The *Law* Association

Level 16, Vero Centre
48 Shortland Street
Auckland City, 1010
New Zealand

PO Box 58
1010 Auckland

09 303 5270

thelawassociation.nz

SUBMISSION BY THE LAW ASSOCIATION CRIMINAL LAW COMMITTEE

GANGS LEGISLATION AMENDMENT BILL 2024

1. The Law Association (TLA) Criminal Law Committee (the committee) comprises legal professionals with specialized expertise in criminal law matters. Within this committee, we are proud to be represented by individuals who possess in-depth knowledge and skills specifically tailored to address the complexities of criminal law.

2. At our committee have extensive experience in navigating the challenging terrain of gang related issues, and we have developed a profound understanding of the nuances involved. Our committee members are well-versed in handling a myriad of gang-related legal matters, drawing from a wealth of expertise and experience.

Submission on Gang Legislation Amendment Bill 2024

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3. This submission is presented on behalf of the committee concerning the Gangs Legislation Amendment Bill 2024 (the Bill).

4. TLA welcomes the opportunity to submit on the Bill and recognises the need to improve justice outcomes for situations involving gangs, we question whether the Bill pulls the right policy levers. TLA believes that legislative reform should focus on "criminal activity" rather than the display of "gang insignia" and the congregation of "gangs."

5. TLA believes that concerns around "gangs" can be addressed by focusing on social investment models targeting the root cause of gang inception and criminal activity rather than legislation, which has in the past proven to be unsuccessful.

6. We express our opposition to the Bill for the following reasons outlined below.

Response to the Gangs Legislation Amendment Bill 2024

7. The proposed Bill aims to diminish gang-related harm and enhance community safety. However, our assessment suggests it will not achieve these goals but rather exacerbate societal harm in the long run. Additionally, Schedule 2 of the Bill presents a roster of 41 distinct

gangs without clear elucidation on the criteria or method used for compilation. This indiscriminate grouping treats all members, including suspected ones, uniformly, reflecting a troubling absence of nuanced consideration. Many gangs comprise of family members.

8. The Bill fails to address the root causes of gang formation, often stemming from poverty, and institutional racism. TLA echo similar concerns raised by Jarrod Gilbert's research paper of Making Gang Laws in a Panic, Lessons from the 1990s and Beyond;

   "Attempts to control gangs need to have a strong evidentiary basis, have clearly defined goals, and should allow objective testing of success or failure. Measures should also take into account issues of universal human rights and impacts on broader justice interests, including impacts on Māori". [1]

9. Further, gang names can change and evolve over time. There are countless gangs who are named after their town or even of their street, which can change. If a particular gang changes their name, in order for this bill to work, it would require law reform every single time. It is another example to show that the bill appears to be purely reactionary and not responsive to how gangs actually operate.

10. This committee has concerns over the interpretation of many of the terms, which are at present overly broad and therefore make practical enforcement even more difficult. For example, "consort", "Gang Insignia", "Gang member", "Immediate family", "Serious offence", "specified gang member" are the main examples of terms which are not well defined, which will lead to potential confusion and disagreement as to their application. These concerns are elaborated upon below.

11. The police maintain alert data on gangs for their day-to-day policing. According to Gilbert's research paper, there are several limitations in the police's classification of "gang". Gilbert believes that the police data classification system is too broad and outdated;

    "Those marked with gang alerts may be gang members, prospects, or simply people with known associations with gangs or gang members. This is a very broad categorisation, and as a result the number of individuals with gang alerts recorded in the data provided by police was 22,251, which is substantially higher than the number of gang members believed to currently exist in New Zealand. Recent statistics provided by the government have placed the number of gang members at 8175, but even this figure has also been acknowledged to be inflated by the inclusion of many individuals who have since left their gang, or who have a gang association but not membership."[2]

12. Caution must be exercised regarding the outdated and overly broad police tools currently used, which may unfairly target individuals for whom the legislation was not intended. For example, an offence punishable by two years' imprisonment being defined as "serious" is overly broad.

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[1] Making Gang Laws in a Panic, page 5 https://www.lawfoundation.org.nz/wp-content/uploads/2022/04/Making-Gang-Laws-in-a-Panic.pdf
[2] Ibid page 10

Offering perspective on the issue of gangs

13. For years, successive administrations have pursued legislative and punitive measures to address the issue of gangs, only to worsen the situation. Historically, marginalized individuals who have been affected by colonization and harsh social policies, have been driven towards gangs. What is required is a better understanding of why people may become involved in gangs on both the individual and societal levels and deal with them from that perspective.

14. This strategy fails to grasp the true role of gangs in our society, as highlighted by a recent statement from a High Court Judge. Indigenous gangs like Black Power and the Mongrel Mob are often scapegoated for various social problems, when they are symptoms of deeper issues rooted in our nation's history. When viewed as fulfilling vital roles, such as providing surrogate families and stability in a turbulent world, it becomes evident why concepts like territory, symbols, and language hold significant meaning for these groups, who lack biological or genealogical ties as binding agents.

15. For many Māori, our colonial past translates into land dispossession, language loss, and marginalization, further exacerbated by the urban migration of the 1960s and 70s. These factors have severed ties to land and community, fractured family structures, and eroded cultural identity.

16. In the 1970s, some of the influx of Pacific Islanders into gangs was in response to the government's Dawn Raid policies, policies that Dr Melani Anae has described as “the most blatant racist attack on Pacific peoples by the New Zealand Government” in New Zealand’s history[3]. These policies exclusively targeted Polynesian overstayers; however, the bulk of the overstayers at the time were from Europe and North America[4]. Careful consideration is necessary to address the root cause of gang involvement to effectively implement crime prevention solutions. As already mentioned, gang membership often follows from simply being born into a family which already has strong connections with gangs and so this history is still relevant.

17. As apparent in various statistics available, Māori and Pacific Islanders are overrepresented in criminal justice system as well as gang population. This Bill will affect this marginalised group in our society.

Criminalising the public display of gang insignia

18. We are strongly opposed to Clause 7, targeting the public display of gang insignia. This provision encroaches upon the right to freedom of expression, contravening both the New

[3] The Dawn Raids: Causes impacts and legacy. https://nzhistory.govt.nz/culture/dawn-raids
[4] Dawn Raid Tactics still happening, despite government Apology, 2 may 2023, https://www.rnz.co.nz/news/national/489091/dawn-raid-tactics-still-happening-despite-government-apology

Zealand Bill of Rights Act 1990 and our international commitments. Upholding these rights is fundamental to the fabric of our society, and any governmental action infringing upon them must be rigorously justified. Regrettably, the current proposal lacks adequate justification for such an infringement. The committee questions the legislative approach, shouldn't the legislative approach target the criminal activity of an organisation, not the choice of attire an individual chooses to wear?

19. Furthermore, the proposed legislation potentially runs afoul of the Treaty of Waitangi by disproportionately impacting Māori, who constitute a significant majority of gang membership in New Zealand. Criminalizing the mere display of gang insignia in public places directly contradicts the equity principle enshrined in the Treaty. Despite internal governmental advice acknowledging this conflict, the legislation fails to address it satisfactorily.

20. The Bill defines "gang insignia" in overly broad terms, encompassing symbols or representations associated with gang membership, affiliation, or support. This expansive definition lacks the necessary precision expected of criminal law, potentially ensnaring individuals who have no connection to gangs. Such ambiguity undermines the principle of legal certainty and may lead to a surge of unnecessary litigation, further straining an already burdened judicial system.

21. The Chief Justice has recently highlighted the overwhelming pressure facing New Zealand's criminal justice system, cautioning against measures that could exacerbate its workload. The current Bill, with its vague provisions and potential for contentious trials over the interpretation of "gang insignia," risks overwhelming an already overstretched system (rather than focusing on actual crimes that have been committed). Thus, careful reconsideration of this legislation is imperative to prevent unnecessary legal disputes and ensure the effective functioning of the judiciary.

22. It is noted, unlike its predecessor legislation which the current Bill is based upon (anti-consorting laws in Western Australia introduced in 2021) the Bill does not ban gang insignia tattoos, in light of cultural significance tattoos have in Māori and Polynesian cultures.

23. The risk is gang patches on their clothing will easily be moved onto their body especially on their faces given the wording of the Bill. This is not a practice that should be encouraged, even if that is not the intention of the legislation we are concerned that it will be a by-product. This means the proposed Bill will not achieve the desired effect, it will only encourage current and future gang members to avoid being arrested rather than leave the gang or disperse.

24. We also firmly believe that this policy is impractical, and will interfere with legitimate policing methods (such as building better relationships with some members of some gangs) and is in fact impossible to enforce. The police service is already overstretched and imposing legislation such as this and expecting it to be enforced is misplacing those precious resources, in our view.

25. This is one example that shows the Bill fails to investigate and/or address the reasons why people join gangs in the first place. Without going into core of the issue, the Bill will remain a purely reactionary piece of legislation rather than a solution, to show the public that the government appears to be dealing with a problem when it is not.

Dispersal Notices

26. Clause 9 within the proposed Bill introduces a novel authority for law enforcement. It authorizes a police officer to issue a "Dispersal Notice" if they possess reasonable grounds: a. to suspect the individual is part of a gathering of 3 or more gang members in a public space; and b. to believe such action is necessary to prevent disruption to community activities.

27. It also requires a careful analysis of what "public place" is. For example, if 3 or more gang members congregate outside their headquarters, which could be a residential house, it would fall under the definition of public place.

28. This provision is fraught with practical problems as to how to define who is in a gang, what if it is a legitimate reason to gather such as a birthday party. This committee feels that current legislation should be sufficient to ensure that there is not a breach of the peace, without singling out particular already marginalised groups in society.

29. This provision also encroaches upon fundamental human rights, including freedom of movement, peaceful assembly, and association, as outlined in the New Zealand Bill of Rights Act 1990. When enforcing this provision, police officers must assess whether issuing a dispersal notice is essential to prevent the "disruption of community activities." However, the Bill lacks clarity on what constitutes a "disrupting activity."

30. The term "disrupting" carries significant ambiguity, encompassing a wide array of activities. According to the Cambridge Dictionary, to "disrupt" means to impede the continuity of something. Consequently, a police officer could justifiably issue a dispersal notice, thereby infringing upon an individual's fundamental rights to move, assemble, and associate, in various scenarios.

31. For instance, a group suspected of belonging to a certain gang playing tennis in a public court could obstruct others from utilizing the facility. Similarly, a gang-affiliated band practicing in a public park might disturb nearby meditation sessions that require silence. Additionally, individuals merely standing on a footpath could be deemed disruptive if perceived as deterring pedestrians. Often, gangs consist of members from the same family, raising questions about whether family gatherings are encompassed by the Bill.

32. In each of these instances, issuing a dispersal notice might seem warranted to prevent disruption to community activities. However, these examples highlight how this power could be wielded to regulate the behaviour of gang members, irrespective of their gang affiliations.

33. On the other hand, if the group of people are breaching the peace or committing other offences then the police have sufficient powers to deal with the situation. For instance, penalties contained in section 98A of the Crimes Act 1961 apply to individuals participating in organised criminal groups.

34. It's insufficient to argue that just because this power could be abused, it won't be. Experience indicates that when granted authority, police officers are likely to exercise it. Granting such

broad powers to the police would have serious ramifications, significantly curtailing the rights to move, assemble, and associate.

35. In practice, for an officer to serve a dispersal notice, there must be first of all a determination as to the identification and that that person being a gang member as well as others. For that identification process to take place, all names and details must be recorded by Police, which will inevitably be uploaded onto NIA system for them to enforce any future breach.

36. This circumvents a need to impose a sentence or an order (such as bail condition), which would require judicial assessment of risk, evidential foundation and most importantly, a hearing. Without seeing any of this, the Bill purports to allow a police constable to make this assessment on the spot to those who may or may not have broken any laws.

37. Pursuant to s.10(2) of the Bill, it proposes to deal with serving a dispersal notice after the gathering has ended. Why must such a notice be served if the gathering in question has ended and presumably left the public place? On what basis can a dispersal notice be served and what purpose would that serve, if it is to avoid gang members from causing fear, intimidate and disrupt the "public"?

38. Furthermore, failure to comply with a dispersal order carries severe penalties, including criminal conviction, imprisonment for up to six months, and fines not exceeding $5,000. Given the broad scope of this power, imposing criminal sanctions for non-compliance appears disproportionate.

39. We oppose the grant of dispersal powers to police officers. However, if such powers are bestowed, we strongly advocate for limiting their scope, particularly by refining overly broad terms like "disrupting" and "activities".

40. Likewise, the notion that disorder and crime can be diminished by prohibiting specific individuals from associating with others is ambiguous, contradictory to fundamental human rights, and, as highlighted by the Australian context, entirely ineffective.

Clause 19 non-consorting orders

41. Clause 19 grants the Commissioner of Police the authority to apply to the District Court for a non-consorting order for specific individuals. The duration of the non-consorting order, as outlined in clause 20 of the Bill, is three years. The primary goal of issuing a non-consorting order is to "assist in disrupting or restricting the capacity of the person to engage in conduct that amounts to a serious offence" (clause 19 1 (b) (iii)).

42. The three-year restriction on freedom to associate is excessively harsh. Section 22 ensures that consorting orders do not apply to immediate family members. However, it is important to note that many gangs consist of extended family members such as uncles, aunts, and cousins, and other "whanau" who are not considered "immediate family" and are therefore not exempt from the order under the exceptions outlined in section 22.

Making gang membership an aggravating factor at sentencing

43. Judges routinely consider the presence of a gang context when relevant during sentencing. However, the mere act of belonging to a gang cannot, on its own, be deemed an aggravating factor in sentencing.

44. The notion of enhancing penalties based on membership contradicts fundamental sentencing principles, which require careful consideration of individual circumstances and facts.

45. One may question how gang affiliation could lead to harsher penalties, given that membership often stems from societal disadvantages and systemic inequalities, such as the disproportionate impact of deprivation and imprisonment on the Māori community: *Heta v R [2018]*.

46. There have been countless decisions where cultural reports were able to identify disadvantaged childhood of the defendants who were often brought up in gang life through their family. Some of them have been born into gang life, whether they like it or not. Our committee is extremely worried that the current Government, having already de-funded cultural reports, will use this specific factor as an only aggravating factor at sentencing, which reflects again its reluctance to see the core contributing factor.

Conclusion

47. Recently, the Chief Science Advisor to the Prime Minister's office emphasised that traditional law enforcement and criminal justice measures seldom lead to gang and crime cessation, a stance diverging from populist rhetoric.

48. The persistent increase in incarcerations reflects adherence to ideology over empirical evidence. The proposed legislation perpetuates the misguided "tough on crime" narrative, disregarding scientific findings and data contradicting its intended outcomes. Rather than diminishing criminal activity, such laws exacerbate societal inequalities, perpetuating the cycle of gang involvement. Moreover, they strain familial bonds and foster mistrust between communities and the government.

49. We strongly urge advocates of this legislation to thoroughly reconsider the insights presented in the Prime Minister's Chief Science Advisor's report, "Using Evidence to Build a Better Justice System." This essential document sheds light on the path towards a more equitable and effective judicial framework. Its findings underscore the paramount importance of grounding legislative initiatives in robust empirical evidence, ensuring that our justice system remains steadfast in its commitment to fairness and efficacy.

50. In echoing the sentiments of the Chief Science Advisor, we emphasize the critical role that evidence-based practices play in shaping policy decisions within the realm of justice. Disregarding or sidelining this foundational principle risks undermining the very fabric of our legal system, jeopardizing the rights and well-being of individuals who rely on its protections.

51. Thus, we implore all stakeholders to heed the clarion call of evidence-based policymaking and to engage in rigorous scrutiny of the proposed legislation considering the invaluable guidance provided by the Chief Science Advisor's report. To do otherwise would be to compromise the integrity and effectiveness of our justice system, a consequence that we simply cannot afford to accept.

The above submission represents the views of the committee on behalf of TLA. If you have any questions regarding this submission please contact Committee Executive, Daniel Conway - email: daniel.conway@thelawassociation.nz

Yours sincerely,

Julie-Anne Kincade KC
Vice President, The Law Association
Convenor, The Law Association Criminal Law Committee