



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Manukau City Council (Control of
Graffiti) Bill 2005

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

I have considered the Manukau City Council (Control of Graffiti) Bill 2005 (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that clause 7 of the Bill authorises measures that limit the rights affirmed in section 19(1) of the Bill of Rights Act. I have also concluded that clause 15 of the Bill authorises measures that limit the rights affirmed in 23(4) of the Bill of Rights Act. These limitations cannot be justified in terms of section 5 of that Act. As required by section 7 of the Bill of Rights Act and Standing Order 266, I draw this to the attention of the House of Representatives.

The Bill

The purpose of the Bill is to minimise the graffiti problem in Manukau City. It does this by creating offences related to marking of graffiti, regulating the display of spray paint in retail premises and prohibiting its sale to minors, providing the Manukau City Council ("the Council") with power to remove graffiti on private property and providing the police with powers to arrest and request information.

Inconsistency with Section 19(1) of the Bill of Rights Act (Freedom from Discrimination)

Clause 7 of the Bill gives rise to an issue of inconsistency with section 19(1) of the Bill of Rights Act by prohibiting the sale of spray paint to persons under the age of 18 years ('minors').

Section 19(1) of the Bill of Rights Act provides that everyone has the right to freedom from discrimination on the grounds of age, commencing at the age of 16 years. The determination of whether a provision is discriminatory depends on whether:

- a) the legislation draws a distinction based on one of the prohibited grounds of discrimination; and
- b) the distinction involves disadvantage to one or more classes of individuals.

Applying this test, any differential treatment of persons above the age of 16 that results in disadvantage is *prima facie* inconsistent with the right to non-discrimination. The prohibition on the sale of cans of spray paint to minors creates disadvantage to minors wishing to purchase such items and must be justified in terms of section 5 of the Bill of Rights Act.

Justifications under Section 5

A limit on a right can be justified in terms of section 5 of the Bill of Rights Act where it meets a significant and important objective, and where

there is a rational and proportionate connection between the limitation on the right and that objective.¹

What is the Significant and Important Objective?

The objective of the Bill is to minimise the graffiti problem in Manukau City. Minimising the presence of graffiti could be seen as a significant and important objective. The marking of graffiti causes damage to public and private property. It creates unwarranted expense for property owners and their local councils. Furthermore, graffiti creates an impression of tolerance of anti-social conduct which is offensive to the community.

Is the Restriction a Rational and Proportionate Response?

The purpose of clause 7 is to contribute to the reduction of graffiti in Manukau by preventing the sale of spray paint to minors within the Manukau district. Minors are perceived to be the greatest perpetrators of graffiti but there is insufficient empirical evidence available to confirm that assumption, and to consequently conclude that there is a rational and proportionate connection between the sale of spray paint to minors and the graffiti problem.

On the evidence available, prohibiting the sale of spray paint to minors in Manukau does not have a strong connection to the stated objective because it is not likely to minimise the incidences of graffiti. Offenders would still be able to purchase graffiti implements in nearby areas or through purchase on their behalf by an adult. Those committing acts of graffiti are likely to be determined and will find alternative methods of acquiring the necessary equipment. In addition, cans of spray paint are not the only graffiti implements identified in the Bill but they are the only ones subject to retail restrictions in the Bill. For example, implements capable of etching glass are also identified but minors would still be able to purchase such implements.

The restriction on the right is not sufficiently precise to ensure that it addresses only those matters that it is intended to address. Given the extent to which spray paint can be used for lawful purposes and the negative impact that the prohibition might have on law-abiding members of the public, prohibiting the sale of spray paint to minors is disproportionate. The Bill will disadvantage minors who are not the intended targets of the Bill by unfairly preventing them from purchasing spray paint merely because they are minors.

Conclusion: Section 19(1)

Prohibiting the sale of spray paint to persons under the age of 18 is discrimination within the definition of section 19(1) of the Bill of Rights Act. Although it has a significant and important objective (the reduction of graffiti), on the evidence available there is no rational and proportionate connection between that objective and the discrimination. Accordingly, clause 7 of the

¹ *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754.

Bill cannot be justified under section 5 of the Bill of Rights Act and appears to be inconsistent with that Act.

Inconsistency with Section 23(4) of the Bill of Rights Act (the Right to Refrain from Making a Statement)

Clause 15 empowers police, where they believe on reasonable grounds that a person is committing or has committed an offence under the Bill, to require that person to supply the name, address and whereabouts of any other person connected in any way with the alleged offence. It would be an offence to intentionally refuse to give, or knowingly misstate, any information.

Section 23(4) of the Bill of Rights Act provides that “everyone who is arrested or detained under any enactment for any offence or suspected offence shall have the right to refrain from making any statement and be informed of that right.” Section 23(4) is triggered at the point of detention, and a statutory requirement to provide information while arrested or detained is *prima facie* inconsistent with this section.

The Canadian Supreme Court has outlined the significant degree of protection that the law affords to the right to refrain from making a statement when arrested or detained. In *R v Hebert*,² McLachlin J (as she then was), said:

The purpose of [the right] is two-fold: to preserve the rights of the detained individual, and to maintain the repute and integrity of our system of justice. More particularly, it is to control the superior power of the state vis-a-vis the individual who has been detained by the state...The state has the power to intrude on the individual's physical freedom by detaining him or her. The individual cannot walk away. This physical intrusion on the individual's mental liberty in turn may enable the state to infringe the individual's mental liberty by techniques made possible by its superior resources and power...The scope of the right to silence must be defined broadly enough to preserve for the detained person the right to choose whether to speak to the authorities or to remain silent, notwithstanding the fact that he or she is in the superior power of the state.

Clause 15 appears to create an implicit power to detain a person suspected of an offence for the purposes of questioning them about that offence. However, the offence in clause 15 of knowingly misstating information to a police officer does not attract the protection of section 23(4). It would be repugnant to the interests of justice for the Bill of Rights Act to provide a defence against lying to the police. However, a requirement to answer questions about other people connected with the offence requires an

² [1990] 2 SCR 151, 179-180.

implicit acknowledgement of involvement in the offence and could amount to compulsion to make a prejudicial statement. This appears to be inconsistent with section 23(4) of the Bill of Rights Act.

Justifications under Section 5

What is the significant and important objective?

The objective of this policy appears to be to enable police to detect persons involved in committing offences under the Bill (namely the marking of graffiti). An argument can be made that this objective is significant and important, given the purpose of the Bill to minimise the graffiti problem in Manukau City.

Is the restriction a rational and proportionate response?

I have formed the view that a requirement to compel a suspect to provide information about their alleged offending is not a proportionate response to the policy objective. The requirement in clause 15 to provide information about other people connected with the alleged offence is a highly unusual statutory provision, as the general corpus of criminal law does not grant police an untrammelled power to question suspects about alleged offending, including indictable offences.³ Clause 15, therefore, impacts on the high value that society places on the right to refrain from making a statement if arrested or detained.

Given that offences under the Act are regulatory in nature and can be dealt with by infringement notices or on summary conviction, I consider that a requirement to compel a suspect to provide information about their own alleged offending is not a proportionate response to the policy objective of minimising graffiti.

In forming this view, I note that protections as to the use of responses to compulsory questioning (such as a restriction on using that information in subsequent criminal proceedings) can amount to a reasonable limit upon the right to silence secured by s 23(4) of the Bill of Rights Act. However, clause 15 of the Bill contains no such protections. In addition, the penalty associated with refusing to provide this information makes the power particularly coercive.

³ The exceptions to this rule relate to motor vehicles, requiring persons driving vehicles to provide the name and address of the owner of the vehicle; and requiring an owner of a vehicle, where the police suspect that the vehicle has been used in the commission of an offence, to provide information which may lead to the identification and apprehension of the driver and passengers of the vehicle (sections 113, 114 and 118 of the Land Transport Act 1998).

I further note that the Police already have available to them a range of investigation techniques that would enable them to detect persons involved in committing offences under the Bill. I do not have information available to me explaining why these existing measures, which would infringe less on the rights of a suspect, could not be used instead to achieve the objective of this provision.

Conclusion: Section 23(4)

Requiring a person to provide information about other people connected with an alleged offence intrudes on the right to refrain from making a statement under section 23(4) of the Bill of Rights Act. Although it can be argued that the clause has a significant and important objective (enabling police to detect persons involved in committing offences under the Bill), the connection between that objective and the restriction on the right not to make a statement cannot be described as rational and proportionate. Accordingly, clause 15 of the Bill cannot be justified under section 5 of the Bill of Rights Act and appears to be inconsistent with that Act.

Conclusion

I conclude that clause 7 of the Manukau City Council (Control of Graffiti) Bill 2005 authorises measures that limit the rights affirmed in section 19(1) of the Bill of Rights Act. Clause 15 of the Bill authorises measures that limit the rights affirmed in section 23(4) of the Bill of Rights Act. These limitations cannot be justified in terms of section 5 of the Bill of Rights Act and therefore the Bill appears to be inconsistent with the rights and freedoms contained in that Act.



Hon David Parker
Attorney-General