

5 February 2008

ATTORNEY-GENERAL

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
WANGANUI DISTRICT COUNCIL (PROHIBITION OF GANG INSIGNIA) BILL

1. We have considered whether the Wanganui District Council (Prohibition of Gang Insignia) Bill (the "Bill"), a Local Bill in the name of Chester Borrows MP, is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). The Bill was introduced to the House of Representatives on 22 November 2007 and is currently awaiting its first reading. We understand that the next Members' Day is scheduled for Wednesday, 13 February 2008.
2. We have concluded that the Bill is inconsistent with section 14 of the Bill of Rights Act and that the inconsistency cannot be justified under section 5 of that Act.
3. We therefore recommend that you bring the Bill to the attention of the House of Representatives as soon as practicable pursuant to section 7 of the Bill of Rights Act and Standing Order 266. A draft report for this purpose is attached for your consideration and signature, if you agree.
4. We have consulted with the Crown Law Office during the preparation of this advice and it agrees with our conclusions.

OVERVIEW OF THE BILL

Policy objectives

5. The Bill is a response to concerns within the Wanganui community about the wearing or display of gang insignia in public places, which is seen as contributing to, or likely to provoke, gang confrontations. The explanatory note also refers to repeated incidents where residents have been intimidated by gang members congregating in public places and wearing insignia.
6. The Bill therefore seeks to allow the Wanganui District Council (the "Council") to prohibit the wearing of gang insignia where such a prohibition is reasonably necessary to prevent or reduce the likelihood of intimidation or harassment of the public or to avoid or reduce the potential for confrontation by or between gangs (clause 5(4)).
7. The Bill would authorise the Council to make bylaws that specify public places within which it will be an offence for any person to wear or display insignia from identified gangs. The offence established by the Bill is punishable upon summary conviction by way of fine not exceeding \$5,000 (clause 6(2)).
8. Clause 4 of the Bill (Interpretation) broadly defines "gang insignia" to mean any sign, symbol, or representation showing membership of, an affiliation with, or

support for a gang and includes any items of clothing to which signs, symbols, or representations are attached.

9. “Gang” is defined to mean:

- Black Power, Hells Angels, Magogs, (the) Mothers, Mongrel Mob, Nomads or Tribesmen; and
- Any other specified organisation, association, or group of persons identified in a bylaw made under clause 5 (Power to make bylaws designating specified places or new gangs) of the Bill.

10. The Bill would allow for a bylaw to be made with respect to any organisation, group, or association only where the Council is satisfied that the entity has a common name or common identifying signs, symbols or representations and its members, associates, or supporters individually or collectively promote, encourage, or engage in a pattern of criminal activity (clause 5(3)).

11. The Bill would also provide the police with attendant powers to arrest a person suspected of committing an offence, and seize and remove gang insignia being worn or displayed in a specified place. Any seized property is forfeited to the Crown if the person from whom the insignia is taken is convicted of an offence (clause 7 – Powers of arrest and seizure in relation to persons wearing or displaying gang insignia).

ISSUES UNDER THE BILL OF RIGHTS ACT

Section 14: Freedom of Expression

12. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right to freedom of expression extends to all non-violent forms of communication that attempt to convey an idea or meaning.¹ Importantly, it includes not only verbal and written speech, but also non-verbal conduct and “symbolic speech”:² which is protected if the person wearing the symbol intends to convey a particular message and if there is a great likelihood that the message will be understood by those who see the symbol.³

13. Clause 6 of the Bill (Prohibition of gang insignia) establishes that it is an offence for any person to wear or display gang insignia at any time in a specified public place in the Wanganui District. The prohibition is activated by the making of bylaws designating any public place as a specified place for the purposes of the Bill, and may be extended by bylaws identifying additional groups to whose insignia it will apply.

14. The Council must use a prescribed special consultative procedure during the development of any such bylaw (clause 5(2)), and must satisfy itself that a bylaw is “reasonably necessary” to prevent or reduce the likelihood of intimidation or

¹ *R v Keegstra* [1990] 3 S.C.R. 697.

² *Hopkinson v Police* [2004] 3 NZLR 704, 711; and *Spence v Washington* 418 US 405 (1974).

³ See, amongst other authorities, *Villegas v City of Gilroy* 2007 U.S. App. LEXIS 9907.

harassment of members of the public or to avoid or reduce the potential for confrontation by or between gangs (clause 5(4)).

15. The power to make bylaws in clause 5 does not exclude the requirement that it must be exercised consistently with the Bill of Rights Act.⁴ For that reason, together with the requirement of reasonable necessity in clause 5(4), the scope of the power would be limited in practice.
16. However, even where a bylaw has been made consistently with these requirements, the offence provision in clause 6 can extend not only to intimidatory or confrontational conduct but also to wearing or display of insignia that does not have that effect.

Gang insignia as expression

17. A number of meanings can be taken from the wearing or display of gang insignia. First, a simple sense of belonging and a statement of identity – “I am a member of a particular gang”. We note, however, that overseas courts have upheld bans on the wearing or display of gang insignia where such insignia is merely for self-identification.⁵
18. Insignia may also be viewed as symbols of intimidation – “I am a member of a group that is known for its violence and unlawfulness and you had better not mess with me”. In this sense, gang insignia arguably threaten violence. It is not settled in New Zealand law whether and at what point threats of violence fall entirely outside the scope of the right of free expression.⁶ Early decisions of the Supreme Court of Canada held that threats of violence fell outside the protection of the right to free expression.⁷ We do note, however, that a majority of the Court has subsequently confirmed that only violence as a form of expression *per se* falls outside the protection of the right.⁸
19. While overseas courts have occasionally been prepared to find that bans on gang insignia do not rise to the level of expressive conduct worthy of protection, we note that context is important as symbols such as gang insignia are capable of carrying different meanings and communicating different ideas depending upon the context in which they are worn. In this connection, the courts have acknowledged that symbols adopted by gangs may in certain circumstances have broad political meanings. For example, the current Black Power insignia features a clenched fist facing forwards. This is an enduring symbol of the civil rights movement, and has become synonymous with the struggle of racial minorities against oppression. This type of expression has overt political significance and falls close to the core values of the right to freedom of expression.
20. Cultural or religious imagery may also be utilised, and blanket prohibitions on the wearing or display of religious emblems that are also seen as “gang related” have

⁴ *Drew v Attorney-General* [2002] 1 NZLR 58.

⁵ See, amongst other authorities, *Villegas v City of Gilroy* 2007 U.S. App. LEXIS 9907.

⁶ See, for example, A Butler & P Butler *The New Zealand Bill of Rights Act: A Commentary* (2005) 315, 13.7.16-13.7.20.

⁷ *RWDSU v Dolphin Delivery Ltd* [1986] 2 S.C.R. 573, 588; and *Irwin Toy v Quebec (A-G)* [1989] 1 S.C.R. 927, 970.

⁸ *R v Keegstra* [1990] 3 S.C.R. 697, 733.

been viewed as unjustified interferences with the right to freedom of expression by overseas courts.⁹

21. The definition of gang insignia contained in the Bill is very wide and may cover symbols worn for the purposes of religious or cultural expression or communicating a political message to others. For this reason, the prohibition that the Bill places on the wearing or display of gang insignia may be said to infringe on an individual's right to freedom of expression.
22. Where a measure is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act. This involves an assessment of whether the measure serves an important and significant objective; and whether there is a rational and proportionate connection between the measure and the objective.¹⁰

Important and significant objective

23. The explanatory note accompanying the Bill states that the prohibition on the wearing or display of gang insignia in specified public places is designed to reduce the likelihood of gang confrontations and the intimidation of members of the public at such places.
24. The explanatory note cites police statistics showing that offences involving confrontation between gang members or other offences with a public safety element have increased from 11 offences in 2004 to 48 offences in 2006, as well as serious gang-related firearm offences that have resulted in attacks upon police and the murder of a two-year old child.
25. We consider that reducing the likelihood of gang confrontations and the intimidation of members of the public at specified public places is an important and significant objective.

Rational and proportionate connection

26. The explanatory note to the Bill states that the wearing or display of gang insignia in public places is the principal means of identifying the members or associates of different gangs and contributes to, and is likely to promote, further gang confrontations. On this basis, removing one of the means by which rival gangs identify each other in certain places would appear to contribute to reducing the likelihood of gang confrontations in those particular places.
27. The prohibition of gang insignia from specified public places will not prevent the intimidation to members of the public caused by the congregation of gang members; however, gang insignia may itself convey a message of intimidation. The prohibition therefore arguably contributes to the goal of reducing the intimidation of members of the public, if to a limited degree.

⁹ See, for example *Chalifoux v New Caney Independent School District* 976 F. Supp. 659 (1997).

¹⁰ In applying section 5, we have had regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754; as well as the Supreme Court of Canada's decision in *R v Oakes* [1986] 1 S.C.R. 103.

28. In terms of proportionality, we observe that:

- Clause 6 would limit a range of expression, varying in value from messages of intimidation to expression that may have cultural or political significance;
- The definition of gang insignia would appear broad enough to capture tattoos or other skin embellishments, and the wearing or display of certain colours;
- There are a variety of existing laws covering the actual behaviours the prohibition of gang insignia is designed to address;
- As the offence provision is based on specified locations, rather than the purpose or conduct of the wearer, it does not differentiate between wearing or display of insignia that does in fact have an intimidatory or confrontational purpose or effect and that which does not; and
- The fine for a contravention of clause 6 is significantly higher than for offences of a similar or more serious nature in the Summary Offences Act 1981 (for example, the maximum fine for intimidation is \$2,000).

29. Gangs undoubtedly represent a significant problem in Wanganui and nationwide. The prohibition on the wearing and display of gang insignia in specified places would appear to make a limited contribution to reducing the likelihood of gang confrontations and the intimidation of members of the public. However, the offence provision extends to prohibit conduct that does not have that effect. That is, it extends to the wearing or display of insignia that is not designed or perceived to be intimidatory or confrontational. On balance, we consider the prohibition would have a disproportionate impact on the right to freedom of expression.

30. We have therefore concluded that the *prima facie* inconsistency with section 14 of the Bill of Rights Act cannot be justified in terms of section 5.

Section 21: the right to be secure against unreasonable search and seizure

31. We have also considered whether the Bill raises an issue under section 21 of the Bill of Rights Act, which provides that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

32. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a “search or seizure”. Second, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are “unreasonable” in the circumstances.

33. Clause 7 of the Bill provides that a member of the police may, without warrant:

- Arrest a person whom the member of the police has good cause to suspect has contravened the prohibition; and/or
- Seize and remove gang insignia (by the use of force if necessary) being worn or displayed in a specified place.

34. The latter power gives rise to an issue of consistency with section 21 of the Bill of Rights Act. However, the police discretion to exercise the seizure power is itself subject to the Bill of Rights Act and may only be exercised when it is reasonable in the circumstances.

CONCLUSION

35. We have concluded that the Bill is inconsistent with section 14 of the Bill of Rights Act.
36. We recommend that, as soon as practicable, you bring the Bill to the attention of the House of Representatives pursuant to section 7 of the Bill of Rights Act and Standing Order 266. A draft report for this purpose is attached for your consideration and signature, if you agree.

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