Hon Ginny Andersen
Minister of Justice

Proactive release – Amendments to the Returning Offenders (Management and Information) Act 2015

Date of issue: 9 August 2023

The following documents have been proactively released in accordance with Cabinet Office Circular CO (23) 04.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1	**Amendments to the Returning Offenders regime** *Cabinet paper* Ministry of Justice 1 February 2023	We recommend withholding some information as it is likely it would, if requested under the Official Information Act 1982, be withheld under section 9(2)(h) to protect legal professional privilege. No public interest has been identified that would outweigh the reasons for withholding it.
2.	**Amendments to the Returning Offenders regime** *Cabinet Minute [CAB-MIN-0008]* Cabinet Office 31 January 2023	We recommend withholding some information as it is likely it would, if requested under the Official Information Act 1982, be withheld under section 9(2)(h) to protect legal professional privilege. No public interest has been identified that would outweigh the reasons for withholding it.
3.	**Returning Offenders (Management and Information) Amendment Bill: Approval for Introduction** *Cabinet paper* Ministry of Justice 17 February 2023	We recommend withholding some information as it is likely it would, if requested under the Official Information Act 1982, be withheld under section 9(2)(h) to protect legal professional privilege. No public interest has been identified that would outweigh the reasons for withholding it.
4.	**Returning Offenders (Management and Information) Amendment Bill: Approval for Introduction** *Cabinet Minute [CAB-MIN-0041]* Ministry of Justice 20 February 2023	We recommend releasing this document in full.

In Confidence

Office of the Minister of Justice

Cabinet Legislation Committee

Returning Offenders (Management and Information) Amendment Bill: Approval for Introduction

Proposal

1 I seek Cabinet's approval for the introduction of the Returning Offenders (Management and Information) Amendment Bill.

Policy

2 The Bill amends the Returning Offenders (Management and Information) Act 2015 ("the ROMI Act") in response to the recent High Court decision of *G v Commissioner of Police,* as approved by Cabinet on 31 January 2023 [CAB-23-MIN-0008 refers].

3 In *G*, the Court found that:

3.1 the ROMI Act does not apply retrospectively; and

3.2 natural justice requires the Commissioner of Police to provide notice and a right to be heard to affected persons before making a determination that they are a returning prisoner for the purposes of the ROMI Act.

4 The ruling means that the Act is not available for returning offenders, such as 501 deportees from Australia, who offended or were sentenced before the ROMI Act came into force. The notice and hearing requirements will also delay the imposition of release conditions on all returning offenders, undermining public safety for a period of time.

5 I consider this situation amounts to an unacceptable risk to public safety and is contrary to how Parliament always intended the Act to work. The Bill only aims to implement the original policy intent for the ROMI Act, with one exception outlined below.

6 The Bill address these issues by:

6.1 clarifying that the ROMI Act applies retrospectively. This will mean that the Commissioner of Police can make a determination that a person is a returning prisoner;

6.2 clarifying that standard and special conditions can be imposed, even where this might be inconsistent with NZBORA;

6.3 confirming that the Commissioner of Police can make a determination that a person is a returning prisoner without providing notice to that person or providing a right to be heard on the decision; and

6.4 validating past conduct and determinations that were made on the basis of offending that occurred prior to 2015, and which were made without prior notice or

a hearing being provided to the affected person. This is necessary to ensure that determinations and conditions remain in force.

7 The Bill only makes one substantive change compared to the original policy intent for the Act. The Bill removes the current 15-day time limit that the returning prisoner has to seek a statutory review of the Commissioner's determination. This responds to concerns raised by the High Court and will mean that returnees have more time to seek legal advice and prepare an application.

8 The Bill may be inconsistent with the New Zealand Bill of Rights Act 1990 ("the NZBORA"). Increasingly, New Zealand courts have taken the view that regimes like the ROMI Act, which impose restrictions that are usually only available through the criminal jurisdiction, amounts to a "penalty". This triggers the right to be free from double punishment at s 26(2), and the prohibition against retrospective increases in penalties at s 25(g). In particular, the prohibition against retrospective increases in penalties is regarded as being absolute, meaning that any limitation of it cannot be justified under s 5 of the NZBORA.

9 Nevertheless, I consider these amendments are necessary to protect public safety, and are limited in terms of their practical impact on the rights of returnees. This is because:

9.1 the proposals only put returning offenders in roughly the same position that they would have been in had they offended in New Zealand. The Act ensures that Police have information about the offender to support future investigations (if required), and that parole-like release conditions can be imposed on returning offenders that have just been released from prison;

9.2 it is likely that the vast majority of returning offenders would have been subject to parole regimes in the jurisdictions they offended in had they not been deported to New Zealand upon their release from prison; and

[redacted] Section 9(2)(h) [redacted]

[redacted]

11 The Bill includes a provision that excludes *G* from the validation of the retrospective application of the Act. Section 9(2)(h) [redacted] The exclusion of *G* from the validation is consistent with the approach taken by Government in response to the Child Protection (Child Sex Offender Government Agency Requisition) Amendment Act 2021, which was developed and passed under urgency in similar circumstances to this Bill.

12 I propose that the Bill be introduced on 22 February and passed through all stages on that day. The degree of the public safety risk requires the Act is clarified as soon as is possible. I consider moving at this speed is appropriate as:

12.1 the Bill only affirms what I consider to be Parliament's original intention for the regime, and

12.2 the Justice committee reviewed the ROMI Act as recently as 2019 and concluded that it was generally operating as intended.

Regulatory impact analysis

13 Cabinet's impact analysis requirements apply to the Bill, but there is no accompanying Regulatory Impact Statement (RIS) and the Treasury has not exempted the proposal from the impact analysis requirements. Therefore, the policy relating to the Bill does not meet the quality assurance criteria.

14 The Regulatory Impact Analysis team at the Treasury and the Ministry of Justice have agreed that a post-implementation review will be developed and provided to Cabinet in the coming months.

Compliance

15 The Bill complies with the principles and guidelines set out in the Privacy Act 2020.

16 The Bill confirms the original policy intent of the ROMI Act. Consequently, the Bill does not raise new Treaty of Waitangi issues beyond those the ROMI Act already creates.

17 The Bill may not comply with the NZBORA (or equivalent relevant international standards and obligations) to the extent that the retrospective application of the Act engages rights that are not able to be subjected to reasonable limitations.

18 The Bill does not comply with Legislation Guidelines (2021 edition) maintained by the Legislative Design and Advisory Committee to the extent that it validates past orders made under the ROMI Act in respect of retrospective offending.

19 A departmental disclosure statement has been prepared noting the above.

Consultation

20 The Ministry of Justice consulted with the Department of Corrections, Crown Law, New Zealand Police, and Treasury. Agency comments have been incorporated into the paper. The Department of Prime Minister and Cabinet was informed.

21 An exposure draft of the Bill and an invitation for a briefing from officials was extended to spokespeople from the National, ACT, and Green parties. Officials met with spokespeople from the National and ACT parties, and the Green Party did not require a briefing. Discussions were constructive, and no changes to the drafting of the Bill itself were requested. Parties will consider their formal positions on the bill at their caucus meetings on 21 February, and I expect a level of support across the House to progress the Bill across all stages.

Binding on the Crown

22 It is proposed that the Act will be binding on the Crown. The Committee's agreement is sought below.

Creating new agencies

23 No new agencies will be created by the Bill.

Allocation of decision-making powers

24 The Bill does not involve the allocation of decision-making powers between the executive, the courts, and tribunals.

25 The Bill will not require regulations to be brought into operation.

Other instruments

26 The Bill does not include any provision empowering the making of other instruments that are deemed to be legislative instruments or disallowable instruments (or both).

Definition of Minister/department

27 The Bill does not contain a definition of Minister, department (or equivalent government agency), or chief executive of a department (or equivalent position).

Commencement of legislation

28 The Bill's provisions will all come into force the day after the date of Royal assent.

Parliamentary stages

29 I propose that the Bill be introduced on 22 February 2023 and passed through all stages that day.

Proactive Release

30 I intend to release the paper proactively, in whole or in part, within 30 business days.

Recommendations

I recommend that the Committee:

1 **note** the Returning Offenders (Management and Information) Amendment Bill 2023 holds a category 2 priority on the 2023 Legislation Programme;

2 **note** that Cabinet agreed to amend the Returning Offenders (Management and Information) Act 2015 to clarify the Act's retrospective application, and that notice and a hearing is not required before the Commissioner of Police makes determinations of a persons' status as a returning prisoner;

3 **approve** the Returning Offenders (Information and Management) Bill 2023 for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;

4 **agree** that the Bill be introduced on 22 February 2023, to be progressed through all stages that day.

Authorised for lodgement

Hon Kiri Allan

Minister of Justice

CAB-23-MIN-0008

Cabinet

Minute of Decision

Amendments to the Returning Offenders Regime

Portfolio **Justice**

On 31 January 2023, Cabinet:

1 **noted** that urgent legislative clarification is necessary to respond to the issues relating to the Returning Offenders (Management and Information) Act 2015 (the Act), raised in the High Court judgement of *G v Commissioner of Police;*

2 **agreed** to amend the Act to clarify that the returning offenders' regime applies retrospectively;

3 **agreed** to amend the Act to clarify that the determination by the Commissioner of Police can be made, and standard and special conditions can be imposed, even where they amount to an unjustifiable limit on rights protected in the New Zealand Bill of Rights Act 1990 (NZBORA);

4 **agreed** to confirm that determinations can be made by the Commissioner of Police without notice being given to the affected person, nor a right to be heard;

5 **agreed** to remove the limit of 15 days for a returning prisoner to seek a review of the determination that they are a returning prisoner;

6 **agreed** to backdate the retrospective application of the Act, except as it relates to *G*, so that historic orders are not invalidated merely because they were imposed on the basis of offending that occurred before the Act came into force;

Section 9(2)(h)

[redacted]

Legislation

9 **noted** that the Minister of Justice intends to seek approval for an amendment bill to be included in the 2023 Legislation Programme;

10 **authorised** the Minister of Justice, in consultation with the Minister of Corrections and the Minister of Police, to make additional minor policy decisions in relation to the drafting of legislation which are consistent with the contents of the paper under CAB-23-SUB-0008;

11 **invited** the Minister of Justice to issue drafting instructions to Parliamentary Counsel Office to give effect to the above decisions.

Rachel Hayward
Secretary of the Cabinet

In Confidence

Office of the Minister of Justice

Chair, Cabinet Social Wellbeing Committee

Amendments to the Returning Offenders regime

Proposal

1 This paper seeks Cabinet's agreement to urgent legislative amendments to the returning offenders' regime in response to the recent High Court decision of *G v Commissioner of Police*.

Relation to Manifesto commitments and government priorities

2 The proposed amendments support the Government's commitment to keep our communities safe, break the cycle of offending and tackle the root causes of crime.

Executive summary

3 In the recent High Court decision of *G v Commissioner of Police*, the Court found that:

3.1 the Returning Offenders (Management and Information Act 2015 ("the Act") does not apply retrospectively; and

3.2 that natural justice requires the Commissioner of Police to provide notice and a right to be heard to affected persons before making a determination that a person is a returning prisoner for the purposes of the Act.

4 I consider the decision creates an unacceptable risk to public safety and is contrary to how Parliament intended the Act to work. This decision means that the Act is not available for returning offenders, such as 501 deportees from Australia, who offended before the Act came into force in 2015. The notice and hearing requirements will also delay the imposition of release conditions which are necessary to uphold public safety. These are currently made before a returnee arrives and is served on them as they enter the country.

5 The High Court's decision has been stayed pending appeal. This means that the Act continues to apply as it had prior to the Court's decision in *G*. While the historic operation of the Act could be confirmed as lawful on appeal, I am still considering options on timing for progressing an amendment Bill. One option is to introduce a bill and have it passed under urgency on 21 February. I will outline my preferred approach in the forthcoming LEG paper for Cabinet consideration.

6 Urgent legislative amendments are required to address the issues of retrospectivity and natural justice. As such, I propose the following legislative changes are made via a standalone bill:

6.1 clarify that the ROMI Act applies retrospectively to capture returning offenders who offended prior to the Act coming into force. This will mean that Commissioner of Police can make a determination that an individual is a returning prisoner, and standard and special conditions can be imposed, even where the court would consider the conditions to be an unjustifiable limit on the right to be free from double jeopardy; and

6.2 confirm that the Commissioner of Police can make a determination that a person is a returning prisoner without providing notice to the returnee or providing a right to be heard on this decision.

7 The proposals may trigger a section 7 New Zealand Bill of Rights Act 1990 ("the NZBORA") report. This is because the proposals limit section 25(g), which the Courts have held is an absolute right that is not capable of limitation.[1] Section 25(g) provides the right to the lesser penalty if the penalty is varied between the commission of the offence and sentencing. The proposals may also attract a s 7 report as an unjustified limit on section 26(2), which protects against double jeopardy.

8 Despite any section 7 report, I consider these proposals are nevertheless necessary to protect public safety and are limited in terms of the practical impacts on returnees.

Background

9 The Act came into effect on 18 November 2015 and created an identification and management regime for returning New Zealanders convicted of criminal offending overseas.

10 There are two categories of returnees:

10.1 **Returning offenders:** returnees who have been convicted in an overseas jurisdiction of an offence that would be imprisonable if it had occurred in New Zealand, and who are deported or removed to New Zealand as a consequence of their overseas conviction; and

10.2 **Returning prisoners:** are a subset of returning offenders who were sentenced to imprisonment for a term of more than one year for their offending, and who return to New Zealand within six months of their release from custody during or at the end of their sentence.

11 The Act generally puts returning offenders in the same position they would be if they had offended in New Zealand. The Act ensures that Police are able to collect information from returning offenders (including their name, date of birth, and in some cases DNA samples) to establish their identity and support future investigations. The Act also imposes parole-like conditions on returning prisoners, to enable their reintegration into community-life following a prison sentence, and ongoing supervision by the Department of Corrections to protect public safety.

12 All returning prisoners are automatically subject to standard conditions. This includes requirements like reporting to a probation officer and undertaking a rehabilitative needs assessment where directed. Additionally, Corrections may apply to the Court for the imposition of one or more special conditions on returning prisoners.[2] Special

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

[2] Special conditions may only be imposed by a Court if they are designed to reduce the risk of re-offending, facilitate rehabilitation and reintegration, or make reasonable provision for the victims of the offender.

conditions can include electronic monitoring, residential restrictions, or alcohol or drug conditions.

13 The Act was drafted and passed under urgency in 2015 following changes to Australian immigration law in 2014. These changes significantly increased the number of offenders returning to New Zealand. Prior to the Act, preventive restrictions could not be imposed on returning offenders arriving in New Zealand.

The High Court has found that the ROMI Act does not apply retrospectively

14 In the recent judgement of *G v Commissioner of Police*, the High Court concluded that Parliament did not explicitly signal its intent for the orders to apply retrospectively. This means that the Act does not apply to offending that occurred before the Act came into force in 2015.

15 The Court also found that the principle of natural justice requires the Commissioner to provide notice and the right to be heard to an affected person before determining that they are a returning prisoner. Currently, the Act is silent as to how natural justice should be given effect to through the determination process.

Impact on public safety

16 Currently, 265 returning offenders are managed by Corrections on conditions. Of this cohort, 41 are being managed for convictions that predate November 2015, and 21 are considered to be high risk due to their likelihood of reoffending and/or risk of harm to others. This includes four offenders with pre-2015 convictions for serious sexual and violent offending who are subject to electronic monitoring. Corrections advises that it is critical to public safety that the whereabouts of these four offenders, and any future returning offenders in similar situations, can be monitored.

17 The findings in G means that these 41 offenders could apply to have their orders quashed. Additionally, future returning prisoners with pre-2015 convictions would have to be released into the community on their arrival in New Zealand without any specific agency support or oversight. Increasingly, offenders returning with pre-2015 convictions are going to be those who were sentenced to longer periods of imprisonment for the most serious types of offending.

18 New Zealand offenders and returning offenders re-offend at around the same rate. As at 30 November 2022, approximately 45% of returning offenders have been re-convicted of an offence in New Zealand. Between 01 January 2015 and 19 May 2021, the proportion of deportees who offended within their first year of arrival has decreased. While many of these individuals are likely involved in less serious offending, there is a small proportion who are involved in serious violence and drug offending. This small proportion is almost certainly contributing to organised crime in New Zealand.

Proposals

Explicitly provide that the regime applies retrospectively

19 I propose amending the Act to clarify that all operative provisions:

19.1 apply retrospectively;

19.2 apply irrespective of any possible unjustified limitation of sections 25(g) and 26(2) of NZBORA; and

19.3 override section 6 of the Sentencing Act 2002 ("the Sentencing Act"), which also enacts section 25(g) of NZBORA, protecting the right to the lesser penalty if the penalty is varied between the commission of the offence and sentencing.

20 These changes will ensure the Act is clear and sets out in plain language how it is to be interpreted vis-à-vis other provisions in law that have wide interpretive effect. Clear direction as to the Act's retrospective application, even where this is inconsistent with the NZBORA and the Sentencing Act, is necessary to ensure the continued management by Corrections of the 40 returning offenders with pre-2015 convictions, along with future returning offender with pre-2015 offending histories.

21 Section 9(2)(h) [redacted]

22 For the avoidance of doubt, I propose amending the Act to clarify the Court's own power to impose special conditions on returning prisoners, even where this would be otherwise inconsistent with ss 25(g) and 26(2) of the NZBORA. This will ensure the Court is clear as to its own power to order special conditions be made, provided the statutory conditions are met. Special conditions are essential to protect public safety. I understand that special conditions are sought by Corrections, and obtained, in respect to nearly every returning prisoner. This reflects the risks to public safety this cohort presents.

Confirm that natural justice requirements for determinations are satisfied through the review mechanism and removing the 15-day application period

23 The High Court held that natural justice requires that returnees are given adequate notice and a right to be heard before the Commissioner of Police makes a determination as to the person's status as a returning prisoner.

24 Currently, determinations can be made, and interim special conditions set, prior to the returning prisoner's arrival in New Zealand. This means that release conditions apply immediately upon the returnee's arrival. Final special conditions are then set by the Court after the returning prisoner has arrived and is able to make submissions.

25 The new requirement for notice and a hearing before the Commissioner of Police makes a determination as to a returnee's status under the Act will delay the imposition of conditions, which creates a public safety gap. Standard conditions only apply, and special conditions can only be considered and imposed, after the initial determination is made as to an offender's status under the Act.

26 I do not consider that notice and the right to be heard is required for a fair process to occur with respect of these determinations. This is because:

26.1 the matters that the Commissioner is required to be satisfied of before making a determination are wholly objective and factual in nature (i.e. the person

either meets the criteria or they do not).[3] The Commissioner can readily be satisfied about whether the relevant conditions are met through a review of the relevant paperwork provided by the deporting jurisdiction. On this basis, there is very little scope for the affected person to make a relevant submission that would affect the determination;

26.2 the Commissioner does not have any discretion on whether or not to make a determination if the statutory criteria are met. The determination flows as a consequence of the law; and

26.3 the Act already provides a process by which the affected person can seek a review of the determination of their status. The Act requires that this review is completed within 20 days of an application being made, providing for quick resolution if there is an issue with the determination.

27 In practice, the lack of notice and hearing prior to determinations being made has not resulted in significant substantive unfairness. Since the scheme was enacted, only one order has been successfully reviewed through the statutory review provision. This was because the individual's sentence was suspended, which meant that although they had been convicted in Australia for conduct that constituted an offence in New Zealand and had been sentenced to 18 months imprisonment (satisfying ss 17(1)(a) and (b)), they had not been released from custody during or at the end of their sentence. Although they were in Immigration detention until their deportation, as it was not following release from prison, on review Police agreed that they did not meet the requirements of s 17(1)(c), and therefore could not be a returning prisoner.

28 I therefore propose to amend the Act to confirm that the Commissioner can be satisfied that a returnee is a returning offender under the Act without notifying or hearing from the affected person. I consider the deviation from the usual requirements for procedural fairness in these instances are justified by the compelling public safety risks associated with any delay in imposing release conditions, and by the limited risk of resulting substantive unfairness.

29 However, I do consider there is merit in amending the review process. Currently, the Act requires that returnee apply for a review against the Commissioner's determination within 15-days of being served with the order.

30 This narrow time-limit on applying for a review was identified by the Court as having the potential to create unfairness, as it could take some time for returnees to seek counsel and prepare an application following their return. While the time limit might help to ensure reviews are sought and concluded promptly, I agree that the 15-day time limit is not necessary in the circumstances. I propose there be no time-limit to a returnee applying for a review of the Commissioner's determination.

Other matters

Backdating the retrospective application of ROMI, except in relation to G

31 I propose the retrospective application of the Act is backdated, except as it relates to *G*. This will confirm that all returning offender orders made since the Act came into force are not invalided merely because were imposed for offending that pre-dated

[3] Paragraph 10.2 above provides an overview of the criteria for the determination of a person's status as a returning prisoner.

November 2015. This is appropriate because I believe that Parliament always intended for the Act to operate retrospectively.

Section 9(2)(h)

[redacted]

[redacted]

[redacted]

Next steps

35 If Cabinet agrees to these proposals, a bill will be introduced to the House in February 2023.

Financial Implications

36 This proposal confirms the status-quo operation of the Act. As such, no new expenditure will be needed as a consequence of these decisions.

Legislative Implications

37 The proposals outlined above would all require changes to the Act.

38 Subject to decisions from Cabinet, my officials will work with Parliamentary Counsel Office (PCO) to draft the relevant provisions in preparation for introduction in early 2023.

39 The Bill will bind the Crown.

Regulatory Impact Statement

40 Cabinet's impact analysis requirements apply to the proposal to amend the Returning Offenders (Management and Information) Act 2012, but there is no accompanying Regulatory Impact Statement and the Treasury has not exempted the proposal from the impact analysis requirements. Therefore, it does not meet Cabinet's requirements for regulatory proposals. The Regulatory Impact Analysis team at the Treasury and Ministry of Justice have agreed that a post-implementation review will be developed and provided to Cabinet in the coming months.

Te Tiriti o Waitangi/Treaty of Waitangi implications

41 This proposal confirms the status-quo operation of the Act. Consequently, the paper does not raise new treaty issues beyond what the Act already provides.

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4 CCPR/C/132/D/3162/2018.

42 Māori are overrepresented in the returning offenders' population. Of the 2845 individuals deported from Australia between January 2015 and November 2022, 42 percent were Māori.

43 While ROMI orders generally involve limits on returnees' freedom, there also provide rehabilitative and reintegrative benefits. These include access to a range of support services, such as health, disability, income, housing and employment services. There are also culturally specific rehabilitation services available in the community, which Māori returnees are able to access.

44 Other Government initiatives are also underway to address the overrepresentation of Māori in the criminal justice system. Where appropriate and available, kaupapa Māori programmes can provide additional support for Māori returnees.

Gender implications

45 This proposal confirms the status-quo operation of the Act. As such, no new gender implications arise on this paper.

46 Generally, the Act impacts men more than women as the vast majority of deported offenders and prisoners returning from overseas jurisdictions to date have been male.

Disability Perspective

47 This proposal confirms the status-quo operation of the Act. As such, no new disability implications arise on this paper.

48 Generally, returning offenders are likely to have multiple and complex needs for which they will need support. There are a range of health and disability services available to returning offenders once they arrive in New Zealand.

Human Rights

49 The proposals engage the following rights under the NZBORA:

49.1 section 25(g) which affirms the right, if convicted of an offence of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty;

49.2 Section 26(2), which affirms that no one who has been finally acquitted or convicted of, or pardoned for, and offence shall be tried or punished again; and

49.3 section 27(1), which affirms the right to natural justice.

50 I consider that the proposals are likely to result in a section 7 report. This is because:

50.1 the tools the Act provides for managing the risk posed by returning offenders are likely to be considered "penalties", triggering ss 25(g) and 25(2). Section 9[illegible] [redacted] Increasingly, however, the courts have taken an expansive view of what amounts to a "penalty", focusing on the punitive effect of the provision rather than an express intent to protect public safety; and

50.2 limitations on section 25(g) of NZBORA are regarded as "absolute" and not subject to reasonable limitation.[5]

51 Nevertheless, I consider these proposals are necessary and appropriate. This is because:

51.1 there is a demonstrable public safety risk that needs to be managed. Returning offenders re-offend at the same elevated rate as offenders in New Zealand, compared to the general population. Specifically, we also know of a number of serious sexual or violent offenders who are assessed as posing a high risk of reoffending that are currently subject to ROMI orders.

51.2 the Act has a limited practical impact on returnees. The Act only aims puts returnees in the general same position as they would have been in had they offended in New Zealand. As it relates to returning prisoners, this means they are released in the community subject to parole-like conditions. Returnees would have been highly likely to be subject to parole in the jurisdiction they offended in, but for the deportation. The key difference between ROMI orders and parole is that it is not possible to recall returning offenders to prison for the remainder of their term of imprisonment if they are assessed as posing an undue risk to public safety. In this way, ROMI orders are less intrusive on returnees' rights and freedoms than parole regime that they might normally have been subjected to.

51.3 Section 9(2)(h) [redacted]

52 I also consider that there is strong justification for limiting section 27(1) given:

52.1 the public safety risks that would result from a delay in imposing release conditions on returning prisoners;

52.2 the limited risk that substantive unfairness will result from the lack of notice or a hearing before Commissioner makes a determination; and

52.3 the improved review mechanism that can provide for quick resolution if the returnee is concerned the determination was wrongly made.

Consultation

53 Comments from the New Zealand Police, Ara Poutama Aotearoa - Department of Corrections, and the Crown Law Office have been incorporated into this paper. The Department of the Prime Minister and Cabinet and the Treasury were informed of the proposals.

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

Communications

54 The communications approach around this paper and associated issues will be managed by my office, in consultation with other Ministers' offices as appropriate.

Proactive Release

55 I intend to proactively release this paper within 30 business days of final decisions been taken by Cabinet.

Recommendations

56 The Minister of Justice recommends that the Committee:

1 **note** that urgent legislative clarification is necessary to respond to the issues relating to the Returning Offenders (Management and Information) Act 2015 ("the Act"), raised in the High Court judgement of *G v Commissioner of Police;*

2 **agree** to amend the Act to clarify that the returning offender's regime applies retrospectively;

3 **agree** to amend the Act to clarify that the determination by the Commissioner of Police can be made, and standard and special conditions can be imposed, even where they amount to an unjustifiable limit on rights protected in the New Zealand bill of Rights Act 1990;

4 **agree** to confirm that determinations can be made by the Commissioner of Police without notice being given to the affected person, nor a right to be heard;

5 **agree** to remove the limit of 15-days for a returning prisoner to seek a review of the determination that they are a returning prisoner.

6 **agree** to backdate the retrospective application of the Act, except as it relates to *G*, so that historic orders are not invalidated merely because they were imposed on the basis of offending that occurred before the Act came into force;

Section 9(2)(h)

Legislation

9 **note** that I intend to seek a slot for the Bill on the 2023 Legislation Programme;

10 **authorise** the Minister of Justice, in consultation with the Minister of Corrections and the Minister of Police, to make additional minor policy decisions in relation to the drafting of legislation which are consistent with the contents of this paper, without further reference to Cabinet; and

11 **invite** the Minister of Justice to issue drafting instructions to Parliamentary Counsel Office.

Authorised for lodgement

Hon Kiri Allan

Minister of Justice

CAB-23-MIN-0041

Cabinet

Minute of Decision

Returning Offenders (Management and Information) Amendment Bill: Approval for Introduction

Portfolio **Justice**

On 20 February 2023, Cabinet:

1 **noted** that a category 2 priority on the 2023 Legislation Programme is sought for the Returning Offenders (Management and Information) Amendment Bill (the Bill);

2 **noted** that in January 2023 Cabinet agreed to amend the Returning Offenders (Management and Information) Act 2015 to clarify the Act's retrospective application, and that notice and a hearing is not required before the Commissioner of Police makes determinations of a persons' status as a returning prisoner [CAB-23-MIN-0008];

3 **approved** the Returning Offenders (Information and Management) Bill 2023 [PCO 25243/1.10] for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;

4 **authorised** the Minister of Justice to approve minor or technical changes to the Bill before introduction;

5 **agreed** that the Bill be introduced on 22 February 2023, with the intention that it pass through all stages that day.

Rachel Hayward
Secretary of the Cabinet