Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Parole Amendment Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 269 of the Standing Orders of the House of Representatives

1. I have considered the Parole Amendment Bill (**Bill**) for its consistency with the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**).[1] I conclude the Bill appears to be inconsistent with the following rights in the Bill of Rights Act: the right of persons finally convicted not to be further punished (affirmed by s 26(2)), the freedoms of movement and peaceful assembly (affirmed by ss 18 and 16), the right not to be arbitrarily detained (affirmed by s 22), and the right to natural justice (affirmed by s 27(1)).

2. I bring these inconsistencies to the attention of the House under s 7 of the Bill of Rights Act and Standing Order 269.

What the Bill does

3. The Bill asks Parliament to amend the law concerning the imposition of conditions on an extended supervision order (**ESO**) under s 107K of the Parole Act 2002 following the High Court issuing judgment in *New Zealand Parole Board v Attorney-General* in June 2023.[2] In that case the High Court issued a declaration that s 107K(3)(bb)(ii) of the Parole Act prevents the Parole Board from imposing special conditions requiring, or resulting in, offenders subject to ESOs residing in the same place their rehabilitative programme is provided.[3]

4. The Department of Corrections, which administers ESOs, notes the Court's declaration renders unenforceable special conditions for rehabilitative programmes imposed on 26 high-risk offenders. If delivery of those programmes were to cease, as compliance with the High Court declaration would require, there would be a profound and present risk to public safety. The Crown and the New Zealand Parole Board have appealed to the Court of Appeal against the decision, but that appeal will not be heard for some time.

5. Section 107K(3)(bb)(ii) was intended to ensure that a combination of residence and programme special conditions did not amount to *de facto* continuation of a sentence of imprisonment already served. However, the Government considers it was not Parliament's intention to inhibit the delivery of effective rehabilitative programmes to manage the acute risk some ESO offenders pose.

6. Accordingly, the Bill makes two substantive amendments to the Parole Act.

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1 PCO 25761/9.0.

2 *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 [**High Court judgment**]. In the context of special conditions, "programme" is defined in s 16 of the Parole Act.

3 High Court judgment at [104].

7. First, cl 4 repeals s 107K(3)(bb)(ii) which, the High Court held, prevented the Parole Board from imposing special conditions on an offender which required the offender to reside with the provider of a programme the offender was required to participate in.

8. Second, the Bill imposes review requirements on the Parole Board, in respect of offenders on ESOs who are subject to special residential conditions to reside with their programme provider. Clause 5 inserts proposed s 107RC, which provides for the Parole Board's biennial review of those offenders' conditions. The Board may confirm, discharge or vary conditions on review.

9. Additionally, the Bill inserts a new pt 2 of sch 1 of the Parole Act to validate special conditions imposed (and acts done in respect of compliance with those conditions) prior to the entry into force of the amendment Act, that would otherwise only be valid upon its enactment.

The ESO regime and special conditions

10. Under Part 1A of the Parole Act, a sentencing court may make ESOs in respect of offenders whose conduct has exhibited a pervasive pattern of serious sexual or violent offending, and who pose a high risk of committing such offending in the future.[4] The purpose of ESOs is "to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences."[5]

11. Although the sentencing court[6] makes the ESO, it is the Parole Board that is empowered to impose the special conditions. The Parole Board may impose "any" special condition[7] provided it is designed to reduce reoffending risk,[8] facilitate rehabilitation and reintegration,[9] or provide for a victim's reasonable concerns;[10] and does not purport to require an offender to take prescription medication without consent.[11] Section 15(3) provides non-exhaustive examples of permissible special conditions, which relevantly include various residential[12] and programme participation conditions.[13]

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4 Parole Act 2002, s 107I(2).

5 Parole Act, s 107I(1).

6 Defined in s 107D of the Parole Act.

7 Parole Act, s 15(1).

8 Parole Act, s 15(2)(a).

9 Parole Act, s 15(2)(b).

10 Parole Act, s 15(2)(c).

11 Parole Act, s 15(4).

12 Section 15(3)(a) and (ab).

13 Section 15(3)(b). "Programme" has the meaning of s 16 of the Parole Act.

12. Only if certain criteria are met may the Parole Board impose a residential restriction.[14] The obligations on a person subject to a residential restriction are:[15]

> (a) to stay at a specified residence:
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> (b) to be under the supervision of a probation officer and to co-operate with, and comply with any lawful direction given by, that probation officer:
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> (c) to be at the residence—
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> (i) at times specified by the Board; or
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> (ii) at all times:
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> (d) to submit, in accordance with the directions of a probation officer, to the electronic monitoring of compliance with his or her residential restrictions:
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> (e) to keep in his or her possession the licence issued under section 53(3) and, if requested to do so by a constable or a probation officer, must produce the licence for inspection.

Second penalty

13. Section 26(2) of the Bill of Rights Act provides no-one finally convicted of an offence shall be tried or punished for it again. This is often termed an immunity from "second penalty" or "double jeopardy" and is considered by the courts to be a norm of fundamental importance. In *Chisnall v Attorney-General*, the Court of Appeal held an ESO is penal in nature, and since it is imposed after conviction and sentence, it constitutes a second penalty contrary to s 26(2) of the Bill of Rights Act.[16]

14. This Bill proposes amendments altering how the Parole Board may combine special conditions attaching to an ESO. This does not fundamentally alter the position that an ESO constitutes a second penalty for the original criminal offence for which the offender has already been punished. Indeed, by allowing for combination of special conditions, it enables offenders subject to ESOs to have conditions imposed which make significant inroads into basic rights protected by the Bill of Rights Act, as discussed further below.

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14 Contained in ss 34 and 35 of the Parole Act.

15 Parole Act, s 33(2).

16 *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [138].

15. The Court of Appeal in *Chisnall v Attorney-General,* while accepting limits on the right in s 26(2) are capable of justification, concluded the ESO regime amounted to a limit on the s 26(2) right that was not demonstrably justified under s 5 of the Bill of Rights Act.[17] The Crown appealed to the Supreme Court on the basis the justification analysis should properly be left to case-by-case assessment by those courts considering specific ESO applications. The Supreme Court has not yet delivered judgment. While in my view the Crown's position is the correct one, it is of utmost importance to the rule of law that unless and until the Court of Appeal's judgment is reversed on appeal, the law is as that Court stated it. That is the law I apply in my assessment of this Bill.

Retrospectivity

16. The Bill applies retrospectively to offenders already subject to an ESO with special conditions requiring them to reside with their programme provider.[18] However, its amendments do not engage the prohibition in s 26(1) of the Bill of Rights Act against retrospectivity. That section provides:

> No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

17. While penal in nature, the Bill's amendments do not create a new "offence" in the meaning of s 26(1). Therefore, no Bill of Rights Act issue arises because of the proposed retrospective operation.[19]

Right to a lesser penalty where the penalty changes after the offence is committed

18. Section 25(g) of the Bill of Rights Act affirms the right:

> ... if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.

19. To the extent the amendment allows a new combination of conditions it could be considered an "increased penalty" but s 25(g) is nonetheless not engaged. As the Court of Appeal explained in *Commissioner of Police v G*, s 25(g) protects an offender from any increase in penalty that occurs between the time they

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17 At [190]–[226].

18 See new pt 2 of sch 1 at [9] above.

19 Section 12 of the Legislation Act 2019 reflects a wider principle that legislation does not, and should not, have retrospective effect, but that is not within the scope of this advice on Bill of Rights Act consistency.

committed the offence and the time they are sentenced.[20] ESO conditions are imposed on an offender by the Parole Board after they are sentenced.

Freedom of movement and peaceful assembly

20. Conditions that require an offender to be and remain at a certain place necessarily limit the freedoms of movement (s 18 of the Bill of Rights Act) and peaceful assembly (s 16 of the Bill of Rights Act). However, limits on these freedoms are demonstrably justified for an offender whose conduct has exhibited a pervasive pattern of serious sexual or violence offending, and who poses a high risk of committing such offending in the future, provided the restrictions are done for the purpose of mitigating that risk and are no greater than is reasonably necessary to achieve it.

21. The proposed amendments will cause an increase in the restrictions on freedom of movement and peaceful assembly beyond what the Act currently contemplates because the combination of programme and residence conditions is now limited only by the requirement on biennial review that it must be no more than is needed to secure attendance at the programme and related activities each day.[21] I note these limits on rights are being heightened in the context of an order which has been determined by the courts to constitute second penalty (as discussed above).

22. Section 107K(3)(bb)(ii) manifested Parliament's intention that the imposition of ESO conditions should not amount to *de facto* detention and that is now to be repealed. Periodic review will go some way to addressing any conditions that are or become unreasonable but it does not prevent unreasonable limits on freedom of movement or assembly being imposed or continued until the review takes place. It is notable in this regard that the proposed review period of two years is a sizeable time period, during which the balance of considerations in respect of an offender could potentially change significantly.

23. Repeal of s 107K(3)(bb)(ii) is considered to be required because the provision, as interpreted by the High Court, will otherwise frustrate the objective of preserving public safety. However, in repealing the provision the protection it offered against excessive restraint on the liberty of offenders after their release from prison will be lost and a court may be unlikely to consider biennial review an effective replacement to ensure limits on these freedoms are no more restrictive than necessary to achieve the aims of public protection and rehabilitation.

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20 *Commissioner of Police v G* [2023] NZCA 93 at [85] and following.

21 Proposed s 107RC(5)(b).

Arbitrary detention

24. Even significant restrictions on freedom of movement will not amount to detention for the purpose of s 22 of the Bill of Rights Act. The restriction must be such as to amount to close custody or its equivalent.[22]

25. A combination of residential and programme conditions could result in such a degree of confinement or control of the offender that it amounts to detention. Such a degree of control is now possible with the repeal of s 107K(3)(bb)(ii) if that degree of control is considered necessary to ensure the offender's attendance at classes or participation in other activities associated with the programme.

26. The only proposed limit on such detention occurring and becoming arbitrary is the proposed periodic review by the Parole Board but that is only required every two years. For the reasons just discussed in relation to the freedoms of movement and peaceful assembly, there will be an inconsistency with s 22 of the Bill of Rights Act.

Natural justice at review

27. Section 27(1) of the Bill of Rights Act provides:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

The contents of the right to natural justice are not prescribed, but contextual. This includes the legal and factual contexts of the relevant provisions of the legislation and any procedural protections it confers, the nature of the decision and power being exercised, and the need to avoid frustrating the purpose of the legislation and the power being exercised.[23]

28. On the Parole Board's biennial review under proposed s 107RC, an offender has a right to be heard by the Board only if the Board wishes to hear from the offender or contemplates imposing more onerous condition(s) on the offender.

29. On the Board's initial imposition of special conditions, s 107KA(7) applies, which provides:

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22 *Drever v Auckland South Corrections Facility* [2019] NZCA 346, [2019] NZAR 1519; *Nottingham v Ardern* [2020] NZCA 144, [2020] 2 NZLR 197.

23 *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [11] per Glazebrook and Hammond JJ, and *Daganyasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.

> The offender and any victim of the offender may make written submissions to the Board and, with the leave of the Board, may appear and make oral submissions on whether special conditions should be imposed, what the conditions should be, and their duration.

30. The scope of review in this Bill is stated in s 107RC(5):[24]

> In determining whether to confirm, discharge, or vary any of the conditions the Board must consider all relevant matters, including whether the condition requiring the offender to participate in a programme—
>
> (a) continues to offer the offender rehabilitation and reintegration that reduces the risk of further offending by the offender (*see* section 15(3)(b)); and
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> (b) does not require that the offender be, or result in the offender being, supervised, monitored, or subject to other restrictions, for longer each day than is necessary to ensure the offender's attendances at classes or participation in other activities associated with the programme (*see* section 107(3)(bb)(i)).

31. The Board's decision on review has significant ramifications for offenders' (and victims') rights and interests regardless of whether the Board contemplates imposing more onerous conditions. If an offender is subject to programme and residential special conditions in combination, as contemplated, a decision to confirm that arrangement is one of significance for the offender, as it has significant ramifications for their basic rights such as freedom of movement.[25]

32. The review is the only intended safeguard provided for in the proposed legislative scheme to ensure combined residential and programme special conditions do not amount to arbitrary detention.[26] Therefore, a right to be heard on review (at least on the same terms as when the conditions are initially imposed) is required to ensure consistency with the s 27(1) right, regardless of what outcome the Board is contemplating. Provision for an oral hearing is particularly important in a setting where reviews are proposed to be at significant intervals of two years.

33. Providing greater opportunity to be heard would not compromise the scheme of the Act by undermining public safety or be disproportionately onerous: the review procedure affects a small number of offenders and reviews happen

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24 Note if time ceases to run on an offender's ESO under s 107P of the Parole Act, the time for the Board completing its review under proposed s 107RC(2) is extended by the same period of time: see proposed s 107RC(7).

25 Situations where liberty is at stake are accepted as a category of case where oral hearings should generally be provided for. See eg *Osborn v Parole Board* [2013] UKSC 61, [2014] 1 All ER 369.

26 See the general policy statement in the explanatory note to the Bill.

infrequently. Nor is the nature of the power being exercised on review comparable to that in *Commissioner of Police v G,* where the statutory context justified a departure from the ordinary position of a right to a hearing in respect of decisions with significant rights implications.[27]

34. For these reasons, proposed s 107RC constitutes a limit on the right to natural justice without evident justification.

35. Lastly, the proposed s 107RC(3)(a) provides that before a review the chief executive must make a recommendation to the Parole Board on whether given conditions are still appropriate, or whether conditions should be discharged or varied and how so. Natural justice would demand that the recommendation and associating reasoning be provided to the offender by right ahead of the hearing (unless there was good reason not to), so that they are able to make meaningful submissions (oral and/or written). However, the Bill does not make provision for this. This omission results in a further apparent inconsistency with the Bill of Rights Act.

Conclusion and recommendation

36. The courts have ruled that ESOs are unjustified second penalties for the purpose of s 26(2) of the Bill of Rights Act. No change to the basic structure of the ESO regime is proposed, so that this inconsistency with the Bill of Rights Act persists.

37. The proposed amendment is intended to prevent s 107K(3)(bb)(ii) from inhibiting participation in programmes that are designed to rehabilitate some of the most dangerous offenders and to protect the public while the ESO is in effect. However, the subsection also reflected Parliament's intention that the liberty interest of offenders who have completed the sentences imposed on them was not to be unreasonably or arbitrarily restrained. The proposed repeal of the subsection nullifies its impact in that regard and facilitating a review every two years is not a sufficient replacement.

38. For completeness I observe that while there is a possibility that the courts and/or Parole Board may ameliorate some of the inconsistencies identified here through rights-consistent interpretation or exercise of legal powers, it is doubtful to what extent this could be done in respect of certain inconsistencies identified. Moreover, in assessing statutory schemes for consistency with the Bill of Rights Act, the courts have recently shown some reluctance to account for the ameliorating potential of rights-consistent judicial interpretation or exercise of

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27 *Commissioner of Police v G* [2023] NZCA 93 at [177]–[181].

powers. This includes judgments in the ESO context and in regard to some of the specific rights-inconsistencies identified in this report.[28]

Hon David Parker
Attorney-General
22 August 2023

[28] See *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484.