

8 August 2024

Hon Paul Goldsmith
Minister of Justice

By email: p.goldsmith@ministers.govt.nz

Tēnā koe, Minister

Re: Gangs Legislation Amendment Bill: Amendment Paper 51

1. I am writing on behalf of the New Zealand Law Society Te Kāhui Ture o Aotearoa, to raise concerns about Amendment Paper 51 on the Gangs Legislation Amendment Bill (**the Bill**), which proposes a new 'gang insignia prohibition order' (**GIPO**) regime.
2. The Law Society expresses disappointment at the introduction of these amendments after the Select Committee process, and without any indication that consultation will be undertaken.
3. In the first instance, the Law Society asks that the Amendment Paper does not proceed, and encourages assessment of the effectiveness of the gang insignia ban before taking further action. This would enable the provision of a full Bill of Rights vet by Crown Law.
4. The Law Society is of the view that the Amendment Paper unjustifiably infringes rights protected by the New Zealand Bill of Rights Act 1990 (**Bill of Rights**), has no rational connection to the purposes of the Bill and its proposed gang insignia ban, and will likely cause harm to the families and whānau – including children – of those subject to a GIPO.
5. If the Amendment Paper is to proceed, we urge wider public consultation. This is essential to democratic law-making, more so where significant regulation is proposed for the private homes of individuals. Broader consultation may assist with refining the scope of the GIPO regime, and avoiding unintended or unjust consequences.
6. The Law Society sets out below:
 - The Amendment Paper's impact on rights protected by the Bill of Rights;
 - The Amendment Paper's impact on families, whānau, and those residing with gang members;
 - Rule of Law concerns; and
 - Recommendations if the Amendment Paper proceeds.

The Amendment Paper's proposals unjustifiably infringe the Bill of Rights

7. The Law Society believes the proposed GIPOs are an unjustified limitation on the right to freedom of expression, exacerbating the rights infringements already identified in the Bill. Gang insignia are a form of speech – expressing membership of a particular group. The proposed amendments seek to regulate a person's private home by outlawing possession, even if they do not intend to display that insignia in a public space.

8. While there may be public policy considerations for regulating ‘speech’ in public spaces, the regulation of speech in a private residence is significant, and in this case not rationally connected to the stated purpose of the gang insignia ban. The explanatory note to the Bill states:

Gang insignia displayed in public may cause some people to feel fearful or intimidated. The display of gang insignia as a status symbol may also assist gangs in marketing themselves to potential prospects and future recruits. As gang members are readily identifiable by their insignia, the display of insignia may exacerbate inter-gang rivalries that lead to gang violence in public spaces.

9. Such considerations are unrelated to the existence of gang insignia within a residential home.
10. Further, while the Regulatory Impact Statement (**RIS**) notes ‘their aim is to deter repeated breaches of the display ban, and do not create a universal prohibition on the private displays of expression and association’,¹ the Law Society disagrees. The residential ban could extend to insignia never intended to be displayed in public – such as a gang member having their father or grandfather’s patch as a memento.
11. The definition of gang insignia includes ‘any item or thing to which a sign, symbol, or representation... is attached or affixed (for example, clothing or a vehicle)’. Whilst the courts may interpret this sensibly, it could lead to unreasonable enforcement action or prosecution. Taken literally the definition could be taken to include printed reproductions of gang insignia – making it a criminal offence to possess a newspaper with a gang symbol in it, or certain books. This is not a concern for the primary public display offence in the Bill, but is a concern arising from the Amendment Paper.
12. The addition of a residential restriction also increases the risk of a person being held criminally liable for being proximate to someone in possession of gang insignia, even when the insignia was outside the person’s possession or control. While someone subject to a GIPO may have disposed of their own insignia, they may come to reside with individuals who possess gang insignia, or have visitors who have with them gang insignia. This risks infringing the right to be presumed innocent, under section 25(c) of the Bill of Rights.
13. The efficacy of the proposed GIPO regime is in doubt. The RIS notes that any deterrent value is likely to diminish over time and the prospect of even an initial deterrent value is not clear.² It also notes the likely rate of compliance and gang reaction to the proposals is uncertain. Despite this, the RIS proceeds to assess the GIPO regime and residential prohibition on the basis of a presumed deterrent effect.³ We note it suggests the ban on possession of insignia is likely to focus Police resources on those *not* involved in serious and organised crime.

Impact on families, whānau, and those residing with individuals subject to a GIPO

14. The Law Society also has concerns about the impact of the proposals on the rights of families, whānau and those residing with an individual subject to a GIPO.

¹ At para 69.

² At paras 5 to 9, 60, 83, and 87.

³ See paras 74 and 83, and table at page 18.

15. The Law Society agrees with the RIS that there is a risk of disproportionate impacts for the whānau and communities in which gang members reside. They may be subjected to repeated searches which 'are likely to be disruptive, invasive, and particularly traumatic for children.'⁴
16. The inclusion of the 'place of residence' condition as a part of a GIPO will extend evidence gathering to the entire property, and likely result in the closets, underwear drawers, and other private areas of whānau being searched. This risks infringing the right to be free from unreasonable search and seizure under section 21 of the Bill of Rights.
17. The RIS states that issuing officers will assess the reasonableness of Police applications for search orders, and that the provision is not intended to authorise the execution of unreasonable searches.⁵ Given the scale of the potential rights infringement, and the lack of rational connection to the purpose of the gang insignia ban, the Law Society considers such assurances to be insufficient. Where an unreasonable search is conducted, an affected third party's access to the means needed to challenge it is likely to be limited.
18. Further, those who reside with an individual subject to a GIPO may have their own freedom of expression infringed. They will be unable to possess gang insignia themselves, despite potentially never having sought to display that insignia in public in breach of the Bill.

Rule of law concerns

19. The Law Society has concerns about the potential impact of the GIPO regime on the rule of law. This risk is also identified in the RIS: the use of the ban to undertake searches not for collecting evidence of offending but as a method of punishment and deterrence.⁶
20. The RIS suggests that the deterrent impact of the GIPO regime relies largely on the deterrent effect of enabling police to obtain a search warrant to search a private home for gang insignia.⁷ It appears from the RIS that police sought this broader residential restriction partly to help them obtain search warrants in a wider range of circumstances, and enable them to more easily secure prosecutions.⁸
21. The Law Society does not agree that legislation of this type should be pursued with a view to limiting the ordinary operational challenges and constraints that exist to ensure the fair and just application of the criminal law. As noted in the RIS, 'the wider policy rationale underpinning the possession ban is that it enables disruptive searches to be conducted. This risks distorting the general legal basis of search powers, from a tool for collecting evidence to a method of punishment/deterrence.'⁹

Drafting recommendations if the Amendment Paper is to proceed

22. If Amendment Paper 51 is to proceed, the Law Society's preference is that clause 8A(2)(c) is removed. This would mitigate the risk of unreasonable search and seizure, as well as unfair or unjust criminal liability, without undermining what the Amendment Paper seeks to achieve. If this subclause is removed, the proposed regime would still prohibit an individual

⁴ Para 63.

⁵ Para 80.

⁶ Paras 64, 79-80.

⁷ Para 75.

⁸ Para 72.

⁹ Para 64.

subject to a GIPO from possessing or controlling gang insignia, but would not criminalise the mere presence of insignia in their residence or in circumstances outside of their control.

23. Secondly, the Law Society recommends amending clause 8A(5), to create a 'reasonable excuse' defence for breach of GIPO. Whilst the Amendment Paper does provide that it is only an offence if a person 'intentionally breaches' an order, it is possible to envisage circumstances where a person is aware they are breaching an order, but for good reason. For example, where a defendant is present at their residence and aware their flatmate has a gang patch, but is in the process of finding a new place to live.
24. Finally, the Law Society recommends amending clause 8A(1) so that a defendant has to have been convicted of two previous offences at the time of the commission of the offence, rather than the date of conviction.
25. By way of example, consider a defendant who faces charges of committing an offence on three occasions: 1 April, 2 April, 3 April. They plead guilty to the two early offences and are convicted. They then are found guilty at trial of the third offence. As they will have had previous convictions when found guilty of the third offence, this would trigger a GIPO, whereas if they had all been convicted at the same time it would not. This seems unfair and unintentional. Clause 8A(1) could instead be amended to read:

- (a) the court convicts the person of an offence against section 7; and*
- (b) the person has been convicted of 2 or more previous offences against section 7 within 5 years of the date of the commission of the offence referred to in paragraph (a).*

Further discussion

26. Finally, I emphasise that the Law Society will always, to the fullest extent possible, make itself available to yourself and the Ministry of Justice to provide feedback on such proposals, at short notice if required. While there will be times we disagree on a proposed course of action, the Law Society shares with you a desire for fair, effective and well-drafted law. We encourage a commitment to public consultation and evidence-based legislation.
27. Should you wish to discuss this further, you can contact the Law Society via Bronwyn Jones (Bronwyn.jones@lawsociety.org.nz).

Nāku noa, nā



David Campbell
Vice President

Copy to: Minister of Police, Hon Mark Mitchell (m.mitchell@ministers.govt.nz)