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ASSUMPTIONS OR ACCURATE JUSTIFICATIONS? A CRITICAL ANALYSIS OF THE SELECT COMMITTEE REPORT ON THE MANUKAU CITY COUNCIL (REGULATION OF PROSTITUTION IN SPECIFIED PLACES) BILL 2010

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Abstract

In 2010 the then Manukau City Council proposed a local Bill to Parliament, the Manukau City Council (Regulation of Prostitution in Specified Places) Bill. This Bill targeted the perceived negative consequences of street-based prostitution that existed within Manukau City. The Bill authorised the Manukau City Council to make bylaws that would specify certain places in the district where street-soliciting of prostitution could not occur. The Bill failed at its Second Reading, following a report by the Local Government and Environment Select Committee recommending that it not be passed. The three main justifications given by the Select Committee to this result are discussed in this paper and are determined as to whether they were accurate and appropriate, or if they were rather mere assumptions. These justifications are that existent laws provided a sufficient solution, the Bill would be an implicit amendment to the Prostitution Reform Act 2003, and that the Bill would face enforcement problems if enacted. This paper finds that while the majority of the justifications given by the Select Committee were accurate, this did not stand true for all their reasoning. Ultimately it is argued that greater scrutiny must be given to Select Committee reports.

Keywords

Street-based prostitution, Select Committee, territorial authorities, bylaws, implied repeal.

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I Introduction

Prostitution in New Zealand was decriminalised in 2003 by the Prostitution Reform Act.[1] While many of the negative consequences from prostitution were resolved from the enactment of this Act, arguably a number still continued to exist throughout the country. One of these problems was with regards to the issue of street-based prostitution in Manukau City, Auckland, and the negative effects that were perceived to be a result from it. Concern regarding this issue led the then Manukau City Council to take a number of actions to attempt to remedy their problems. In 2010 the Manukau City Council proposed a local Bill, the Manukau City Council (Regulation of Specified Places) Bill (the Specified Places Bill). This Bill aimed to prohibit street-based prostitution in specified public places in Manukau City.[2] The Bill failed at its Second Reading,[3] following a report by the Local Government and Environment Select Committee that recommended that the Bill not be passed.[4] This paper will consider these justifications communicated in the Select Committee's report.

This paper will first give a brief background on the issue of prostitution in Manukau City and describe the specific consequences of street-based prostitution that led to the introduction of the Bill. It will be argued that these factors may have been assumptions, rather than accurate justifications, and therefore may have not been appropriate recommendations to make in light of the Specified Places Bill. It will then be argued that greater scrutiny must be applied to the justifications put forward by the Select Committee, rather than taking them for face value.

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1 Prostitution Reform Act 2003.

2 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (explanatory note) at 1.

3 (25 February 2015) 703 NZPD 1923.

4 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 2.

The three recommendations made by the Select Committee that will be examined in this paper are:

- The Specified Places Bill was unnecessary as existing laws could be utilised to regulate the problems from street-based prostitution.[5]
- The Specified Places Bill should not be passed as it may change the legal meaning of the Prostitution Reform Act (and, while not expressly stated, the Bill may create inconsistency between a national and local law).[6]
- The Specified Places Bill may not be effective due to problems regarding the enforcement of bylaws.[7]

It will then be concluded that the Select Committee made a number of assumptions in regards to the recommendations they proposed. While most of their arguments were based on sound reasoning, not all of the aspects of their assumptions were true, suggesting that some of the Select Committee's recommendations were not appropriate in light of the Specified Places Bill.

II Background and Context

New Zealand became the first country in the world to fully decriminalise prostitution in 2003, with the passing of the Prostitution Reform Act 2003. This included the decriminalisation of street-based prostitution.[8] Street-based prostitution specifically refers to where prostitutes solicit their trade outside of brothels or 'indoor' workplaces, typically

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5 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 3.

6 At 6.

7 At 5.

8 Ministry of Justice *Review of Street-Based Prostitution in Manukau City* (April 2009) at 3.

in public places or 'the streets'.[9] Manukau City residents have described the consequences of street-based prostitution as creating a nuisance.[10] Issues of street-based prostitution encouraging drug use, criminal and gang behaviour have been expressed, as well as concerns over excessive noise, damaging of nearby properties and increased littering in concerned areas.[11] Further, the problem of street-based prostitution has also been described as a result of its presence and the moral objections against it.[12] There is a perceived undesirable and negative impact on the reputation of the area, potentially extending as far as to affect property values.[13] However, the extent to which prostitution can be attributed as being the sole or primary factor in causing these issues is debated. It has been argued that street-based prostitution is only one factor, with others such as the frequency of liquor stores and existent gang culture contributing to the anti-social behaviour in these areas.[14] It has been further argued that the negative consequences of prostitution no longer prove to be a problem since the decriminalisation of prostitution in 2003.[15]

In a bid to resolve these perceived problems, the Council took a number of actions between 2003 and 2010. Closed circuit television cameras were introduced into several areas and the Council had used environmental design guidelines with urban development in the city.[16] While the installation of these cameras was intended to discourage undesirable activity, in some cases this was not achieved, as street-based prostitutes often viewed these

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9 Ministry of Justice *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (May 2008) at 117.

10 (7 December 2005) 628 NZPD 651.

11 (7 December 2005) 628 NZPD 651.

12 (7 December 2005) 628 NZPD 651.

13 Ministry of Justice *Review of Street-Based Prostitution in Manukau City*, above n 8, at 9.

14 At 9.

15 Ministry of Justice *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003*, above n 9, at 29.

16 (7 December 2005) 628 NZPD 651.

cameras as protections of their safety and security whilst soliciting.[17] Similarly the environmental design guidelines did not succeed in eliminating the targeted problems.[18] As a whole these attempts were largely unsuccessful and did not resolve the problems of street-based prostitution in Manukau City.

In 2005 the Manukau City Council (Control of Street Prostitution) Bill was introduced to Parliament, making it an offence to solicit for prostitution in a public place in Manukau City.[19] This Bill differed from the pre-Prostitution Reform Act offence as it made the prescribed offence applicable to both prostitutes and their clients.[20] The Bill held that any person who offended in this manner was liable to a fine of $10,000.[21] Further, the Bill provided police with the power to request and obtain information from potential offenders and to request a person to provide the details of a person reasonably believed to have committed an offence under the Bill. [22] The 2005 Bill passed its First Reading,[23] however following a report by the Local Government and Environment Committee, recommending the Bill not be passed, the Bill failed at its Second Reading.[24] The Specified Places Bill was in essence a second attempt to regulate street-based prostitution as was desired by the 2005 Bill.

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17 (7 December 2005) 628 NZPD 651.

18 (7 December 2005) 628 NZPD 651.

19 Manukau City Council (Control of Street Prostitution) Bill 2005 (6-1) (explanatory note) at 1.

20 Manukau City Council (Control of Street Prostitution) Bill 2005 (6-1), cl 6.

21 Clause 6.

22 Clause 12.

23 (7 December 2005) 628 NZPD 651.

24 (11 October 2006) 634 NZPD 5653.

The Specified Places Bill was introduced to Parliament in 2010.[25] The Bill was taken over by the Auckland Council after its creation in 2010.[26] The aim of this Bill was to authorise the then Manukau City Council to make bylaws that would specify certain places in the district where the soliciting or business of prostitution could not occur.[27] The Bill was limited in the power it gave to the Council. Under the Bill, the Council would not have the authority to prohibit street-based prostitution in all public areas within Manukau City, or regulate the location of brothels within the area.[28] The First Reading of the Bill took place on the 8th September 2010, where it passed by 82 votes to 36 votes.[29] At the Second Reading of the Bill, on the 25th February 2015, the Bill was voted down by 11 votes to 109 votes.[30] This was following the Select Committee's report on the 5th December 2014, recommending that the Bill not be passed.[31] The Select Committee in their report stated a number of reasons why the Bill should not be passed.[32] Three of these main reasons were that the Bill was unnecessary as existing laws were sufficient to address the problem, the Bill may change the meaning of the Prostitution Reform Act, and that there were

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25 (8 September 2010) 666 NZPD 13792.

26 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (interim select committee report) at 2.

27 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (explanatory note) at 1.

28 At 1.

29 (8 September 2010) 666 NZPD 13792.

30 (25 February 2015) 703 NZPD 1923.

31 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 2. An interim report by the Select Committee was published on 10 February 2012, see Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (interim select committee report), which discussed the issues of the disestablishment of the Manukau City Council and the subsequent replacement by the Auckland Council. This interim report also took note of the Auckland Council's proposed amendments on the Specified Places Bill.

32 At 1.

enforcement problems that limited its effectiveness. These three main justifications given by the Select Committee will now be discussed in turn.

III The Use of Existing Bylaws

One of the Select Committee's justifications as to why the Specified Places Bill should not be passed was that the Bill was unnecessary in solving the problems of street-based prostitution that the Manukau City Council faced.[33] Instead, the Select Committee stated that the Manukau City Council could regulate the problem of street-based prostitution through the use of existing bylaws.[34] The questions of whether existing bylaws appropriately cover the issues of nuisance complained of by the council, and the validity of such bylaws if they were made, arise in light of this recommendation. This section of the paper will examine this recommendation given by the Select Committee, to determine whether this was an accurate justification or rather a mere assumption. Ultimately, while the Committee was correct in stating that a bylaw could be made to address the problems complained of, there was an issue of uncertainty regarding the validity of this bylaw.

A The Select Committee's Reasoning

In their report, the Local Government and Environment Select Committee stated that the Specified Places Bill was not necessary as the Auckland Council could regulate street-based prostitution through existing bylaw-making powers.[35] The Select Committee said that such powers were available under the Local Government Act 2002.[36] It can be inferred from the text of the report that s 145, regarding the purposes for which a territorial authority

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33 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 3.

34 At 3.

35 At 3.

36 At 3.

can make a bylaw, was being referred to here.[37] The Committee stated that under this Act, such a bylaw could be introduced which was not inconsistent with the New Zealand Bill of Rights Act 1990 or the Prostitution Reform Act 2003.[38]

To support their recommendation on the use of bylaws the Select Committee referred to two examples of similar bylaws that attempted to regulate similar situations.[39] First, the Select Committee gave the example of the Rodney District Council's Brothels and Commercial Sex Premises Bylaw 1998. This bylaw regulates the actions of street-based sex workers by defining them to be 'hawkers' under the Trading in Public Places Bylaw.[40] Secondly, the Committee gave the example of the Hamilton City Council's Prostitution Bylaw 2009 that prohibits soliciting in public places in that Council's area.[41] Further, the Committee stated that bylaws already in existence at that time could be used to address a number of problems associated with street-based prostitution.[42] These were namely concerns regarding noise, littering and kerb-crawling (slow-moving vehicles in areas where street-based prostitutes solicit their trade).[43]

B The Issue of Existing Bylaws

To evaluate the adequacy of this recommendation made by the Select Committee, it will first be discussed how the problems complained of by the Manukau City Council can be appropriately addressed by a bylaw made under s 145 of the Local Government Act.

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37 Local Government Act 2002, s 145.

38 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 3.

39 At 4.

40 At 4.

41 At 4.

42 At 3.

43 At 3.

Secondly, the issue of the validity of such a bylaw will be discussed, concluding that the untested nature of the bylaw's validity does not necessarily defeat this recommendation made by the Select Committee.

The appropriateness of the Select Committee's recommendation can be ascertained by determining whether a bylaw regulating street-based prostitution falls within the scope of s 145 of the Local Government Act 2002. The specific bylaw-making power that the Select Committee outlined in their report lies in the context of the general bylaw-making powers that are held by all local authorities. Within New Zealand's centralised and unitary system of government, all law-making power is essentially held by the central government.[44] However, local government also plays a significant role in governing their respective localities. The authority that enables local government bodies to exercise these powers are derived from Parliament, under the Local Government Act 2002.[45] The Local Government Act vests significant powers to local authorities to enable them to make decisions concerning local issues.[46] One of these is the powers to create bylaws.[47] Bylaws are a type of subordinate legislation that gives local authorities the powers to address issues in a way that is appropriate for their communities, within their districts or regions.[48] The creation of bylaws by local government bodies must adhere to the relevant regulations that are set out within the Local Government Act.[49] Under s 145 of the Act, local authorities can make bylaws for the following purposes:[50]

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44 Elaine Mossman and Pat Mayhew *Central Government Aims and Local Government Responses: The Prostitution Reform Act 2003* (Ministry of Justice, October 2007) at 5.

45 At 5.

46 At 6.

47 Local Government Act 2002, s 145.

48 Dean Knight "Power to Make Bylaws" [2005] NZLJ 165 at 165.

49 Local Government Act 2002, s 145.

50 Section 145.

(a) protecting the public from nuisance;[51]

(b) protecting, promoting, and maintaining public health and safety;[52]

(c) minimising the potential for offensive behaviour in public places.[53]

In light of the power of local authorities to make bylaws, the Select Committee's recommendation was legally correct. Local authorities do have the power under s 145 of the Act to make bylaws regulating the soliciting of sex in public places. Such a bylaw would be justifiable under s 145(a), (b) and (c) of the Act, as the bylaw is specifically targeting the nuisance caused by the presence of street-based prostitution,[54] protecting the health and safety of local people,[55] and aiming to curb offensive behaviour.[56] Therefore the Committee's recommendation here was in line with the reasoning that local authorities, such as the Auckland Council, already have the power to address problems such as these. However there still remains the large question of the validity of such a bylaw. This indicates that the Select Committee did not consider the legal repercussions that may arise from their recommendation.

C Validity of the Bylaw

A bylaw may be challenged and invalidated by the courts. The four main ways in which a bylaw may be challenged is if the bylaw is:[57]

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51 Local Government Act, s 145(a).

52 Section 145(b).

53 Section 145(c).

54 Section 145(a).

55 Section 145(b).

56 Section 145(c).

57 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (Oxford University Press, Melbourne, 2004) as cited in Mossman and Mayhew, above n 45, at 15.

(a) contrary to the New Zealand Bill of Rights Act 1990;[58]

(b) repugnant or inconsistent with other laws;[59]

(c) unreasonable in regard to the scope of the bylaw and the impact it has on the community;[60] and

(d) ultra vires.[61]

It is uncertain whether a bylaw created by the Auckland Council (or the then Manukau City Council), on the Select Committee's recommendation, would be challengeable for its validity. There are three likely definitions of uncertainty that may exist in the Select Committee's report. The first definition is that of a pure uncertainty, based on the argument that the Select Committee did not state whether a bylaw made under their recommendation would have been invalid or not. This argument of pure uncertainty does not give much strength to the overall issue of uncertainty, however undoubtedly this does exist here. The second definition of uncertainty is based on the fact that the Select Committee did not elaborate on whether the bylaw would or would not be invalid. This concerns the issue of uncertainty regarding transparency in the Select Committee's reasoning. The final definition comes from the Select Committee's reasoning and analysis in substance being wrong. All three of these uncertainties existed in the Select Committee's report. This means that one of the major recommendations that the Select Committee made in their report was untested and they were recommending something with an unknown result. Therefore to some extent the recommendation here was ultimately an assumption rather than a carefully reasoned justification.

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58 Local Government Act, s 155(3).

59 Bylaws Act 1910, s 14.

60 Section 17.

61 Section 17; the ground of the bylaw being ultra vires also exists however this paper will not discuss this point further as this was not highlighted in the Select Committee report as being a major issue.

The idea of a bylaw created under the Specified Places Bill being contrary to the New Zealand Bill of Rights Act 1990 was highlighted in the Select Committee's report.[62] This is one ground under which the validity of the bylaw may be challenged, and was raised by the Manukau City Council in their submission to the Specified Places Bill.[63] The Select Committee report defended this by saying that it was possible for the council to create a bylaw under the existing Local Government Act that would not be inconsistent with the New Zealand Bill of Rights Act.[64] However no information was provided as to how this would be possible. This is evidence of uncertainty regarding a lack of transparency in the Select Committee's reasoning.

There is also an argument that has been raised in both the Select Committee report on the 2005 Bill and the Specified Places Bill that the bylaw may be invalid as it is repugnant to another Act.[65] Here this would be with the Prostitution Reform Act 2003. The bylaw created under s 145 of the Local Government Act could be inconsistent with the Prostitution Reform Act as it regulates the presence of street-based prostitution. The Prostitution Reform Act is silent on the issue of street-based prostitution. Therefore as there are no stipulations regulating or prohibiting street-based prostitution,[66] it must be asked whether this silence in the Prostitution Reform Act would create a repugnancy. The silence in the Prostitution Reform Act and the clause in the Specified Places Bill does not give rise to a direct inconsistency, instead this is an implicit inconsistency. It is unknown whether the minds of the drafters of the Prostitution Reform Act considered the idea of a strict non-regulation of street-based prostitution. Therefore while it may be discussed as to the

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62 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 3.

63 Manukau City Council "Submissions of the Manukau City Council on the Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 to the Local Government and Environment Select Committee" at 15.

64 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 3.

65 At 6; Manukau City Council (Control of Street Prostitution) Bill 2005 (6-1) (select committee report) at 2.

66 Ministry of Justice *Review of Street-Based Prostitution in Manukau City*, above n 8, at 3.

potential ways in which a bylaw may be held to be inconsistent with the Prostitution Reform Act, the final conclusion to this can only be determined by the Court. However, the discussion here does reflect that there may be a live issue of challenging the bylaw as being contrary to the Prostitution Reform Act. The lack of discussion and the express dismissal of this issue by the Select Committee suggests the uncertainty of transparency exists again, as well as uncertainty due to a substantially incorrect analysis.

Further, this bylaw may be challenged as being invalid due to it being unreasonable in its scope. This idea was briefly highlighted under the Select Committee report, regarding the reach of the Bill itself.[67] Here the Committee communicated concern that the Bill would cover the whole of the Auckland area.[68] The Committee criticised the Bill in this respect, saying that it may be inappropriate as the Bill would attempt to address an issue that was not unique to the area it covered.[69] Therefore if the Auckland Council took up the Committee's recommendation and did create the Bill in bylaw form there may be a question over its reach being too broad and being challengeable as invalid. As the Select Committee did not further discuss this issue, this illustrates uncertainty of transparency in their reasoning.

D Conclusion on this Recommendation

The ultimate decision as to whether a bylaw made on the Select Committee's recommendation would be invalid or not rests with the Courts. The issue of the recommendation being 'untested' and uncertain still remains. The fact that the bylaw would be 'untested' in terms of its validity is not necessarily a barrier to its recommendation. This recommendation can be appropriate if it can be proved that the Select Committee did make

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67 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 2.

68 At 2.

69 At 2.

a good prediction. Here the recommendation to attempt to regulate street-based prostitution under a bylaw was more appropriate than having the Specified Places Bill passed. If the Bill were passed, then the courts would be unlikely to inquire into the validity of the Bill, assuming that Parliament's intentions were set and would be less inclined to alter them.[70] However if the Manukau City Council were to regulate these problems under a bylaw, despite its untested validity, a greater check on the local authorities' powers will be provided for.[71] Further it is likely that the courts will allow local authorities to regulate street-based prostitution, as the Council here aimed to do, as long as the bylaw is carefully constructed and justified.[72] This increased scrutiny from the Courts' ability to check on bylaws is appropriate, especially relating to the issue of regulating street-based prostitution. This check by the Courts is a mechanism to ensure that local authority actions do not extend too broadly.

The analysis in this paper suggests that uncertainty still exists regarding the validity of a bylaw that the Auckland Council would make based on the Select Committee's recommendation. However, the untested nature of this bylaw does not diminish the appropriateness of this recommendation being posed here. While the uncertainty does exist, the validity or invalidity of the bylaw will not hinder the council, but rather only stop them from acting unreasonably. Ultimately the Select Committee's reasoning here may be criticised for being an assumption based on an untested proposition. Despite this being partially resolved by the fact that this recommendation was based on sound reasoning, the issues discussed here warrant justification for greater scrutiny to be given to such Select Committee recommendations and reports.

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70 Dean Knight "Pimping Proscriptions" (29 January 2011) LAWS179 Elephants and the Law <www.laws179.co.nz>.

71 Knight, above n 70.

72 Knight, above n 70.

IV Implied Repeal of the Prostitution Reform Act 2003

The Select Committee also recommended that the Specified Places Bill should not be passed as it could change the meaning of the Prostitution Reform Act 2003.[73] This justification will be examined to consider whether it was accurate in light of the Bill, or whether it was a mere assumption. It is argued here that the idea of a changed legal meaning is the same as an implied repeal of the Prostitution Reform Act. Therefore the idea of implied repeals and to what extent the Specified Places Bill would implicitly repeal the Prostitution Reform Act will be discussed. This analysis will conclude that while the Bill may repeal the Act, this repeal would not undermine the policy of the Prostitution Reform Act. Further, the effect of this repeal would change depending on the view of implied repeal that is taken.

A The Select Committee's Justification

The Select Committee, in their report on the Specified Places Bill, stated their concern regarding the impact that the Bill would have on the Prostitution Reform Act.[74] The Committee said that while the Bill would not textually amend or repeal the Act, it could have changed its meaning.[75] This change was in terms of the legal meaning of the Act as it would apply in a particular locality.[76] The specific way in which this change would have occurred was not stated and the issue was not described any further in the report. Therefore this justification does not provide much substance as to the reasoning behind it. However the brief comments that were made by the Committee suggest that they were confident to

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73 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 6.

74 At 5.

75 At 6.

76 At 6.

conclude that the relationship between the Specified Places Bill and the Act was not one of implied repeal.[77]

A similar justification was made by the Select Committee in their report on the 2005 Bill.[78] However there the Select Committee expressly stated their concerns of the 2005 Bill being an implicit amendment to the Prostitution Reform Act.[79] This was as the 2005 Bill sought to re-criminalise the soliciting of street-based prostitution within Manukau City, whereas the Prostitution Reform Act in 2003 decriminalised soliciting throughout New Zealand.[80] In light of this, the express negating of the Specified Places Bill repealing the Prostitution Reform Act is perplexing, as both bills aimed to target similar situations, although in a different way. On this note it could be expected that both Bills would give rise to similar concerns of repeal. Therefore as the Select Committee expressly dismissed any concerns of implied repeal with the Specified Places Bill, the question arises to whether it truly does not pose any issues of implied repeal.

B The Legal Operation of Implied Repeal

Within the principle of parliamentary sovereignty is the common law principle of implied repeal.[81] This is where a statutory provision impliedly amends an earlier provision, despite the fact that it does not expressly do so.[82] This doctrine states that if there is inconsistency or repugnancy between two pieces of legislation, the law that was passed later in time

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77 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 6.

78 Manukau City Council (Control of Street Prostitution) Bill 2005 (6-1) (select committee report) at 2.

79 At 2.

80 At 3.

81 *Laws of New Zealand* Constitutional Law: Parliament (online ed) at [76].

82 John Burrows and Ross Carter *Statute Law in New Zealand* (4th ed, Lexis Nexis, Wellington, 2009) at 453.

prevails over the other.[83] When this situation occurs, however, the Courts have more recently leaned towards the idea that Parliament intends for its enactments to operate within the context of one another.[84] Therefore where two statutes are inconsistent it must be asked whether they are fundamentally inconsistent with each other, and if they are not, the statutes are to be read together and reconciled as far as possible.[85] This therefore amends or repeals the earlier Act only to the extent of its inconsistency.[86] Reconciliation must be attempted especially for those situations where Parliament indicated that its provisions were compatible.[87] Where this is impossible however, the effect of an implied repeal or amendment is held as the only solution.[88] While of an entirely different nature to express repeal, implied repeal results in the same effect as the former.[89] Courts have become increasingly more reluctant to find implicit amendments, as modern drafting means that repeals are conducted usually in express terms.[90]

Further is the idea of implied repeal pro tanto.[91] This is where a particular provision of a general statute is inconsistent with a specific provision that is subsequently made in respect

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83 *Laws of New Zealand* Constitutional Law: Parliament, above n 81, at [76].

84 At [76].

85 At [76].

86 At [76].

87 *Laws of New Zealand* Statutes: Passing, Commencement, Amendment, and Cessation (online ed) at [69].

88 Burrows and Carter, above n 82, at 453.

89 *Laws of New Zealand* Statutes: Passing, Commencement, Amendment, and Cessation, above n 87, at [69].

90 At [69]; there is a further approach to implied repeal, differing from the orthodox approach that is described here. This approach was described by Elias J in the case of *R v Pora* [2001] 2 NZLR 37 (CA) at [42]. However this approach to implied repeal will not be considered as the statutes here do not meet the requirement stated in that case, of being constitutional statutes.

91 *Laws of New Zealand* Statutes: Passing, Commencement, Amendment, and Cessation, above n 87, at [71].

of that particular situation.[92] Here the general statute is overridden by the subsequent particular statute.[93] The specific situation is thereby exempt from the operation of the general statute.[94] This idea most frequently arises where a local or private Act is subsequently passed after a public Act, both dealing with the same subject.[95] In the case where these Acts can be read consistently, the courts will strive to do so, or aim to limit the exclusion of the public Act to the least extent possible.[96] However where no reconciliation can be achieved, and effect cannot be given to both Acts at the same time, the public Act must prevail.[97]

C Implied Repeal and the 2010 Bill

The inconsistency between the Specified Places Bill and the Prostitution Reform Act regards the Bill's provision concerning street-based prostitution.[98] The Select Committee did not specifically state where the issue of the Bill changing the meaning of the Prostitution Reform Act arose, however the following inference is likely to capture the inconsistency that they discussed. This is further supported by the 2005 Bill's discussion on inconsistency which concerned a similar inconsistency.[99] While the Specified Places Bill aimed to regulate and prohibit street-based prostitution in certain areas, the Prostitution Reform Act was entirely silent on this issue. This inconsistency can be categorised as an

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92 *Laws of New Zealand* Statutes: Passing, Commencement, Amendment, and Cessation, above n 87, at [71].

93 At [71].

94 At [71].

95 At [71].

96 At [71].

97 At [71].

98 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1), cl 5.

99 Manukau City Council (Control of Street Prostitution) Bill 2005 (6-1) (select committee report) at 2.

implied repeal pro tanto.[100] The question here is whether these two inconsistent provisions can be read consistently.

There is difficulty here in reading the Prostitution Reform Act and the Specified Places Bill consistently. This is because to give effect to the Prostitution Reform Act, the actions of street-based prostitution cannot be prohibited or regulated, as there is no provision to do so in the Act. However the regulation and prohibition of street-based prostitution in certain areas is exactly what the Specified Places Bill aimed to do. Conversely, to give effect to the Bill would mean that the Prostitution Reform Act would not be able to stand in regards to its silence on street-based prostitution. In this case it would be likely that the Courts would rather limit the exclusion of the Prostitution Reform Act to the least extent, therefore limiting its application regarding street-based prostitution only to the Auckland region.[101] The effect of this ultimately depends on whether it is a reconciliation or a remaining inconsistency. If this were to be understood to be an inconsistency, the Prostitution Reform Act must have prevailed over the Specified Places Bill.

It is believed that the reading of the Prostitution Reform Act and the Bill can be understood to be a reconciliation. This is mainly because the silence in the Prostitution Reform Act, on the regulation of street-based prostitution, does not necessarily suggest that Parliament did not want street-based prostitution regulated. There is a strong argument to say that if Parliament did intend to prohibit regulation, it would have expressly provided for that in the Act. This silence therefore provides a way in which the Prostitution Reform Act and the Specified Places Bill can be reconciled and read consistently.

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100 This interpretation comes from the fact that here the Prostitution Reform Act 2003 was a public Act and the Specified Places Bill, if enacted, would be a local Act.

101 This would employ the application of the pro tanto implied repeal and reading the statutes consistently together.

D Evaluation of the Select Committee's Justification

The likely conclusion from applying the law of implied repeals to the inconsistency between the Prostitution Reform Act and the Specified Places Bill is reconciliation. Also any inconsistency that does occur is only an issue if the change caused by the Specified Places Bill to the Prostitution Reform Act is perceived to be negative. In light of this inconsistency between the Prostitution Reform Act and the Bill, this is not necessarily an issue of concern if this implied repeal is justified.

The implied repeal of the Prostitution Reform Act is only problematic if it undermines the policy of the Act. Here there are arguments both ways as to whether the Bill would undermine the policy of the Prostitution Reform Act if it were enacted. On one hand the policy and purpose of the Act was to protect and provide safe working environments for sex workers and their clients.[102] The absence of a provision of street-based prostitution was made to remove any underground street-soliciting and the subsequent harms that sex workers would face, as well as to provide for better protection of workers by authorities.[103] The Bill, by prohibiting street-based soliciting within certain areas in Auckland may, however, create underground illegal environments fostering unsafe working environments for sex workers.[104] In this way the Bill would be directly in conflict with the Prostitution Reform Act's policy. However, there lies the argument that this prohibition would not be for the whole of the Auckland region, and would not give rise to an underground market.[105] The safety of sex workers would not be jeopardised in this way.[106] This interpretation would not see the Bill undermine the policy of the Act. This latter argument is stronger, as while there would be a prohibition, this would be limited to certain areas in the Auckland region. This further supports the argument that, despite the Bill changing the meaning of

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102 Ministry of Justice *Review of Street-Based Prostitution in Manukau City*, above n 8, at 19.

103 At 13.

104 At 19.

105 Manukau City Council, above n 63, at 9.

106 At 9.

the Prostitution Reform Act, this is not problematic. The Specified Places Bill does not centrally undermine the Act. The policy of the Act remains unharmed and takes away from the problem that the Bill imposes.

Leaving the issue of the policy of the Prostitution Reform Act aside, the Select Committee needed to be clearer in discussing this justification of implied repeal. In this sense the Select Committee's reasoning was not sufficient. For a more convincing argument the Select Committee needed to comment on whether there actually was an implied repeal of the Prostitution Reform Act, what this repeal was, and how this would apply if the Bill were enacted. The Select Committee can be criticised here for their silence on this. The lack of communication of the Select Committee's reasoning here made for a poor justification.

E Inconsistency between a National and Local Law

One issue that was considered in the Select Committee's report on the 2005 Bill was that if the 2005 Bill were passed, there would be a local law existing that was different from a national law.[107] In their report on the 2005 Bill it was stated by the Select Committee that this was one reason why the Bill should not be passed.[108] Despite this, no mention of this issue was made in the Select Committee's report on the Specified Places Bill. Therefore this paper will here briefly ask whether this issue still did exist in relation to this Bill and whether it still played a central part in the Select Committee's decision-making here.

One explanation why the report on the Specified Places Bill may not have discussed the issue of differing laws is due to the fact that it was not concerned with a criminal offence but rather with the potential breach of a bylaw. The 2005 Bill aimed to prohibit street-based prostitution by making it an offence to solicit for prostitution in public places in Manukau

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107 Manukau City Council (Control of Street Prostitution) Bill 2005 (6-1) (select committee report) at 2.

108 At 7.

City.[109] However the Specified Places Bill was only concerned with the offence of breaching a bylaw.[110] Despite having this distinction between the 2005 Bill and the Specified Places Bill, it must be asked whether there truly was no ground for having this justification weigh towards the Select Committee's ultimate decision on the 2010 Bill. While the type of offence is not criminal as the 2005 Bill aimed to be, the end result is the same regardless of what type of offence it is. This may suggest that this issue was one which did arise under the Specified Places Bill. However it is beyond the scope of this paper to inquire into the extent and nature of this issue. This paper aims to highlight this issue only.

V Enforcement Difficulties

Another justification given by the Select Committee, as to why the Specified Places Bill should not be passed, was due to the difficulties of its enforcement.[111] Despite presenting enforcement as a problem, the Select Committee did not canvass what these problems were. Therefore this part of the paper will question this justification, to determine whether this Bill truly would have faced problems with its enforcement or not. While this justification was correct, as a number of enforcement difficulties would have existed if the Bill were passed, the Select Committee needed to discuss this further in order to present a well-founded justification.

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109 Manukau City Council (Control of Street Prostitution) Bill 2005 (6-1), cl 6.

110 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1), cl 5.

111 Manukau City Council (Control of Street Prostitution) Bill 2005 (6-1) (select committee report) at 4.

A The Select Committee's Reasoning

The Select Committee provided a brief discussion on the issue of the Bill's enforcement, if it were enacted.[112] The Select Committee began with acknowledging the Auckland Council's belief that the bylaw enforcement measures that existed at that time were ineffective for controlling the problems associated with street-based prostitution.[113] This was a clear illustration of the problems that local authorities have with the enforcement of bylaws. While the Select Committee agreed that these problems were true, they stated that this did not warrant recommending the Bill, as the Bill would not alleviate these adverse effects of bylaw enforcement.[114]

The Select Committee also expressed their view that the powers of enforcement that the Bill imposed were already available in other legislation, therefore the Bill was unnecessary.[115] The Select Committee specifically stated that the Summary Offences Act 1981 provided the power of arrest for offences under that Act, such as for disorderly behaviour.[116] Further, the Select Committee stated that there were other powers of enforcement available for bylaws to be enforced when breached.[117] Finally the Select Committee noted that to remedy some of these expressed problems, the Bill could alternatively create an infringement offence under s 259 of the Local Government Act. However the difficulties in establishing and maintaining such an offence made this undesirable.[118] The Committee stated that amending s 259 of the Local Government Act to

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112 Manukau City Council (Control of Street Prostitution) Bill 2005 (6-1) (select committee report) at 4.

113 At 5.

114 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 5.

115 At 5.

116 At 4.

117 At 4.

118 At 5.

alleviate these problems was beyond the scope desired by the implementation of this Bill.[119] This was another reason why the Select Committee said that Bill should not be passed.

B Enforcement Problems under the Bill

Local authorities have their enforcement powers provided to them under the Local Government Act 2002. Section 143 of the Act provides local authorities with the powers to enforce bylaws and to undertake the administration of those enforcement powers.[120] Sections 239 of the Act specifically states that it is an offence to breach a bylaw made under Part 8 of the Act, punishable by the penalty set out in s 242(4).[121] This penalty is a fine not exceeding $20,000.[122] These are the provisions that the Specified Places Bill is concerned with. The enforcement mechanism that the breach of a bylaw under the Specified Places Bill would take is ordinary prosecution.[123]

While not stated in the Select Committee report, the problems of the cost of enforcement and the difficulty of attaching liability for breach are the specific problems of enforcing the bylaws under the Specified Places Bill. These specific concerns stem from the general problem of the enforcement of bylaws. Under the Specified Places Bill, the issue of enforcement of bylaws would arise, as clause 5 allows for the power to create bylaws

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119 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 5.

120 Local Government Act 2002, s 143.

121 Section 239.

122 Section 242(4).

123 *Laws of New Zealand* Local Government: Regulatory, Enforcement, and Coercive Powers (online ed) at [132]. There are also various other measures by which a bylaw can be enforced, such as through infringement notices, injunctions, unilateral removal of works or seizures of property, or arrest in the case of liquor bylaws. However these do not apply in this situation.

designating specified places.[124] Clause 12 provides that a breach of the bylaw is an offence punishable by a $2,000 fine.[125]

The first problem, the cost of enforcing the Specified Places Bill, is a problem that arises in regards to the enforcement of bylaws in general. Coupling this with the way in which breaches of bylaws are enforced, this results in a high cost for prosecuting for a breach. While this is a legitimate concern in regards to the enforcement of the Bill if it were passed, this does not justify recommending that the Bill not be passed. This is because essentially in all cases of a breach of bylaw this problem with enforcement will likely exist. Therefore it does not appear logical to recommend that this Bill should not be passed, based on a problem that already widely exists.

The second problem of enforcement, the difficulty of attaching liability for an offence under the Specified Places Bill, is a problem more specific to this Bill and its context. The submission by the New Zealand Police on the Bill highlighted some of these concerns more specifically.[126] The Police stated that it would be difficult, if the Bill were enacted, to determine the motives of a suspected sex worker in a specified area and attach liability to them for breach of the Bill.[127] The Police stated that to determine such motives, there was a risk that an undercover officer might risk engaging in the 'business of prostitution' as per cl 12(1) in pursuance of this motive.[128] This risk would make it difficult for police officers to ascertain a breach of the bylaw.[129] Further, the Police stated that undercover officers would be needed to enforce breaches of the Bill, as those who engage in street-based

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124 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1), cl 5.

125 Clause 12.

126 New Zealand Police "Submission on the Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010" at [2].

127 At [18].

128 At [18].

129 At [18].

prostitution were likely to be wary of uniformed police officers.[130] These issues with enforcement stem from the nature of the problem of street-based prostitution. Street-based sex workers are likely to be cautious of their actions, especially when breaching the Bill by soliciting for sex in a specified area.

C Evaluation of the Select Committee's Justification

While they are real concerns of enforcement under the Specified Places Bill, the problems of attaching liability for an offence, and the cost of enforcement are not valid justifications to recommend that the Bill should not be passed. Street-based prostitution is not the only activity where determining liability is difficult or costly. Similarly with attaching liability to offences such as drug detection and psychological abuse, problems with ascertaining liability are likely to exist.[131] Undoubtedly the 'undercover' or 'discreet' nature of prostitution does make the actions which officers would have to attach liability to harder to ascertain than a number of other offences.[132] Further, the likelihood of this problem occurring is very high.[133] However attaching liability under this Bill is not incomparable to other offences. Similarly the cost involved in enforcing offences does not seem incomparable to others either. Therefore while these are justified and real concerns, it does not appear that these problems of enforcement are justified in being grounds for recommending the Bill not be passed.

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130 New Zealand Police, above n 126, at [17].

131 Helena Barwick, Alison Gray and Roger Macky *Domestic Violence Act 1995: Process Evaluation* (Ministry of Justice, April 2000) at 87; Chris Wilkins, Krishna Bhatta and Sally Casswell "The emergence of amphetamine use in New Zealand: findings from the 1998 and 2001 National Drug Surveys" (2002) 115 NZMedJ 256 at 257.

132 Jan Jordan *The Sex Industry in New Zealand: A Literature Review* (Ministry of Justice, March 2005) at 86.

133 New Zealand Police, above n 126, at [18].

As stated by the Select Committee, an alternative measure that could have been taken under the Bill was to create an infringement offence under s 259 of the Local Government Act.[134] This would have made the offence under clause 12 of the Bill an infringement offence.[135] This was suggested by the Select Committee because infringement offences can be enforced differently than breaches of a bylaw and may alleviate bylaw enforcement problems.[136] This suggestion was appropriate in light of the Specified Places Bill; the nature of street-based prostitution and the attachment of liability to such offences seems more aligned with the other summary offences, rather than the breach of a bylaw. While it is beyond the scope of this paper to discuss the effect of this entirely, this alternative would have been a better option than the Bill's bylaw enforcement.

As discussed, the Select Committee's justification that the enactment of this Bill would not alleviate problems concerned with the enforcement of bylaws was correct. This paper has highlighted the issues of enforcement that this Bill would have faced. These are the problems of the cost of enforcement and the difficulty to attach liability for the breach of the bylaw. Both these problems would likely have arisen if the Bill were passed. Therefore this suggests that the Select Committee's reasoning here was appropriate. However what the Select Committee failed to do was to communicate these problems of enforcement. The stating of general problems of enforcement was not sufficient for the purposes of providing a justification as to why the Bill should not be passed. Deeper consideration of these problems would have provided a better foundation for this justification.

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134 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 5.

135 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1), cl 12.

136 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 5.

VI The Standard Expected of Select Committees

The discussion in this paper has revealed that a number of assumptions underlie the Select Committee's report on the Specified Places Bill. In this part of the paper it will be briefly communicated why understanding and revealing these assumptions in the Select Committee's reasoning is so significant. This will be addressed by discussing the expected standard of Select Committees in general and then comparing this with the report for the Specified Places Bill.

The general standard to be expected of Select Committees is very high. Select Committee's play an extremely important role in the legislative process. They ultimately provide the most influential opinion to Parliament on whether or not a certain law should be passed.[137] Select Committees are constituted by Members of Parliament, and as a whole create a body of experts on matters that concern their Committee.[138] Beyond the nature of the Select Committees themselves, the process of Select Committee reporting on Bills also supports the high standard that should be held against them. The crucial role of public submissions to Select Committees gives some public accountability to the Committee's decisions.[139] Similarly, Select Committee decisions can have significant legal and societal repercussions depending on the extent that their reports are relied on in Parliament's decision making.[140] All these factors suggest that the standard to be expected from Select Committees is incredibly high. Select Committee reports should have minimal or no faults in their reasoning. It is not expected of Select Committees to accurately determine all issues, such as those that are beyond their technical expertise. However it is expected that Select Committees provide accurate and comprehensive reasoning when they produce reports on Bills.

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137 Office of the Clerk of the House of Representatives *Effective Select Committee Membership: A Guide for Members of Parliament* (2014) at 8.

138 At 8.

139 At 8.

140 At 8.

Here the standard expected of the Select Committee has not been met. This paper has questioned and discussed three major justifications that the Local Government and Environment Select Committee gave in their report on the Specified Places Bill. As is evident throughout this discussion a number of uncertainties and instances of lack of reasoning have been revealed in the report. The Specified Places Bill was introduced to Parliament in 2010 and was voted down in 2015.[141] For a Bill that was in Parliament for five years it is expected that an accurate and carefully constructed Select Committee report would result. Further, Manukau City's residents were potentially greatly affected by this report, depending on the influence it had. In light of this, the Select Committee report does not meet the standard that was expected here. This is concerning when it is apparent the influence that these reports can have in the ultimate passing of a Bill. Greater scrutiny therefore must be given to Select Committee reports and the reasoning within them. It cannot be assumed that the Select Committee's reports are absolute and conclusive. They must be taken further than face value. This does not undermine the acknowledgment of the high standard that Select Committees in general meet. However in regards to this Bill, this high standard was not met.

VII Conclusion

This paper has taken a number of justifications given by the Select Committee in their report on the Specified Places Bill and examined them critically. The purpose of this has been to ascertain whether these truly were accurate and appropriate justifications or whether they were mere assumptions without reasoned support. The ultimate aim of this has been to argue that greater scrutiny must be given to Select Committee reports, recognising the significance they hold in the legislative process. This has been conducted through the critical analysis of three major justifications given by the Select Committee in their report.

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141 Office of the Clerk of the House of Representatives, above n 137, at 8.

First, the justification that the problems of street-based prostitution could be regulated through the establishment of bylaws under the Local Government Act 2002 was considered.[142] This factor was discussed through the examination of the powers held by local authorities in creating bylaws and the grounds under which a bylaw may be invalid. Here the validity of such a bylaw made under the recommendation of the Select Committee was proved to be was unknown. Despite this uncertainty this justification was still accurate and appropriate. This was due to the discussion that a court would not hold such a bylaw as being invalid, as it would likely comply with the grounds on which a bylaw can be made. However a conclusive answer as to the validity of the bylaws made if the Bill were enacted cannot ultimately exist until the issue has been tested by the courts.

The second justification to be examined was that the Specified Places Bill changed the legal meaning of the Prostitution Reform Act 2003.[143] The idea of implied repeals was discussed to ascertain whether the Bill would change the legal meaning of the Prostitution Reform Act, and to what extent. A conclusive answer could not have been communicated by the Select Committee on this issue. This is because the courts may take a different interpretation of the issue of implied repeals, thereby changing the effect of the Specified Places Bill on the Prostitution Reform Act. Whether or not there was an implied repeal of the Act would only be a problem if the policy of the Act was undermined. It was here concluded that while the Specified Places Bill may repeal the Prostitution Reform Act, this would not have undermined the Act's policy.

Finally the justification that the Specified Places Bill would provide enforcement difficulties was discussed.[144] The powers regarding the enforcement of bylaws was examined, and the extent to which the Specified Places Bill would affect this was considered. Here this justification was made on sound reasoning. This was a carefully

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142 Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 (197-1) (select committee report) at 2.

143 At 5.

144 At 4.

considered justification, supporting the idea that even if the Bill were passed it would not provide the remedy that its promoters thought it would. While this was an appropriate justification, it would have been more desirable if the Select Committee proposed an adequate alternative, rather than a mere rejection on this ground.

The consideration of these justifications and recommendations made by the Select Committee has found that the Select Committee's report on this Bill was in a number of ways based on assumptions rather than valid justifications. This indicates that greater scrutiny must be applied to these reports, rather than taking them for face value. In light of this it has been concluded that the Select Committee did not meet the standard that was expected of them. The Select Committee's report plays a large role in the passing or non-passing of a Bill, therefore it remains that greater scrutiny must be given to the Select Committee and their actions to hold them to meet a higher standard.

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The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,572 words.

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