



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Wanganui District Council (Prohibition
of Gang Insignia) Bill

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990 and
Standing Order 266 of the Standing Orders of the House
of Representatives*

I have considered the Wanganui District Council (Prohibition of Gang Insignia) Bill ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"). I have concluded that clause 6 of the Bill appears to constitute a limitation upon section 14 of the Bill of Rights Act. This limitation cannot be justified in terms of section 5 of that Act. As required by section 7 of the Bill of Rights Act and Standing Order 266, I draw this to the attention of the House of Representatives.

PURPOSE OF THE BILL

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, as well as intimidating members of the public. 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.

INCONSISTENCY WITH SECTION 14 OF THE BILL OF RIGHTS ACT

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

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 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. The power to make bylaws in clause 5 does not exclude the requirement that it be exercised consistently with the Bill of Rights Act.³ For that reason, together with the requirement of reasonable necessity in clause 5(4), the scope of the power will be limited in practice.

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.

¹ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 15-16.

² *Hopkinson v Police* [2004] 3 NZLR 704, 711.

³ *Drew v Attorney-General* [2002] 1 NZLR 58.

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.⁴ However, I have concluded that clause 6 gives rise to a *prima facie* issue of consistency with section 14 in any case by prohibiting a broad range of expression, varying from messages of intimidation to symbolic cultural, political or religious aspects. I note, of course, that, even if protected, intimidatory expression is given little weight under section 14, but that cultural, political or religious protection is more strongly protected.

Justifications under section 5 of the Bill of Rights Act

Where a Bill 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 the inconsistency is considered to be a reasonable limit that is justifiable under section 5 of that Act. A limit on a right can be justified in terms of section 5 where it meets a significant and important objective, and where there is a rational and proportionate connection between the limitation on the right and that objective.⁵

Important and Significant Objective

The explanatory note accompanying the Bill provides 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.

Article 19(3) of the International Covenant on Civil and Political Rights confirms that the right to freedom of expression may be subject to certain restrictions, including where necessary for the protection of public order, or the protection of the rights and freedoms of others. Case law suggests that behaviour which amounts to intimidation is disruptive of the public order even if no violence is reasonably in prospect.⁶

I therefore accept 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

The explanatory note states that the wearing or display of gang insignia in public places is the principal means of identifying the members or

⁴ See, for example, A Butler & P Butler *The New Zealand Bill of Rights Act: A Commentary* (2005) 315, 13.7.16-13.7.20.

⁵ In applying section 5, I 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; *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754; and *R v Hansen* [2007] 3 NZLR 1 at [70], [123], [203]-[204] and [271].

⁶ *Brooker v Police* [2007] 3 NZLR 91, 111 (Elias CJ).

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 logically appear to contribute to reducing the likelihood of gang confrontations.

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, or their behaviour. However, gang insignia may itself convey a message of intimidation in that it identifies its wearers as members of a group known for violence and unlawfulness. I therefore consider that the prohibition has a rational (if tenuous) connection to the goal of reducing the intimidation of members of the public at specified public places.

In terms of proportionality, I observe that:

- Clause 6 would limit a range of expression, varying in value from messages of intimidation to expression that may have political or cultural 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).

Gangs represent a serious and apparently escalating problem in Wanganui. 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. On balance, I consider that the prohibition would have a disproportionate impact on the right to freedom of expression.

CONCLUSION

Based on the analysis set out above, I have concluded that the Bill appears to be inconsistent with section 14 of the Bill of Rights Act and that the inconsistency cannot be justified under section 5 of that Act.


Hon Dr Michael Cullen
Attorney-General