



30 August 2022

Attorney-General

**Criminal Activity Intervention Legislation Bill: compliance with the Bill of Rights Act
(PCO ref: 24852, version 15.0)**

Our Ref: ATT395/368

1. We have reviewed the draft Criminal Activity Intervention Legislation Bill (**the Bill**) for its compliance with the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**). We advise the Bill appears to be consistent with the Bill of Rights Act.

What the Bill does

2. By this Bill, the Government asks Parliament to respond to an increase in serious gang activity that has threatened public safety and caused fear in the affected communities. This has involved the dangerous and intimidating use of cars, and the discharge of firearms at rival gang houses.
3. The Bill aims to amend the criminal law and equip the Police with powers to disrupt this worrying public manifestation of organised criminal activity quickly and effectively.
4. The Bill is omnibus,¹ designed to effect amendments to the Crimes Act 1961, the Arms Act 1983, the Sentencing Act 2002, the Land Transport Act 1998, the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (**AML/CFT Act**), the Search and Surveillance Act 2012 and the Criminal Investigations (Bodily Samples) Act 1995.

Part 1: discharging firearm with intent to intimidate

5. By this Part, the Government proposes to:
 - 5.1 Create a new, separate offence in the Crimes Act of discharging a firearm with an intent to intimidate one or more people (s 308A).² That offence carries a maximum penalty of five years' imprisonment.
 - 5.2 Amend the Arms Act so that if a person is convicted of an offence under the new s 308A, they may subsequently be disqualified from holding a firearms licence within 10 years following either their conviction or their

¹ Introduced under Standing Order 267(1)(a), which provides a Bill proposing to amend one or more Act may be introduced where the amendments concern a single, broad policy goal.

² Clauses 4 and 5 of the Bill, which respectively amend s 308 of the Crimes Act to remove reference to intimidating or annoying by discharging a firearm, and establish a separate offence directed to intimidation by discharging a firearm in the proposed new s 308A.

release from custody following conviction.³ In addition, this Part proposes to amend the Arms Act and Sentencing Act so a judge may, upon sentencing a person aged 18 years and over for an offence under s 308A, make a firearms prohibition order against them.⁴

- 5.3 Amend the Search and Surveillance Act to enable an enforcement officer to undertake trespass surveillance and use interception devices for the purpose of obtaining evidence in connection with the new offence.⁵
- 5.4 Amend the Criminal Investigations (Bodily Samples) Act 1995 so Police may collect bodily samples of persons arrested and detained in connection with the new offence for the purpose of evidence gathering.⁶ In addition, Police may store any DNA profile taken from such samples in a DNA profile databank.⁷

Part 2: enforcement officers' powers to seize and impound vehicles

6. This Part proposes amendments strengthening enforcement officers' powers to seize and impound vehicles connected with offending under the Land Transport Act for certain offences under that Act: driving recklessly;⁸ driving dangerously;⁹ driving carelessly and causing injury of death while speeding, overtaking or improperly using the road.¹⁰

Part 3: search and seizure of weapons in gang conflict

7. This Part proposes amendments to the Search and Surveillance Act to provide:
- 7.1 a new type of warrant for the search and seizure of weapons in the context of gang conflict;¹¹ and
- 7.2 a new seizure power for cash found in suspicious circumstances and believed to be over \$10,000.¹²
8. In respect of the search warrant power, if "gang conflict" exists, a constable may apply to a Judge for a warrant to search places and vehicles in a certain area for the purpose of locating and seizing weapons.¹³ A constable applicant must

³ Clauses 6 and 7 of the Bill, amending s 22H of the Arms Act.

⁴ Clauses 6 and 8 of the Bill, amending s 39A of the Arms Act; and cls 9 and 10 of the Bill, amending s 111A of the Sentencing Act to provide a Judge may make orders under Part 7A of the Arms Act upon sentencing under the proposed new s 308A.

⁵ Clauses 11 and 12 of the Bill, amending s 45 of the Search and Surveillance Act.

⁶ Clauses 13 and 14, adding the new s 308A to the offences listed in sch 1, pt 3 of the Criminal Investigations (Bodily Samples) Act.

⁷ Clause 14.

⁸ Land Transport Act, s 35(1)(a).

⁹ Section 35(1)(b).

¹⁰ Section 39(1).

¹¹ Clause 20 provides new subpart 6A of Part 2 of the Act. Clause 18A provides relevant definitions for "gang", "gang member", "gang insignia", "gang conflict" and "weapon" with reference to the Prohibition of Gang Insignia in Government Premises Act 2013, s 4(b).

¹² Clause 33, proposing new s 123A.

¹³ Clause 18B.

provide certain detail, including the context of the contended conflict as well as descriptive detail and certain identifying information about the specific vehicles and areas proposed to be searched; and the purpose, scope and time periods of the warrant sought.¹⁴ A Judge may then issue the search warrant if satisfied there are reasonable grounds to believe gang conflict exists, and in the area specified, and that issuing the warrant may reduce the risk of harm to people or property.¹⁵

9. Requirements for the warrant's form and contents are substantially similar to those in the equivalent existing provision of the Search and Surveillance Act,¹⁶ save for removing the requirement a Judge must specify the number of times a warrant can be used.¹⁷ The warrant may extend to the search of vehicles not specified in the warrant but reasonably suspected to be used or owned by a person specified in the warrant, either a gang member or another person encouraging or assisting the gang conflict.¹⁸ In addition, this Part provides requirements for whom, and how, the constable must notify in executing the warrant.¹⁹

Part 4 – Restrictions on certain transactions under AML/CFT Act

10. Part 4, by proposed new s 67A of the AML/CFT Act, restricts persons in trade from transacting for certain items in cash if the total value exceeds prescribed thresholds, including jewellery, watches and precious metals and stones; motor vehicles; and ships. The value thresholds for transactions for those items will be set by regulations.
11. The Bill's amendments to the AML/CFT Act will provide separate routes for civil and criminal liability for contravention of the proposed new s 67A:
 - 11.1 Clause 28 extends civil liability and existing penalties in the AML/CFT Act to reporting entities who contravene s 67A.²⁰
 - 11.2 Clause 31 creates a new s 105A of the AML/CFT Act, making it an offence to contravene s 67A. If an individual in trade is convicted under this new section, they will be liable for either or both of a maximum term of two years' imprisonment, or a fine of up to \$300,000. If a body corporate or partnership is convicted, they will be liable for a fine of up to \$5 million.²¹

¹⁴ Clause 18C(1).

¹⁵ Clause 18D.

¹⁶ Section 103.

¹⁷ As provided in s 103(j) of the Search and Surveillance Act.

¹⁸ Clause 18D(5)(b).

¹⁹ Clause 22.

²⁰ Amending the existing s 78 of the AML/CFT Act to include a new s 78(h).

²¹ Clause 31, inserting proposed new s 105A.

12. However, this Part maintains the “one penalty only rule” protection in the AML/CFT Act so that a Court may not impose criminal or civil penalties under s 67A more than once for substantially similar conduct.²²

Part 5 – seizure of cash found in suspicious circumstances

13. This Part amends the Search and Surveillance Act to provide constables the power to seize cash or cash equivalents (for example, gold) of \$10,000²³ where they:²⁴
- 13.1 reasonably believe the cash meets the threshold value;
 - 13.2 are not satisfied with the explanations the person in possession of the cash has given; and
 - 13.3 have reasonable grounds to suspect the cash does not have lawful or legitimate origins, or will be used for a dishonest or illegal purpose.
14. These seizure powers apply in two circumstances: first, where a Police officer is lawfully exercising a search power and finds cash they believe to meet this threshold amount; or where a constable is informed by an enforcement officer (including aviation security officers) they have seen or found cash in suspicious circumstances while lawfully searching a person.
15. The cash is automatically released and reverted to its owner after seven days unless a District Court Judge grants an application to hold it for longer on satisfaction Police continue to hold it on reasonable grounds as in paragraph [13.3], and that they are continuing or commencing proceedings under the Criminal Proceeds (Recovery) Act 2009.²⁵ The total period of time a Judge may authorise Police to hold the cash is 63 days. Police must then return the cash:
- 15.1 after the period authorised by the Court has expired and criminal proceeds recovery proceedings have either not been commenced, or are withdrawn or dismissed; or
 - 15.2 if the person from whom the cash was seized requests its return from Police and provides sufficient evidence of its lawful origins or intended purpose.²⁶ If Police refuse such a request, that person may then apply to the Court for orders returning the cash.²⁷ A Judge may order the cash is returned to them if satisfied it would be contrary to the interests of justice for Police to continue to hold it, balancing the value of cash

²² AML/CFT Act s 74.

²³ Clause 35 amends s 342 of the Search and Surveillance Act to provide the Governor-General may increase or decrease this defined sum by Order in Council.

²⁴ Clause 33, proposing new s 123B.

²⁵ Clause 33, proposing new s 123C.

²⁶ Clause 33, proposing new s 123D.

²⁷ Clause 33, proposing new s 123E.

seized and the damage to the applicant if it is not returned against Police's need of it for court proceedings.²⁸

Parts of the Bill that engage the Bill of Rights Act

16. The proposed amendments to the Crimes Act, Arms Act and Sentencing Act create new offences and impose consequences for committing them but none of them purport to operate retrospectively, involve any reverse onus of proof or impose disproportionate penalties. They do not cause any inconsistency with the Bill of Rights Act.
17. The amendments to the Land Transport Act will increase the qualifying offences in respect of which an enforcement officer must impound the vehicle for 28 days, but this confiscation interferes with the property rights of the vehicle owner which are not guaranteed by the Bill of Rights Act and are therefore not inconsistent with it.
18. The amendments to the AML/CFT Act limit the exercise of property rights in cash and specified goods but do not interfere with any guaranteed rights under the Bill of Rights Act and neither does the proposed new offence in s 67A cause any inconsistency with it.
19. The proposed amendments that do engage guaranteed rights are those which will amend the Search and Surveillance Act to authorise the seizure of cash found in suspicious circumstances and to search for and seize weapons during a gang conflict,²⁹ and the consequential amendment to the Criminal Investigations (Bodily Samples) Act that will add the new s 308A offence to the list of the qualifying offences for which a bodily sample can be compelled.
20. In each case the right engaged is s 21, which guarantees freedom from unreasonable search and seizure. Our assessment is that while the proposed amendments engage s 21, they do not cause any inconsistency with it.

Section 21 of the Bill of Rights Act

21. Section 21 of the Bill of Rights Act guarantees the right to be secure against unreasonable search or seizure.
22. The leading case on s 21 describes the right it guarantees as an amalgam of underlying rights to property, personal freedom, privacy and dignity but the touchstone is the protection of reasonable expectations of privacy against intrusion by the state.³⁰
23. For a statutory search power to be consistent with s 21 the intrusion into privacy must be justified by a sufficiently compelling public interest. The greater the intrusion, the greater will be the justification required. It must also be

²⁸ Clause 33, proposing new s 123E(2)(a)–(c).

²⁹ Existing powers of surveillance and search under the Search and Surveillance Act will be amended to accommodate the new Crimes Act offence the Bill proposes so that Police may locate evidence of offending. This does not modify or extend the powers themselves and it requires no further consideration.

³⁰ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 per Blanchard J at [161].

accompanied by adequate safeguards to ensure it will not be exercised unreasonably.

24. The compelling public interest usually invoked to justify a search power is the investigation and detection of evidence of criminal offending, but it can also be justified by the need to recover the proceeds of crime and other tainted property and, where weapons are involved, the protection of public safety. In the case of the present Bill there is, in our view, ample justification for granting the additional powers of search and seizure to the Police.

Seizure of cash (proposed s 123B)

25. In the case of the proposed s 123B of the Search and Surveillance Act, which will enable the seizure of cash amounts over \$10,000 for which no satisfactory explanation is made, it is not clear that s 21 is necessarily invoked in these circumstances because the power only applies where a constable or an enforcement officer is already exercising a lawful power of search.
26. Section 123 of the Search and Surveillance Act currently authorises the seizure of items in plain view, if they could have been targeted by a search power under any enactment, but this proposed provision goes further. There is no requirement for a belief that the cash is an instrument of crime, it requires only suspicion.
27. We consider the better approach is to assume the proposed s 123B augments the existing search power and is therefore an extension of it which requires justification.
28. The additional intrusion into privacy caused by seizure of the cash is minimal, especially given that it can be retained for only seven days without judicial order.
29. The adjustment in behaviour required for a person who legitimately keeps large quantities of cash in their home is only to be able to offer a convincing explanation for doing so. Contemporary life in New Zealand has vastly reduced the lawful use of large cash sums in commercial and consumer transactions but since it is untraceable it remains the preferred method of exchange in criminal activities.
30. In the circumstances, the brief confiscation of the cash is not unreasonable where a constable, after due enquiries, is not satisfied with the explanation given.

Warrant to search for weapons during gang conflict

31. Part 3 proposes amendment to the Search and Surveillance Act to confer new powers on Police to search for and seize weapons in the context of “gang conflict” as defined. The powers have greater width than existing search powers. If a gang conflict exists, a constable may apply for a warrant to search multiple places and vehicles in the area where the conflict is occurring for the purpose of locating and seizing weapons.


32. We are satisfied there is a compelling policy justification for the proposed search and seizure power. Gang conflicts frequently feature the discharge of firearms in public, raising an immediate concern for public safety. It is only when such a conflict has occurred that the power becomes available, and it is confined to the search for and seizure of the weapons.
33. We are also satisfied the requirements summarised in paragraphs [7]–[9] above, taken together, provide substantial safeguards to prevent the unreasonable use of the power, principally through the requirement for prior judicial authorisation.
34. Although the warrant may cover multiple addresses and vehicles and the Bill will remove the requirement for the Judge to specify the number of times a warrant may be used, the Judge will still be able to place conditions on the warrant to ensure that it is reasonable in the circumstances. There is an overall requirement for the Judge to be satisfied that the warrant they issue may reduce the risk of harm to people or property.

Collection of bodily samples (proposed s 308A)

35. The Bill proposes to amend the Criminal Investigations (Bodily Samples) Act 1995 (CIBSA) so Police may collect bodily samples for the purpose of evidence gathering in respect of alleged offences under the proposed new s 308A of the Crimes Act.. The new offence will be added to Part 3 of Schedule 1 to the CIBSA which means Police may demand a sample based on intention to charge under s 24J and 24K without prior judicial authorisation.
36. We note that when s 24J and 24K were added by an amendment to the CIBSA in 2009, the Amendment Bill attracted a s 7 report because the Attorney General was not satisfied there were sufficient controls in place to ensure the power would be exercised reasonably.³¹ We note also that since then the Police Manual has been updated to include guidelines, prepared in co-operation with the Ministry of Justice to ensure the discretionary power was exercised consistently with s 21.³²


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~~Noted / Approved / Not Approved~~


 Hon David Parker
 Attorney-General
 1 / 9 / 2022

Encl.

³¹ Report of the Attorney General on the Criminal Investigations (Bodily Samples) Amendment Bill (2009) (<https://www.justice.govt.nz/assets/Documents/Publications/BORA-Criminal-Investigations-Bodily-Samples-Amendment-Bill.pdf>)

³² Simon France (ed) *Adams on Criminal Law* (online ed, Thomson Reuters) at [CI [24J]