



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Manukau City Council (Control
of Street Prostitution) 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*

Manukau City Council (Control of Street Prostitution) Bill 2005

I have considered the Manukau City Council (Control of Street Prostitution) Bill 2005 (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that the effect of clause 12 of the Bill in requiring alleged offenders to make a statement to police appears to be inconsistent with section 23(4) of the Bill of Rights Act, and does not appear to be justified in terms of section 5 of the Bill of Rights 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 Bill provides for local control over street prostitution in Manukau City, by prohibiting soliciting and associated conduct in public places, in order to control various forms of social nuisance. The Bill makes it an offence to solicit for prostitution in a public place; applies to both prostitutes and their clients; creates new infringement offences; and provides the police with powers to require information to be supplied and to arrest suspected offenders.

Inconsistency with the Bill of Rights Act

The Bill gives rise to an inconsistency with section 23(4) of the Bill of Rights Act, which 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." This section 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.

The inconsistency arises because clause 12 of the Bill (*Police may require certain information*) provides that where a police officer believes on reasonable grounds that a person is committing or has committed an offence under the Bill, the police officer may direct that person to give "to the extent known to that person, the name and address and whereabouts of any other person connected in any way with the alleged offence." The clause creates an offence of intentionally refusing to give information when directed to do so.

In considering this issue I have been influenced by case law of the Supreme Court of Canada, which outlines the high degree of protection that the law affords

to the right to refrain from making a statement when arrested or detained. In *R v Hebert*¹, 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 12 appears to create an implicit power to detain a person suspected of an offence for the purposes of questioning them about that offence. 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 *prima facie* inconsistent with section 23(4) of the Bill of Rights Act.

I have therefore gone on to consider whether the *prima facie* inconsistency with section 23(4) can be justified under section 5 of the Bill of Rights Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and the objective.

Is this a justified limitation under section 5?

In our view, the Bill aims to control soliciting and other related conduct in public so as to reduce the interference of these activities on other individuals' use of public places and to reduce social nuisance caused by street soliciting. The Bill creates regulatory offences to achieve this objective. The objective of clause 12 appears to be to assist the control of soliciting and related criminal offending by enabling police to detect persons involved in committing offences under the Bill. This objective could be seen as a significant and important objective.

¹ [1990] 2 SCR 151, 179-180.

Turning to the issue of proportionality, 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. I also note that the requirement in clause 12 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.² This clause, 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 have formed the view that a requirement to compel a suspect to provide information about their own alleged offending is not a proportionate means of achieving the policy objective outlined above.

In forming this view, I note that protections as to the use of answers given in response 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 12 of the Bill contains no such protections. In addition, the penalty associated with refusing to provide this information (a mandatory \$5,000 fine) makes the power particularly coercive.

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 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

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, given the inevitable consequence of implicitly acknowledging involvement in the offending. Although it can be argued that the clause has a significant and important objective (controlling soliciting and

² 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).

related conduct by enabling police to detect persons involved in committing offences under the Bill), I do not consider that the connection between that objective and the restriction on the right in section 23(4) can be described as rational and proportionate, given the availability of other means to achieve this objective.

I conclude that clause 12 of the Manukau City Council (Control of Street Prostitution) Bill 2005, in requiring persons who are detained by police to make a statement, appears to be inconsistent with section 23(4) of the Bill of Rights Act, and does not appear to be justified in terms of section 5 of that Act.



Hon David Parker
Attorney-General