

## **Summary Offences (Graffiti) Amendment Bill**

Office of Hon Dr Michael Cullen

15 February 2008

### **Summary Offences (Graffiti) Amendment Bill (PCO 8118/5): Consistency with New Zealand Bill of Rights Act 1990 [Introduced as Summary Offences (Tagging and Graffiti Vandalism) Amendment Bill]**

1. I have considered the Summary Offences (Graffiti) Amendment Bill (199/1) ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act") and have concluded that while the Bill raises a number of issues under the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act", each of these is justifiable in terms of section 5 of that Act.
2. I note, in this respect, that the minimum age restriction on the sale of paint spraycans contained in clause 5 of the Bill is similar to a restriction contained in a local Bill, the Manukau City Council (Control of Graffiti) Bill. I note further that that restriction was, along with several other provisions of that Bill, drawn to the attention of the House in December 2005 as inconsistent with the Bill of Rights Act by the then Attorney-General, the Hon David Parker.[\[1\]](#) I have set out my reasons for differing from the conclusion in respect of that provision.

### **Issue of age discrimination in the prohibition of sale of paint spraycans to young people**

3. Clause 5 of the Bill amends the Summary Offences Act 1981 to make it an offence to sell a paint spraycan to any person under 18 years of age. The age restriction is a *prima facie* limit on the right against discrimination on the grounds of age under section 19(1) of the Bill of Rights Act and section 21(1)(i) of the Human Rights Act 1993("HRA").
4. It is therefore necessary to consider whether the age restriction is justifiable under section 5 of the Bill of Rights Act. In applying section 5, it is necessary to consider whether the *prima facie* age discrimination serves an important objective and, further, whether that *prima facie* discrimination is both rationally connected and proportionate to that objective.[\[2\]](#)
5. On this approach, it is clear that the Bill, including the age restriction, is directed at the important objective of abating the economic and other costs that arise from tagging and other forms of graffiti. Further, as a significant proportion of tagging and other graffiti is carried out by people under 18 using paint spraycans, the age restriction is also clearly rationally connected to that objective. I also note the advice of the Ministry of Justice that the use of 18 as an age of eligibility is logistically straightforward, as it allows use of the age verification schemes, including "18+ cards", developed for alcohol and some gambling.
6. The principal question in respect of the age restriction in clause 5 is whether it is proportionate: that is, whether the *prima facie* age discrimination is balanced by the positive effects of the age restriction.
7. It is therefore necessary to consider the adverse and positive effects of the age restriction in objective terms. The age restriction arises from the observations that many of those

seriously involved in tagging and other forms of graffiti are under the age of 18 and that paint spraycans are commonly used in tagging.[3]

8. On that basis, I note that not all people engaged in tagging are under 18 and, significantly, that tagging appears to be carried out by only a very small proportion of young people: for example, the Ministry of Justice has advised that a Christchurch study suggested that in that city there were only approximately 200 "casual taggers" and 30-50 "prolific taggers". The adverse effects are therefore that:

8.1 Young people are categorised as potential offenders, notwithstanding that only a small proportion of young people offend and that older people also do so; and

8.2 The restriction extends to limit legitimate, as well as illegitimate, use of paint spraycans. The practical impact of the restriction on legitimate users is lessened by the limitation of the restriction to sale, rather than use or possession, the exception for educational coursework and the fact that it would be possible for people over 18 to buy on behalf of young people. It remains, however, that young people will be curtailed in their use of paint spraycans in the workplace and other legitimate purposes.

9. Against these, the expected positive effect can be understood in four respects:

9.1 Given that many of those currently involved in tagging are aged 17 or under and that spraypaint is believed to be the predominant tagging material, the restriction will inhibit access to needed materials among many current taggers and, with it, will act to reduce the occurrence of tagging.

9.2 Further, and given the age profile of people engaged in tagging, the occurrence of tagging may also be limited more indirectly as the limit on the unsupervised availability of spraypaint to young people diminishes opportunities to start engaging in tagging.[4]

9.3 Moreover, by effectively requiring young people who wish to have access to spraypaint to involve people aged 18 and over, the age restriction can be expected to contribute to a shared sense of responsibility among both young and older people.

9.4 Last, and most widely, and noting that control of tagging and other graffiti is a difficult regulatory problem that must be addressed in a wide variety of ways, the minimum age requirement forms part of a broad and tangible regulatory response to the tagging problem.[5]

10. I note there is some reason to expect that the direct positive effects of the age restriction will be limited. Most widely, it will remain open to young people to use materials or implements other than spraycans and also to obtain spraycans through people aged over 18, including older people engaged in tagging. Further, a similar age limit provision in the Graffiti Control Act 2001 (South Australia) was apparently not effective in addressing graffiti problems.[6]

11. Nonetheless, I consider that the age restriction is a proportionate response to a serious societal problem. For the reasons given, I consider that the age restriction is justifiable in terms of section 5 of the Bill of Rights Act.

### ***Previous report in respect of the Manukau City Council (Control of Graffiti) Bill***

12. As noted, my conclusion in respect of the age restriction differs from the conclusion reported to the House in December 2005 that a similar restriction in clause 7 of the Manukau City Council (Control of Graffiti) Bill was unjustifiable. I note that that clause differed from the present Bill in two respects that I consider decisive:

12.1 The effect of the Manukau City Council (Control of Graffiti) Bill was limited to that geographical area. That limitation is significant in two respects:

- As noted in the report to the House on that Bill, the restriction could, for that reason, be circumvented by buying elsewhere; and
- Young people in the Manukau area were effectively "singled out" and subjected to a restriction that did not apply to young people in other areas.

12.2 The Manukau City Council (Control of Graffiti) Bill did not contain any exception for the sale of spraypaint for use in an educational context. Given that many people aged under 18 are in education or training, this exception significantly lessens the adverse practical effect of the age restriction.

13. For those reasons, I consider that the two provisions are sufficiently distinct that it is possible to come to a different conclusion here.

### **Other issues under the Bill of Rights Act**

14. Two other aspects of the Bill give rise to issues under the Bill of Rights Act. However, these appear to be readily justifiable and so raise no point of inconsistency.

### ***New offence of "graffiti, tagging, defacing etc"***

15. Clause 4 of the Bill inserts a new section 11A of the Summary Offences Act 1981 which makes it an offence to write, draw, paint, spray, or etch on, or otherwise mark, any building, structure, road, tree, property, or other thing without lawful authority or the consent of the occupier or owner or other person in lawful control.
16. The new offence of "graffiti, tagging, defacing etc" falls within the very broad scope of expressive activity that is *prima facie* protected by the right to free expression affirmed by section 14 of the Bill of Rights Act.<sup>[7]</sup> However, the limit created by clause 4 is readily justifiable, as it only criminalizes graffiti or other markings done without lawful authority or the consent of the owner of the property affected. These interests, and the wider societal interests adversely affected by graffiti, warrant the restriction.

### ***Reverse onus on defendant to charge of selling spraycans to minors***

17. Proposed section 14A(4) (clause 5) in the Bill provides a defence to the charge of selling paint spraycans to a person aged under 18 years if the defendant proves that he or she believed on reasonable grounds that the buyer was of or over the age of 18 years. This reverse onus provision requires an accused person to prove his or her defence and, as such,

is *prima facie* inconsistent with the presumption of innocence affirmed by section 25(c) of the Bill of Rights Act.

18. Here, however, this provision is justifiable on the basis that the offence concerns a regulated commercial activity in which individuals choose to participate. In the context of a voluntary and regulated activity, it is reasonable to impose regulatory requirements on participants and, where the matter is within their peculiar knowledge, to require such persons to show that they have complied with those requirements. It is also relevant that the offence and penalty are of an essentially regulatory, rather than serious criminal, character.<sup>[8]</sup>

Yours sincerely

Hon Dr Michael Cullen  
**Attorney-General**

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#### Footnotes

1 *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Manukau City Council (Control of Graffiti) Bill 2005*, AJHR J.4, December 2005, 3-4

2 See, most recently, *R v Hansen* [2007] 3 NZLR 1 (SC) at [70], [123], [203]-[204] and [271].

3 The Ministry of Justice has advised that a study in Christchurch indicated that the "hard core" of frequent taggers were aged 15-17 and that an Auckland City Council database suggests a "peak age" among frequent taggers of 15-16. The Ministry of Justice / Local Government New Zealand *KnowHow Beat Graffiti Guide 06* notes the view of Manukau City Council that "an estimated 95%" of graffiti offenders are aged 12-17 but comments that graffiti "tends to be done by youth from 12-19 years of age". Further, and so far as is relevant, we note that the Anti-Social Behaviour Act 2003 (UK) imposes an age limit of 16, while the Graffiti Control Act 2001 (South Australia) has an age limit of 18.

4 See the explanatory note to the Bill at p 6.

5 See the explanatory note to the Bill at pp 4-5.

6 Report of the Local Government and Environment Committee on the Manukau City Council (Control of Graffiti) Bill (2006), 3.

7 See, for example, *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA): the scope of expression extends "as wide as human thought and imagination".

8 See, for example, *Hansen*, above n , 29 & 74-75; *R v Wholesale Travel Group Inc* [1991] 3 SCR 154 and *A G v Malta* (ECtHR, App 1664/90).