

# Manukau City Council (Control of Graffiti) Bill 2005

2 December 2005

Attorney-General

## LEGAL ADVICE

### CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: MANUKAU CITY COUNCIL (CONTROL OF GRAFFITI) BILL 2005

1. We have considered the Manukau City Council (Control of Graffiti) Bill 2005 ('the "Bill"'), a Local Bill in the name of Hon George Hawkins MP, for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). The Bill was introduced to the House of Representatives on 22 November 2005 and is currently awaiting its first reading. The Ministry understands that the next Members' Day is scheduled for 7 December 2005.
2. We have concluded that the effect of the Bill in prohibiting the sale of spray paint to minors is inconsistent with section 19(1) of the Bill of Rights Act (freedom from discrimination). We have also concluded that the provision in the Bill empowering police to require a person suspected of an offence to supply the name, address and whereabouts of any other person connected in any way with the alleged offence, is inconsistent with section 23(4) of the Bill of Rights Act (the right to refrain from making any statement).
3. These proposals do not appear to be justified in terms of section 5 of the Bill of Rights Act and we recommend that you draw this to the attention of the House of Representatives as required by section 7 of that Act and Standing Order 266. The Crown Law Office has seen this opinion and agrees with our conclusions.
4. We have considered other provisions of the Bill for consistency with section 14 (freedom of expression), section 21 (search and seizure) and section 25(c) (right to be presumed innocent) of the Bill of Rights Act but have found them to be consistent with the rights and freedoms contained in that Act.

## PURPOSE OF THE BILL

5. 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.

## ISSUES OF INCONSISTENCY WITH THE BILL OF RIGHTS

### Section 14: Freedom of Expression

6. Clause 8 of the Bill requires a sign to be displayed in premises selling spray paint stating that it is unlawful to sell cans of spray paint to minors and that evidence of age might be required. We have considered whether clause 8 is inconsistent with section 14 of the Bill of Rights Act which gives everyone the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

7. The term "expression" included in section 14 has been interpreted as encompassing conduct that has an expressive component.<sup>[1]</sup> The Courts in Canada and the United States have held that freedom of expression necessarily entails the right to say nothing or the right not to say certain things.<sup>[2]</sup> Nevertheless, we have concluded that clause 8 is consistent with section 14 of the Bill of Rights Act. Although it requires vendors to make a mandatory factual statement, that statement extends only to a notification of the law rather than an expression of ideas or opinions.
8. Clause 10 of the Bill makes it an offence to mark graffiti without lawful authority. Because graffiti is a form of expression, this could be seen as being *prima facie* inconsistent with section 14 of the Bill of Rights Act. However, we consider the restriction to be justifiable under section 5 because of the social nuisance caused by unlawful graffiti. The purpose of the Bill is not to restrict expression but to minimise a mode of expression that causes unacceptable damage to public and private property.

### **Section 19(1): Freedom from Discrimination**

9. Clause 7 of the Bill makes it an offence to sell spray paint to a minor. The Bill defines a 'minor' as a person who is under the age of 18 years.
10. Section 19(1) of the Bill of Rights Act and section 21(1)(i) of the Human Rights Act 1993 provide 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.
11. 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 be free from discrimination. The prohibition on the sale of cans of spray paint to minors creates a disadvantage to minors wishing to purchase such items and must therefore be justified in terms of section 5 of the Bill of Rights Act.

### *Justifications under Section 5*

12. 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.<sup>[3]</sup>

### **A Significant and Important Objective**

13. 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.

## Rational and Proportionate Connection

14. Clause 7 contributes 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 conclude that there is a rational and proportionate connection between the sale of spray paint to minors and the graffiti problem.
15. On the evidence available, prohibiting the sale of spray paint to minors in Manukau does not have a strong connection to the stated objective of the Bill 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 to this, cans of spray paint are not the only graffiti implements identified in the Bill but they are the only ones subject to restrictions on sale. For example, implements capable of etching glass are also identified but minors would still be able to purchase such implements.
16. 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 cause disadvantage to those minors who are not the intended targets of the Bill and who will be unfairly prevented from purchasing spray paint because of their age. The *Report of the Manukau City Council on Graffiti Control*, produced in 2004, acknowledges that its own legal advice suggests that such restrictions would be found to be in breach of the Bill of Rights Act.<sup>[4]</sup>

## Conclusion

17. 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 Bill cannot be justified under section 5 of the Bill of Rights Act and appears to be inconsistent with that Act. The Ministry recommends that you draw this inconsistency to the attention of the House of Representatives in accordance with section 7 of the Bill of Rights Act.

## Section 21: Search and Seizure

18. Clause 9 of the Bill empowers the Council to issue warrants under section 174 of the Local Government Act 2002 authorising a person to enter a property for the purposes of Part 2 of the Act (sale of spray paint). An authorised person can remain on the premises if he or she reasonably believes cans of spray paint are being sold or have been sold. The authorised person may investigate whether provisions of the Act have been complied with and may take photographs and other recordings.
19. Section 21 of the Bill of Rights Act gives everyone the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise. The Canadian Supreme Court has drawn a distinction between a "search" and an

"inspection" of commercial operations to ensure compliance with the law.<sup>[5]</sup> A lower standard of justification will apply to inspections and it might not even be necessary to obtain a search warrant. A warrant would be required where the inspector suspects an offence has been, or is being, committed.

20. Clause 9 of the Bill includes a requirement to obtain a search warrant. Arguably, warrants related to the investigation of an offence should be issued by a judicial officer; however, warrants issued under this provision will be subject to normal judicial scrutiny through judicial review. We also note that the relevant offences are all infringement offences. For these reasons, we consider that clause 9 is consistent with the Bill of Rights Act.

### **Section 23(4): the right to refrain from making any statement**

21. 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.
22. 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 raises a prima facie issue of inconsistency under this section.
23. 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*,<sup>[6]</sup> 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.*

24. 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. The provision in clause 15 making it an offence to knowingly misstate information is consistent with the Bill of Rights Act. 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 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?

25. 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 proportionate response?

26. We 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. We also note that 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.<sup>[7]</sup> Clause 15, therefore, impacts on the high value that society places on the right to refrain from making a statement if arrested or detained.
27. Given that offences under the Act are regulatory in nature and can be dealt with by infringement notices or on summary conviction, we have formed the view 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.
28. In forming this view, we 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 section 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.
29. We 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. We do not have information available to us 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)*

30. 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.

## Section 25(c): the Right to be Presumed Innocent

31. Clause 11(1)(b) of the Bill makes it an offence to carry a prescribed class of graffiti implement without lawful excuse. The prescribed class includes implements capable of spraying paint, making a mark wider than 15mm or etching glass.
32. Section 25(c) of the Bill of Rights Act gives everyone who is charged with an offence, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.
33. Statutory provisions which require the accused to rebut a particular fact, or provide an excuse, reverse the onus of proof and are prima facie inconsistent with the presumption of innocence in section 25(c) of the Bill of Rights Act. Clause 11(1)(b) creates a reverse onus offence because it requires the defendant to prove that he or she had a lawful reason for an otherwise unlawful act. Offence provisions that depart from the presumption against innocence need to be justified under section 5 of the Bill of Rights Act.

### *Justifications under Section 5*

34. A number of factors need to be considered in determining whether a departure from section 25(c) is justified under section 5:
  - a. the nature and context of the conduct to be regulated;
  - b. the penalty level;
  - c. the reasons why the defendants should provide evidence or prove on the balance of probabilities that they are not at fault; and
  - d. the ability of the defendant to exonerate themselves.
35. Where the purpose of the offence provision is to protect the public from the potentially negative consequences of otherwise lawful behaviour, rather than the moral culpability of the offender, this objective may justify a reversal of the standard of proof.<sup>[8]</sup> In this case, while one purpose of the provision is to punish the offender, the offence is regulatory rather than "truly criminal" in nature, and relates primarily to preventing social harm. A reversal of the burden of proof will also be less of a concern where the penalty is relatively low (in this case up to \$1500) and will therefore have a less significant impact on the accused.
36. Reverse onus offences can also be justified where the offence turns on a particular matter that is *peculiarly* within the knowledge of the defendant. The purpose for which an individual might possess spray paint and other graffiti implements is something which is peculiarly within their knowledge. There are a wide variety of lawful purposes and it should be relatively straight forward for an alleged offender to produce evidence in support of their case. Conversely, it would be difficult for the prosecution to prove beyond reasonable doubt that they did not possess such an item for a legitimate purpose.
37. The Ministry considers that the prohibition on carrying cans of spray paint can be justified under section 5 and therefore appears to be consistent with the Bill of Rights Act.

## CONCLUSION

38. We have concluded that clause 7 of the Manukau City Council (Control of Graffiti) Bill 2005 appears to be inconsistent with section 19(1) of the Bill of Rights Act. We have also

concluded that clause 15 of the Bill appears to be inconsistent with section 23(4) of the Bill of Rights Act. These inconsistencies do not appear to be justifiable in terms of section 5 of that Act.

39. We recommend that, as soon as practicable, you bring the Bill to the attention of the House of Representatives, pursuant to section 7 of the Bill of Rights Act and Standing Order 266. We attach a draft section 7 report for your consideration.

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## Footnotes

1 See, for example, the decision of the Supreme Court of Canada in *Irwin Toy Ltd v Attorney-General (Quebec)* [1989] 1 SCR 927, 968.

2 *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

3 In applying section 5, the Ministry of Justice has regarded to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754.

4 *Report of the Report of Manukau City Council On Graffiti Control* (August 2004), 8-9.

5 *R v Jarvis* 219 DLR (4th) 233

6 [1990] 2 SCR 151, 179-180.

7 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).

8 *R v Wholesale Travel Group* (1992) 84 DLR (4th); 213.

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