

19 October 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Public Finance (Prohibition on Providing Public Funds to Gangs) Amendment Bill

Purpose

1. We have considered whether the Public Finance (Prohibition on Providing Public Funds to Gangs) Amendment Bill (the Bill), a member's Bill in the name of Simeon Brown MP, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 17 freedom of association. Our analysis is set out below.

The Bill

3. The Bill's expressed intention is to ensure legitimately accessed public funds do not directly or indirectly end up in the hands of gangs by way of entities that are run by, or associated with, gangs.¹ The Bill's explanatory note states that "[t]he decision to grant funds to an organisation that has the involvement of a gang or gangs is unconscionable, the absence of a prohibition in the law on this matter has meant funding can be given to gangs to run programmes through organisations."
4. The Bill amends the Public Finance Act 1989 (the principal Act) to prohibit the Crown from "pay[ing] money (directly or indirectly) to a gang". The explanatory note makes it clear that the Crown must also take all reasonable precautions, and exercise due diligence, to avoid acting contrary to this prohibition.
5. An associated offence for failing to adhere to this is also included. The penalty for committing an offence is, in the case of an individual, to a term of imprisonment not exceeding 12 months or to a fine not exceeding \$2000, and in the case of a person or organisation a fine not exceeding \$5000.²

Consistency of the Bill with the Bill of Rights Act

Section 17 – Freedom of association

6. Section 17 of the Bill of Rights Act affirms that everyone has the right to freedom of association. The right to freely associate is directed towards the right to form or participate in an organisation, to act collectively, rather than simply to associate as

¹ "Gang" has the meaning given in the Prohibition of Gang Insignia in Government Premises Act 2013, which lists the names of known gangs with the ability of more names to be added through regulations.

² Public Finance Act 1989, s 77(2).

individuals.³ The right recognises that everyone should be free to enter a consensual arrangement with others and promote common interests of the group. The right to freedom of association applies for the benefit of legal persons, such as companies, as well as natural persons.⁴

7. The freedom of association can be limited in a number of ways, including where legislation treats people differently on the basis of membership of an association, or prohibits or creates disincentives towards membership. The right to freedom of association is an important building block of a free and democratic society. It may, however, be more justifiable to place limits on s 17 in the context of gangs.

Is freedom of association engaged?

8. Clause 4 of the Bill inserts a new s 73A into the principal Act to prohibit the Crown from paying money directly or indirectly to a gang.
9. While not explicit, the objective of the Bill is to ensure that public funds are not used for unlawful purposes. Preventing public funds from being paid directly or indirectly to gangs (or entities that are controlled by gangs) would achieve this objective.
10. Whether or not freedom of association is engaged largely hinges on how this particular provision would operate in practice, particularly what it means to "indirectly" pay public funds to a gang. We have concluded that a rights consistent interpretation of the Bill means that freedom of association is not engaged.
11. Prohibiting payment of public funds "indirectly" to a gang potentially has broad application and could be interpreted as extending to entities that are not gangs or gang controlled. To use an example, the prohibition could extend to a charitable organisation that provides drug rehabilitation services in a particular region. The charitable organisation employs a handful of individuals, who are also members of a gang, who help provide their service through their connections with hard to reach communities. The organisation also has on its board an individual who is also a member of a gang. On this analysis s 17 would be engaged by the Bill because it would have a chilling effect on a non-gang controlled entity's ability to choose who it would associate with or who could become part of its organisation, if it was reliant on Government funds for its operation.
12. However, while the Bill could be interpreted in this way, in our view, that would not be a rights consistent interpretation of the Bill that should or could be adopted by a state actor making a decision on funding. A rights consistent interpretation of the Bill would see its effect limited to gangs or gang controlled entities, and would not extend to entities that were not gang controlled but simply employ or associate with individuals who are members of gangs, such as the example of the charitable organisation outlined above.

³ *Moncrief-Spittle v Regional Facilities Auckland Limited* [2021] NZCA 142 [30 April 2021] at [113].

⁴ *Turners & Growers Limited and Ors v Zespri Group Limited and Anor (No 2)* (2010) 9 HRNZ 365 (HC) at [68].

Conclusion

13. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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