

Report of the

# ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990  
on the Sentencing (Community Sentencing to  
Fit the Crime) Amendment Bill

*Presented to the House of Representatives pursuant to  
Section 7 of the New Zealand Bill of Rights Act 1990 and  
Standing Order 264 of the Standing Orders of the House  
of Representatives*

## **Sentencing (Community Sentencing to Fit the Crime) Amendment Bill**

I have considered the Sentencing (Community Sentencing to Fit the Crime) Amendment Bill (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that clause 17 of the Bill appears to be inconsistent with section 17 of the Bill of Rights Act, and does not appear to be justified in terms of section 5 of the Bill of Rights Act. As required by section 7 of the Bill of Rights Act (and Standing Order 264) I draw this to the attention of the House of Representatives.

### **The Bill**

The explanatory note to the Sentencing (Community Sentencing to Fit the Crime) Amendment Bill states that a key objective of the Bill is to reinstate court control over punishment. The Bill also aims to enhance probation service powers to ensure the discipline among community work attendees.

In order to meet those objectives, the Bill seeks to repeal various provisions of the Sentencing Act 2002 that currently govern the circumstances in which community based sentences (namely supervision and community work) may be imposed. The Bill also modifies the regime for the imposition of non-association orders.

The Bill extends the standard supervision conditions which apply when an offender is sentenced to supervision by broadening the scope of offences related to the breach of a non-association order, and requiring scheduled or random testing for drug and alcohol abuse. In relation to the sentence of supervision, the Bill allows Judges to impose supervision at the end of prison sentences. In addition, the Bill makes provision for supervision sentences to be cumulative instead of concurrent. Finally, the Bill restores Judges' powers to state where community work will be done and to impose conditions on it.

### **Breach of Section 17 of the Bill of Rights Act**

I consider that clause 17 of the Bill appears to be inconsistent with section 17 of the Bill of Rights Act (the right to freedom of association). This provision provides that "a person identified in a non-association order of which he or she has received a copy, commits an offence if, without reasonable excuse, he or she associates with the offender who is subject to the non-association order, in contravention of the order".

#### *Important and Significant Objective*

A non-association order is designed to deter an offender from committing further offences and to assist in the offender's rehabilitation and reintegration. I consider that this provision furthers this aim by ensuring that criminal associates (as well as other people who may affect an offender's rehabilitation and reintegration) are discouraged from contacting the offender. This objective is a significant and important one.

*Rational and Proportionate Connection between Objective and Proposed Measure?*

However, in terms of section 5 of the Bill of Rights Act, I must also consider whether there is a rational and proportionate connection between the clause's objective and the measures proposed to effect that objective.

Extending the breach of non-association order to include an individual identified in a non-association order is rationally connected to the social objective of assisting the rehabilitation and reintegration of the offender.

Nonetheless, a provision must be proportionally as well as rationally related to the objective underlying the provision. When the Judge is making the non-association order he or she will have access to detailed information about the offender and will be able to predict, at least to some extent, what the offender's future circumstances will be. However, the Judge will not have the same range of information available to them about an individual identified in a non-association order.

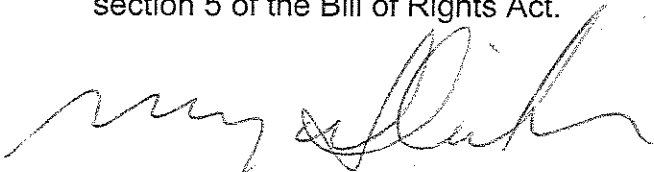
Clause 17 may apply in situations where the individual has no opportunity to appeal or seek amendment of the order at a later time. There is also the concern that, for some of these people, the non-association obligation may not take effect until several years later when the offender leaves prison. It is difficult to see how granting this order *ex parte*, and without the knowledge of where this person might be when the offender is released from prison and their social status, would be proportionate to the social objective of rehabilitation.

In my view, there may also be alternatives to the Bill which achieve its underlying objective, but are less intrusive on the right to freedom of association. For example, the current law of aiding and abetting might already address the issue that clause 17 is aimed at.

Consequently, I consider that, on the basis of the information available to me, clause 17 of the Bill cannot be said to be proportionally related to an underlying objective of reinstating court control over punishment. Accordingly, this clause cannot be considered a reasonable and demonstrably justified limit on the right to freedom of association in terms of section 5 of the Bill of Rights Act.

**Conclusion**

I conclude that clause 17 of the Sentencing (Community Sentencing to Fit the Crime) Amendment Bill appears to be inconsistent with section 17 of the New Zealand Bill of Rights Act 1990, and does not appear to be justified in terms of section 5 of the Bill of Rights Act.



Hon Margaret Wilson  
Attorney-General