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Synthesising the Wanganui District Council (Prohibition of Gang Insignia) Act  
2009 and the right to ...

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**SYNTHESISING THE WANGANUI DISTRICT  
COUNCIL (PROHIBITION OF GANG  
INSIGNIA) ACT 2009 AND THE RIGHT TO  
FREEDOM OF EXPRESSION**

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## *I INTRODUCTION*

The Wanganui District Council (Prohibition of Gang Insignia) Act 2009, in conjunction with the Wanganui District Council (Prohibition of Gang Insignia) Bylaw 2009, prohibits the display of gang insignia in specified places in the Wanganui district. This prohibition seeks to remedy the harms of public intimidation and violent gang confrontation. However, the need for this remedy is questionable because the extent of these harms is unclear and the pre-existing statutory framework already addressed these harms. The prohibition limits the freedom of people to express membership, support or affiliation in respect of the gangs listed in the Act and Bylaw. The prohibition therefore comes into conflict with the right to freedom of expression.

The New Zealand Bill of Rights Act 1990 (the BORA) protects the right to freedom of expression and prescribes how the right may be limited or disregarded. Applying section 5, it is argued that the display of gang insignia falls within the scope of expression protected by the BORA, but that the natural and intended meaning of the prohibition of the display of gang insignia unjustifiably limits the right to freedom of expression. While the purposes of the prohibition are sufficiently important to warrant limiting the right to freedom of expression, the prohibition is not rationally or proportionately connected to these purposes. Essentially, the prohibition is too broad because it prohibits the display of gang insignia that neither intimidates nor increases the likelihood of violent gang confrontation.

Under section 6 of the BORA, an alternative meaning can arguably be given to the prohibition that is more consistent with the freedom of expression and better respects the purposes of the prohibition. Under this meaning the prohibition would only apply to the display of gang insignia that intimidates or promotes violent gang confrontation. It is even arguable that it is tenable, under section 6, to interpret the prohibition to only apply to the display of gang insignia that is intended to intimidate or promote violent gang confrontation.



However, this author argues that it is simply not tenable to interpret the prohibition in either of these ways. Parliament has clearly decided that all display of gang insignia within the specified areas is to be prohibited. It is irrelevant whether such display does, in fact, intimidate or promote violent gang confrontation, because Parliament has deemed this to be the case.

The prohibition cannot be given a more BORA-consistent meaning under section 6. Therefore, according to section 4, the prohibition must be enforced as applying to all display of gang insignia in the specified places, even though it represents an unjustified limitation under section 5.

## ***II WANGANUI DISTRICT COUNCIL (PROHIBITION OF GANG INSIGNIA) ACT 2009***

The Wanganui District Council (Prohibition of Gang Insignia) Act 2009 (the PGI Act) came into force on the 10 May 2009. It prohibits the display of gang insignia in specified public places in the Wanganui district. However, for the prohibition to be enforceable the PGI Act required the Wanganui District Council (the Council) to make a bylaw specifying the public places where the prohibition shall apply.<sup>1</sup> The Council has passed the Wanganui District Council (Prohibition of Gang Insignia) Bylaw 2009 (the PGI Bylaw), which specifies that the prohibition of the display of gang insignia applies to all the public places in the Wanganui district urban area as well as the general public area at Mowhanau Beach and Village, and rural halls.<sup>2</sup> The PGI Bylaw also included the Red Devils, Head Hunters, and Manga Kahu as gangs subject to the prohibition.<sup>3</sup> The PGI Bylaw came into force on 1 September 2009.<sup>4</sup> Therefore, the prohibition of the display of gang insignia has been in force since 1 September 2009.

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<sup>1</sup> Wanganui District Council (Prohibition of Gang Insignia) Act 2009, ss 4,5, & 12.

<sup>2</sup> Wanganui District Council (Prohibition of Gang Insignia) Bylaw 2009, s3.

<sup>3</sup> Ibid, s 2.

<sup>4</sup> Ibid.



### *A Purpose*

Disappointingly for a statute lacking complexity, the PGI Act does not clearly express a purpose. Section 3 of the PGI Act is titled “purpose”, but unhelpfully only divulges that the purpose of the PGI Act is to “prohibit the display of gang insignia in specified places” within the district of the Wanganui District Council.<sup>5</sup> Section 3 merely states what the PGI Act does, not what harm it seeks to remedy.

However, the purpose can be inferred from the PGI Act itself. Section 5 (1) of the PGI Act confers upon the Council the power to make bylaws determining which gangs are prohibited from displaying their gang insignia and where this prohibition exists. This power of the Council is limited by the requirement of section 5 (5) that such bylaws must be “reasonably necessary in order to prevent or reduce the likelihood of intimidation or harassment of members of the public in a specified place or to avoid or reduce the potential for confrontation by or between gangs.”<sup>6</sup>

Therefore, the twin purposes of the Wanganui prohibition, according to the legislation, are to prevent or reduce the intimidation of members of the public and to avoid or reduce gang confrontation.<sup>7</sup>

The purposes of the PGI Act, as understood during its passage through Parliament, changed. The PGI Bill was introduced to Parliament to reduce the occurrence of gang confrontation, which was seen to cause members of the public to feel intimidated.<sup>8</sup> It therefore sought to reduce both the occurrence gang confrontations and public intimidation. However, during

<sup>5</sup> Wanganui District Council (Prohibition of Gang Insignia) Act 2009, s 3.

<sup>6</sup> *Ibid*, s 5(5).

<sup>7</sup> See Wanganui District Council (Prohibition of Gang Insignia) Bill 2007, no 171-1 (Explanatory Note); Draft Wanganui District Council (Prohibition of Gang Insignia) Bylaw 2009 (Statement of Proposal); Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Wanganui District Council (Prohibition of Gang Insignia) Bill (20 February 2008).

<sup>8</sup> Wanganui District Council (Prohibition of Gang Insignia) Bill 2007, no 171-1 (Explanatory Note); (2 April 2008) 646 NZPD 15338.



the Committee of the Whole House, Chester Borrows, the Member of Parliament responsible for the PGI Bill, stated that the “legislation is trying to deal to one particular issue, and that is the intimidation that people feel when they are surrounded by patched gang members.”<sup>9</sup>

It is unclear whether Mr Borrows is here ignoring the reduction or avoidance of gang confrontation as a purpose of the Wanganui prohibition. It is possible that “dealing to intimidation” may involve addressing both intimidation of members of the public and confrontations by, or between, gangs. However, the uncertainty over whether the purpose is to target public intimidation or to target both public intimidation and gang confrontation reflects a disjuncture between the perceived harm and the proposed remedy.<sup>10</sup> During the third reading of the PGI Bill Mr Borrows reinforced this narrow view of the PGI Bill’s purpose:<sup>11</sup>

It is targeted at the intimidatory nature of wearing and displaying gang insignia. It is not an attempt to outlaw gangs, stop gang offending, or bring about world peace; it is a narrowly focused instrument to stop intimidation by virtue of the display of gang insignia – that is it.

The lack of a clearly articulated purpose is significant for the issue, under section 5 of the BORA, of whether the Wanganui prohibition justifiably limits the right to freedom of expression.

## ***B Definitions***

Section 4 of the PGI Act defines “gang” and “gang insignia”:

**gang** means—

- (a) Black Power, Hells Angels, Magogs, Mothers, Mongrel Mob, Nomads, or Tribesmen; and
- (b) any other specified organisation, association, or group of persons identified in a bylaw made under section 5

<sup>9</sup> (25 March 2009) 653 NZPD 2088.

<sup>10</sup> See below (IV D 3) for discussion of the lack of rational connection between the Wanganui prohibition’s purposes and its measures.

<sup>11</sup> (6 May 2009) 654 NZPD 2945.



**gang insignia—**

- (a) means a sign, symbol, or representation commonly displayed to denote membership of, an affiliation with, or support for a gang, not being tattoos; and
- (b) includes any item of clothing to which a sign, symbol, or representation referred to in paragraph (a) is attached

The PGI Bylaw included the Red Devils, Head Hunters, and Manga Kahu as gangs for the purposes of the PGI Act.<sup>12</sup>

It is uncertain how these definitions will be interpreted and applied. First, uncertainty surrounds the readiness to include or exclude groups, organisations or associations in the definition of “gang”.<sup>13</sup> Second, the extent of the definition of “gang insignia” is uncertain. For example, it is possible that a red hooded shirt,<sup>14</sup> or yellow t-shirt,<sup>15</sup> may fall within the definition of gang insignia. Third, consistency in the interpretation of what constitutes “gang insignia” is a potential issue.<sup>16</sup> A more thorough consideration of these issues is outside the focus of this paper. However,

<sup>12</sup> Wanganui District Council (Prohibition of Gang Insignia) Bylaw 2009, s 2.

<sup>13</sup> Section 5 (4) of the Wanganui District Council (Prohibition of Gang Insignia) Act 2009 states that [t]he Council must not make a bylaw identifying a gang under subsection (1)(b) unless it is satisfied that the organisation, association, or group proposed to be identified has the following characteristics:

- (a) a common name or common identifying signs, symbols, or representations;
- and
- (b) its members, associates, or supporters individually or collectively promote, encourage, or engage in a pattern of criminal activity.

However, see (25 March 2009) 653 NZPD 2104-2113; Draft Wanganui District Council (Prohibition of Gang Insignia) Bylaw 2009 (Statement of Proposal); Wanganui District Council “Minutes of Extraordinary Meeting of the Wanganui District Council” (22 May 2009) 1956-1957 <[www.wanganui.govt.nz](http://www.wanganui.govt.nz)> (last accessed 9 July 2009) for lack of discussion regarding common identification, patterns of criminal activity, or reasonable necessity of including those listed as gangs.

<sup>14</sup> On 25 September 2008 Paul Kumeroa was assaulted by Black Power members and later died of head injuries. Mr Kumeroa was not associated with or affiliated to any gang but was wearing a red hooded sweatshirt: “... clothes that were the wrong colour that night and ... associated him with the rival gang.” See “Gang Rivalry May Have Played Part in Kumeroa Killing” (22 November 2008) *Wanganui Chronicle* Wanganui <<http://www.wanganuichronicle.co.nz>> (last accessed 2 July 2009).

<sup>15</sup> Jordan Herewini was run over twice by Mongrel Mob members and died. Mr Herewini “had earlier been in a scuffle with Mongrel Mob members over his yellow T-shirt, as the colour is associated with the local - rival - Tribesmen gang.” See Alanah May Eriksen “Teen Killed Over T-shirt Colour, Say Residents” (29 January 2009) *The New Zealand Herald* <<http://www.nzherald.co.nz>> (last accessed 2 July 2009).

<sup>16</sup> Metiria Turei MP (4 March 2009) 652 NZPD 1650-1652.



they are raised to show, if nothing else, potential issues in the application of the prohibition that relate to the scope of the PGI Act and its impact on the freedom of expression.

### ***C Prohibition of the display of gang insignia***

Section 12 of the PGI Act establishes the offence of displaying gang insignia in specified places. It states:

- (1) No person may display gang insignia at any time in a specified place in the district.
- (2) Every person who, without reasonable excuse, contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding \$2,000.
- (3) Without limitation, and to avoid doubt, a Judge may apply section 128 of the Evidence Act 2006 in deciding whether a sign, symbol, or representation is gang insignia for the purposes of this Act.

It is therefore an offence to display, in any public place specified in the PGI Bylaw, any sign, symbol, or representation, not being tattoos, commonly displayed to denote membership of, an affiliation with, or support for any gang listed in the PGI Act or Bylaw.

### ***D Enforcement***

The Police are responsible for enforcing the PGI Act and Bylaw. A constable may, without warrant, arrest any person reasonably suspected of displaying gang insignia in a specified place. A constable may also seize the gang insignia, using force if necessary.<sup>17</sup> Furthermore, any seized gang insignia is forfeited to the Crown if the arrested person pleads guilty to, or is convicted of, an offence under section 12.<sup>18</sup>

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<sup>17</sup> Wanganui District Council (Prohibition of Gang Insignia) Act 2009, s 13(1).

<sup>18</sup> *Ibid*, s 13(2).



A constable may, without warrant, stop a vehicle to exercise the above powers of arrest and seizure.<sup>19</sup>

### *E Summary*

The PGI Act and Bylaw are a response to the perceived problem of gang confrontation and public intimidation in Wanganui. According to the Council, the display of gang insignia is:<sup>20</sup>

the principal means of identifying the members or associates of different gangs and contributes to, and is likely to promote, further gang confrontations. Members of the public are intimidated by gang members congregating in public places and wearing gang insignia.

The assumption underlying the PGI Act and Bylaw is that by removing the public display of gang insignia the potential for gang confrontation and public intimidation is removed or reduced.

The following section steps back and examines the extent of these harms and the need for the Wanganui prohibition as a remedy.

## **III SETTING THE SCENE**

### *A Wanganui's Gang Problem*

On 28 February 2006 a violent confrontation took place at a suburban Wanganui petrol station between members of the Hells Angels and Mongrel Mob gangs. In response, Wanganui Mayor Michael Laws declared that Wanganui "will not be intimidated by the gang violence that erupted in the

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<sup>19</sup> Ibid, s 14.

<sup>20</sup> Wanganui District Council (Prohibition of Gang Insignia) Bill 2007, no 171-1 (Explanatory Note).



city today.”<sup>21</sup> This comment highlights the dual aspect of the harm caused by gangs: violent confrontations and intimidation of members of the public.

### *1 Violent gang confrontation*

Wanganui has a problem of gang offending. Police statistics show that in the three years 2004-2006 gangs committed 350 offences in Wanganui, 76 of which were defined as “gang clashes”.<sup>22</sup> Furthermore, gang-related offending is on the rise. In 2004, gangs committed 77 offences in Wanganui. In 2005, the number of gang-related offences rose to 82. In 2006, the number of gang-related offences jumped to 191. The number of violent confrontations by, or between, gangs in public places is also increasing. In 2004, 11 such incidents occurred. In 2005, 17 incidents occurred. And in 2006, the number of incidents of violent gang confrontation alarmingly rose to 48.<sup>23</sup>

Examples of gang-related incidents include an unprovoked assault in a courthouse involving members of opposing gangs; death threats; and shots fired at rival gang members, their houses, and cars.<sup>24</sup> Many of the offences occurred in public places such as petrol stations, parking lots, and courthouses and involved weapons such as baseball bats, knives, guns and tomahawks.<sup>25</sup> More recent examples of gang-related incidents include the drive by shooting of 2 year old Jhia Te Tua,<sup>26</sup> and the assault and death of non-gang member Paul Kumeroa<sup>27</sup>.

<sup>21</sup> Wanganui District Council “Wanganui will not be intimidated: Mayor backs Police action” (28 February 2006) Press Release <[www.wanganui.govt.nz](http://www.wanganui.govt.nz)> (last accessed 5 July 2009).

<sup>22</sup> “Gang OIA – Response” (Obtained under Official Information Act 1982 Request to Area Commander, Wanganui Police, New Zealand Police) <[www.wanganui.govt.nz](http://www.wanganui.govt.nz)> (last accessed 1 October 2009). Note that domestic violence offences that did not spill into the public arena; search warrants and traffic related offences that did not include a public safety interest; and offences in prison were excluded from the statistics.

<sup>23</sup> “Gang OIA – Response”, above n 22; Wanganui District Council “Gang Offending Shows Need for Patch Ban” (3 April 2007) Press Release <[www.wanganui.govt.nz](http://www.wanganui.govt.nz)> (last accessed 2 July 2009).

<sup>24</sup> *Ibid*, Appendix A.

<sup>25</sup> *Ibid*.

<sup>26</sup> “Trial into Murder of Jhia Te Tua Begins” (10 November 2008) *The New Zealand Herald* <<http://www.nzherald.co.nz>> (last accessed 2 July 2009).

<sup>27</sup> “Gang Rivalry May Have Played Part in Kumeroa Killing”, above n 14.



Despite this picture of gang violence in Wanganui, the police statistics are misleading. The main offences committed by gang members in the three year period 2004-2006 were dishonesty, and drug and anti-social offences.<sup>28</sup> Dishonesty offences account for nearly 40 per cent of the total gang-related offences.

The 76 incidents of gang clashes, so often referred to by proponents of the gang insignia ban,<sup>29</sup> include instances of mere possession of an offensive weapon; drug possession; consumption of alcohol in breach of liquor ban; and gang presence in the central business district.<sup>30</sup> These incidents were not necessarily ancillary to violent gang confrontations and when included as such, distort the statistics by suggesting greater occurrence of gang violence than is the reality.<sup>31</sup> Of the 76 incidents of gang clashes only 22 involved physical altercations or shots from firearms. A further 15 involved incidents of aggression or confrontation, such as verbal altercations, that did not result in physical altercations.<sup>32</sup>

Furthermore, the statistics provided by the police are not concerned with the presence or absence of gang insignia. Rather, the focus of the police statistics was the "number, frequency and magnitude of gang clashes in Wanganui."<sup>33</sup> Therefore, even if the police statistics do show a problem of violent gang confrontations, they do not show a clear connection between the occurrence of violence and the display of gang insignia.

<sup>28</sup> "Gang OIA – Response", above n 22.

<sup>29</sup> Chester Borrows (4 March 2009) 652 NZPD 1644; Wanganui District Council "Gang Offending Shows Need for Patch Ban" (3 April 2007) Press Release <[www.wanganui.govt.nz](http://www.wanganui.govt.nz)> (last accessed 2 July 2009); Wanganui District Council (Prohibition of Gang Insignia) Bill 2007, no 171-1 (Explanatory Note).

<sup>30</sup> "Gang OIA – Response", above n 22, Appendix A.

<sup>31</sup> Cr Vincent claimed that out of 600 gang related incidents over 4 year period only 7 occurred in the central business district, and of those 7 incidents, 3 occurred on the same day by the same 2 people. Rob Vincent, Wanganui City Councillor "Wanganui Gang Patch Law" (Nine to Noon, 7 May 2009) Radio New Zealand National <[www.radionz.co.nz](http://www.radionz.co.nz)> (last accessed 2 July 2009).

<sup>32</sup> "Gang OIA – Response", above n 22.

<sup>33</sup> "Gang OIA – Response", above n 22.



## 2 *Public intimidation*

The second aspect of harm caused by gangs is the intimidation of members of the public by gang members. This harm is a consequence of the violent gang confrontations. Because gangs are known to be violent, the mere presence of a gang member may intimidate. The display of gang insignia increases the ability to identify gang members, and therefore, increases the ability of gang members to intimidate:<sup>34</sup>

... when a Black Power or Mongrel Mob patch is put on those individuals, they become to the observer the manifestation of all the publicity in respect of criminal offending by that gang. Just by wearing that patch they become, in the eyes of the onlooker, rapists, murderers, assailants, or random killers who are likely to break into spontaneous violence at any stage. That is the history of the Mongrel Mob, Black Power, and Hell's Angels. Those gangs exploit that record. They exploit that history, they publicise it, and they honour and applaud it, and that is intimidating. The intimidation is directly tied to the recognition of the insignia and all that it represents. The display and wearing of the gang patch creates that intimidation ...

This argument is that the mere display of gang insignia intimidates regardless of whether the displayer is behaving in an intimidatory way or not.<sup>35</sup> Gang insignia categorically declares gang membership and therefore bestows upon the displayer the gang's violent, criminal history of the public conscience. Accordingly, the mere display of gang insignia intimidates regardless of the displayer's behaviour due to the violent history the gang insignia represents.

One problem with this argument is that the violent and intimidating history is bestowed due to gang members' previous violent and intimidating behaviour not the display of gang insignia. While it may increase intimidation, the display of gang insignia does not create intimidation. The

<sup>34</sup> (6 May 2009) 654 NZPD 2945.

<sup>35</sup> (6 May 2009) 654 NZPD 2945. See also Wanganui District Council "Minutes of the Meeting of the Extraordinary Meeting of the Wanganui District Council" (10 March 2006) 1861 <[www.wanganui.govt.nz](http://www.wanganui.govt.nz)> (last accessed 7 July 2009).



display of gang insignia is therefore a supplement to, rather than a cause of, intimidation.

In the Youth Survey Wanganui 2005, 49 per cent of youth listed intimidation by gang members as the “single-biggest threat to their feeling safe in their own community” and biggest negative feature of Wanganui.<sup>36</sup> Commenting on the survey’s findings, Mayor Laws said that the “gang culture in Wanganui intimidated Wanganui people especially youth,” and that there is “no question that the Wanganui community was intimidated by patched gang members.”<sup>37</sup>

However, no further evidence is offered to support the claim that members of the public are intimidated by the display of gang insignia. It is simply assumed that because gang members are violent, or at least are portrayed and understood to be such, the public is intimidated by their presence and that the display of gang insignia plays an important part in this intimidation.

In Wanganui Referendum 07 nearly two-thirds of voters responded in favour of a ban of the wearing of gang insignia in public places.<sup>38</sup> This response does not necessarily evidence that the public is intimidated by the display of gang insignia. It may simply be that those who voted disapprove of, or dislike, gang members. It is probable that members of the public are, at least sometimes, intimidated by gang members. However, it is far from certain that the display of gang insignia plays a significant role in this intimidation.

<sup>36</sup> (6 May 2009) 654 NZPD 2945. See also (25 March 2009) 653 NZPD 2090; Wanganui District Council “Minutes of the Meeting of the Strategy Committee” (23 March 2006) 2016 <[www.wanganui.govt.nz](http://www.wanganui.govt.nz)> (last accessed 5 July 2009).

<sup>37</sup> Wanganui District Council “Minutes of the Meeting of the Strategy Committee”, above n 36, 2016.

<sup>38</sup> Wanganui District Council “Minutes of the Meeting of the Wanganui District Council” (30 April 2007) 3536 <[www.wanganui.govt.nz](http://www.wanganui.govt.nz)> (last accessed 2 July 2009).



### *B The Wanganui District Council's Response*

On 10 March 2006 the Wanganui District Council held an extraordinary meeting to address the rise in gang-related offences. The Council agreed to draft a "bylaw to ban gang regalia and colours from the Central Business District, and all other public places, in the Wanganui District."<sup>39</sup> While the problem to be addressed by the proposed bylaw was not made explicit, the Council's debate centered on two issues: violent gang confrontations and intimidation of members of the public. It was argued that the ban would remove the "sphere of intimidation" created by patched gang members "strutting around the streets" and allow people to feel safer on the streets.<sup>40</sup> However, the Council did not explain how banning gang regalia would address violent gang confrontations.<sup>41</sup>

Following concern over the consistency of the bylaw with the New Zealand Bill of Rights Act 1990 the Council decided to pursue the proposed ban as a local Bill.<sup>42</sup> However, the Council first sought to measure the community's support for the proposed ban.<sup>43</sup> The question of whether "Wanganui [should] introduce a local bill that outlaws the wearing of gang insignia in public places?" was put forward in the local referendum of April 2007.<sup>44</sup> Of the nearly 48 per cent of electors that voted, 64.62 per cent voted in favour, while 31.73 per cent voted against.<sup>45</sup> According to Mayor Michael Laws, a ban on gang regalia would "... send a simple message: gangs are not welcome in Wanganui."<sup>46</sup>

<sup>39</sup> Wanganui District Council "Minutes of the Extraordinary Meeting of the Wanganui District Council" (10 March 2006), above n 35, 1864.

<sup>40</sup> *Ibid*, 1862-1863.

<sup>41</sup> The ban on gang-patches was expressed as removing intimidation not gang confrontation. See, for example, *ibid*, 1863.

<sup>42</sup> Wanganui District Council "Minutes of the Meeting of the Wanganui District Council" (26 February 2007) 3280-3281 <[www.wanganui.govt.nz](http://www.wanganui.govt.nz)> (last accessed 2 July 2009); "Crime Stats Show Gangs a Serious Problem Here, Says Laws" (4 April 2007) *Wanganui Chronicle* Wanganui <<http://www.wanganuichronicle.co.nz>> (last accessed 2 July 2009).

<sup>43</sup> Wanganui District Council "Minutes of the Meeting of the Wanganui District Council" (26 February 2007), above n 42, 3280-3281.

<sup>44</sup> Wanganui Referendum 07 "Gang Insignia Bill" <[www.wanganuireferendum.govt.nz](http://www.wanganuireferendum.govt.nz)> (last accessed 2 July 2009).

<sup>45</sup> Wanganui District Council "Minutes of the Meeting of the Wanganui District Council" (30 April 2007) 3536 <[www.wanganui.govt.nz](http://www.wanganui.govt.nz)> (last accessed 2 July 2009).

<sup>46</sup> Wanganui District Council "Gang Offending Shows Need for Patch Ban", above n 29.



On 22 November 2007 the Wanganui District Council (Prohibition of Gang Insignia) Bill was introduced to Parliament as a “new tool to ... reduce the likelihood of confrontation between gang members by enabling Council to prohibit wearing or displaying of gang insignia in specified places in the district.”<sup>47</sup> Such a prohibition was seen to address both the incidence of gang confrontation and also the intimidation of members of public by gang members.

### *C Existing Statutory Framework*

While not targeting gangs specifically, the existing statutory framework already addresses the perceived harms, caused by gangs of, of public intimidation and violent gang confrontations. Indeed, these perceived harms are based on police statistics of criminal offending. Therefore, the perceived harms to be remedied are necessarily already covered by criminal offences.

#### *1 Summary Offences Act 1981*

The Summary Offences Act 1981 establishes offences that address the gang problem in Wanganui. The Act criminalizes both violent confrontations and public intimidation. It is an offence to assault another person,<sup>48</sup> fight in public,<sup>49</sup> associate with violent offenders,<sup>50</sup> and behave, or incite another to behave, in a disorderly manner in a public place.<sup>51</sup> Therefore, legislation already exists addressing, and prohibiting, the harm of gang confrontation.

The Summary Offences Act 1981 also establishes offences addressing public intimidation. Section 21 of the Summary Offences Act 1981 creates an offence of intimidation. The offence requires intent to intimidate or

<sup>47</sup> Wanganui District Council (Prohibition of Gang Insignia) Bill 2007, no 171-1 (Explanatory Note).

<sup>48</sup> Summary Offences Act 1981, s 9.

<sup>49</sup> Ibid, s 7.

<sup>50</sup> Ibid, s 6A.

<sup>51</sup> Summary Offences Act 1981, s 3.



frighten, or knowledge that the conduct is likely to cause the other person reasonably to be frightened or intimidated. Behaviour that intimidates but that is not accompanied by an intent to intimidate does not establish the offence.<sup>52</sup> Furthermore, the offence addresses behaviour aimed at a particular person.<sup>53</sup> Therefore, the display of gang insignia is already an offence under section 21 where the displayer intends to, or is reckless as to whether his or her conduct does, intimidate a particular person or group. The offence of common assault under section 9 includes:<sup>54</sup>

threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other person to believe on reasonable grounds that he has, present ability to effect his purpose

While this offence captures public intimidation by the use of threats, it does not capture the mere display of gang insignia. A threat may be made by “any act or gesture”. However, it would stretch the definition to hold that the mere display of gang insignia constitutes a threat to apply force and provides reasonable grounds to believe that a threat will be carried out.

Under section 4 the use of offensive language in public places is an offence.<sup>55</sup> This offence covers public intimidation by the use of offensive language. The offensive language does not have to be addressed to a particular person.<sup>56</sup> However, for the purposes of this offence, the display of gang insignia does not constitute language and so is not, in itself, caught by the offence.

These offences require offensive behaviour, threats to apply force, of intention or reckless intention directed at a particular person. Therefore, absent such conduct and intention, the Summary Offences Act 1981 does

<sup>52</sup> *R v Brooker* (2004) 22 CRNZ 162, para 5 (CA) William Young J for the Court.

<sup>53</sup> Under Section 21 of the Summary Offences Act 1981 every person commits an offence who, with intent to frighten or intimidate any other person, or knowing that his or her conduct is likely to cause *that other person* reasonably to be frightened or intimidated: threatens to injure; follows; stops, confronts, or accosts in a public place; *that other person*.

<sup>54</sup> Summary Offences Act 1981, s 2(1).

<sup>55</sup> *Ibid*, s 4.

<sup>56</sup> *Ibid*, s 4(1)(c).



not address the intimidation of members of public caused by the mere display of gang insignia.

The Summary Offences Act 1981 creates offences for intimidating behaviour but not for the mere display of gang insignia. This does not suggest that the mere display of gang insignia is a harm in need of remedy. Rather, it suggests that such remedy is neither necessary nor desirable. Prohibiting the display of gang insignia does not address a harm to remedied. The harm of public intimidation is already remedied by the Summary Offences Act 1981. The residual behaviour that the prohibition covers, the mere display of gang insignia, should not attract sanction. The mere display of gang insignia lacks both an element of intention and the required level of offensiveness to warrant criminal sanction.<sup>57</sup>

## 2 Court orders

Court orders are used to prevent further gang confrontations by targeting known, or suspected, offenders. Under section 112 of the Sentencing Act 2002 the court may make a non-association order where an offender is convicted of an offence punishable by imprisonment. A non-association order prohibits the offender from associating with a specified person or class of persons. The court must be satisfied that the making of a non-association order is reasonably necessary in order to prevent the offender from committing further offences punishable by imprisonment.<sup>58</sup>

Under section 31 of the Bail Act 2000 the court may impose any condition on the release of a defendant that it considers is reasonably necessary to ensure that the defendant does not commit any offence while on bail. Similarly, the Parole Act 2002 allows for the imposition of any condition on an offenders parole release.<sup>59</sup> Such conditions include non-association orders and orders prohibiting the display of gang insignia.

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<sup>57</sup> See *Brooker v Police* [2007] 3 NZLR 91, paras 41-47 (SC) Elias CJ.

<sup>58</sup> Sentencing Act 2002, s 112(2).

<sup>59</sup> Parole Act 2002, s 15(3)(c).



In June 2009 six Nomads gang members were arrested over violent incidents following the death of the Nomads' leader. While five of the men were remanded in custody the sixth was remanded on bail with orders not to wear gang insignia or associate with other members of the Nomads gang.<sup>60</sup>

This example suggests that prohibiting the display of gang insignia may be useful to reduce the likelihood of violent gang confrontations in a particular case. However, such prohibitions can only be imposed as a condition of release on parole or bail and so only enforceable against a known, or suspected, offender. It does not necessarily follow that a general prohibition of the display of gang insignia is required to prevent violent gang confrontations. A prohibition as part of a court order relates to a particular person, having regard to the particular situation. A general prohibition, on the other hand, applies to all displayers of gang insignia regardless of whether such display would likely lead to violent gang confrontations. Therefore, while it may be appropriate in a particular case to prohibit the display of gang insignia by a person as a condition of a court order, it does not follow that a general prohibition of the display of gang insignia is appropriate.

#### ***D Previous Recommendations for Tackling the Gang Problem***

A prohibition of the display of gang insignia has not previously been recommended. In 1981 a committee on gangs was established to analyse the existing gang situation in New Zealand and recommend the establishment of new, or modifications to existing, programmes, practices and policies.<sup>61</sup> While the Committee did not object to young people meeting together, it did reject "gang behaviour that results in violence,

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<sup>60</sup> "Gang Man Hurls Abuse at Judge" (3 July 2009) *The Dominion Post*, A7.

<sup>61</sup> New Zealand Committee on Gangs "Report of the Committee on Gangs" (Wellington, April 1981) (i).



territorial disputes and intimidation."<sup>62</sup> The Committee defined a gang as a peer group association distinguished from other groups by the "display of overt violent behaviour or acts of intimidation."<sup>63</sup> The Committee recommended greater use of non-association orders in probation, alternative sentencing measures, preventive programmes, and a review of the law concerning unlawful assembly and riot.<sup>64</sup> However, regarding gang insignia, the Committee made no recommendation but instead commented that "[t]o consider the issue of the manner of dress of gang members ... is fraught with difficulties and is likely to be counterproductive."<sup>65</sup>

Therefore, while the committee was concerned by the violence and intimidation caused by gangs, it preferred to address these concerns through strengthening existing practices rather than introducing a prohibition of the display of gang insignia, which it did not see as helpful.

In 1988 the Human Rights Commission expressed concern over proposed criminal provisions which would address behaviour and circumstances already covered by existing law.<sup>66</sup> The proposed section 5A of the Disorderly Assemblies and Restrictions on Association Bill 1988 was designed to "tackle the intimidating presence of people who congregate in public places to the alarm of other members of the public ... [and] so conduct themselves, or assemble in such a way, as to cause a person in the immediate vicinity to be fearful, on reasonable grounds, of the likelihood of violence or disorderly behaviour."<sup>67</sup> However, due to the broad range of behaviour already prohibited by the Summary Offences Act 1981 the Commission questioned the need for the new provision.<sup>68</sup> Furthermore, the implications of the proposed section 5A for freedom of peaceful assembly, discrimination based on the grounds of race, and freedom of expression

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<sup>62</sup> Ibid, 4.

<sup>63</sup> Ibid, 1 & 4.

<sup>64</sup> Ibid, 41-44.

<sup>65</sup> Ibid, 37.

<sup>66</sup> New Zealand Human Rights Commission "Disorderly Assemblies and Restrictions on Association Bill 1988: Report by the Human Rights Commission under Section 6(1)(c) of the Human Rights Commission Act 1977 to the Prime Minister" (July 1988).

<sup>67</sup> Ibid, 4.

<sup>68</sup> Ibid, 4-5.



“override the value of any small increase in Police powers to deal with the “gang problem”.”<sup>69</sup>

Therefore, even though the proposed provision may have reduced intimidation it was not seen to be such a significant gain, in light of existing measures, to warrant infringing fundamental rights. Significantly, since the Commission's report the New Zealand Parliament has enacted a Bill of Rights that affirms New Zealand's commitment to upholding and protecting those fundamental rights.

The Wanganui prohibition provides only a small increase in Police powers to deal with the problem of intimidation and confrontation involving gang members. Statutory offences already exist that cover these problems. Due to the existence of the BORA, the reasoning of the Human Rights Commission that fundamental freedoms should not lightly be overridden is even more pertinent.

The following section considers whether the PGI Act and Bylaw limits the right to freedom of expression contained in the (BORA),<sup>70</sup> and if so whether this limitation is justified.

#### *IV NEW ZEALAND BILL OF RIGHTS ACT 1990*

The New Zealand Bill of Rights Act 1990 (the BORA) affirms the rights and freedoms, including the right to the freedom of expression, contained in Part 2 of that Act.<sup>71</sup> These rights are protected by the interrelated provisions of sections 4, 5 and 6.

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<sup>69</sup> Ibid, 8.

<sup>70</sup> New Zealand Bill of Rights Act 1990, s 14.

<sup>71</sup> Ibid, s 2.



### *A The Application of Sections 4, 5, and 6*

Sections 4, 5 and 6 do not prescribe a clear approach for determining whether an enactment is consistent with the rights and freedoms contained in the BORA.<sup>72</sup>

Section 4 recognises Parliament's plenary law making power by providing that an enactment shall not be "in any way invalid or ineffective" simply because it is inconsistent with a right or freedom contained in the BORA. Therefore, in New Zealand the fundamental rights contained in the BORA do not constitute superior law and cannot be used to strike down inconsistent laws.

However, subject to section 4, section 5 provides that:

the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 6 requires that:

[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

This paper adopts the approach suggested by the majority of the Supreme Court in the leading case of *Hansen v R*.<sup>73</sup> The *Hansen* approach is favoured in cases where a provision is capable of having conceptually distinct meanings.<sup>74</sup> The Wanganui prohibition is capable of having three conceptually distinct meanings: all display of gang insignia is prohibited, the display of gang insignia that intimidates or promotes gang confrontation

<sup>72</sup> See *Moonen v Film and Literature Board of Review (No 1)* [2000] 2 NZLR 9, para 16 (CA) Tipping J for the Court; *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754, paras 14-15 (CA) Richardson P for the Court; *Hansen v R* [2007] NZSC 7; 3 NZLR 1, para 61 (SC) Blanchard J; paras 93-94 Tipping J; paras 191-192 McGrath J.

<sup>73</sup> *Hansen v R* [2007], *ibid*.

<sup>74</sup> *Ibid*, para 94 (SC) Tipping J.



is prohibited, the display of gang insignia done with intent to intimidate or promote gang confrontation is prohibited. The Court of Appeal recommended a different approach in *Moonen v Film and Literature Board of Review (No 1)*.<sup>75</sup> However, the prohibition of the display of gang insignia is not like the provision in *Moonen (No 1)*, which was “conceptually elastic and therefore intrinsically capable of having a meaning which impinged more or less on freedom of expression.”<sup>76</sup>

The *Hansen* approach can be summarised as follows:<sup>77</sup> first, ascertain the natural meaning of the provision. Second, ascertain whether there is an “apparent inconsistency”<sup>78</sup> between this meaning and a BORA right or freedom. If there is an “apparent inconsistency”, ascertain whether the limitation is justified in terms of section 5. If it is justified, the “meaning is not inconsistent with the Bill of Rights in the sense envisaged by section 6, and should be adopted by the court.”<sup>79</sup> If the limitation is not justified under section 5, then, the fourth step is to apply section 6 and determine whether a “consistent or more consistent meaning is reasonably possible.”<sup>80</sup> If such a meaning is tenable, it should be adopted. If a consistent or more consistent meaning is not tenable, then, due to section 4, the natural meaning must be adopted even though it presents an unjustified limitation on the relevant BORA right or freedom.

Applying this approach, the following sections analyse the relationship between the prohibition of the display of gang insignia and the right to freedom of expression contained in the BORA.

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<sup>75</sup> *Moonen v Film and Literature Board of Review (No 1)*, above n 72.

<sup>76</sup> *Hansen v R*, above n 72, para 93 (SC) Tipping J.

<sup>77</sup> *Ibid*, paras 57-60 Blanchard J; para 92 Tipping J; para 192 McGrath J.

<sup>78</sup> *Ibid*, para 89 Tipping J.

<sup>79</sup> *Ibid*, para 60 Blanchard J.

<sup>80</sup> *Ibid*, para 90 Tipping J.



### ***B Natural Meaning of the Wanganui Prohibition***

The prohibition contained in the PGI Act is clearly stated:<sup>81</sup>

No person may display gang insignia at any time in a specified place in the district.

The offence is satisfied by the mere display of gang insignia. The intention and purpose of the displayer is irrelevant. Therefore, the offence is one of strict liability and entails a blanket ban of the display of gang insignia. This view is supported by the powers of arrest and seizure under s 13, which allow a constable to arrest a person suspected of displaying gang insignia and/or seize the displayed gang insignia without warrant.

The natural meaning is simply that all display of gang insignia is prohibited.

### ***C Apparent Inconsistency between the Wanganui Prohibition and the Right to Freedom of Expression***

To determine whether the natural meaning of the Wanganui prohibition is consistent with the right to freedom of expression it is necessary to first ascertain the scope of that right and then to consider whether the display of gang insignia falls within that scope.

#### ***1 The scope of freedom of expression***

The BORA affirms the right to freedom of expression.<sup>82</sup> Section 14 states:

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.

<sup>81</sup> The Wanganui District Council (Prohibition of Gang Insignia) Act 2009, s 12.

<sup>82</sup> New Zealand Bill of Rights Act 1990, s 2.



The right is “as wide as human thought and imagination”<sup>83</sup>, and includes both verbal and non-verbal conduct<sup>84</sup>. The reference to “of any kind in any form” in section 14 indicates that no expressive act falls outside the ambit of section 14 of the BORA on the grounds of what is communicated or how it is communicated.<sup>85</sup> Furthermore, the use of the qualifier “including” indicates that the freedom of expression is not limited to the freedom to seek, receive, and impart information and opinions.<sup>86</sup> Rather than addressing limitations to the freedom of expression at the definitional stage, the approach favoured is to give the right to freedom of expression the widest interpretation possible. According to Butler and Butler, the “easier and more consistent approach is to address all limitations on s 14 of BORA through the rubric of s 5 of BORA.”<sup>87</sup> Indeed the very existence of a general limitations provision suggests that the rights and freedoms contained in the BORA are to be defined widely and only limited through the general limitations provision.<sup>88</sup>

The Canadian approach is that expression is any activity that conveys, or attempts to convey, a meaning.<sup>89</sup> As the definition of freedom of expression in the BORA is non-exhaustive, conduct with an expressive content would be protected and this approach seems to have been adopted by the New Zealand courts.<sup>90</sup>

The display of gang insignia would, based on the above discussion, fall within the scope of freedom of expression protected by section 14 of the BORA. It has expressive content. It conveys the message that the displayer is a member of a particular group in society. It is integral to the

<sup>83</sup> *Moonen v Film and Literature Board of Review (No 1)*, above n 72, para 15 (CA) Tipping J for the Court.

<sup>84</sup> *Hopkinson v Police* [2004] 3 NZLR 704, para 41 (HC).

<sup>85</sup> Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis, Wellington, 2005) 310.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, 316. The justified limitation provision of s 5 BORA suggests that the scope of freedom of expression should not be defined to include limitations.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Irwin Toy Ltd v Attorney-General (Quebec)* [1989] 1 SCR 927, para 42 (SCC) Dickson CJ, Lamer and Wilson JJ.

<sup>90</sup> Andrew Butler and Petra Butler, above n 85, 312-314.



member's affirmation of identity and therefore important for individual self-fulfilment.<sup>91</sup>

However, it is possible that some conduct does not constitute expression and so is not protected by the right to freedom of expression contained in the BORA. For example, in Canada violence as a form of expression is not protected,<sup>92</sup> and in Germany expression that combats the free democratic basic order is not protected by the freedom of expression<sup>93</sup>.

In New Zealand, freedom of expression is not absolute but "intrinsically limited in certain ways."<sup>94</sup> In *Solicitor General v Radio NZ Ltd* the Court endorsed the Canadian approach that protects all expression, except violence, that conveys, or attempts to convey, meaning.<sup>95</sup> However, the Court held that the right to freedom of expression was necessarily limited by the right to a fair and impartial trial because it is "at least as fundamental and as important as the right to freedom of speech."<sup>96</sup> It is unclear at what point violence, or threats of violence, fall outside the protective scope of the right to freedom of expression.<sup>97</sup>

It is unclear why the consideration of competing rights, such as the right to a fair and impartial trial or the right to be free from coercion or violence, should take place at the definitional stage and not through the rubric of section 5. As already argued, the very existence of the section 5 general

<sup>91</sup> Human self-fulfilment is one of the three main justifications given for the freedom of expression. See *ibid*, 309; *Irwin Toy Ltd v Attorney-General (Quebec)*, above n 89, para 54 (SCC) Dickson CJ, Lamer and Wilson JJ.

<sup>92</sup> *Irwin Toy Ltd v Attorney-General (Quebec)*, above n 89, para 43 (SCC) Dickson CJ, Lamer and Wilson JJ.

<sup>93</sup> Grundgesetz für die Bundesrepublik Deutschland, article 18.

<sup>94</sup> *Solicitor General v Radio NZ Ltd* [1994] 1 NZLR 48, 59 (HC).

<sup>95</sup> *Ibid*, 59-60 (HC). See also New Zealand Ministry of Justice "The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector" (November 2004) <[www.justice.govt.nz](http://www.justice.govt.nz)> (last accessed 7 July 2009).

<sup>96</sup> *Solicitor General v Radio NZ Ltd*, above n 94, 59-60 (HC).

<sup>97</sup> Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Wanganui District Council (Prohibition of Gang Insignia) Bill (20 February 2008) 3.



limitation provision suggests that limitations on rights and freedoms should not be addressed at the definitional stage.<sup>98</sup>

The following section considers whether the display of gang insignia falls within the protective scope of the right to freedom of expression.

2 *Does the display of gang insignia fall within the protective scope of the right to freedom of expression?*

Bishop argues that gang insignia should not fall within the protective scope of the right to freedom of expression because they constitute threats of violence, and generally undermine the principles of freedom of expression.<sup>99</sup> Bishop argues that gang insignia intimidate and are intimately connected to violence. Gang insignia therefore represent threats of violence and force people to “alter how their lives are lived,”<sup>100</sup> undermining their freedom of action. Gang insignia undermine the principles of freedom of expression. According to Bishop, gang insignia contribute to little to the marketplace of ideas, signify the rejection of democracy because they represent an endorsement of violence, and preclude a tolerant and welcoming environment for the realisation of individual self-fulfilment.<sup>101</sup>

Support for the argument that gang insignia should not fall within the protective scope of the freedom of expression because they constitute threats of violence can be found in the United States Supreme Court case of *Virginia v Black*.<sup>102</sup> In that case the United States Supreme Court held that cross burning done with intent to intimidate did not attract the protection of the freedom of expression because such behaviour constituted a “true

<sup>98</sup> Andrew Butler and Petra Butler, above n 85, 316.

<sup>99</sup> Christopher Bishop *Fashion Tips for Liberals : Gang Patches, Public Places, and Freedom of Expression* (LLB(Hons) Research Paper, Victoria University of Wellington, 2007) 15. Bishop refers to gang patches, not gang insignia, reflecting the wording of the proposed prohibition at the time of his writing.

<sup>100</sup> *Ibid*, 16-17.

<sup>101</sup> *Ibid*, 19.

<sup>102</sup> *Virginia v Black* (2003) 538 US 343.



threat".<sup>103</sup> "“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>104</sup>

In the United States, cross burning done with intent to intimidate poses a true threat because cross burnings are inextricably intertwined with the “long and pernicious” history of the Ku Klux Klan as a lawless and, even, a terrorist organisation.<sup>105</sup> The majority in *Virginia v Black* held that intimidation is a “type of true threat, where a speaker directs a threat to a person with the intent of placing the victim in fear of bodily harm or death.”<sup>106</sup> “[T]he Klan used cross burnings as a tool of intimidation and a threat of impending violence.”<sup>107</sup> These threats carried “special force” due to the Klan’s long history of violence,<sup>108</sup> so that “when a cross burning is used to intimidate, few if any messages are more powerful.”<sup>109</sup> For example, one woman stated that “the burning cross symbolized to her as a black American: ‘murder, hanging, rape, lynching. Just about anything bad that you can name...’”<sup>110</sup>

A similar argument is made in support of the Wanganui prohibition.<sup>111</sup> Chester Borrows MP argued that “[g]ang members have raped, murdered, beaten, and stolen in gang regalia with no hesitation, and they have shown no remorse... their behaviour... has instilled reasonable fear in the minds of average Kiwis...”<sup>112</sup> Therefore, it is arguable that the public display of gang insignia, because of the pernicious history of gangs in New Zealand, does express an intent to commit acts of unlawful violence on members of the public.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid, 359-60.

<sup>105</sup> Ibid, 352-360.

<sup>106</sup> Ibid, 360.

<sup>107</sup> Ibid, 354.

<sup>108</sup> Ibid, 355. The majority judgment’s description of Klan violence includes incidents of murder, flogging, and tar-and-featherings [at 354], bombings, beatings, shootings, stabbings and mutilations [at 355].

<sup>109</sup> Ibid, 357.

<sup>110</sup> Ibid, 390-391.

<sup>111</sup> C Borrows (6 May 2009) 654 NZPD 2945.

<sup>112</sup> C Borrows (16 April 2008) 646 NZPD 15756.



Bishop's argument that gang insignia should not attract the protection of the freedom of expression relies on the assumption that the display of gang insignia necessarily intimidates and therefore undermines the principles of freedom of expression. The pernicious history of gangs supports this assumption. The problem with this argument is not that intimidating or violent expression should fall outside the protection of freedom of expression, but that the display of gang insignia is regarded as necessarily intimidating.

In *Virginia v Black* the majority of the United States Supreme Court held that a cross burning does not necessarily intimidate as the Ku Klux Klan also used cross burnings as a potent symbol of shared group identity and ideology.<sup>113</sup> The Supreme Court recognised that a prohibition of all cross burnings, regardless of whether the actor intended to intimidate, failed to distinguish between the different types of cross burnings and so prohibited innocent and legitimate expression. However, because the prohibition in *Virginia v Black* required an intent to intimidate it constituted a true threat and was justifiably prohibited.

It is hard to accept that the display of gang insignia in a positive context, such as a patched gang member fishing with his partner and child,<sup>114</sup> expresses an intent to commit an act of unlawful violence. The Wanganui prohibition applies to all display of gang insignia regardless of whether the displayer intended to intimidate or not. The display of gang insignia might well be done with intent to intimidate and constitute a true threat. However, gang insignia may also be displayed as an expression of membership and identity. Therefore, the prohibition fails to distinguish between the different types of display.

Bishop concedes that although "a bare gang patch, by itself, means very little... the demeanour and the behaviour of the wearer affect the message

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<sup>113</sup> *Virginia v Black*, above n 102, 356-7.

<sup>114</sup> Rob Vincent, above n 31.



transmitted.”<sup>115</sup> Therefore, it is the form of expression that justifies excluding the content of expression from the protection of the freedom of expression.

Under this argument, gang insignia should only be excluded from the protective scope of the freedom of expression when the form is violent, threatening or undermines the principles of freedom of expression. However, the prohibition of the display of gang insignia extends to all display of gang insignia, including situations where the form of expression is peaceful. If the bare gang patch means very little and the display is peaceful then there is no justification, under Bishop’s argument, to exclude the display of gang insignia from the protective scope of the freedom of expression.

A true threat is not simply a threat of impending violence for the individual or group at which the burning is targeted. It is also a threat “directed to the national identity, to the country’s sense of itself as a liberal, tolerant society that has put the period of Klan terror behind it.”<sup>116</sup> A true threat must resonate with the relevant political climate.<sup>117</sup> For example, Nazi expression does not constitute a true threat in the United States because the threat of nazism does not draw upon a long and pernicious history of that country and so does not resonate with the political climate of the United States.<sup>118</sup>

Gangs in New Zealand may well have a pernicious history and be involved in lawless activity. However, as general criminal organisations gangs are different to the morally repugnant Ku Klux Klan or Nazi groups. Gangs do not threaten a country’s identity as a liberal, tolerant society in the same way as racial or genocidal terrorists.

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<sup>115</sup> Christopher Bishop, above n 99, 15.

<sup>116</sup> Robert A Kahn “Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany” (2006) 83 U Det Mercy L Rev 163, 180.

<sup>117</sup> Ibid, 180.

<sup>118</sup> However, see Richard L Wiener & Erin Richter “Symbolic Hate: Intention to Intimidate, Political Ideology, and Group Association” (2008) 32 Law & Hum Behav 463; Alexander Tsesis “Regulating Intimidating Speech” (2004) 41 Harv J on Legis 389.



Parliament has clearly decided that the display of gang insignia does not pose a true threat to the national identity. If the display of gang insignia did pose such a threat then the prohibition would have been enacted nationwide rather than only in Wanganui. Furthermore, gangs have not been criminalized and membership to a gang is not illegal. Therefore, expressing membership to a gang, the content of the message conveyed by the display of gang insignia, is not illegal. Such expression of identity should attract the protection of free speech unless the form of expression contravenes existing law.

The display of gang insignia itself does not intimidate or constitute a true threat. It is the form of the display and not the content of the gang insignia that may intimidate or threaten. Therefore the display of gang insignia falls within the protective scope of the freedom of expression. The PGI Act is apparently inconsistent with the freedom of expression by prohibiting the display of gang insignia. It is therefore necessary to consider whether such limitation is justified in terms of section 5 of BORA.

#### ***D Is the Wanganui Prohibition a Justified Limitation on the Freedom of Expression?***

##### *1 The law*

Section 5 of the BORA states:

... the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.



In the leading New Zealand case of *Hansen v R* the Supreme Court held that the inquiry under section 5 is essentially “whether a justified end is achieved by proportionate means.”<sup>119</sup>

Drawing on the leading Canadian case of *R v Oakes*, Tipping J concluded that whether a limitation is justified under section 5 requires addressing the following questions:<sup>120</sup>

- (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
- (b) (i) is the limiting measure rationally connected with its purpose?
  - (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
  - (iii) is the limit in due proportion to the importance of the objective?

## 2 *Sufficiently important purposes*

The purposes of the prohibition of the display of gang insignia are to prevent or reduce intimidation of members of the public by gang members and to avoid or reduce gang confrontation. The purpose of the prohibition is not to solve the total gang problem as it exists in Wanganui.<sup>121</sup> These goals are sufficiently important to warrant the existence of laws criminalising both intimidation and the use of violence.<sup>122</sup> The prevention of criminal activity is important. Further, members of the public should be able to “go about their business without fear or trepidation.”<sup>123</sup>

The Attorney-General found that the objectives of the Wanganui prohibition are sufficiently important and significant to justify limiting the

<sup>119</sup> *Hansen v R*, above 72, para 123 Tipping J. See also, *Hansen v R*, above 72, para 42 Elias CJ; paras 63-66 Blanchard J; paras 203-205 McGrath J; para 272 Anderson J.

<sup>120</sup> *Ibid*, para 103-104 (SC) Tipping J.

<sup>121</sup> (4 March 2009) 652 NZPD 1642.

<sup>122</sup> See above discussion on the existing statutory framework at III C.

<sup>123</sup> (16 April 2008) 646 NZPD 15764.



freedom of expression because they seek to protect public order.<sup>124</sup> Under the International Covenant on Civil and Political Rights, affirmed by the BORA, the protection of public order justifies limiting the right to freedom of expression.<sup>125</sup>

The Wanganui prohibition was initially advanced by the Council as a bylaw under section 145 of the Local Government Act 2002.<sup>126</sup> This section gives the Council authority to make bylaws for the purposes of protecting the public from nuisance; protecting, promoting, and maintaining public health and safety; and minimising the potential for offensive behaviour in public places.<sup>127</sup> The purposes of the Wanganui prohibition are sufficiently important to permit the making of a bylaw. This suggests that the purposes also justify limiting the right to freedom of expression.

### 3 *Rational connection*

The limitation that the prohibition of the display of gang insignia places on the right to freedom of expression is not rationally connected to prohibition's purposes.

First, as discussed above, the evidence relied on to establish the perceived harm of gang violence and public intimidation does not show any connection between the display of gang insignia and the harm. The police statistics relied on to show the need for a prohibition of gang insignia focussed on gang related incidents of a public nature.<sup>128</sup> The display of gang insignia was not specifically considered in the data. Therefore, while the data showed a concerning level of gang violence it did not show that the display of gang insignia was in any way connected to this. This lack of evidence of a connection between the display of gang insignia and the

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<sup>124</sup> Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Wanganui District Council (Prohibition of Gang Insignia) Bill (20 February 2008) 3.

<sup>125</sup> International Covenant on Civil and Political Rights, art 19(3).

<sup>126</sup> Wanganui District Council "Minutes of the Meeting of the Extraordinary Meeting of the Wanganui District Council" (10 March 2006), above n 35, 1860.

<sup>127</sup> Local Government Act 2002, s 145.

<sup>128</sup> "Gang OIA – Response", above n 22.



perceived harm suggests that prohibiting the display of gang insignia may not affect the level of public intimidation or gang confrontations.

Second, the Wanganui prohibition does not directly prohibit the offending behaviour of public intimidation or violent gang confrontations. Existing law already directly addresses public intimidation and violent confrontation. It is therefore unnecessary for the PGI Act to explicitly do so too. The Attorney-General, in his report to parliament on the PGI Bill's consistency with the BORA, accepted that "gang insignia may itself convey a message of intimidation."<sup>129</sup> However, because the prohibition did not directly prevent intimidating behaviour he held that the connection between the prohibition and the purpose of reducing intimidation was "tenuous".<sup>130</sup>

Despite a lack of direct connection, the Wanganui prohibition is rationally connected to its purposes if, by prohibiting the display of gang insignia, public intimidation and gang confrontation are reduced.

The problem is that gang insignia do not intimidate, nor are they violent. While the purposes of the Wanganui prohibition are concerned with action and behaviour detrimental to public order, the limitation on the right to freedom of expression is not. Labour MP Grant Robertson argued that "the patches that gang members wear do not commit crime. The patches do not perpetrate the violence, it is the people."<sup>131</sup> The Honourable Michael Cullen described the PGI Bill as "purely cosmetic".<sup>132</sup> The Wanganui prohibition does not regulate behaviour, but appearance. It does not prohibit public intimidation and violent gang confrontation but the display of gang insignia.

Supporters of the prohibition argue that the "mere act of wearing patches intimidates others; and by wearing their patches, [gang members] are acting

<sup>129</sup> Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Wanganui District Council (Prohibition of Gang Insignia) Bill (20 February 2008) 4.

<sup>130</sup> Ibid.

<sup>131</sup> G Robertson MP (4 March 2009) 652 NZPD 1649.

<sup>132</sup> Ibid, 1658.



in a confrontational and provocative way to other gangs and to other people.”<sup>133</sup> Under this view, if the display of gang insignia is prohibited then, consequently, intimidation and confrontation will be reduced.

This author has trouble accepting that the mere display of gang insignia intimidates.<sup>134</sup> It is the behaviour or conduct of the displayer that intimidates. If someone is gaily strolling down the street, singing out-loud, they are hardly likely to intimidate members of the public even if they are visibly wearing a gang patch. If that same person is barging down the footpath, pushing past people, audibly swearing, they are likely to intimidate nearby members of the public even if they are not visibly wearing any gang insignia. This example shows that it is not the display of gang insignia that intimidates but the behaviour of the displayer. For this reason, this author holds that the display of gang insignia is not rationally connected to the purpose of reducing or preventing public intimidation by gang members.

Supporters of the prohibition argue that prohibiting the display of gang insignia will reduce gang violence. The explanatory note to the PGI Bill stated that gang insignia are the principal means of identifying members of different gangs and therefore contribute to, and promote, gang confrontations.<sup>135</sup> On this basis, the Attorney-General conceded that prohibiting the principal means of identifying rival gang members would lead to a reduction in the likelihood of gang confrontations.<sup>136</sup>

However, gang members in Wanganui know who the members of other gangs are. They do not need gang patches to identify rival gang members.<sup>137</sup> As a means of identification, the prohibition of gang insignia will not reduce, and is therefore not rationally connected to, gang violence.

<sup>133</sup> Ibid, 1655.

<sup>134</sup> See above discussion at IV C 2.

<sup>135</sup> Wanganui District Council (Prohibition of Gang Insignia) Bill 2007, no 171-1 (Explanatory Note) 1.

<sup>136</sup> Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Wanganui District Council (Prohibition of Gang Insignia) Bill (20 February 2008) 3-4.

<sup>137</sup> K Locke MP (6 May 2009) 654 NZPD 2953.



Supporters also argue that prohibiting the display of gang insignia removes the confrontational and provocative manner of gang insignia that "tips wary aggression over into violence."<sup>138</sup> The display of gang insignia inflames situations where members from different gangs cross paths. The prohibition will remove this inflammatory element. This author accepts that, in certain situations, the display of gang insignia is provocative and promotes the likelihood of gang confrontations. However, the display of gang insignia does not increase the likelihood of gang confrontation when no members of other gangs are present. Therefore, as with the purpose of reducing public intimidation, the connection between the Wanganui prohibition and the purpose of reducing the likelihood of gang confrontation is, at best, tenuous.

This author believes that it is the behaviour of the displayer, and not the mere display of gang insignia, that intimidates or increases the likelihood of gang confrontation. The Wanganui prohibition does not prohibit public intimidation or gang confrontation. For these reasons, the author believes that the Wanganui prohibition is not rationally connected to its purposes.

Even if it is accepted that the mere display of gang insignia intimidates and provokes gang confrontation, regardless of the displayer's behaviour, it does not necessarily follow that prohibiting the display of gang insignia will prevent intimidation and gang confrontation. The prohibition does not address intimidation or provocation of gang confrontation but simply one means by which these harms are believed to occur. Therefore, these harms may increase or reduce independently of the display of gang insignia.

Furthermore, accepting that the mere display of gang insignia intimidates and provokes gang confrontation does not support an overall finding that the Wanganui prohibition is a proportionate means to reduce or prevent public intimidation and violent gang confrontation. The prohibition is a

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<sup>138</sup> Christopher Bishop, above n 99, 31.



greater limitation on the freedom of expression than necessary to achieve the purpose.

#### 4 *Minimum impairment*

The prohibition of the display of gang insignia limits the right to freedom of expression more than is reasonably necessary to sufficiently achieve the prohibition's purposes.

In *Virginia v Black* the United States Supreme Court emphasised the importance of content neutrality.<sup>139</sup> Content neutrality requires that any restriction on the freedom of expression must not be made on the basis of content.<sup>140</sup> In an earlier case the Supreme Court had held that a law prohibiting cross burning that would arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" was unconstitutional for lack of content-neutrality.<sup>141</sup> A cross burning that aroused anger, alarm or resentment in others on a basis *other than* race, colour, creed, religion or gender was not prohibited. The law was not content neutral and therefore unjustifiably limited the freedom of expression.

The concept of content neutrality highlights the arbitrary nature of the Wanganui prohibition and shows that the Wanganui prohibition will not sufficiently achieve its purpose of preventing or reducing public intimidation and violent gang confrontation. Because intention to intimidate is irrelevant, the application of the Wanganui prohibition is determined by the definition of gang insignia. Only the insignia of the listed gangs are prohibited. The display of gang insignia, not covered by the PGI Act and Bylaw, is not prohibited even if done with intent to

<sup>139</sup> *Virginia v Black*, above n 102, 360-363.

<sup>140</sup> Robert A Kahn, above n 116, "Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany" (2006) 83 U Det Mercy L Rev 163, 172.

<sup>141</sup> *RAV v City of St. Paul* (1992) 505 US 377.



intimidate. Therefore, the Wanganui ban is not neutral because it only applies to the display of a subset of gang insignia.

The connection between the prohibition and the purpose of reducing public intimidation is at best tenuous. Reducing public intimidation is not guaranteed, because the prohibition only prohibits the display of some gangs' insignia, and not intimidating behaviour. Therefore, the limitation on the right to freedom of expression, incurred by the prohibition, does not sufficiently achieve the reduction in public intimidation and impairs the freedom of expression more than necessary.

Similarly, whether each display of gang insignia actually promotes the likelihood of gang confrontation is irrelevant. While the prohibition of the display of gang insignia removes a potentially inflammatory factor in gang confrontation, it does not guarantee the objective of reducing gang confrontation. The limitation of the right to freedom of expression, incurred by the prohibition of the display of gang insignia, is more than reasonably necessary because a reduction in gang confrontation is not guaranteed. The display of gang insignia, not covered by the PGI Act and Bylaw, is not prohibited even if done with intent to promote violent gang confrontation.

Content neutrality also highlights the overly broad nature of the Wanganui prohibition. The Wanganui prohibition prohibits all display of gang insignia. It is irrelevant whether or not the displayer intends to intimidate and even whether or not the display does intimidate. The purpose of the prohibition is to remove intimidation, yet it will apply to non-intimidating display. Therefore, the Wanganui prohibition overly impairs the right to freedom of expression.

##### 5 *Proportionate limitation*

The Wanganui prohibition disproportionately limits the right to freedom of expression in light of the prohibition's purposes.



As already argued, there is no rational connection between the prohibition and the prevention of public intimidation and gang confrontation and the achievement of the purposes is not guaranteed. Therefore the limitation on the right to freedom of expression is disproportionately high.

Even if the purposes of the Wanganui prohibition are the mere reduction in public intimidation and gang confrontation, the prohibition of the display of gang insignia is still a disproportionate limitation on freedom of expression. The purposes could be achieved by the smallest reduction in public intimidation or gang confrontation. However, limiting the freedom of gang members to express their identity as a member of a group is too great a measure to achieve the smallest reduction of public intimidation and gang confrontation. This is even more so when public intimidation and gang confrontation were already covered by existing laws. The limitation on the freedom of expression comes at no real gain and is therefore disproportionately large compared to the importance of the objective.

## 6 *Summary*

The Wanganui prohibition is an unjustified limitation on the right to freedom of expression. Even if the Wanganui prohibition is rationally connected to its purposes it is a disproportionate limitation on freedom of expression and more than necessary to achieve its purposes.

Section 4 of the BORA requires the natural meaning of the prohibition to be adopted and applied, even though it is an unjustified limitation on the freedom of expression, unless section 6 permits the adoption of a meaning that is more consistent with freedom of expression.

### *E Is A More Consistent Meaning Available?*

Section 6 of the BORA requires that the prohibition of the display of gang insignia be given such tenable meaning that is most consistent with the right



to freedom of expression. Only a tenable meaning can be given to an enactment. However, it is not always easy to determine whether a meaning is tenable or not. Further, it is unclear whether section 6 requires interpreting the prohibition in such a way as to provide the least possible limitation, or the least possible, reasonable limitation.

### *1 Tenable meaning*

Section 6 does not require adopting the most BORA-consistent meaning. Rather, it requires adopting the most BORA-consistent meaning that *can be given* to the enactment. The meaning adopted under s 6 must be a tenable interpretation of the enactment.

Courts can read in to legislation qualifications and modifications that are consistent with fundamental rights.<sup>142</sup> In *Quilter v Attorney-General* Thomas J said that “even if a meaning is theoretically possible, it must be rejected if it is clearly contrary to what Parliament intended.”<sup>143</sup> However, Parliament is presumed to legislate consistently with fundamental rights unless the legislation clearly suggests otherwise. The BORA itself is evidence of Parliament’s intent to legislate consistently with fundamental rights. “In that way the Bill of Rights can be conceived as a delegation of authority [to the courts] to read down and read in where this would not be inconsistent with legislative purpose.”<sup>144</sup>

In so doing courts walk a fine line between legitimate judicial interpretation and illegitimate legislative amendment. According to Rishworth, this line is crossed in two situations. First, judicial interpretation is inappropriate where it amounts to the “implementation of policy choices that should

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<sup>142</sup> Paul Rishworth *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 148 & 152.

<sup>143</sup> *Quilter v Attorney-General* [1998] 1 NZLR 523, 541 (CA) Thomas J.

<sup>144</sup> Paul Rishworth, above n 142, 164.



properly be left to the legislature.”<sup>145</sup> Second, it is inappropriate where the adopted meaning would “defeat the accepted purpose of the enactment.”<sup>146</sup>

The natural meaning of the Wanganui prohibition provides a strong limitation on the freedom of expression because it applies to all display of gang insignia, regardless of whether the gang insignia is displayed to intimidate and provoke gang confrontation, or as peaceful expression of identity. The issue is whether it is tenable to give the prohibition a meaning that is more consistent with the freedom of expression than the natural meaning, and yet does not defeat the accepted purpose of the prohibition.

It is not tenable to give the Wanganui prohibition a meaning that does not at all limit the freedom of expression. The very purpose of the prohibition is to prevent or reduce public intimidation and avoid or reduce gang confrontation by prohibiting the display of gang insignia. Therefore, to not defeat this accepted purpose the meaning must be interpreted to at least prohibit intimidating or provocative display of gang insignia. Such a meaning still provides some limitation, albeit to a lesser extent, on the freedom of expression.

The Wanganui prohibition can be read down to the display of gang insignia that intimidates or promotes confrontation due to section 5(5) of the PGI Act. Section 5(5) informs that the purpose of the Wanganui prohibition is to prevent or reduce the likelihood of intimidation or harassment of members of the public in a specified place or to avoid or reduce the potential for confrontation by, or between, gangs. To limit the prohibition to the display of gang insignia that intimidates or promotes confrontation promotes both the purposes of the Wanganui prohibition and BORA compliance. Such a reading more closely attaches the prohibition to the harm it seeks to remedy, and thus respects the purpose of the prohibition. Such a reading is also more consistent with the freedom of expression

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<sup>145</sup> Ibid, 149.

<sup>146</sup> Ibid, 149.



because it does not prohibit innocent expression that does not intimidate or promote confrontation.

It must be noted that section 5(3) of the PGI Act removes the necessity for the Council to consider BORA consistency when making a bylaw under section 5. Section 5(3) requires the Council to follow sub-sections 83(a) and (b) of the Local Government Act 2002 (the LGA), relating to the necessary elements of the statement of proposal, when making a bylaw under the PGI Act. However, section 5(3) does not require the Council to follow section 83(c) of the LGA which, via section 155, requires a bylaw to be consistent with the BORA.<sup>147</sup> The requirement of BORA consistency in section 155 of the LGA only applies to bylaws made under the LGA and so does not apply to bylaws made under the PGI Act.

The non-application of the BORA to the Council's bylaw making powers under the PGI Act was recognised by Wanganui mayor Michael Laws: "Parliament ha[s] expressly given the council power to impose the gang patch ban. This include[s] putting aside the Bill of Rights Act."<sup>148</sup>

However, to hold that the Council does not have to consider BORA implications when making bylaws under the PGI Act, does not mean that the Wanganui prohibition itself does not have to comply with the BORA. It may be that the Council was exempted by Parliament from complying with the BORA because the principal Act had already been subjected to BORA scrutiny by Parliament. However, the exemption of the Council from considering the BORA when making a bylaw under the PGI Act does not, and can not, prevent a BORA challenge against the Wanganui prohibition.

Section 6 of the BORA therefore still applies to the Wanganui prohibition and permits reading down the prohibition to provide a meaning that

<sup>147</sup> However, the Council's statement of proposal for the draft bylaw did consider, albeit superficially, BORA implications: Draft Wanganui District Council (Prohibition of Gang Insignia) Bylaw 2009 (Statement of Proposal) <[www.wanganui.govt.nz](http://www.wanganui.govt.nz)> (last accessed 28 July 2009).

<sup>148</sup> "Hell's Angels' gang patch objections to be heard" (28 July 2009) Press Release <[www.wanganui.govt.nz](http://www.wanganui.govt.nz)> (last accessed 25 August 2009).



respects both the purpose of the Wanganui prohibition and Parliament's intent to legislate consistently with the right to freedom of expression. This is achieved by reading the prohibition as applying to the display of gang insignia that intimidates or provokes confrontation.

A question remains whether section 6 permits reading down the prohibition to apply only to the display of gang insignia that intimidates or promotes confrontation, or whether section 6 permits reading in a further requirement that the displayer must intend to intimidate or promote confrontation. Requiring intent provides less limitation on the freedom of expression because the display of gang insignia that intimidates or promotes gang confrontation would not be prohibited if the displayer did not intend to do so. However, reading in a requirement of intent may defeat the purpose of the prohibition and therefore not be tenable.

## 2 *Can intent be read in?*

This section discusses the different approaches taken in the United States and New Zealand to whether intent is required for the freedom of expression to be justifiably limited.

### (a) The United States approach

In *Virginia v Black* the United States Supreme Court held that an intent to intimidate is necessary to justifiably limit the freedom of expression in cases of intimidating expression.<sup>149</sup> In that case a Virginia statute that prohibited cross burning justifiably limited the freedom of expression because the prohibition only applied to those cross burnings done with the intent to intimidate.

A majority of the United States Supreme Court held that the First Amendment right to the freedom of expression permits prohibiting this

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<sup>149</sup> *Virginia v Black*, above n 102.



subset of intimidating expression because cross burning is a “particularly virulent form of intimidation” due to its “long and pernicious history as a signal of impending violence.”<sup>150</sup>

However, the majority held that a cross burning does not necessarily intimidate because the Klan also used cross burnings as a potent symbol of shared group identity and ideology.<sup>151</sup> Therefore, it was essential that the ban was limited to those cross burnings done with intent to intimidate. Prohibiting all cross burnings would unjustifiably limit legitimate forms of expression and would amount to suppressing mere distasteful ideas.<sup>152</sup>

However, the Virginia statute went on to provide that:<sup>153</sup>

[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

This prima facie evidence provision was unconstitutional because it allowed for the possibility that cross burning that is not done with the intent to intimidate, but as a statement of political ideology or group identity, may be caught. Therefore, the “provision chills constitutionally protected political speech because of the possibility that a State will prosecute—and potentially convict—somebody engaging only in lawful political speech...”<sup>154</sup>

The United States Supreme Court’s finding that cross burning can only be prohibited, and the freedom of expression justifiably limited, where an intent to intimidate is present is significant for the Wanganui prohibition.

The Wanganui prohibition prohibits all display of gang insignia and so fails to distinguish between the display of gang insignia that intimidates and the display, which is done as an expression of political ideology or group

<sup>150</sup> Ibid, 363.

<sup>151</sup> Ibid, 356-7.

<sup>152</sup> Ibid, 358.

<sup>153</sup> Va. Code Ann. §18.2—423 (1996).

<sup>154</sup> *Virginia v Black*, above n 102, 365.



identity. According to *Virginia v Black*, the Wanganui prohibition would not be a justified limitation of the freedom of expression. Therefore, as required by section 6, the meaning of the Wanganui prohibition should be read down to require intent on the part of the displayer in order to be more consistent with the freedom of expression.

(b) The different freedoms of expression

The freedom of expression guaranteed in the First Amendment to the United States Constitution<sup>155</sup> is different to the freedom of expression guaranteed by section 14 of the BORA<sup>156</sup>. The right to freedom of expression is dependent on context, and is determined by a country's history and experience.<sup>157</sup>

Freedom of expression in the United States receives a strong constitutional protection which is "seemingly unparalleled anywhere else in the world"<sup>158</sup> and extends to protect "the kind of speech that most of the rest of the democratic world prohibits"<sup>159</sup>. Freedom of expression receives the strongest constitutional protection among the individual civil rights protected by the American Constitution, and "generally prevails over other democratic values, such as equality, human dignity, and privacy."<sup>160</sup> One author argues that the strong constitutional protection is due to the long history of constitutional litigation.<sup>161</sup> As the United States Supreme Court has, over the years, extended constitutional protection "for freedom of speech in one situation, that protection has been carried over to other situations implicating First Amendment rights."<sup>162</sup>

<sup>155</sup> The relevant text of the First Amendment to the United States Constitution is, "Congress shall make no law ... abridging the freedom of speech...".

<sup>156</sup> Section 14 of the New Zealand Bill of Rights Act 1990 reads, "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."

<sup>157</sup> Robert A Sedler "An Essay on Freedom of Speech: The United States Versus the Rest of the World" (2006) Mich St L Rev 377, 378.

<sup>158</sup> Ibid, 380.

<sup>159</sup> Ibid, 377.

<sup>160</sup> Ibid, 379 & 383.

<sup>161</sup> Ibid, 377.

<sup>162</sup> Ibid, 380.



The context in New Zealand is different. Freedom of expression is protected through legislation. In enacting the BORA Parliament was able to "balance and accommodate different individual rights, and to make value judgments as to appropriate limitations on particular individual rights."<sup>163</sup> Freedom of expression is not supreme law and does not prevail over other rights and freedoms as it does in the United States.

In declining to give the overriding status of supreme law to the local Bill of rights and enacting it instead as ordinary legislation, the New Zealand government was deliberately creating a fundamentally different arrangement from that of the United States.<sup>164</sup>

These differences make it dangerous to draw comparisons between the freedoms of expression in the two countries. However, comparisons may be made when caution is exhibited.

Where the relevant context (social, political, historical...etc) is different between the two countries, an approach taken in one country may not be appropriate in the other. Furthermore, because freedom of expression is constitutionally protected in the United States, justifications for limiting freedom of expression must reach a higher threshold than in New Zealand. Therefore, expression that is not restricted in the United States may well be restricted in New Zealand.

Due to these different freedoms of expression it is arguable that *Victoria v Black* sets the threshold too high to justifiably limit the right to freedom of expression in New Zealand. A requirement of intent may not be necessary in New Zealand. Consequently, prohibiting the display of gang insignia that intimidates, even where the displayer does not intend to intimidate, may justifiably limit the freedom of expression in New Zealand.

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<sup>163</sup> Ibid, 380.

<sup>164</sup> Catherine Lane West-Newman "Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy, Cultural Difference" (2001) 9 Waikato L Rev 231, 240.



## (c) The New Zealand approach

In *Brooker v Police* the New Zealand Supreme Court held that intention is not a necessary element for the offences of disorderly behaviour and offensive behaviour under section 4(1) of the Summary Offences Act 1981. However, the behaviour must cross an objective threshold and amount to more than mere annoyance.

Behaviour constitutes disorderly behaviour if it disturbs or violates the public order.<sup>165</sup> Elias CJ held that:<sup>166</sup>

what is essential ... is that the behaviour is disruptive of public order and is not simply a private affront or annoyance to a person present or to whom the behaviour is directed. ... Whether behaviour is disorderly is not to be assessed against the sensibilities of individuals to whom the behaviour is directed or who are present to see and hear it, but against its tendency to disrupt public order.

Similarly, offensive behaviour must “be capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs.”<sup>167</sup>

The Wanganui prohibition does not explicitly address disorderly and offensive behaviour. However, by addressing public intimidation and violent gang confrontation it can be seen to address a subset of the behaviour addressed by the offences of disorderly and offensive behaviour. Both the Wanganui prohibition and the offences of disorderly and offensive behaviour are concerned with protecting public order.<sup>168</sup>

To be consistent with the offences of disorderly and offensive behaviour the display of gang insignia should, therefore, constitute an offence when such

<sup>165</sup> *Brooker v Police*, above n 57, para 56 (SC) Blanchard J.

<sup>166</sup> *Ibid*, paras 33 & 41 Elias CJ.

<sup>167</sup> *Ibid*, para 55 Blanchard J.

<sup>168</sup> Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Wanganui District Council (Prohibition of Gang Insignia) Bill (20 February 2008) 3.



display is disruptive of public order, but not when it is merely annoying. The intent of the display is not relevant because the offence is measured by the expectations of a reasonable person to the "normal functioning of life in the environs of that place."<sup>169</sup>

The display of gang insignia that causes members of the public to feel intimidated and that promotes the potential for gang confrontation constitutes a "disruptive interference with the ordinary expectation of members of the public that they can enjoy amenities of their environment without disturbance."<sup>170</sup> Such behaviour is more than mere annoyance or an emotional disturbance.

Where behaviour involves a genuine exercise of the right to freedom of expression then a higher threshold exists for the behaviour to constitute disorderly behaviour.<sup>171</sup> In determining whether behaviour constitutes disorderly behaviour the courts should "weigh the manner but not the content of the expression."<sup>172</sup> This suggests that where the display of gang insignia involves a genuine and peaceful exercise of expression of identity then it is unlikely to be held to disrupt the public order. However, the display of gang insignia, in an aggressive manner, as a tool of intimidation and would likely be disruptive of public order.

Significantly, Elias CJ noted in *Brooker* that the offence of disorderly behaviour is capable of "significant impact upon important freedoms" because the power to arrest without warrant permits prior restraint of the freedom of expression.<sup>173</sup> She therefore held that "the freedom of speech should be restricted for reasons of public order only when there is a clear danger of disruption rising far above annoyance."<sup>174</sup> The significant impact on the freedom of expression did not mandate reading in a requirement of intent to disrupt public order. Rather, it simply raised the threshold to be

<sup>169</sup> *Brooker v Police*, above n 57, para 56 Blanchard J.

<sup>170</sup> *Ibid*, para 121 McGrath J.

<sup>171</sup> *Ibid*, para 92 Tipping J.

<sup>172</sup> *Ibid*, para 61 Blanchard J.

<sup>173</sup> *Ibid*, para 34 Elias CJ.

<sup>174</sup> *Ibid*, para 42 Elias CJ.



met before the Court would be willing to find that the behaviour disrupted the public order.<sup>175</sup>

This argument also applies to the Wanganui prohibition. The PGI Act similarly permits arrest and seizure without warrant and so also permits prior restraint of the freedom of expression. Therefore, the display of gang insignia should only be prohibited, and the freedom of expression limited, where the display creates a clear danger of disruption rising far above annoyance. The risk of prior restraint does not necessitate a requirement of intent. The freedom of expression can be protected against the risk of prior restraint by raising the threshold to be met before finding that the public order has been disrupted.

*Brooker* shows that what is important is whether public order is disrupted and not whether the accused intended to disrupt public order. This suggests that if the Wanganui prohibition can be read down, as per section 6 of the BORA, it is unnecessary to read in a requirement of intent, because what is essential is that the display of gang insignia disrupts public order by intimidating or promoting violent gang confrontation. Similarly to the offences of disorderly and offensive behaviour, intimidation would be measured against the objective expectations of a reasonable person in the context, not the subjective sensibilities of the alleged victim.

A problem with this argument is that while the Wanganui prohibition and the offences of disorderly and offensive behaviour may address the same, or similar, behaviour they are found in two different legislative schemes. Therefore, the elements necessary for the offences of disorderly and offensive behaviour do not necessarily apply to the Wanganui prohibition. The offences of disorderly and offensive behaviour require showing that the accused has behaved in a disorderly, or offensive, manner. The Wanganui prohibition only requires showing that the accused displayed gang insignia in a specified place. That this behaviour may constitute public intimidation

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<sup>175</sup> *Ibid*, para 59 Blanchard J.



amounting to disorderly behaviour is not relevant to establishing the offence.

A further problem is that the Summary Offences Act 1981 specifically establishes an offence of public intimidation.<sup>176</sup> The offence requires the accused to have either intended to, or been reckless as to whether his or her conduct would, frighten or intimidate any other person. This is highlighted by the fact that Mr Brooker was initially arrested for intimidation but, as there was no evidence of an intent to intimidate, the charge was amended to one of disorderly behaviour.<sup>177</sup> This offence of public intimidation is more relevant to the Wanganui prohibition because it deals specifically with intimidating behaviour and not, the more general, disorderly behaviour. If any guidance can be taken from a different legislative scheme, as questioned in the above point, the intimidation offence suggests that intimidating behaviour should only constitute an offence where the accused intends to intimidate, or is reckless as to whether his or her behaviour intimidates.

This argument relates to the purpose of reducing public intimidation. The other purpose of the Wanganui prohibition of avoiding or reducing gang confrontation is more analogous to the offence of disorderly behaviour and so may not require intent.

#### (d) Summary

The preceding discussion shows that it is unclear whether a requirement of intent could arguably be read in to the Wanganui prohibition. While the offences of disorderly and offensive behaviour suggest intent is unnecessary, the section 21 offence of intimidation in the Summary Offences Act 1981 suggests that intent is necessary. *Victoria v Black* suggests that intent is necessary in cases of intimidating expression.

<sup>176</sup> Summary Offences Act 1981, s 21.

<sup>177</sup> See *Brooker v Police*, above n 57, paras 16-17 Elias CJ.



However, due to the different contexts in the United States and New Zealand intent may not be required in New Zealand.

If it fell to be decided, this author argues that the tenable meaning of the Wanganui prohibition that is most consistent with the right to freedom of expression would prohibit the display of gang insignia where it intimidates or promotes confrontation. This meaning does not require intent on the part of the displayer and therefore prohibits behaviour, which the displayer did not intend to be intimidating or provocative. However, to require intent would frustrate the purposes of the Wanganui prohibition, as it would not prohibit the display of gang insignia that unintentionally intimidates or provokes gang confrontation. As *Brooker* emphasises, the essential point is that harm occurs not that the accused intended to do so. A person is not caught when the display is merely annoying, but only when it breaches the expectations of a reasonable person to the normal functioning of life in the environs of that place. Therefore, under this meaning, the prohibition only captures the display of gang insignia that has the potential to disrupt the public order through intimidation or confrontation.

It would be justified in terms of section 5 of the BORA because it excludes innocent display from the prohibition, while still respecting the purpose of the prohibition. The prohibition would only apply to display that intimidates or promotes confrontation. Therefore there would be a rational and proportionate connection between the prohibition and its purposes. There would be a direct link between the prohibition and the harm it seeks to address.

An example of when the display of gang insignia may intimidate or provoke gang confrontation even though the displayer does not intend to do so would be the display by patched gang members passively observing a gang confrontation. Members of the public could justifiably feel intimidated by this display because of the directly associated gang confrontation, even though the individual displayer may not intend to intimidate.



However, as the remaining section points out, this argument over whether or not intent can be read in is a moot one.

### 3 *Least possible reasonable limitation*

In *Moonen (No 1)* the Court of Appeal held that:<sup>178</sup>

if there are two tenable meanings, the one which is most in harmony with the Bill of Rights must be adopted. ... An enactment which limits the rights and freedoms contained in the Bill of Rights should be given such tenable meaning and application as constitutes the least possible limitation.

The Court of Appeal considered section 6 as sequentially prior to section 5. Under this approach the first step is to determine the tenable meaning that constitutes the least possible limitation of the BORA right or freedom, as per section 6. The second step is then to determine whether this least inconsistent meaning is a justified limitation of the BORA right or freedom, as per section 5. This approach promotes interpreting a provision in favour of fundamental rights and freedoms.<sup>179</sup>

In *Moonen (No 2)* the Court of Appeal was invited to revisit this finding and hold that "a Bill of Rights consistent interpretation is one which involves the least possible *reasonable* limitation on a Bill of Rights right or freedom, rather than the least possible limitation (my emphasis)."<sup>180</sup> However, due to the scope of the appeal the Court was not required to decide the issue.

The majority of the Supreme Court in *Hansen* seems to support the notion that the BORA requires adopting the meaning that provides the least possible, reasonable limitation. According to the majority, section 5 is

<sup>178</sup> *Moonen v Film and Literature Board of Review (No 1)*, above n 72, para 16 Tipping J for the Court.

<sup>179</sup> *Hansen v R*, above n 72, para 6 Elias CJ.

<sup>180</sup> *Moonen v Film and Literature Board of Review (No 2)*, above n 72, para 12 Richardson P for the Court.



sequentially prior to section 6. Under this approach if the natural and intended meaning of a limiting measure is justified by section 5 the meaning is “not inconsistent with the Bill of Rights as envisaged by s 6.”<sup>181</sup> In such a situation, “section 5 has legitimised the inconsistency”<sup>182</sup> between the limiting measure and the BORA. Such a limitation is reasonable because it is justified. This approach respects Parliament’s plenary lawmaking powers and “ability to legislate in terms which constitute a justified limit”.<sup>183</sup>

It is clear from *Hansen* that if the natural and intended meaning is justified in terms of section 5, then this meaning satisfies section 6 and should be adopted. It is also clear that if the natural and intended meaning is not justified in terms of section 5, and no other meaning is tenable, then this meaning must nevertheless be adopted because of section 4. However, it is not clear what approach is to be taken in the situation where the natural and intended meaning is not justified in terms of section 5 and an alternative, less-inconsistent meaning is tenable that is, nevertheless, also unjustified in terms of section 5. While the alternative meaning must be “reasonably possible”,<sup>184</sup> it is not clear whether the alternative meaning can only be adopted if it is justified in terms of section 5. That is, if section 6 is engaged does it mandate the adoption of a meaning that is neither intended nor justified? The judgment of Tipping J suggests that, where no meaning is available that is justified under section 5, the intended meaning should be adopted because Parliament’s plenary lawmaking powers would be frustrated if section 6 requires the adoption of an unjustified and unintended meaning over the natural and intended meaning.<sup>185</sup>

While it is arguable that the Wanganui prohibition could tenably be interpreted to only apply to the display of gang insignia that intimidates or promotes gang confrontation, it is simply not possible to do so. Parliament

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<sup>181</sup> *Hansen v R*, above n 72, para 60 Blanchard J.

<sup>182</sup> *Ibid*, para 90 Tipping J.

<sup>183</sup> *Ibid*, para 90 Tipping J. See also *ibid*, para 61 Blanchard J.

<sup>184</sup> *Ibid*, para 91 Tipping J.

<sup>185</sup> *Ibid*, paras 90-91 Tipping J.



has clearly determined that all display of gang insignia crosses the threshold from tolerable, and valid, behaviour to behaviour that should attract sanction. The offences in the Summary Offences Act 1981 of disorderly and offensive behaviour and intimidation criminalize behaviour when it crosses a certain threshold. In each case it must be proved that the behaviour crosses from the tolerable, and valid, to that which attracts sanction. The Wanganui prohibition, however, criminalizes all behaviour that constitutes the display of gang insignia. It does not have to be proved in each case that the display of gang insignia crosses the threshold from tolerable and valid behaviour to behaviour that should attract sanction because Parliament has already determined that all display of gang insignia be prohibited.

Parliament has made a decision on the merits of the display of gang insignia that, as in the case of disorderly and offensive behaviour, is normally left to the courts to decide. This decision of Parliament must be respected and precludes interpreting the Wanganui prohibition differently, even though Parliament's intended meaning constitutes an unjustifiable limitation of the right to freedom of expression.

It simply is not tenable to read a requirement of intimidation or provocation of gang confrontation in to the prohibition of the display of gang insignia. Such interpretation is consistent with the purposes of the Wanganui prohibition but amounts to legislative amendment, rather than judicial interpretation. Parliament has chosen not to directly prohibit the harmful conduct of intimidation and gang confrontation. Rather, it has chosen to prohibit the expression of gang insignia. In so doing, Parliament has determined that such expression does intimidate and promote gang confrontation.



## V CONCLUSION

The Wanganui prohibition prohibits the display of gang insignia in specified public places in the Wanganui district. The purposes of the Wanganui prohibition are to reduce or prevent public intimidation and to reduce or avoid gang confrontation. It is not tenable to read down the prohibition so that it only applies to display of gang insignia that intimidates or promotes gang confrontation, or to display of gang insignia that is intended to do so. Such meanings are more consistent with the right to freedom of expression because they narrow the scope of the prohibited display, increasing the connection between remedy and harm. However, for the courts to interpret the Wanganui prohibition in these ways would override legislative intention. Parliament clearly intended the prohibition to apply to all display of gang insignia. Therefore, this meaning must be adopted and applied as required by section 4 of the BORA.

This is so, despite the Wanganui prohibition constituting an unjustified limitation of the right to freedom of expression under section 5 of the BORA. The Wanganui prohibition is, at best, only tenuously connected to its purposes because it does not prohibit the harm it seeks to remedy, but rather the display of gang insignia. The display of gang insignia may be used in particularly virulent cases of intimidation. However, the display of gang insignia does not necessarily intimidate nor promote gang confrontation. It is not the display of gang insignia, but the conduct of the displayer, that intimidates or promotes gang confrontation. The Wanganui prohibition is overbroad in its scope because it captures innocent expression that neither intimidates nor promotes gang confrontation. The Wanganui prohibition fails to distinguish between the different types of display of gang insignia and so is a disproportionate limitation of the right to freedom of expression. This is especially so when the Wanganui prohibition does not guarantee achievement of its purposes and the harms of public intimidation and gang confrontation were already covered by legislation.



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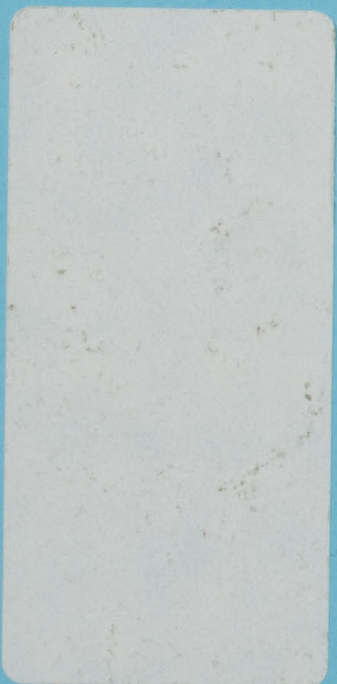
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