Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Returning Offenders (Management and Information) 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 whether the Returning Offenders (Management and Information) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA).

2. I have concluded that following a recent decision of the High Court there is an apparent inconsistency with the prohibition against retrospective increases in penalty (s 25(g) of the NZBORA) and the right to natural justice (s 27(1) of the NZBORA).

3. As required by s 7 of the NZBORA and Standing Order 269, I draw this to the attention of the House of Representatives.

The Bill

4. This Bill amends the Returning Offenders (Management and Information) Act 2015 (the Act). It provides expressly that the Act is to apply to offenders who have already served a sentence for the offending that makes them eligible for a determination under the Act, notwithstanding any inconsistency with the New Zealand Bill of Rights Act 1990 (NZBORA).

5. The Bill is being introduced in response to the High Court's decision in *G v Commissioner of Police*[1] which held that s 17 of the Act does not apply to returning offenders who committed offences in other jurisdictions before 18 November 2015, when the Act came into force. The High Court reached this view because it ruled the making of a determination under s 17 constitutes a penalty for the purpose of s 25(g) of the NZBORA and a punishment for the purpose of s 26(2) of the NZBORA and read the enactment down to prevent inconsistency with those guaranteed rights. It also held that the Commissioner of Police had to provide notice and the right to be heard to a returning offender before deciding that they are a "returning prisoner" and therefore subject to the Act. This ruling was made because the Court found that such a hearing was required by natural justice for the purpose of s 27 of the NZBORA.

6. The effect of this Bill, if passed into law, will be to reverse the result of *G v Commissioner of Police* in the High Court while preserving the effect of the decision for G himself.

7. This means that returnees can be subject to parole-like conditions in New Zealand if they have been deported here after a prison sentence in another jurisdiction, and Police will be able to collect information from them to establish their identity and support future investigations. While this is currently the position for returning offenders who committed offences after November 2015, the Bill will make clear that the scope of the Act extends to those who committed offences prior to that date also.

8. The Bill also validates past conduct under that Act so that any determinations or actions in respect of a returnee who committed an offence in another jurisdiction prior to 2015, which would otherwise be invalid following *G v Commissioner of Police*, are deemed to be lawful.

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1 [2022] NZHC 3514.

The effect of the High Court's ruling

9. When the Returning Offenders (Management and Information) Bill was introduced in 2015, my predecessor issued a report under s 7 of the NZBORA, but only because the Bill proposed to apply part of the Criminal Investigations (Bodily Samples) Act 1995 which had itself been found to be inconsistent with s 21 of the NZBORA. He found no inconsistency with s 25(g) or s 26(2) because he did not consider that measures to support and supervise returning offenders were punitive.[2] Were the matter free from authority I would endorse that view and would have made no report on this Amendment Bill under s 7.

10. My own view remains that these measures are rehabilitative rather than punitive and go no further than replicating the release conditions that would apply if these offenders had been re-integrated into the communities they offended against and not deported. However, the High Court has found as a matter of law that this is not how the Act is to be interpreted.

11. The Crown promptly appealed against the High Court's decision. That appeal was heard on 2 February 2023 and the decision of the Court of Appeal is reserved. In the meantime, the House may, and I do, disagree with the High Court's decision. But it is of the greatest importance to the rule of law that unless and until the judgment is reversed on appeal or the Act is amended, we accept that the High Court's decision is authoritative that the making of a determination under s 17 of the Act is a penalty for the purpose of s 25(g) and a punishment for the purpose of s 26(2). In deference to the authority of the Court on matters of law, I must accept that ruling in my assessment of the consistency of this Amendment Bill with the NZBORA.

Retrospective increase in punishment

12. The Bill stipulates that the Act must be applied, and the Commissioner of Police must make a determination that a person is a returning prisoner, if the statutory criteria in s 17 are met, even where this may be inconsistent with the right to retrospective increases in penalties protected by s 25(g) NZBORA. This means the Commissioner does not have the discretion to exercise his power to make a determination consistently with the NZBORA, as the Bill directs him or her to make a determination even where a rights infringement may result.

13. The Bill authorises the Commissioner to make determinations that a returnee is a returning prisoner, even where their offending in an overseas jurisdiction predated the Act coming into force. The returnee is thereby subject to a determination and release conditions that were not available in law as a management tool at the time they committed an offence.

14. Section 25(g) of the Bill of Rights Act provides:

> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

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[2] The Hon. Christopher Finlayson: *Report of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Returning Offenders (Management and Information) Bill* (17 November 2015)

(g) 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:

15. This provision also reflects a fundamental common law right that a defendant's conduct is to be judged by the law at the time of the conduct and not in retrospect.[3]

16. This raises two issues:

16.1 Is a determination under the Act and the consequences that flow from it a "penalty";

16.2 Is the imposition of a returning offender order part of the "sentence" for the offending, such that the penalty has increased between the commission of the offence and sentencing?

17. On the first question, the immediate consequence of a determination that a person is a returning prisoner is that they are subject to standard release conditions (for example, mandatory reporting to a probation officer, inability to leave New Zealand without consent). It is possible that a person could also be subject to special release conditions (for example, electronic monitoring of whereabouts), and requirements to supply of identifying particulars and bodily samples.

18. Courts have taken an expansive view of what can properly be regarded as a penalty.[4] In developing the law in this area, the distinction between punitive aspects of a sentence and aspects of offender management that are aimed to protect the public, rehabilitate and reintegrate the offender have not been determinative of whether the measure is a penalty.

19. In *G v Commissioner of Police*, the High Court held that a determination under the Act was a penalty by reference to its purpose and punitive effect in practice.[5] Although this decision is subject to appeal on this point the current legal position is that a determination made pursuant to the Act is a penalty.

20. On the second question, the High Court in *G v Commissioner of Police* held that post-imprisonment orders like extended supervision orders and release conditions on returning offenders must be regarded as part of the "sentence" for the original offending. The High Court said that on a literal approach, s 25(g) does not apply because the Act was not enacted between conviction and sentencing in Australia, but after sentencing. However, the Court held that the determination must be regarded as part of the sentence because it involved the imposition of a penalty after the person's return to New Zealand and is analogous to the sentencing process.[6] The judgment is subject to appeal on this point, but the current legal position is that a determination under the Act is a "sentence" for the purpose of s 25(g).

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3 *R v Poumako* [2000] 2 NZLR 695 (CA) at [73] and *R v Pora* [2001] 2 NZLR 37 (CA) at [32].

4 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 and *Chisnall v Attorney-General* [2022] 2 NZLR 484 (regarding extended supervision orders and public protection orders), *D (SC 31/2019) v New Zealand Police* [2021] 1 NZLR 213 (placement of a child sex offender register).

5 *G v Commissioner of Police* [2022] NZHC 3514, at [73].

6 At [58].

21. This means I must consider whether the penalty has increased between the commission of the offence and the imposition of the "sentence", i.e. the determination under the Act. For those who offended before 2015 it has. As at the time the offence was committed, the standard and special conditions and other requirements imposed under the Act were not part of the range of penalties that could be imposed on the offender as a consequence of their conviction. They would almost certainly have been subject to release conditions if released in the country of origin *or* deportation to New Zealand but did not become subject to deportation *and* release conditions in New Zealand until the Act was passed.

22. Applying the High Court judgment, in requiring the Commissioner of Police to make a determination in those circumstances, the Bill limits s 25(g) NZBORA.

Can the inconsistency with s 25(g) be justified?

23. The next question is whether this inconsistency can be justified under s 5 of the NZBORA. The High Court in *G v Commissioner of Police* did not consider whether the limitations of s 25(g) were justified because the case was not argued on that basis.

24. Long-standing authority has identified s 25(g) as protecting a fundamental criminal justice right. Indeed, it has been described as one of the "absolute" rights in NZBORA although the Court of Appeal decisions establishing this principle (*R v Poumako*,[7] *R v Pora*[8]) were about more traditional penalties of prison sentences. If the right is subject to justified limitation it could only be in exceptional circumstances. The primary means of preventing the right from being applied too broadly is by narrowing the concept of penalty, but the High Court has determined that a determination under the Act is a penalty for this purpose.

25. Applying the High Court's interpretation of s 17 to this Amendment Bill, I must therefore conclude that there is a limitation of the right in s 25(g) that cannot be justified by reference to the policy objectives of the Bill.

Double jeopardy

26. Section 26(2) of the NZBORA provides:

> No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

27. For the reasons set out above, a determination under the Act will be regarded as a punishment. Offending in an overseas jurisdiction forms the basis for the determination under the Act and its consequences – an overseas conviction and a sentence of imprisonment are pre-conditions for a determination.[9] The determination therefore amounts to a second penalty for the same offending. The High Court in *G v Commissioner of Police* held that a determination was a second penalty for the purpose of s 26(2) of the NZBORA.[10]

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7 *R v Poumako* [2000] 2 NZLR 695 (CA), at [6].

8 *R v Pora* [2001] 2 NZLR 37 (CA), at [70].

9 Returning Offenders (Management and Information) Act 2015, s 17.

10 *G v Commissioner of Police* [2022] NZHC 3514, at [111].

28. The Bill makes it clear that the Commissioner of Police must make a determination if the statutory criteria in s 17 are met, even where this may be inconsistent with s 26(2) of the NZBORA. The Bill therefore limits s 26(2) of the NZBORA.

Can the limitation of s 26(2) be justified?

29. The next question is whether this limitation can be justified under s 5 of the NZBORA. The High Court in *G v Commissioner of Police* did not consider whether the limitations of s 26(2) were justified because the case was not argued on that basis.

30. Limits on s 26(2) are capable of justification but its fundamental importance means that any limitation will require a strong justification.[11]

31. The s 5 inquiry is approached as follows:[12]

    31.1 does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?

    31.2 if so, then:

        31.2.1 is the limit rationally connected with the objective?

        31.2.2 does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?

        31.2.3 is the limit in due proportion to the importance of the objective?

Is the objective sufficiently important?

32. The purpose of the Bill is to ensure the Act applies retrospectively to returning prisoners who offended overseas before 2015, in accordance with the original policy intent of the Act: to ensure public safety and to provide returning offenders with gradual and supervised reintegration and rehabilitation on their return to New Zealand.[13] This will in turn reduce their risk of reoffending in New Zealand. Some of those subject to determinations may have recently been released from prison overseas and have limited connection with New Zealand, other than citizenship, and no support networks here.

33. These objectives are sufficiently important. As at January 2023, 265 returning offenders were subject to management under the Act, 41 of whom have convictions predating November 2015, so will be directly affected by the retrospective application of the Bill. 21 of the offenders currently under management are considered high risk due to likelihood of reoffending, or risk of harm to others, and approximately 45% of returning offenders have been convicted of an offence in New Zealand.[14] Given the

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11 *Chisnall v Attorney-General* [2022] 2 NZLR 484, at [190].

12 *R v Hansen* [2007] 3 NZLR 1 (SC).

13 Returning Offenders (Management and Information) Bill 98 – 1, Explanatory note.

14 Returning Offenders (Management and Information) Amendment Bill, Explanatory note.

known risk of reoffending, a level of monitoring or oversight to ensure public safety and reintegration is an important objective.

Is there a rational connection between the limit and the objective?

34. There is no evidence demonstrating the effectiveness of the regime in reducing reoffending and enhancing public safety or reintegrating offenders into New Zealand. In part this is because it does not appear we previously sought to monitor the risk of reoffending for persons who are deported to New Zealand. The statistics since the Act came into force suggest a significant number of returning prisoners reoffend in New Zealand (45%) despite the ongoing management and supervision under the Act. However, I am satisfied there is a rational connection between the imposition standard and special conditions and reintegration and a reduced risk of reoffending and as compared to the counterfactual situation where there would be no engagement between the state and returning offenders.

Is the impairment on the right greater than reasonably necessary to achieve the objective?

35. In the design of the original policy which became the Act, other less rights-infringing measures were considered. In particular, the provision of enhanced support measures on a voluntary basis were considered, which would clearly not constitute a "penalty". These measures would be akin to what is provided under the refugee resettlement scheme to assist people to integrate into New Zealand.[15] While these measures would achieve the same results in terms of re-integration, they were considered to be far less effective in ensuring public safety as they require no formal supervision of offenders and are voluntary, meaning many offenders could opt out entirely.

36. The standard and special conditions available are equivalent to those which would apply if the returnee was released from a sentence of imprisonment in New Zealand, however a returnee may be subject to conditions for a longer period of time. As the returnee is in a similar position to what they would be in if they had been subject to similar parole conditions in the overseas jurisdiction, or if they had served a sentence in New Zealand, their management under the Act may be seen as the least restrictive means to achieve the public safety imperative.

Is the limit in due proportion to the importance of the objective?

37. The degree to which the Bill infringes the right protected by s 26(2) is in due proportion to the importance of public safety and reintegration of offenders. As outlined above, there is a known risk of re-offending amongst returning offenders and difficulties in reintegrating into New Zealand, especially amongst those who have recently been released from prison overseas and have limited connection with New Zealand, other than citizenship, or support networks here.

38. The Bill's limitation of s 26(2) of the NZBORA is therefore demonstrably justified under s 5.

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[15] Regulatory Impact Statement *Management of Offenders Returning to New Zealand*, available at https://www.treasury.govt.nz/sites/default/files/2015-10/ris-justice-mro-nov15.pdf

Natural justice

39. The High Court in *G v Commissioner of Police* held that the approach Police had been taking, in serving a returning prisoner with a determination notice as soon as they arrived in New Zealand, breached s 27(1) of the NZBORA (the right to natural justice) as it did not give the person the opportunity to be heard regarding the possibility of a determination being made.[16]

40. Section 27 of the NZBORA 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.

41. What natural justice requires depends on the context,[17] and any justifications for limitations on s 27 are generally built into the consideration of what natural justice requires in a particular situation. In this context the High Court has held that natural justice for a returning prisoner determination requires a returnee to be notified in advance about the prospect of a determination and the opportunity to be heard on it. The Bill, which explicitly prohibits the Commissioner from providing notice or the right to be heard to the returnee, is therefore inconsistent with s 27 of the NZBORA.

42. As the High Court has already determined this point, although it is subject to appeal, it is not possible to argue that the inconsistency with natural justice is demonstrably justified under s 5. The arguments that might be marshalled to justify preventing prior notice and a hearing are the same arguments the High Court rejected in determining that prior notice and a hearing were required.

Conclusion

43. Giving recognition to the authority of the High Court's judgment, as I must, I have concluded that the Bill appears to be inconsistent with the prohibition against retrospective increases in penalty, affirmed in s 25(g) of the NZBORA and the right to natural justice, affirmed in s 27(1) of the NZBORA, and I draw those inconsistencies to the attention of the House.

Hon David Parker
Attorney-General

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16 *G v Commissioner of Police* [2022] NZHC 3514, at [139]-[140].

17 *Daganyasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.