



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on
the Gangs Legislation Amendment Bill

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990 and
Standing Order 269 of the Standing Orders of the House of
Representatives*

1. I have considered the Gangs Legislation Amendment Bill (PCO 25941/8.0) (the **Bill**) for consistency with the New Zealand Bill of Rights Act 1990 (the **Bill of Rights Act**). I conclude the proposed prohibition on the display of gang insignia in public places is inconsistent with the rights to freedom of expression, association and peaceful assembly in the Bill of Rights Act.¹ Further, I conclude that the proposed power to issue dispersal notices is inconsistent with the right to peaceful assembly in the Bill of Rights Act.²
2. I bring these apparent inconsistencies to the attention of the House under section 7 of the Bill of Rights Act and Standing Order 269.
3. The Bill also engages other rights in the Bill of Rights Act but, I am satisfied that it does not unjustifiably limit those rights.

The Bill

4. The Bill seeks to reduce the ability for gangs to operate and cause fear, intimidation and disruption to the public. It will do this by:
 - 4.1 prohibiting the display of gang insignia in public places;
 - 4.2 enabling Police to issue dispersal notices to gang members gathering in public;
 - 4.3 enabling the courts to issue consorting prohibition notices to stop certain gang members from associating; and
 - 4.4 making gang membership an aggravating factor at sentencing.
5. I provide more details about these amendments below, where they engage the rights and freedoms in the Bill of Rights Act.
6. If some gang members think they are beyond the reach of the law, they are wrong. But just as they are subject to the law, including the law proposed by this Bill, they are also entitled to its protection.

Prohibiting the display of gang insignia in public places

7. The display of gang insignia in government premises is currently prohibited under the Prohibition of Gang Insignia in Government Premises Act 2013. The Bill proposes to repeal this Act and enact a broader prohibition on the display of gang insignia in all public places.³

¹ New Zealand Bill of Rights Act, ss 14, 16, and 17.

² Section 16.

³ It also proposes to repeal the Wanganui District Council (Prohibition of Gang Insignia) Act 2009, which provides the Wanganui District Council a power to issue by-laws to prohibit the display of gang insignia in certain circumstances, and the Prohibition of Gang Insignia in Government Premises Regulations 2018.

8. The Bill proposes to make the display of gang insignia at any time in a public place, without reasonable excuse, an offence.⁴ The offence will not be committed if the display was for or related to:⁵
 - 8.1 a genuine artistic or educational purpose; media reporting; the broadcast of a documentary; law enforcement; providing training or information to persons carrying out work for a government agency; and
 - 8.2 was, in the circumstances, reasonable for that purpose.
9. The maximum penalty upon conviction for the offence will be a term of imprisonment not exceeding 6 months, or a fine not exceeding \$5,000.⁶
10. The Bill defines a "Gang" as:⁷

...any organisation, association, or group of persons that is specified by a name that is the same as, or substantially similar to, that of any organisations, associations, or group of persons identified in Schedule 2.
11. "Gang insignia" is defined as a "sign, symbol, or representation commonly displayed to denote membership of, an affiliation with, or support for a gang, not being a tattoo" and includes any "item or thing to which a sign, symbol, or representation ... is attached or affixed".⁸
12. "Public place" is defined as⁹
 - (a) ... a place that, at any material time, is open to or is being used by the public, whether or not on payment of a charge, and whether or not any owner or occupier of the place is lawfully entitled to exclude or reject any person; and
 - (b) includes any vehicle, craft, or vessel that carries or is available to carry passengers for reward (for example, an aircraft, a hovercraft, a ship, a ferry, a train, or a motor vehicle); but
 - (c) does not include any publicly accessible online place (for example, an Internet site or an online application or similar)

⁴ Clause 7.

⁵ Clause 8.

⁶ Clause 7(2).

⁷ Clause 4. Schedule 2 currently identifies various known gangs and may be added to by the Governor-General by order in council made on the recommendation of the Minister of Police – clause 28.

⁸ Clause 4.

⁹ Clause 4.

Freedom of expression - section 14

13. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, which includes the freedom to seek, receive, and impart information and opinions of any kind and in any form.¹⁰ As Sir Stephen Sedley put it:¹¹

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome, and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.

14. Any limitation of that freedom, even for gang members, must be justified or it will be inconsistent with the Bill of Rights Act. However, gang insignia is associated with intimidation and criminal activity,¹² so it is more susceptible to justified limitation than other forms of expression.

Freedom of peaceful assembly and association – sections 16 and 17

15. Section 16 of the Bill of Rights Act protects freedom of peaceful assembly, which is crucial to preserving the right to protest, a cornerstone of our democracy, but its protection reaches into all gatherings that enable participation in community life.¹³
16. Section 17 protects freedom of association. This includes forming or participating in an organisation, to share information and ideas, and to act collectively.¹⁴
17. Sections 16 and 17 do not protect associations and assemblies for illegal purposes.¹⁵ The fact that gangs facilitate criminal activity does not make them illegal for this purpose. Gang membership may also involve association for legal and pro-social purposes, including political purposes, which do receive the protection of sections 16 and 17. This has been confirmed by the courts on numerous occasions when considering the legality of bail conditions that prohibit identified gang members from associating.¹⁶
18. The banning of gang insignia will not prohibit gang members from assembling or associating with one another. They may do so in private, wearing gang insignia, and in public, not wearing gang insignia, provided they do not disrupt the activities of other members of the community.

¹⁰ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, (1999) 5 HRNZ 224 (CA) at [15]; *Attorney-General v Smith* [2018] NZCA 24 at [38] noting that: “Low value” expression — whether mundane and innocuous (such as private discourse or commercial radio) or hateful and dangerous (such as hate speech, an incitement to violence or even violent action itself) — is expression regardless.”

¹¹ *Redmond-Bate v DPP* [1999] Crim LR 998 (QBD) at [20].

¹² *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) at [97].

¹³ *Morse v Police* [2012] 2 NZLR 1 (SC) at [110].

¹⁴ *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142, [2021] 2 NZLR 795.

¹⁵ Section 98A of the Crimes Act 1961 makes it a criminal offence to associate for the purpose of committing offences. The High Court in *Timoti v Police* HC Auckland CRI-2009-404-320, 17 December 2009 confirmed that the fact that the plaintiff had breached s 4(1)(a) of the Summary Offences Act meant that he was not protected by his right to freedom of association (at [46]).

¹⁶ See *Paora v R* [2016] NZHC 727 at [32]; *Ross v R* [2021] NZHC 834; *R v Chapman* [2022] NZHC 153 at [20] – [21].

19. However, the explanatory note to the Bill confirms that one of the Bill's purposes is to "disincentivise gang membership" and it will clearly have that impact. The proposed gang insignia ban is one of a suite of measures designed to achieve this purpose, by making it more difficult for gang members to publicly interact with one another, advertise their gang membership and recruit other members. To this extent it limits the freedoms peaceful assembly and association in sections 16 and 17 of the Bill of Rights Act and that limitation must be justified or it will be inconsistent with the Bill of Rights Act.

Is this justified under section 5 of the Bill of Rights Act?

20. Section 5 of the Bill of Rights Act provides that rights and freedoms may be subject to reasonable limits that are prescribed by law and demonstrably justified in a free and democratic society. Assessing this requires examination of: (1) whether the limit serves a purpose sufficiently important to justify curtailment of the right; (2) whether the limit is rationally connected to that objective, and (3) whether it impairs the right no more than is reasonably necessary. Looked at in the round the limit must be proportionate to both the value of the right and the importance of the objective.¹⁷
21. As above, the objective of the Bill is to reduce the ability of gangs to operate and cause fear, intimidation, and disruption to the public.¹⁸ The explanatory note also records that a purpose of the Bill is to disincentivise gang membership and records that:

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 eventuate into gang violence in public spaces.

22. I consider these objectives sufficiently important to justify some limitation on the freedoms of gang members and that the proposed limitation is rationally connected with this objective.
23. This is consistent with the position previous Attorney's-General have taken on the Prohibition of Gang Insignia in Government Premises Bill, and the Wanganui District Council (Prohibition of Gang Insignia) Bill,¹⁹ and the decision of the High Court in *Schubert v Wanganui District Council* [2011] NZAR 233 (HC).²⁰

¹⁷ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1; *R v Oakes* [1986] 1 SCR 103.

¹⁸ Clause 3.

¹⁹ After receiving this report Parliament amended the bill to make it more consistent with the Bill of Rights Act.

²⁰ At [107] – [108]. The High Court was considering the consistency of a bylaw made under the Wanganui District Council (Prohibition of Gang Insignia) Act 2009 with the Bill of Rights Act.

Does the Bill limit the freedoms no more than is necessary to achieve these objectives?

24. This is a more finely balanced question because the proposed prohibition covers all public spaces at all times. Other members of the public, whom the Bill is intended to protect from fear and intimidation, may not even be present.
25. The insignia ban discourages but does not prevent gang members from associating or assembling, and the only expression it prevents is the message of their identity as gang members to other members of the public. That is expression of low value and they can still identify as gang members in all the ways that are not prohibited.
26. More limited prohibitions could target places where intimidation of the public is more likely such as playgrounds, sports fields, beaches and other places of public recreation where the public are highly likely to be. If necessary, such a limited ban could be supplemented by giving constables a discretionary power to direct the removal of gang insignia in any other place if fear and intimidation is likely to occur.
27. There would need to be a convincing reason why less intrusive measures would not achieve the social purpose before a complete ban could be justified. It may be that policing a more restricted ban would be compromised and defeat the objective, but that has not been considered.
28. For these reasons, I consider the limitation to the freedoms of association, assembly and expression caused by this part of the Bill has not been justified under section 5 of the Bill of Rights Act.
29. This is consistent with the High Court's decision in *Schubert v Wanganui District Council* that a similarly broad limitation on the public display of gang insignia in public places in Wanganui²¹ unjustifiably breached section 14.²²

Dispersal notices

30. The Bill proposes to give Police power to issue a dispersal notice to a person if they have reasonable grounds to:²³
 - 30.1 suspect that they are part of a group of three or more gang members who are gathering in a public place; and
 - 30.2 to believe that the issue of the notice is necessary to avoid disrupting activities of other members of the community.
31. Notices may be issued while the gathering is taking place or after it has ended.²⁴ They may not be issued to people who are gathering for the purpose of

²¹ Introduced by a by-law under the Wanganui District Council (Prohibition of Gang Insignia) Act 2009.

²² *Schubert v Wanganui District Council* [2011] NZAR 233 (HC).

²³ Clause 9.

²⁴ Clause 9(2).

demonstrating support for, or opposition to, or otherwise publicising, any point of view, cause, or campaign.²⁵

32. If the notice is issued while the gathering is taking place, Police may require the people named in the notice to leave the public place or go beyond a reasonable distance from the public place.²⁶
33. Notices take effect when served and remain in effect for 7 days after the date of the gathering, unless earlier revoked.²⁷ While a notice is in effect the person who has been served with the notice must not associate with people named in the notice in a public place.²⁸ However, notices do not prevent the association of:²⁹
 - 33.1 members of the same immediate family; and
 - 33.2 people who are associating because they are in legal custody, serving a sentence, appearing in court, or subject to a court order or an order or conditions imposed by or under legislation, or for work, education, or health care purposes.
34. People issued with a dispersal notice may apply to vary the terms of the notice to allow association with a named person in certain circumstances, such as to attend a tangi or funeral or participate in any other specified lawful activity.³⁰
35. Further, people may apply to the Commissioner of Police to review a notice, if they believe it was not validly issued. The Commissioner must determine applications for review and communicate their decision within 72 hours and failure to do this results in the expiry of the notice.³¹
36. It will be an offence to “knowingly, and without reasonable excuse, associate with a named person in a public place” while a notice is in effect. The penalty will be a term of imprisonment not exceeding 6 months or a fine not exceeding \$5,000.³²
37. Finally, the Bill proposes to give constables who are proposing to issue a dispersal notice a power to detain people to take their biographical details, issue, and/or serve the notice and creates an offence for failing to comply with directions issued by Police during this process.³³ The maximum penalty for this will also be a term of imprisonment not exceeding 6 months or a fine not exceeding \$5,000.

²⁵ Clause 9(3).

²⁶ Clause 12.

²⁷ Clause 13.

²⁸ Clause 14.

²⁹ Clause 15.

³⁰ Clause 16.

³¹ Clause 18.

³² Clause 17.

³³ Clause 11.

Right not to be arbitrarily detained – section 22

38. Confirmation of the identity of the person and the ability to issue and serve the notice is necessary for the purpose of the notice and the section requires that the detention be limited to the time reasonably necessary for this. The length of time will largely be determined by the amount of co-operation received but I am satisfied that the Bill is not authorising any arbitrary detention.

Freedom of peaceful assembly – section 16

39. The issue of a dispersal notice would provide a further marginal limitation on freedom of association, but the freedom substantially affected is the freedom of peaceful assembly. Although the order can only be made where the constable is satisfied that the meeting is disrupting the activities of other persons, the order will remain in force for seven days unless earlier revoked and will prevent assembly with the named other gang members for any purpose other than those specifically exempted by clause 15, whether or not that assembly is peaceful.
40. A dispersal notice will therefore limit section 16 of the Bill of Rights Act. This is not cured by the ability for people subject to a notice to apply for variation of the notice for specified reasons, as such applications may take up-to 72 hours to be determined.³⁴
41. Turning to justification, as with the gang insignia prohibition, I am satisfied that dispersal notices serve, and are rationally connected to, a sufficiently important objective.
42. There is clearly a need to prevent the gang members from shifting their meeting to another public location, and clause 15 does make exceptions for the most likely pro-social reasons a gang member may need to assemble in public with other gang members, but one important one is absent.
43. A notice cannot be issued to a gang member who is participating in a public demonstration, but once issued, it will prevent the gang member from doing so at any time while the notice is in force.
44. The right to assemble for the purpose of a protest has great public importance in a democracy and limitations on that right should not be entertained in the absence of imminent risk to safety or public order.
45. The recipient of a dispersal notice would have to seek a variation of it, in order to attend a public demonstration with other gang members specified in the notice. Even if that could be effectively exercised given the time frames involved, there should be no requirement to seek permission to exercise this fundamental constitutional right. As the United States Supreme Court said:³⁵

it is offensive, not only to the values protected by the First Amendment, but to the very notion of a free society, that in the context of everyday public

³⁴ Clause 16.

³⁵ *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002).

discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.

46. In this one respect, I consider the dispersal notice regime as proposed will impair the freedom of peaceful assembly more than is necessary and is inconsistent with s 16 of the Bill of Rights Act. The inconsistency could be resolved by adding political protests to the category of exempted activities in clause 15.

Non-consorting orders

47. The Bill proposes to give the District Court power to make an order that prohibits named gang members from consorting with each other for up to three years.³⁶ Such an order may be made if the relevant people³⁷ are specified gang offenders and it would “assist to disrupt or restrict the capacity of the person to engage in conduct that amounts to a serious offence”.
48. An order may not be made if the person shows that its detrimental effects on them outweigh its societal benefit.³⁸ Further an order may not prevent consorting between members of the same immediate family or consorting between people who are in legal custody, serving a sentence, appearing in court, or subject to a court order or an order or conditions imposed by or under legislation, or for work, education, or health care purposes.³⁹
49. It will be an offence to breach a non-consorting order knowingly and without reasonable excuse.⁴⁰ The penalty for this is a term of imprisonment not exceeding 5 years or a fine not exceeding \$15,000.
50. The Bill also provides a pathway for variation or discharge of non-consorting orders in particular circumstances, such as if the person is no longer a gang member or is no longer considered at risk of committing a serious offence⁴¹ or to allow the person to attend a tangi or funeral or participate in any other specified lawful activity.⁴²

Freedom of association – section 17

51. Non-consorting orders limit people’s right to freedom of association. As with dispersal notices, whether this is justified under section 5 of the Bill of Rights Act will depend on the facts of each case.
52. The courts are required to act consistently with the Bill of Rights Act and therefore will only make non-consorting orders when and to the extent justified. On this basis, the Bill does not unjustifiably limit section 17.

³⁶ Clauses 19 and 20.

³⁷ I.e. the person against whom the order will be made and the others with whom they will be prohibited associating with.

³⁸ Clause 19(2).

³⁹ Clause 22.

⁴⁰ Clause 23.

⁴¹ Clause 24(2).

⁴² Clause 25.

Making gang membership an aggravating feature at sentencing

53. Section 9 of the Sentencing Act 2002 sets out aggravating factors that the judge must take into account when sentencing or otherwise dealing with an offender, to the extent they are applicable in the case. One of these is the “nature and extent of any connection between the offending and the offender’s” participation in an organised criminal group or association.⁴³
54. The Bill proposes to repeal this and replace it with a requirement that the judge consider whether the offender was, at the time of the offending, a participant in a criminal group or involved in any other form of organised criminal association.⁴⁴

Disproportionately severe punishment – section 9

55. Section 9 of the Bill of Rights Act provides, in part, that everyone has the right not to be subjected to disproportionately severe punishment. A limit of s 9 is incapable of justification.⁴⁵
56. Although section 9 of the Sentencing Act requires the judge to take these aggravating factors into account in sentencing, the judge retains the overall discretion as to the sentence given. As above, this discretion must be exercised consistently with the Bill of Rights Act. The proposed new aggravating feature therefore does not create any risk that a disproportionately severe sentence will be imposed.

Right to the benefit of the lesser penalty – section 25(g)

57. Section 25(g) of the Bill of Rights Act provides that people charged with an offence have the “right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentence, to the benefit of the lesser penalty”.
58. Schedule 4 of the Bill proposes to add a part to schedule 1AA of the Sentencing Act to clarify that the new aggravating feature proposed for section 9 of the Sentencing Act “applies only to proceedings commenced on or after the commencement date”.
59. Section 25(g) relates not to when proceedings are commenced, but to when the offence was committed. However, the amendment to section 9 of the Sentencing Act is plainly intended to apply prospectively and, in the absence of clear words that it is to apply retrospectively to people who committed their offence before the amendment came into force but are to be sentenced after, I am satisfied that a Court will not apply it to any offender in a manner that is inconsistent with the right protected by section 25(g).

⁴³ Sentencing Act 2002, s 9(hb).


⁴⁴ Clause 36.

⁴⁵ *Fitzgerald v R* [2021] NZSC 131; [2021] 1 NZLR 551.

Freedom from discrimination – section 19

60. Section 19 of the Bill of Rights Act provides that everyone has the right to freedom from discrimination on any of the grounds set out in section 21 of the Human Rights Act 1993. Race is one of the prohibited grounds.⁴⁶ Gang membership is not.
61. Legislation will discriminate if it:⁴⁷
- 61.1 treats or affects persons or groups in comparable situations differently on the basis of a prohibited ground;
 - 61.2 this differential treatment or effect causes material disadvantage; and
 - 61.3 this is not justified under section 5 of the Bill of Rights Act.
62. It is well established that a disproportionate percentage of gang members are Māori, as set out in the regulatory impact statement to the Bill.
63. However, applying the reasoning of the Court of Appeal in *Ngaronoa v Attorney-General*, I do not consider the Bill engages section 19.⁴⁸ Specifically, because:
- 63.1 The Bill treats Māori and non-Māori gang members the same.⁴⁹
 - 63.2 If the Bill was discriminatory under the Bill of Rights Act because of the disproportionate representation of Māori in gangs, this would mean all attempts to protect the public from gangs would be discriminatory.⁵⁰
 - 63.3 Gang membership represent a very small percentage of both the total Māori and non-Māori populations so the difference in the constitution of gangs does not create a material disadvantage as between Māori and non-Māori.⁵¹


Hon Judith Collins KC
Attorney-General

 February 2024

⁴⁶ Human Rights Act 1993, s 21(f).

⁴⁷ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [143].

⁴⁸ *Ngaronoa v Attorney-General* [2017] NZCA 351.

⁴⁹ At [137].

⁵⁰ At [138].

⁵¹ See [147] – [148] of *Ngaronoa*.