

Prohibition of Gang Insignia in Government Premises Bill

18 July 2012

ATTORNEY-GENERAL

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
PROHIBITION OF GANG INSIGNIA IN GOVERNMENT PREMISES BILL

1. We have considered whether the Prohibition of Gang Insignia in Government Premises Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). The Bill was introduced into the House of Representatives on 28 June 2012 and is currently awaiting its first reading. The Bill is a Local Bill in the name of Todd McClay MP.

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 14 of that Act (freedom of expression). Our analysis is set out below.

PURPOSE OF THE BILL

3. The purpose of the Bill is to ensure that staff and clients at Government premises are free from intimidation through displayed gang insignia where the gang promotes, encourages or engages in criminal activity.

4. The Bill makes it a summary offence, punishable by a fine up to \$2000, to display gang insignia in Government premises without reasonable excuse.

CONSISTENCY WITH THE BILL OF RIGHTS ACT

Freedom of expression

5. 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. The right is as wide as human thought and imagination.^[1]

6. Gang insignia can be considered a form of expression and may fall under the protection of s 14 of the Bill of Rights Act. Gang insignia is, however, at the lower end of protected expression as it is associated with intimidation and criminal activity.^[2]

Is this a justified limit under s 5 of the Bill of Rights Act?

7. Where a provision is found to pose a limit on 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 demonstrably justified in terms of s 5 of that Act. Following the guidance of the New Zealand Supreme Court decision in *Hansen v R*,^[3] the s 5 inquiry may be summarised as:

- a. does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?
- b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?

Important objective and rational connection

8. Clause 3 of the Bill states that the Bill's purpose is to prohibit the display of gang insignia on premises of departments of the Public Service and Crown Entities, and Local Authorities in New Zealand. The underlying objective is to provide for workplaces and public services that are free from the intimidation that many New Zealanders suffer where gang insignia is displayed. We consider that these objectives are sufficiently important to justify some limitation on the right to freedom of expression and that the limitation is rationally connected with this objective.

Proportionality

9. The issue of banning gang insignia is not a new issue. In 2008, the Attorney-General presented a report to Parliament stating that the Wanganui District Council (Prohibition of Gang Insignia) Bill appeared to be inconsistent with the Bill of Rights Act. Parliament amended that Bill to make it more consistent and it was enacted into law in 2009. Soon after, the Wanganui District Council made a bylaw on the prohibition of gang insignia. In 2011, the High Court overturned the bylaw as being inconsistent with the Wanganui District Council (Prohibition of Gang Insignia) Act 2009 and the Bill of Rights Act.^[4]

10. The High Court found that the effect of the bylaw was to effectively ban gang insignia in all public places in the District.^[5] In addition, the Court found that the ban on gang insignia was very broad and could cover brand names and fashion clothing more generally.^[6] The effect of the bylaw was, therefore, disproportionate to the objective.

11. In contrast, the Bill specifically defines "gang", "gang insignia" and "Government premise". All three of these definitions provide a level of specificity that prevents overreach. The display must occur in a Government premise. The premises are explicitly defined in the Bill and do not cover broad geographic areas. The definitions specifically exclude residential dwellings under the authority of the Housing New Zealand Corporation. The Bill excludes tattoos and implicitly excludes colours as a gang insignia means a sign, symbol, or representation that is attached to clothing.

12. The Bill defines a gang as having a common name and identifying signs, symbols or representations. The insignia must denote membership in the gang.^[7] In addition, the definition requires that the gang's members, associates or supporters must individually or collectively promote, encourage or engage in criminal activity. The Bill specifies a number of gangs that already meet these requirements and additional gangs may be specified by regulation if they meet the above definition. As the objective of the Bill is to lessen intimidation, it is appropriate that the only gangs included under the Bill, or added later by regulation, are those that are commonly known and associated with criminal activity. It is this notoriety and unlawful activity that leads to intimidation.

13. Finally, the importance of limiting gang intimidation of staff and clients in Government premises clearly outweighs the expression value of gang insignia associated with criminal activity.

14. We consider that the provisions of the Bill appear to limit freedom of expression no more than is reasonably necessary to achieve the objective of the Bill and the limit is in proportion to this objective.

CONCLUSION

15. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

Melanie Webb
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Office of Legal Counsel

Footnote 1

Moonen v Film and Literature Board of Review [2000] 2 NZLR 9, (1999) 5 HRNZ 224 (CA) at [15] (Tipping J), cited with approval in *Living Word Distributors v Human Rights Action Group* [2003] 3 NZLR 570, 582, (2000) 6 HRNZ 28 (CA) at [36] (Richardson P)

Footnote 2

Schubert v Wanganui District Council [2011] NZAR 233 at [97]

Footnote 3

[2007] NZSC 7

Footnote 4

Schubert v Wanganui District Council above n 2 at [170] and [171]

Footnote 5

At [51]

Footnote 6

At [66]

Footnote 7

This would exclude brands and devices that can be displayed or worn that are similar to gang insignia such as skulls; see *Schubert* at [66]

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