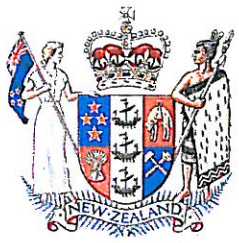

Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 262 of the Standing Orders of the House of Representatives

1. I have considered this Bill for consistency with the New Zealand Bill of Rights Act 1990. I conclude it appears to be inconsistent with the rights against the imposition of retroactive penalties and double jeopardy which are affirmed by s 26 of that Act.

Proposed changes to the Extended Supervision Orders regime

2. The Bill proposes further extension and modification of the Extended Supervision Order (ESO) regime in part 1A of the Parole Act 2002.

3. The ESO regime was introduced in 2003 and modified in 2009. As currently enacted it enables a Court to make an order authorising the Parole Board to impose a range of continuing restrictions and conditions on offenders who have completed finite sentences of imprisonment and the associated parole period. An ESO is only to be imposed on offenders who have committed serious sexual offences against children where the Court that sentenced the offender is satisfied that they pose a high risk of committing further such offences. The conditions can include residential restrictions akin to home detention with electronic monitoring and these conditions can endure for up to 10 years.

4. This Bill would retain the ESO regime and extend it. Offenders who have committed serious sexual offences against adults would also be eligible for an ESO as would some serious violent offenders. The range of qualifying offences is expanded to include attempts and conspiracies, and equivalent offences committed overseas. An ESO would also be capable of renewal for consecutive periods of 10 years, with mandatory five yearly reviews by the Court applying after that time. The ability to impose an intensive monitoring order requiring the offender to submit to close and continuous personal supervision for up to 12 months would reside with the Court rather than the Parole Board.

5. The Bill also contains new safeguards against ESOs being imposed unnecessarily in two principal ways. First, it extends the matters which must be addressed by the health assessor's report and requires the Court to be satisfied the offender has, or had, a pervasive pattern of serious sexual or violent offending before making an order. Any risk of sexual re-offending must be high before an order is imposed; a risk of violent re-offending must be very high. Second, high impact conditions, that is residential restrictions of 70 hours a week or more and electronic monitoring that can track the whereabouts of an offender outside his or her residence, must be reviewed by the Parole Board every two years.

Section 22 of the Bill of Rights Act

6. Section 22 protects individual liberty by guaranteeing the right not to be arbitrarily detained.

7. The conditions that may be imposed by the Board under an ESO may include a requirement to reside and remain at an address. In the first 12 months of any order it could involve a twenty-four hour confinement to that address and be accompanied by an intensive monitoring condition. After the first 12 months of any order, fulltime confinement to the address may not be imposed but below that there is no maximum daily or weekly period prescribed. Under the extensions proposed by this Bill, such residential restrictions could be imposed for an

unlimited number of consecutive ten-year periods, if the offender continues to meet the criteria for the ESO. An intensive monitoring condition could only be imposed once so would not feature in any renewed ESO.

8. The imposition of significant residential conditions, particularly where accompanied by intensive personal supervision or electronic monitoring, could constitute a detention rather than simply a restriction on the offender's freedom of movement.[1]

9. A small number of recidivist sexual and violent offenders constitute a significant continuing threat to public safety. Neutralising that threat is an important social objective and incapacitating the offenders through forms of detention and monitoring is a measure that is rationally connected to achieving that objective. However, detention for protective purposes will breach the right guaranteed by s 22 if not accompanied by an effective mechanism for review to end it promptly if it ceases to be justified.[2]

10. As presently enacted, under s107M the sentencing Court has the power at any time to cancel an ESO if the criteria for it are no longer present, and the Parole Board is empowered by s107O to cancel or modify any condition if it is no longer required. Both powers are triggered by an application either by the offender or the Chief Executive of the Department of Corrections.

11. Under the Bill, ss107M and 107O remain and have been supplemented by a mandatory biennial review by the Parole Board of the continuing need for high impact conditions that might amount to detention. These biennial reviews in combination with the existing review provisions constitute an effective procedural safeguard against arbitrary detention. The Bill does not infringe the right guaranteed by s 22 of the Bill of Rights Act but rather brings the existing legislation into compliance with that section.

Section 26 of the Bill of Rights Act

12. This section protects the individual against retroactive penalties and double jeopardy. It applies only to criminal penalties, so the ESO regime would only limit the right if the restrictions that it imposes can be characterised as criminal rather than civil in nature.

13. While the purpose of the ESO is to protect the community from future offending and not to punish offenders for past offences, the current inclusion of ESOs within the Parole Act means ESOs form part of the process of criminal justice. The Parole Act treats an ESO application as a criminal proceeding: ESOs are imposed on "offenders", it is the sentencing Court that imposes the order[3], the Criminal Procedure Act 2011 applies[4] as does criminal legal aid.[5] Such considerations led

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1 *Secretary of State for the Home Office v JJ* [2008] 1 AC 385 (HL); *Secretary of State for the Home Department v AP* [2010] 3 WLR 51 (UKSC)

2 *Rameka v New Zealand* UNHRC (1090/2002) (2003) 7 HRNZ 663, 679 *"The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public"*

3 Section 107I

4 Sections 107G and 107R

the Court of Appeal in *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) to hold ESOs amount to criminal punishment.[6]

14. Double jeopardy arises because the restrictive conditions add a further penalty to the sentence the offender has already served. Many if not most offenders eligible for an ESO would have been eligible at the time of sentencing for an indefinite sentence of preventive detention but either it was not sought or the Court chose not to impose it. In this way the ESO regime constitutes an additional criminal punishment imposed after sentence,

15. Section 107C(2) of the Parole Act is not materially altered in this Bill. That section confirms that an offender may be eligible for an ESO even where the qualifying offence was committed before Part 1A of the Parole Act came into force. The penalties imposed on those offenders are retroactive, a clear limitation on the right guaranteed by s 26(1) of the Bill of Rights Act.

16. In 2003 when Part 1A of the Parole Act was introduced, the then Attorney General in her s 7 report concluded that that the ESO regime limited the rights guaranteed by s 26. It was a view endorsed by the Court of Appeal in *Belcher*. I reached the same view in my report to the House on the Parole (Extended Supervision Orders) Amendment Bill in 2009.

17. The aspects of the ESO regime that cause the limitation of the rights against double jeopardy and retroactive punishment are preserved by this Bill and their application is extended. Any impairment of the rights guaranteed by s 26 cannot be demonstrably justified under s 5 of the Bill of Rights Act unless it is no more than is reasonably necessary to achieve the objective.[7]

18. A future risk of offending can be addressed at the time of sentencing in a way that will not infringe s 26 through the sentence of preventive detention. Where preventive detention is not available the Public Safety (Public Protection Orders) Bill demonstrates that outside the sentencing process the same objective can be achieved in a manner consistent with the Bill of Rights Act through a regime of civil rather than criminal detention.

19. The Public Protection Order legislation will create a civil regime designed to protect the public from the most serious kinds of sexual and violent re-offending. A potential way to ensure Bill of Rights Act compliance without compromising public safety could be to extend that legislation to provide a civil framework for supervision orders that have the same purpose and effectiveness as ESOs. Consideration will be given to this once the Public Safety (Public Protection Orders) Bill has been enacted.

20. For the present, an ESO remains as a criminal penalty. For that reason, the limitation on s 26 of the Bill of Rights Act arising from the Parole (Extended

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5 Section 107X

6 At [47].

7 Applying the well-known test in *R v Oakes* [1986] 1 SCR 103, approved by the Supreme Court in *R v Hansen* [2007] 3 NZLR 1 (Elias CJ at [42]; Blanchard J at [64]; Tipping J at [103] McGrath J at [203].

Supervision Orders) Amendment Bill is not demonstrably justified in a free and democratic society and the Bill is therefore inconsistent with the Bill of Rights Act.

Hon Christopher Finlayson
Attorney-General
27 *March 2014*