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established by the
Legal Profession Act 1986

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19th March 2018

The Honourable Faris Al Rawi,
Attorney General of Trinidad and Tobago,
Government Plaza,
Corner London and Richmond Streets,
Port of Spain

Dear Attorney General,

Re: The Anti-Gang Bill No. 4 of2018

The Law Association takes the belated opportunity to offer some brief comments and observations on the Anti-Gang Bill No. 4 of 2018, which we understand is to be debated in the Senate on 20th March 2018.

We regret that we have not had time to submit the Bill to the wider membership for their comments. What follows therefore are the suggestions of the Council of the Law Association and its Legislative Review Committee.

The Offences

The offences created by the Bill all center around the definition of the word 'gang' and the phrase 'gang-related activity'. A 'gang' is defined as a combination of persons, whether formally or informally organized, who engage in gang-related activity. In turn, 'gang related activity' is defined as an offence listed in the First Schedule, including an attempt to commit, a conspiracy to commit, and aiding, abetting, counselling or procuring the commission of such an offence, "which a gang leader or gang member plans, directs, orders, authorizes, or requests". We detect a degree of circularity in the underlying core definition of the offences created by the Bill which, we fear, may lead to the failure of some prosecutions.

First of all, we note that the First Schedule lists the offences of gang membership, coercing or encouraging gang membership, preventing a gang member from leaving the gang, harboring a gang leader or gang member, concealing a gang-related activity and recruiting a gang member. These are all offences created by the Bill itself. Since the elements of all of these offences require reference to the definition of the word 'gang', which is defined by reference to the activity in which the gang is engaged, namely gang-related activity, the inclusion of offences in the first schedule which depend upon the definition of the word 'gang' leads to this circularity: that gang related activity means, ultimately, the offence of engaging in gang related activity, and so on and so on.

We would therefore suggest that all gang related offences created by the Bill be excluded from the First Schedule. We do not anticipate that this would

weaken the Bill in any way. Rather, we anticipate that it would be strengthened by removing the possibility that a futile attempt would be made to charge an offence based upon a non-sequitur, namely, an allegation that a person is a member of a combination of persons engaged in gang-related activity, namely, gang-related activity.

A similar difficulty arises from the requirement that the offence which constitutes gang-related activity must be directed, ordered, authorised or requested by a gang leader or gang member. The definition therefore requires, first, the identification of the person directing etc. the offence as being a gang leader or gang member. The definitions of both 'gang leader' and 'gang member' require a relationship with a 'gang' which then leads to the requirement that the combination of persons be engaged in gang-related activity, the definition of which then requires the activity to be directed by a gang leader or gang member. The exercise is once again circular and tends to create a loop which can go on indefinitely.

We are unable to discern the need for the gang-related activity being directed by a gang leader or gang member. It is sufficient that a person is a member of a combination of persons engaged in the criminal activity listed in the First Schedule, without the need to identify the persons directing the activity. We suggest therefore that the definition of gang-related activity excludes the concluding phrase, "which a gang ... requests."

Breaches of the Constitution

We appreciate that the legislators understand that the Bill proposes measures which will infringe constitutional rights and that the intention is to enact the Bill nevertheless. It might therefore appear to be redundant to draw your attention to those aspects of the Bill which do infringe constitutional rights. But since, even in the case of a Bill passed with a three-fifths majority, it may nevertheless be struck down by the High Court because it is not reasonably justifiable in a society that has respect for fundamental rights and freedoms, we think it useful to point to certain aspects of the Bill which may not pass constitutional muster.

Strict Liability

First of all, we note that some of the offences are of strict liability, not requiring any specific mens rea or knowledge of the gang-related activity in which the gang is engaged. For example, it is an offence to be a gang member, an offence which is punishable by imprisonment for twenty-five years. A gang member is a person who belongs to a gang. A gang is defined as a combination of persons engaged in gang-related activity. Once it is established that a gang exists, therefore, it is then only necessary to prove that the person belongs to the gang. There does not appear to be any requirement that the person should know that the combination of persons to which he or she belongs engages in the offences listed in the schedule. The act of belonging by itself constitutes the offence. The danger is that a person may be sent to jail for a long time without even knowing that the persons he or she is associating with are engaged in criminal activity.

We recommend that the offences be defined in such a way as to make knowledge of the criminal activities of the gang an element of the offence.

Search Warrant

Section 15(2) provides that:

"A police officer may, with a warrant issued by a Magistrate so enabling him to do, enter a dwelling house and search it if he has reasonable cause to believe that a gang leader, gang member or a person whom he has reasonable cause to believe has committed an offence under this Act may be found in that dwelling house."

The trigger for the grant of the warrant appears to be the state of mind of the police officer, namely that he has reasonable cause to believe the matters stated in the section, as opposed to the objective existence of factors which give rise, in the mind of the Magistrate, to a reasonable cause to believe the matters listed in the section. On this interpretation, it would be sufficient for a police officer to swear that he has reasonable cause to believe, without actually attesting to the facts which support such a belief.

As it is, experience shows that even where a statute requires that the Magistrate be satisfied that there is in fact reasonable cause to believe a certain state of affairs, the habit has developed of acting solely on the police officer's say so that he (the police officer) has reasonable cause to believe. This approach has been held by the highest authority to be wrong and warrants issued on that basis to be unlawful.

The purpose of requiring the Magistrate to be satisfied of the existence of objective facts giving rise to the belief is to provide some protection to the citizen whose dwelling house is to be invaded, against police overreach. If the Magistrate is not required to objectively assess the facts giving rise to the belief, but to act solely on the existence of the police officer's belief, that protection is removed. If would be no different from giving the police officer the power to search, without the need for a warrant, acting on his own perceived belief.

We recommend that the sub-section be amended to provide that the warrant is to be issued only if the Magistrate is satisfied that there is reasonable cause to believe that a gang leader, gang member or a person who the Magistrate has reasonable cause to believe has committed an offence under this Act, may be found in the dwelling house.

We note that this is in fact the formulation that is used in section 16(5) where an application is made ex parte to a judge for a detention order. The Judge is required to be satisfied that there are reasonable grounds to believe the matters listed therein.

Detention

Section 16(1) empowers a police officer, <u>any police officer</u>, to detain a person for three days, without a warrant, on the basis of a reasonable suspicion (<u>not belief</u>) that the person has committed or is interfering in the investigation of an offence under the Act, without

charging him for the offence. If it is thought necessary to extend the period of detention, an application must be made to the High Court.

The Bill therefore empowers any police officer to deprive a person of his liberty for three days, without recourse, on the mere suspicion, albeit reasonable, of the infraction under section 16(1). This infringes the right to brought promptly before a judicial officer and deprives the detainee of his liberty without due process.

The first thing to note is that the power of arrest given to police officers under section 15(1) is based upon reasonable cause to believe, as opposed to the lower standard of reasonable suspicion. It is not clear why the higher standard is required for an arrest, but a lower standard for a three day detention.

Secondly, it is not at all clear that there is justification for detention without legal recourse when the offences under the Bill do not involve the actual commission of the offences which constitute gang-related activity. For example, as the law stands, a person suspected of murder may be arrested and investigations continued, but the obligation to bring him or her promptly before a judicial officer must be complied with. Section 16(1) by contrast gives the police power to detain for three days for belonging to a group which engages in murder, even though a particular murder is not under investigation or has not been recently committed. One can understand a power to detain where some criminal activity (other than a gang offence against the Bill) by the detainee is imminent. But it does not appear to be reasonably justifiable to detain someone for belonging to a gang or for any of the other offences under the Bill which do not involve any immediate criminal activity by the person detained, other than belonging to the gang.

The law as it presently stands allows the police to detain for a period of time without charge, as long as the obligation to bring the detainee promptly before a magistrate is observed. We see no reason why the police should not be required to apply to a judge immediately it is thought necessary to detain a person, without charge, any longer than is already permitted in law.

The ex parte application for a detention order

Sections 16(4) and (5) permit a police officer to apply ex parte for a detention order which can be for a period of fourteen days. While we appreciate the need to present the evidence which the police have at this stage in the absence of the detainee, we are concerned that there is nothing in the section or in the Form 1 in the Second Schedule, by which the application is to be made, which requires the officer to present evidence on oath. This is a serious flaw and undermines the protection which the requirement that a judge issue the detention order is designed to provide.

We recommend that it be made clear that the application to be made to the judge be supported by evidence on oath.

Further, while again we appreciate the need to make the application ex parte in the first instance, we are concerned that there is no facility for the detainee making an application to the judge to show why the detention order should be discharged. It cannot be reasonably justifiable in a democratic society for a person to be detained without charge for fourteen days without being given any opportunity to be heard.

We recommend that provision be made for the detainee to apply to the judge to discharge the detention order.

A minor matter

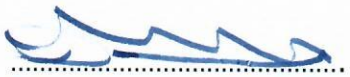
Section 16(3)(b)&(c) require 'a custody record' relating to the person detained to be maintained in which the grounds for detention are to be recorded. This is an important record which allows a detainee a platform from which to mount any challenge to his detention. It is therefore crucial that that such records be in fact created.

Sadly, the profession's experience is that important records, such as a police officer's pocket diary, are not filled out because pocket diaries are not made available to police officers.

On the other hand, one record which always appears to be available and in use in the station diary. We therefore recommend that the station diary be used to create the custody record referred to in section 16(3).

Respectfully submitted.

Yours faithfully,



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