully in any place or vehicle or is conducting a lawful search of a person.<sup>5</sup>

3.3 This proposed power goes further than the existing power contained in section 123 of the SSA. That provision allows for the seizure of items in plain view, in circumstances where a constable is otherwise lawfully on a premises or conducting a lawful search of a person, and has reasonable grounds to believe that they could have seized the item(s) under a search warrant or another search power. The proposed power in clause 33 does not require a belief that the cash is an instrument of crime – rather, it requires the lower threshold of suspicion. As noted in Crown Law's advice on compliance with the New Zealand Bill of Rights Act 1990, the intrusion into privacy is minimal given it can only be retained for 7 days without judicial order.<sup>6</sup> The intrusion is also balanced against the fact that the use of large quantities of cash in today's terms given current technology is generally associated with criminal activities.

3.4 The following comments are made:

- (a) Under proposed section 123A, "cash" is defined as including gold bars and ingot. It is difficult to imagine a constable having the ability to assess the worth of gold. Presumably, account would need to be had of the constable's reasonable enquiries regarding the value of gold bars and ingot. In any event, it is noted that it would need to be returned to the person within seven days, unless the time is extended by order of the Court, so any mistake as to quantity is likely to be corrected there.
- (b) It is noted that "suspicious circumstances" in proposed section 123B(2) is not defined. Given the scope for confusion, it is suggested that this is defined simply by reference to those circumstances in section 123B(4)(b) and (c).
- (c) The proposed section 123B(3) expressly allows for questioning about the origins and intended use of the suspicious cash. Given the consequences of an unsatisfactory

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<sup>5</sup> Clause 123B(1)(a).

<sup>6</sup> <https://www.justice.govt.nz/assets/Documents/Publications/20220914-Criminal-Activity-Intervention-Legislation-Bill-Consistency-with-NZBORA-as-amended.pdf>, 30 August 2022 at [28].

answer (namely the seizure of said cash under subclause (4)), it is suggested that the person being asked those questions should be advised of the consequences of their answers, namely that this could result in the seizure of their cash for up to 7 days (and potentially longer).

- (d) The proposed section 123B(3) makes it discretionary for the constable to question the person in possession of the cash about its origin and intended use. This explanation is an important safeguard against cash being unreasonably seized, and it should be mandatory for an explanation to be sought before any cash can be seized. The Law Society recommends that an additional subsection is included following subsection (4) that states “for the avoidance of doubt, before a constable seizes any cash under subsection (4), they must question the person in possession of the cash under subsection (3).”
- (e) On a related point, it is noted that the ability to seize, where a constable is not satisfied with the explanations the person gives in response to questioning under proposed section 123B(3), places the burden on the person answering to satisfy the constable that they have it for legitimate purposes. This runs counter to all other powers in the SSA, where the obligation is on the enforcement officer to satisfy themselves that the required threshold for executing the power has been reached. It is unclear whether this is intended. Further, given that any answers given may be potentially incriminating, and used against the person at a later stage, consideration should be given as to whether to include a requirement to caution the person being asked. Rather than relying on the circumstances as set out in the Chief Justice’s Practice Note on Police Questioning, consideration should be given to clearly setting out this requirement in the provision.



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