Gangs and Organised Crime Bill

5 February 2009

Attorney-General

Gangs and Organised Crime Bill: Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/84

1. I have reviewed the Gangs and Organised Crime Groups Bill for consistency with the New Zealand Bill of Rights Act 1990.

2. The Bill raises issues in respect of:
   1. 2.1 the right against unreasonable search and seizure, as it extends the scope for warrants for the interception of communications; and
   2. 2.2 the right to freedom of expression affirmed by s 14 of the Bill of Rights Act, as it provides a power to require removal of certain intimidating structures.

3. I conclude that no inconsistency arises.

Analysis


Crimes Act 1961

5. Clause 4 of the Bill proposes to clarify the knowledge requirements for the offence of participating in an organised criminal group under s 98A of the Crimes Act 1961, and increase the maximum penalty to 10 years imprisonment. As the amendment to s 98A follows R v Cara [2005] 1 NZLR 823 and does no more than clarify the elements of the offence of participation, no issue arises.

6. Clauses 5 and 6 of the Bill propose to increase the range of specified offences for which an interception warrant for private communications relating to organised criminal enterprises may be sought, from offences punishable by 10 years imprisonment to offences punishable by 7 years imprisonment and so increase the range of offending for which warrants may be obtained.

7. Given that the warrant power continues to be limited to serious offences and is subject to judicial oversight, I do not consider that any inconsistency arises.

Local Government Act 2002

8. Clause 10 of the Bill proposes to amend s 216 of the Local Government Act 2002 to extend the power of the District Court to remove or alter a fence, structure or vegetation from property occupied by persons who have been convicted or have committed or are
committing or likely to commit offences. At present that power is limited to circumstances where the structure has or is facilitating or contributing criminal activity (defined) or is intended to injure a person. The Bill proposes to add a third option, being where the structure "is such that the court is satisfied that it may reasonably be regarded as intimidating".

9. The definition of structure is sufficiently broad to extend to signs and other expressive objects and it is conceivable and even likely that some intimidating structures will be of that nature. It follows that the proposed amendment raises an issue of possible interference with the right to freedom of expression under s 14 of the Bill of Rights Act. Section 14 reads:

"Everyone has the right to freedom of expression, including the freedom to seek, receive and in part information and opinions of any kind in any form."

10. The right is "as wide as human thought and imagination"[1]. It extends to non-verbal conduct and so would extend to signs and other expressive structures.[2] As the proposed amendment has the potential to apply to structures that convey meaning, even if that meaning is offensive, it amounts to a limit on the right to freedom of expression. It is therefore necessary to consider whether that limit is justifiable under s 5 of the Bill of Rights Act.

11. In applying s 5, consideration is given to whether the limit serves an important objective, and is rationally connected, reasonably minimally impairing and proportionate to its objective.[3]

1. 11.1 The objective of the provision is to ensure that members of the community are able to live in their neighbourhoods free from intimidation or fear of violence or other crime. This is an important objective, capable of justifying limits on the right to freedom of expression.

2. 11.2 The ability to order removal of structures that can reasonably be regarded as intimidating is rationally connected to the objective of ensuring the community lives free of intimidation. The proportionality and rational connection of the provision is further supported by the limitation of the provision to owners or occupiers who have committed offences or are likely to commit offences.

3. 11.3 The Bill applies an objective standard that the structure be reasonably regarded as actually intimidating. It follows that the proposed power is not over-broad in that only those structures that give rise to the problem (i.e. intimidation) are caught by the provision.

12. Most significantly, the order is made by the District Court who provides an independent assessment of the application and makes its own assessment of whether the structure can be reasonably regarded as intimidating. The Court is also obliged by s 6 of the Bill of Rights Act to apply the provision consistently with that Act.

13. I note that the High Court in Zdrahal v Wellington City Council [1995] 1 NZLR 700 found that an abatement notice requiring the removal of a swastika from a resident’s wall that was visible from neighbouring properties and a public cemetery, was a proportionate method of preserving the cultural, aesthetic and natural attributes of the neighbourhood environment.

14. I conclude that no inconsistency arises with this proposal.

Sentencing Act 2002
15. Clause 12 of the Bill proposes to add an additional aggravating factor in s 9(1) of the Sentencing Act that must be taken into account by a Court when sentencing or otherwise dealing with an offender. The additional factor is whether the offender has committed the offence partly or wholly because of his or her participation in an organised criminal group or involvement in any other form of organised criminal association.

16. While "organised criminal group" is defined by reference back to s98A of the Crimes Act 1961, "organised criminal association" is not defined, and it will therefore be for the Court to determine the scope of this description.

17. The proposed amendment does not refer to simple membership of a group or association as an aggravating factor, but rather requires that the offender committed the offence for which he or she is being sentenced because of his or her membership. For that reason, the proposal does not limit the right of freedom of association affirmed by s 17 of the Bill of Rights Act.

18. This advice has been prepared with the assistance of Hamish McLachlan, Assistant Crown Counsel. In accordance with Crown Law practice, this advice has been peer reviewed by Ben Keith, Crown Counsel.

Yours faithfully

Victoria Casey
Crown Counsel

Footnotes
1. Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (CA), [15].

2. Hopkinson v Police [2004] 3 NZLR 704 (HC), [41].

3. R v Hansen [2007] 3 NZLR 1 (SC), [70], [123], [203]-[204] and [271].

In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Gangs and Organised Crime Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.