Friday, 6 June 2008

Clerk of the Committee
Law and Order Select Committee
Level 10
Bowen House
Parliament Buildings
WELLINGTON

SUBMISSION: WANGANUI DISTRICT COUNCIL (PROHIBITION OF GANG INSIGNIA) BILL

1 The Legislation Advisory Committee ("LAC") was invited by the Law and Order Committee to make a submission on the Wanganui District Council (Prohibition of Gang Insignia) Bill ("Bill"). This submission is in response to that invitation.

2 The LAC was established to provide advice to Government on good legislative practice, legislative proposals, and public law issues. It produces and updates the LAC Guidelines adopted by Cabinet as appropriate benchmarks for legislation.

3 This submission is confined to those aspects of the Bill that are relevant to the LAC's role in promoting quality legislation. The LAC is not concerned with the broad policy objectives of proposed legislation rather than with public law issues that might be raised.

4 It is our conclusion that the matters that are being addressed in the Bill should be dealt with by central government through the general criminal law, and not by local act or bylaw. Should the Bill become law, it would extend the District Council's bylaw-making power into areas not contemplated by the Local Government Act and inappropriate for regulation by bylaw.

5 The LAC considers that the Bill has serious problems. These are –

- The ordinary bylaw-making procedure under the Local Government Act 2002 should apply to any bylaw made under the Bill. That procedure should not be displaced by one that does not provide the same safeguards.

- The Bill would enable a local authority to designate particular conduct (wearing gang insignia) as an offence punishable on conviction by a fine of up to $5,000. A person suspected of committing an offence is liable to arrest without warrant, to have the insignia seized and removed, and to have the insignia forfeited to the Crown on conviction. These are matters that should be dealt with under the general law, not in local authority bylaws. There are substantial dangers in using bylaws for general public order purposes, including that a disjunction between the law and order strategies of central and local governments could arise.

- The criteria for making a bylaw under the Bill are vague, open-ended, and are likely to prove difficult or impossible to establish.

- The Bill is inconsistent with the New Zealand Bill of Rights Act 1990.

- Any bylaw made under the Bill is likely to be found *ultra vires* the empowering provision in the Bill, as were the regulations at issue in the case of *Drew v Attorney-General*.

- Any bylaw made under the Bill is likely to be found invalid under the Bylaws Act 1910.

Existing Procedure for Making Bylaws

6 Bylaws are one of the most powerful forms of local government regulation; they both provide local authorities with flexibility to respond to particular issues in their district and are a significant coercive tool. As Dean Knight has noted,

"[l]ocal authorities are increasingly turning back to one of their most historic forms of regulation to deal with modern problems […]."[1] A framework for their use and review exists under the Local Government Act 2002. We should be very cautious about empowering local authorities to make bylaws under parallel regimes.

7 Part 8, subpart 1 of the Local Government Act empowers territorial authorities, like the Wanganui District Council ("District Council"), to make bylaws and sets out the procedure the local authority must follow when making a bylaw. There is no question that the Local Government Act applies to the District Council, which the first paragraph of the Explanatory Note to the Bill acknowledges.

8 The procedure under the Bill for making bylaws raises concern. There are a number of statutes, other than the Local Government Act, that empower local authorities to make bylaws for specific purposes.[2] However, under these statutes, the local authorities must exercise their bylaw-making powers in accordance with the procedure established by the Local Government Act.[3] This approach is not followed in the Bill. Instead, the Bill creates a statutory scheme under which the District Council can make bylaws that limit the application of the procedure for making bylaws, which is provided for in the Local Government Act, to the use of the special consultative procedure as provided in section 83 of that Act. In so doing, it also replaces the test for determining whether a bylaw should be made from that established in section 155 of the Local Government Act to requiring satisfaction on the part of the District Council "that the bylaw is reasonably necessary" in order to fulfil the purposes in clause 5(4) of the Bill.[4]

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[1] Dean Knight, "Power to make bylaws", NZLJ (May 2005), 165.

[2] Airport Authorities Act 1966, s. 9; Burial and Cremation Act 1964, s. 16; Dog Control Act 1996, s. 20; Hazardous Substances and New Organisms Act 1996, s. 23; Prostitution Reform Act 2003, ss. 12 – 14; Transport Act 1962, s. 72.

[3] The procedure for making bylaws under the Transport Act is contained in the Local Government Act, *see Kelly v Wellington City Council* [1995] 3 NZLR 750 at 753. Section 13 of the Prostitution Reform Act makes clear that the procedure for making bylaws set out in the Local Government Act must be followed. Section 20 of the Dog Control Act provides that bylaws must be made in accordance with the Local Government Act and shall be deemed to have been made under that Act.

[4] Local Government Act, section 155 provides: "When making a bylaw under the Local Government Act, the local authority must *inter alia* determine whether the bylaw is the most appropriate way of addressing the perceived problem and whether the proposed bylaw gives rise to any implications under the New Zealand Bill of Rights Act 1990."

9 Furthermore, the Bill fails to include the protection, expressly provided for in section 155(3) of the Local Government Act, against the making of bylaws that are inconsistent with the New Zealand Bill of Rights Act 1990 ("NZBORA").[5] This is an important safeguard and should be included in the Bill unless there is a clear justification for not doing so. Finally, it should be noted that while the Bill refers to the "special consultative procedure set out in section 83" of the Local Government Act, it is not clear whether this also incorporates section 86 of the Local Government Act, which specifically provides for the use of the special consultative procedure in relation to making, amending, or revoking bylaws.

10 The creation of another, parallel statutory procedure for making bylaws, and one that does not incorporate all of the checks and balances contained in the Local Government Act, is undesirable. This is particularly so given the purposes of the Bill; matters of public order should not be dealt with on an *ad hoc* basis around New Zealand. The Local Government Act already provides for a well-structured, and applicable, procedure. There does not appear to be any justification for going beyond it.

Inappropriate Use of Bylaw-making Powers

11 The general purposes for which a bylaw can be made include "protecting the public from nuisance", "protecting and promoting public health and safety" and "minimising the potential for offensive behaviour in public places."[6] Recent examples of bylaws made to protect the public from nuisance and to protect public health and safety are the Waipa District Urban Fire Control Bylaw 2000 and the Auckland City Council Dog Control Bylaw 2004.[7] The Opotiki District Council is currently consulting on a proposed "Public Places" bylaw, which is being made on the basis of all three of the general purposes. This draft bylaw regulates a range of activities that may occur in a public place, for example, the repair of

[5] Note that the Prostitution Reform Act expressly states, contrary to section 155(3) of the Local Government Act, that a bylaw made under the Prostitution Reform Act *can* be inconsistent with the NZBORA.

[6] Local Government Act, s. 145.

[7] *See Parlane v Waipa District Council* HC HAM CIV 2006-284-357 [20 February 2007] at paras 23 – 24; *Harrison v Auckland City Council* HC AK CIV 2005-404-2214 [14 March 2006] at para. 63. Note that the Dog Control Bylaw was made pursuant to the Dog Control Act 1996 and in accordance with the Local Government Act, and its purposes equate with those provided for in section 145 of the Local Government Act.

broken fences that abut a public place, the requirement for buskers to be licensed, noise restrictions, and the congregation of people in a manner that obstructs the public or traffic.[8]

12 Section 146 of the Local Government Act provides for "specific bylaw-making powers", which include regulating waste management, and managing, regulating, and protecting water supply, land drainage, cemeteries, and land under the control of the local authority. While it is expressly provided that the purposes in section 146 do not limit the general purposes in section 145, they do provide an illustration of the types of activities that Parliament, as recently as 2002, contemplated bylaws would be used to regulate.

13 The purposes of bylaws and a survey of bylaws currently in force indicate that the use of bylaws has been approached narrowly. By contrast, the Bill takes a very wide view of what an appropriate use of a bylaw may be; the very fact that this enabling legislation is perceived to be necessary appears to recognise that its purpose does not fall within those established by the Local Government Act.

14 The LAC is cognisant of the real difficulties facing the District Council with regard to gang intimidation and confrontation and the District Council's wish to deal with those difficulties. The LAC, however, considers that, in this instance, the local act and the bylaw are not the appropriate instruments to address those difficulties. The Bill empowers the District Council to make bylaws that will proscribe a class of conduct, and permits arrest without warrant, the seizure and forfeiture of property, and a fine on conviction. This is the domain of ordinary criminal law. Should the Bill become law, it would extend the bylaw-making powers of the District Council into new territory, and is likely to be viewed by other local authorities around New Zealand as precedent for the development of similar legislation applicable to their regions. In the LAC's view, there are substantial dangers in using bylaws for general public order purposes. It could lead to a plethora of law and order regimes in New Zealand and a potential

[8] It is worth noting that the draft "Public Places" bylaw also provides that "nuisance" has the meaning assigned to it in section 29 of the Health Act 1956. The definition in section 29 is long, but includes situations such as keeping any animal or carcass as to be offensive or likely to be injurious to public health, carrying on of a business in manner likely to be unnecessarily offensive or injurious to public health, or situating or keeping a premises in such a state as is likely to be offensive or injurious to public health.

disjunction between the law and order strategies of central and local governments, both of which have wide and highly undesirable ramifications.

15 On the assumption that the Bill is required to give the District Council powers that it would not otherwise have under the Local Government Act, we suggest that it is for central government to decide how best to address the concerns of the District Council, and similar concerns of other local authorities. The Select Committee could bring the issue to the attention of the Government and invite the Government to take it up.

Problems with the Scope of the Bill

16 The powers given to the District Council and the all-encompassing nature of the offence provision are causes for concern. They could form the basis for challenges to any bylaw made under the Bill on a number of different grounds.

17 Under the Bill, the grounds for making a bylaw are very broad and largely undefined. The District Council needs to be satisfied that a bylaw is "reasonably necessary" in order to "prevent or reduce the likelihood of intimidation or harassment" or "to avoid or reduce the potential for confrontation by or between gangs." Only one of these limbs needs to be met. As such, at a minimum, the District Council could make a bylaw if it was satisfied that a bylaw was reasonably necessary for "reducing" the "likelihood of intimidation of members of the public." The extent of the required "reduction" is not specified and, arguably, this factor would be met even if the District Council believed the bylaw would result in a miniscule reduction. Similarly, it is not clear what would constitute "intimidation". Further, the bylaw would not need to actually reduce intimidation, but only the "likelihood of" it. Finally, who are the "members of the public"? How many people need to be affected? Similar issues arise with regard to the second ground on which a bylaw could be made; not only is "reduce the potential for confrontation" a very low threshold, but it is not apparent how such a ground could be evaluated.

18 There is also a worrying lack of clarity regarding another key provision of the Bill, which relates to what may be designated as a "gang". Under clause 5(1)(b) of the Bill, the District Council may "identify" an organisation, association, or

group as a "gang". The criteria upon which the District Council can identify a "gang" are extremely broad, including that "associates or supporters" of an organisation, association, or group "individually or collectively promote, encourage, or engage in a pattern of criminal activity."[9] It is not clear what the extent of the connection or relationship must be for a person to qualify as a "supporter" or "associate" of an organisation, association, or group. Moreover, on the face of it, it is not even necessary for the group that is identified by the District Council as a "gang" to be involved in a "pattern of criminal activity" in the ways described. Furthermore, how will a "pattern of activity" be determined? The phrase is vague, and will be hard to substantiate.

19 Although the definition of "gang insignia" may be somewhat limited by the requirement that the signs, symbols, or representations must show "membership of, or an affiliation with, or support for a gang […]", it is similarly openly defined in the Bill. The term extends the reach of a bylaw to colours, tattoos and jewellery. Furthermore, it would encompass "gang insignia" that did not confront or intimidate the public.

20 The offence provision applies to "any person" who wears or displays "any sign, symbol, or representation showing membership of, affiliation with, or support for a gang […]", which encompasses signs, etc. that may not intimidate or confront. The offence is a strict liability offence, with significant consequences: a maximum fine of $5000, possible arrest by the police and possible seizure and forfeiture of private property (the "gang insignia") "by use of force if necessary." These provisions appear quite draconian.

Potential Challenges to Bylaw-making Power

New Zealand Bill of Rights

21 The Bill raises the issue of compliance with the NZBORA, particularly the rights to freedom of expression and freedom of association. Expression comes in a myriad of both written and oral forms of communication, such as newspapers, television, public parades and activities. The New Zealand Court of Appeal has characterised the right to freedom of expression as "as wide as human thought and

[9] The Bill, cl. 5(3)(b).

imagination."[10] The right to freedom of movement incorporates both the right to leave and enter New Zealand, and the right to move physically within New Zealand, for example to walk through a public park or sit in a civic square.[11] Any limitations placed on these rights must by law, under section 5 of the NZBORA, be reasonable and "demonstrably justified in a free and democratic society." Elias CJ has stated in *Hansen* that:

> The objective sought to be achieved by the limiting provision must be of sufficient importance to warrant infringement of a fundamental human right. The limitation must be no more than is reasonably necessary to achieve the purpose. The objective against which a provision is justified cannot be wider than can be achieved by the limitation of the right.[12]

22 The Attorney-General has concluded that clause 6 of the Bill "gives rise to a *prima facie* issue of consistency with section 14 in any case by prohibiting a broad range of expression, varying from messages of intimidation to symbolic, cultural, political or religious aspects."[13] The restriction placed by the Bill on the right to freedom of expression is disproportionate: "[t]he prohibition on the wearing and display of gang insignia in specified places would appear to make a limited contribution to reducing the likelihood of gang confrontations and the intimidation of members of the public. However, the offence provision extends to prohibit conduct that does not have that effect."[14] We agree with the conclusions of the Attorney-General.

23 In addition to clause 6 of the Bill being an unjustified limitation on the right to freedom of expression, it is likely that any bylaws made under the Bill will be subject to NZBORA challenges. In *Drew v Attorney-General*, the Court of Appeal expressed its view that regulations that were inconsistent with section 4 of the NZBORA were not protected by that section if the empowering provision under which the regulations were made was capable of being interpreted so as not

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[10] *Moonen v. Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).
[11] Andrew Butler and Petra Butler, *The New Zealand Bill of Rights: A Commentary* (LexisNexis NZ Ltd: Wellington, 2005), 471.
[12] *Hansen v R*, SC 58/2005, 20 February 2007 at para. 42. *See also*, for example, Blanchard J at paras 64 – 65 and Tipping J at para. 104. *See also R v Oakes* [1986] 1 SCR 103.
[13] 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) ("Report of the Attorney-General"), 3.
[14] Report of the Attorney-General, 4.

to authorise the making of regulations that are inconsistent with the NZBORA.[15] If the empowering provision could be so interpreted, "the regulation is invalid because the empowering provision, read, just like any other section, in accordance with s 6 of the Bill of Rights, does not authorise the regulation."[16] Consequently, regulations that are inconsistent with the NZBORA will only enjoy section 4 protection when the inconsistency has been authorised by statute, which is not the case with the Bill.

24 The wide-ranging application of a bylaw to people within the Wanganui District and the prevention on the display or wearing of a largely open-ended class of signs and symbols, which may not intimidate or confront, and the significant consequences that could flow for a person found in violation of the bylaw, may lead to challenges that the bylaw is an unjustified limitation on the right to freedom of expression.

25 The potential scope of what may constitute a "gang" and "gang insignia" is so wide that a bylaw made under the Bill may have the effect of prohibiting large numbers of people from being in, or passing through, specified public places in the Wanganui District, including in situations where their conduct was not confrontational or intimidatory. Again, it is likely that a bylaw will be challenged on the ground that it is an unjustified limitation on the right to freedom of movement.

26 The absence of a provision, such as that in section 155(3) of the Local Government Act, prohibiting bylaws that are inconsistent with the NZBORA, and the requirement of the District Council to make a bylaw only when it is satisfied that it is "reasonably necessary", will not prevent such challenges. The Bill and bylaws made pursuant to the Bill are unlikely to stand up to scrutiny under the NZBORA. The Bill should be reconsidered on this basis.

[15] *Drew v Attorney-General* [2002]1 NZLR 58 at 73. Note that section 4 of the NZBORA provides: "No court shall, in relation to any enactment […] – (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any invalid or ineffective; or (b) decline to apply any provision of the enactment – by reason only that the provision is inconsistent with any provision of this Bill of Rights."

[16] *Drew v Attorney-General* [2002]1 NZLR 58 at 73.

Bylaws Act 1910

27 The Bylaws Act 1910 provides an avenue for challenging bylaws. The Bylaws Act would apply to any bylaw made under the Bill, should it become law. Under the Act, any person can challenge a bylaw by applying to the High Court for an order quashing the bylaw, or any part of it, on the basis that it is invalid. The High Court can quash the bylaw or amend it to make it valid.[17] The grounds for invalidity are set out in section 17:

> If any bylaw contains any provisions which are invalid because they are *ultra vires* of the local authority, or repugnant to the laws of New Zealand, or unreasonable, or for any other cause whatever, the bylaw shall be invalid to the extent of those provisions and any others which cannot be severed therefrom.

28 In New Zealand, bylaws have been subject to considerable scrutiny on the ground of unreasonableness. The leading New Zealand authority, *McCarthy v Madden*, indicated that the New Zealand courts will be more ready than courts in other Commonwealth countries to find unreasonableness in bylaws because of the lack of existing checks and balances on their enactment.[18] The Court stated that the reasonableness or unreasonableness of a bylaw is essentially a matter of fact and it established a set of principles to be applied when making such a determination, which may be summarised as follows:[19]

- A bylaw is not unreasonable merely because particular Judges may think that it goes further than is prudent, necessary or convenient;
- Where local authority bylaws are not subject to government confirmation, the courts may subject them to greater scrutiny than other bylaws;
- Where a bylaw affects a public common law right such as the right to use roads for the purpose of traffic, it will be scrutinised with greater care than

[17] Bylaws Act, s. 12.
[18] *McCarthy v Madden* (1914) 33 NZLR 1251, cited in *Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787 at para. 101; Kenneth Palmer, *Local Government in New Zealand* (2nd ed, The Law Book Company Ltd: Sydney, 1993), 438.
[19] *McCarthy v Madden* (1914) 33 NZLR 1251 at 1268 - 1270. The principles were summarised in *Harrison v Auckland City Council* HC AK CIV 2007-404-1445 [21 April 2008] at para. 52. *See also J B International Ltd v Auckland City Council* HC AK CIV 2005-404-2214 [14 March 2006] at paras 52 – 58.

a bylaw which affects only the particular rights of inhabitants within the local authority district;

- The reasonableness of a bylaw can only be ascertained in relation to the surrounding facts, including the nature and condition of the locality in which it is designed to take effect; the evil, danger or inconvenience which it is designed to remedy; and whether or not public or private rights are unnecessarily or unjustly invaded;

- Where a bylaw affects a public right common to the inhabitants of more than one local authority, the bylaws of neighbouring local authorities should be taken into account;

- A bylaw regulating the exercise of a public right must take into consideration general legislation on the same subject, and not be framed in such a way as necessarily to destroy that public right; and

- A bylaw which destroys or unnecessarily interferes with a public right without producing a corresponding benefit to the inhabitants of a locality will be unreasonable.

29 *McCarthy v Madden* has been followed by the courts up to the present day.[20] More recently, the courts have also referred to the principle of proportionality when determining the reasonableness of a bylaw.[21] In *Carter Holt Harvey Ltd v North Shore City Council*, Asher J noted that the test of unreasonableness as expressed in *McCarthy v Madden* is "more a matter of judgement, considering the

[20] *Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787 at paras 98 – 99. The Court notes at paragraph 99 that there is a "very substantial line of New Zealand cases" that follows *McCarthy v Madden*. *See also for example Willowford Family Trust v Christchurch City Council* HC CHCH CIV 2004-409-002299 [29 July 2005] at paras 66 - 70; *J B International Ltd v Auckland City Council* HC AK CIV 2005-404-2214 [14 March 2006] at paras 52 – 59, 69 - 71; *Harrison v Auckland City Council* HC AK CIV 2007-404-1445 [21 April 2008] at paras 51 – 61; Dean Knight, "Power to make bylaws", NZLJ (May 2005), 167. *Cf. Conley v Hamilton City Council* [2008] 1 NZLR 789 at 797 – 799; *Waitakere City Council v Lovelock* [1997] 2 NZLR 385, but *see also* Thomas J's separate judgment.

[21] *Willowford Family Trust v Christchurch City Council* HC CHCH CIV 2004-409-002299 [29 July 2005] at paras 68 - 71; *J B International Ltd v Auckland City Council* HC AK CIV 2005-404-2214 [14 March 2006] at paras 74 – 75; *Harrison v Auckland City Council* HC AK CIV 2007-404-1445 [21 April 2008] at paras 59 – 60; *Conley v Hamilton City Council* [2008] 1 NZLR 789 at 798 – 799. *See also* Dean Knight, "Brothels, bylaws, prostitutes and proportionality", NZLJ (December 2005), 425.

proportionality of any interference with a public right against the benefit to inhabitants in the area."[22]

30 Asher J also suggested that, since more checks and balances are now in place with respect to bylaws made in accordance with the Local Government Act, the *McCarthy v Madden* approach may need to be applied with caution.[23] However, where those checks and balances do not exist or partially exist, as with the bylaw-making power provided by the Bill, it is likely that the courts will remain willing to use a fairly low threshold of reasonableness, as set down in *McCarthy v Madden*, when determining the validity of a bylaw.

31 There are serious questions regarding the bylaw-making power in the Bill. The problems inherent in the Bill will result in bylaws that will be similarly flawed. It is likely that, should the Bill in its present form become law and bylaws are made pursuant to it, they will not stand up to scrutiny on the ground of reasonableness.

32 In particular, it is doubtful whether, referring to the *McCarthy v Madden* principles, such a bylaw would be considered reasonable when "ascertained in relation to the surrounding facts, including the nature and condition of the locality in which it is designed to take effect; the evil, danger or inconvenience which it is designed to remedy; and whether or not public or private rights are unnecessarily or unjustly invaded." Moreover, it could be deemed unreasonable on the basis that it "unnecessarily interfered with a public right without producing a corresponding benefit to the inhabitants of a locality."

Conclusion

33 The matters that are being dealt with in the Bill should be addressed by central government through the general criminal law, not by local act or bylaw. The Bill would extend the District Council's bylaw-making power into areas not contemplated by the Local Government Act and not appropriate for regulation by bylaw. If the Select Committee is of the opinion that the issue needs to be

[22] *Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787 at para. 102.
[23] *Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787 at para. 105. *See also J B International Ltd v Auckland City Council* HC AK CIV 2005-404-2214 [14 March 2006] at para. 59. Stevens J endorsed Asher J's approach, *see Harrison v Auckland City Council* HC AK CIV 2007-404-1445 [21 April 2008] at paras 57 – 60.

addressed by the general criminal law, it could bring the issue to the attention of the Government and invite the Government to take it up.

34 If it is decided, however, that it should be enacted, the Bill should not create a distinct procedure for making bylaws. Rather, the District Council should be required to follow the procedure established in the Local Government Act and, consequently, the same checks and balances should apply to bylaws made pursuant to the Bill. Moreover, attention should be given to tightening its scope by clearly defining the circumstances in which a bylaw may be made and whose conduct can be restricted. If enacted in its current form, it is likely that the Bill will be challenged under the NZBORA and any bylaws that are made pursuant to the Bill will be subjected to challenge as *ultra vires* and unreasonable.