Criminal Justice Reform Bill

20 November 2006

Attorney-General

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
CRIMINAL JUSTICE REFORM BILL
Our Ref: ATT395/22

1. We have considered the Criminal Justice Reform Bill (PCO 7194/13) and conclude that it is not inconsistent with the New Zealand Bill of Rights Act 1990 (BORA).

2. We have discussed a number of issues in detail below. To summarise, our conclusions are:

2.1 The retrospective nature of the proposed sentencing guidelines and the changes to the parole regime are not inconsistent with the right against retrospective penalties in s 25(g) of the BORA. The principal reason is that they do not change the maximum penalty that can be imposed for any particular offence.

2.2 The application of the two new community based sentences to persons who committed their offences before the provisions come into force and where the offence carries a maximum penalty of a community-based sentence, is not inconsistent with the right against retrospective penalties in s 25(g) of the BORA because Courts applying the provisions must exercise their sentencing discretion consistently with the BORA, by virtue of s 6 of the BORA.

2.3 The structure, composition and role of the proposed Sentencing Council are not inconsistent with judicial independence and impartiality, as provided for in s 25(a) and s 27 of the BORA. In the event that participation in the work of the council gave rise to a conflict of interest in a particular case, there are practical mechanisms available to ensure that no breach of the BORA occurs.

2.4 The proposed nature of the sentencing guidelines (which are not intended to be as prescriptive or rigid as their United States counterparts) and the ability of the courts to depart from the guidelines in 'the interests of justice' provide sufficient protection to ensure criminal process rights are not breached in individual cases.

2.5 The power to require offenders to attend medical, psychological or therapeutic programmes can be exercised consistently with the right to refuse medical treatment protected by the BORA, by the courts imposing such orders against the wishes of the offender only in cases when it is justifiable under s 5 of the BORA.

2.6 The various restrictions upon the rights to freedom of association and freedom of movement are justifiable pursuant to s 5 as is the protective provision for young persons in respect of the imposition of the sentence of home detention.

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Overview of Bill

3. The Bill amends a range of legislation, largely affecting bail, sentencing and parole of offenders. The stated purpose of the Bill is to introduce a range of measures to arrest the sharp increase in the prison population in recent years.

4. The Bill's provisions include:

4.1 The establishment of a Sentencing Council responsible for issuing sentencing and parole guidelines. The stated intention of such guidelines is to increase the level of consistency and transparency in decisions in these areas and to promote 'truth in sentencing'. At the same time, the guidelines are expected to allow ample room for judicial discretion in sentencing individual offenders.

4.2 The introduction of an explicit hierarchy of sentences and orders.

4.3 The introduction of three new sentences that are intended to be alternatives to imprisonment for less serious offenders, thereby addressing the increasing use of

incarceration for such offenders. The Bill makes home detention a sentence in its own right, able to be imposed by the sentencing judge. Two new community based sentences of community detention and intensive supervision are introduced by the Bill.

4.4 Amendments to the Bail Act to better reflect the common law and ensure that offenders are not unnecessarily remanded in custody rather than on bail.

4.5 Amendments to the parole regime.

4.6 Miscellaneous amendments to:

4.6.1 The Extended Supervision regime for the management of child sex offenders in the Parole Act 2002.

4.6.2 The Prisoners' and Victims' Claims Act 2005, deferring the date of the sunset clause contained in that Act.

4.6.3 The Sentencing Act 2002 in relation to standard and special release conditions for short-term sentences.

Retrospectivity of the Bill

5. There are a number of provisions of the Bill that have the potential to engage the right affirmed by s 25(g) of the BORA. In particular:

5.1 The new sentences of Intensive Supervision, Community Detention and Home Detention will be available in respect of all persons who are sentenced after the provisions come into force, irrespective of the date on which the offence was committed. The transitional provisions provide some safeguards for persons who commit offences before the commencement of the provisions, including a requirement that the offender consent to the imposition of the sentence.[1] However, there are no express safeguards to ensure that offenders are not given heavier sentences than could have been imposed before the commencement date.

5.2 Clause 35 of the Bill provides that sentencing guidelines developed by the Sentencing Council are to apply to all persons sentenced after the guidelines come into force, whether or not the guideline was in force when the offence was committed. This raises a theoretical possibility that an offender may receive a heavier sentence that would have been imposed before the guideline comes into force. A similar provision exists in respect of parole guidelines.

5.3 The proposed parole provisions mean that, for persons sentenced after the commencement of the provisions:

5.3.1 There is no longer any entitlement to release from prison for persons serving sentences of 12 months or less. Under the current provisions of the Parole Act 2002 such persons would have been automatically entitled to release from prison (subject to any court

imposed conditions) after serving half of their sentence. Under the new provisions such persons will not be eligible for parole and will have to serve their full sentence in prison.

5.3.2Entitlement to release from prison for persons serving sentences of more than 12 months and up to 24 months is replaced with discretionary parole after serving two-thirds of the sentence. Under the current provisions of the Parole Act 2002 such persons would have been automatically entitled to release from prison (subject to court imposed conditions) after serving half of their sentence.

5.3.3 Parole eligibility is increased from one-third to two-thirds for persons serving sentences of 24 months or more.

The provisions apply according to the date of sentence, rather than the date of commission of the offence. Accordingly, they raise the possibility that without a corresponding change in sentencing practises some persons sentenced after the provisions come into force will serve a longer period in prison than if they had been sentenced before the provisions come into force.

6. In our view, the provisions do not breach the right protected by s 25(g) of BORA that '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'. The simple reason for this conclusion, as supported by both domestic and international jurisprudence, is that the right protected by s 25(g) relates only to the maximum penalty for an offence.[2] It does not extend to the penalty imposed in individual cases by the sentencing court or the administration of that penalty in terms of parole. However, whilst this provides a simple answer to the question of whether s25(g) is breached, given the recent domestic case law in relation to the right it is appropriate to include a more detailed discussion of the issue.

Scope of the right in respect of retrospective penalties

7. Section 25(g) provides that:

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

...

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.

8. The right in respect of retrospective penalties has been considered by the Supreme Court on two occasions: *Morgan v Superintendent of Rimutaka Prison* [2005] NZSC 26 and *R v Mist* [2005] NZSC 77.

9. In *Morgan* the majority (Elias CJ dissenting) held that s 6 of the Sentencing Act and s25(g) of the BORA related only to the maximum penalty[3] that could be imposed

for the generic offence, and did not extend to the individual sentence that might have been imposed on a particular offender.[4]

10. Applying the conclusion of the majority of the Supreme Court in *Morgan,* the retrospective nature of the sentencing and parole guidelines and the changes to the parole regime do not breach s 25(g) of the BORA because the provisions do not change the maximum penalty able to be imposed for any offence.

Application of the right to sentencing guidelines

11. Overseas jurisprudence makes clear that rights in respect of retrospective criminal offences can include judicial development of the law relating to criminal **liability** . However, no jurisdiction has extended this to include development of the law in relation to **penalties** such as sentencing guidelines or practises.

12. There are three principal reasons for this:

12.1 'Penalty' applies to statutory maximums only.

12.2 It is reasonably foreseeable that within the maximum penalty, sentencing practises and guidelines may change.

12.3 The guidelines are advisory only and do not guarantee a particular sentence or reduce the maximum penalty that could be imposed.

Europe and the United Kingdom

13. The European Court has not considered the application of Article 7 of the European Convention to judicial developments in sentencing practises or guidelines. It has, however, been consistent in its statements of general principle that the inquiry for the court is whether the punishment is within the limit fixed by the legislative provision.[5]

14. The United Kingdom Court of Appeal has consistently rejected the argument that Article 7 is breached where there is an increase in judicial sentencing levels: *R v A and W* [2001] 2 Cr App R 275 (CA); *R v JJC* 24 September 2001 (CA); *Twisse* [2001] 2 Cr App R 37. Two rationales can be elucidated from the judgments. Firstly, the Article applies only to changes in the maximum penalty. Secondly, it is reasonably foreseeable that within the maximum penalty, sentencing practises and guidelines of the courts may change.

United States

15. The US Courts of Appeals have repeatedly held that the right in respect of retrospective penalties is not violated by retroactive sentence enhancements. In a line of judgments,[6] the most recent of which was delivered on 3 August 2006,[7] the Courts of Appeals have rejected claims of a violation of due process where the application of the judgment of the Supreme Court in *United States v Booker* 541 US 1

(which rendered federal sentencing guidelines advisory rather than mandatory) resulted in some offenders receiving or being exposed to higher penalties than could have been imposed when the guidelines were treated as mandatory.

16. The Courts noted that one of the purposes of the right is "giving people 'fair warning' of the legal consequences that their actions will have".[8] The requirement of fair warning was satisfied because the defendants had been given fair warning that their offences were punishable by the maximum penalty set out in the Criminal Code. The fair warning relates to the "possible consequences" of the defendants' actions.[9] Related to this is the fact that the guidelines (as held by the Supreme Court in *Booker*) were advisory only and could be departed from by the sentencing judge if the circumstances warranted it.[10]

Canada

17. The Saskatchewan Court of Appeal has considered the right in the context of increased ranges of sentences imposed by the courts and has held that "'punishment' must be construed to mean the punishment fixed by Parliament rather than any range of sentences that may emerge in court decisions within the controlling statutory provisions": *R v D (R)* 48 CR (4th) 90 para 11. See also *R v WG,* 6 November 1995.

Conclusion

18. The explanatory note to the Bill makes clear that it is envisaged that the sentencing guidelines will be similar in form to sentencing guideline judgments presently issued by appellate courts. Further, whilst the sentencing court is directed to follow the guidelines, he or she may depart from the guidelines in 'the interests of justice'. Like the advisory federal sentencing guidelines in the United States,[11] they do not guarantee a particular sentence or reduce the maximum sentence able to be imposed for an offence.

19. Accordingly, we have concluded that the retrospective application of the proposed sentencing guidelines does not breach s 25(g) of the BORA.

Application of the right to changes in parole eligibility

20. Under the Bill:

20.1 Persons serving sentences imposed prior to the commencement of the Sentencing Act 2002 (30 June 2002) will continue to have their sentence administered under the transitional provisions of the Act, which preserve:

20.1.1 A general entitlement to release[12] for persons serving sentences of 12 months or more after serving two-thirds of the sentence: s 105 Parole Act 2002.

20.1.2 A general entitlement to release for persons serving sentences of 12 months or less, after serving half of their sentence: s 105 Parole Act 2002.

20.1.3 Parole eligibility in accordance with s89 of the Criminal Justice Act 1985 i.e. generally, one-third for persons serving sentences of 12 months or more for offences other than serious violent offences: s20(2) Parole Act 2002.

20.2 Persons serving sentences imposed between 30 June 2002 and the commencement of the new parole provisions (the 'initial period' as defined in clause 80 of the Bill):

20.2.1 If serving a sentence of more than 2 years[13], will continue to be eligible for parole after serving one-third of their sentence or the minimum period of imprisonment imposed by the sentencing court pursuant to ss 86, 89 or 103 of the Sentencing Act (clause 120 *cf* s 84 Parole Act).

20.2.2 If serving a sentence of 2 years or less, will continue to be entitled to release after serving half of the sentence (clause 121 *cf* s 86(1) Parole Act). However, their release from prison is not unconditional. They will continue to be subject to any court imposed conditions, a breach of which constitutes an offence punishable by up to one year's imprisonment.[14] For those serving sentences of 12 to 24 months, it is highly likely that at least the standard conditions will apply.[15]

20.3 Persons serving sentences imposed after the commencement of the new parole provisions, irrespective of the date of the offence:

20.3.1 If the sentence is 12 months or less, will serve the full sentence. There is no longer any entitlement to release or eligibility for parole for such persons.

20.3.2 If the sentence is more than 12 months will not be eligible for parole until they have served two-thirds of their sentence: clause 120(1).

21. The provisions are such that, without a corresponding change in sentencing practises, some offenders may serve longer periods in prison under the proposed parole regime than if were sentenced before the provisions come into force. The table annexed to this advice compares the relative positions of different offenders.

Application of majority judgment in Morgan

22. In *Morgan* the Supreme Court considered the question of whether the changes to the parole regime enacted by the Parole Act 2002 amounted to a retrospective penalty. Mr Morgan had been sentenced to a term of three years imprisonment after the Act came into force in respect of sentences committed prior to the Act coming into force. Had he been sentenced prior to the Act coming into force he would have been entitled to release (subject to conditions and liability to recall) after serving two thirds of his sentence. In his case, this entitlement was subject only to any extension of his release date for commission of disciplinary offences.[16] As a result of being sentenced after the Parole Act 2002 came into force, he was not entitled to release at two-thirds but was eligible for parole after serving one-third.

His applications for parole had been unsuccessful. He argued that he should be entitled to release after serving two-thirds of his sentence and that the removal of such entitlement breached the right in respect of retrospective penalties.

23. The majority of the Supreme Court held that 'penalty' means the maximum penalty which a court could have imposed under the previous sentencing regime. Applying this approach, the provisions do not breach s 25(g) of the BORA as they do not affect the maximum penalties for offences.

The 'effective maximum' analysis of Tipping J

24. In *Morgan,* the Court left open the possibility that the maximum penalty prescribed by Parliament for a particular offence could effectively be reduced by reason of another legislative provision that provides for a non-discretionary entitlement to release. Tipping J considered that such an entitlement arose by reason of the provisions of the Criminal Justice Act 1985 which provided for release of some offenders after serving two thirds of their sentence. Tipping J considered that in such cases the maximum penalty for the offence was effectively reduced by one-third. The same argument potentially arises in respect of some of the current provisions in the Parole Act 2002.

25. The other three judges in the majority in *Morgan* did not express a concluded view on this point.[17] However, both Gault J and Henry J expressed some concern over this approach in circumstances where the offender's 'release' is subject to conditions and the offender is vulnerable to recall.[18] We agree with those concerns and consider the better view is that because the person is not actually released from the sentence until the sentence expiry date,[19] it is not possible to say that the maximum penalty for an offence is anything less than the prescribed maximum.

Regime to be considered as a whole

26. In any event, even if release and parole entitlements formed part of the 'penalty' for the purposes of s 25(g), as the explanatory note makes clear it is likely that the changes to the parole regime will be accompanied by adjustment in sentencing practice, through the simultaneous commencement of the sentencing guidelines.[20]

Application of the right to new community based sentences

27. In our view the retrospective availability of home detention as a sentence in its own right does not breach the right in respect of retrospective penalties affirmed by s25(g) because the sentence can only be imposed in respect of offences punishable by imprisonment (clause 38 and proposed s 15A(1)(b)). Accordingly, it is within the prescribed maximum penalty for the offence. In any event it is available only where the purposes of sentencing cannot be achieved by any less restrictive means and where the sentencing court would otherwise impose a sentence of imprisonment (clause 38).

28. The retrospective availability of the new community based sentences of intensive supervision and community detention do give rise to potential breaches of s 25(g) of the BORA. However, in our view the provisions can be interpreted and applied consistently with the BORA (and subject to s 6 of the Sentencing Act 2002) to avoid any breach.

29. The circumstances in which the provisions might breach the right are where:

29.1 An offence is committed prior to the provisions coming into force; and

29.2 The maximum penalty prescribed for such an offence is a community based sentence.[21]

30. The hierarchy of sentences set out in clause 37 makes clear that these sentences are harsher than the existing community based sentences. Accordingly, a person who commits an offence for which the maximum penalty is a community based sentence before the provisions come into force, is potentially subjected to a harsher penalty than existed at the time of commission of the offence if such a sentence was imposed. The safeguards contained in the transitional provisions, which prevent such a sentence being imposed without the offender's consent, go some way to minimising the risk of a breach of the right,[22] but do not avoid a breach altogether.

31. In our view these provisions must be read subject to s 6 of the Sentencing Act 2002 and consistently with s 25(g) of the BORA so that if imposition of the sentence were to result in a harsher penalty than that available at the time of commission of the offence, then that sentence cannot be imposed.

Judicial Independence and Impartiality

32. The Bill establishes a Sentencing Council composed of both judicial and non-judicial members. The Council's functions are set out in clause 10 of the Bill and include:

- producing sentencing and parole guidelines;
- assessing and taking account of the cost effectiveness of the guidelines;
- providing a statement of the guidelines' effect on the prison muster;
- giving advice on and considering issues about sentencing and parole;
- collating and providing to the judiciary information on sentencing practice and the adherence to and departure from sentencing and parole guidelines; and
- providing information to the public about sentencing and parole.

33. Sentencing guidelines include sentencing principles, sentencing levels, particular types of sentences, other matters relating to sentencing practice and grounds for departure from the guidelines. The Bill sets out a consultation process for the

development of guidelines (clauses 14-16). Once finalised the guidelines are presented to the Minister with a statement of the guidelines' effect on the prison muster. The Minister then presents the guidelines to the House of Representatives which may disallow them in whole only (clause 19).

34. Courts are directed to impose sentences consistent with sentencing guidelines 'unless the court is satisfied that it would be contrary to the interests of justice to do so' (clause 40). If a court departs from the guidelines, it must give reasons for doing so (clause 43).

35. Sentencing Councils are becoming increasingly common internationally. Many are composed of both judicial and non-judicial members, but there is significant variation in how they operate. Some Councils serve as a research and advisory body with the development of formal guidelines being the province of the superior courts (see, for example, the systems in the Australian States of Victoria and New South Wales). At the other extreme are many of the Councils operating in the United States, where the guidelines are very prescriptive and there is little scope for departure by the sentencing courts. The New Zealand model is most similar to that recently established in the United Kingdom.

36. There is little jurisprudence in relation to Sentencing Councils. However, there has been an unsuccessful challenge to the constitutionality of the United States federal Sentencing Commission and the guidelines produced by it. One of the grounds for the challenge was that it breached the principle of separation of powers.

37. The doctrine of the separation of powers is relevant to considering whether judicial independence and impartiality is affected by the proposed Sentencing Council. Section 25(a) of the BORA provides the following right, which extends to sentencing decisions, that:

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

...

The right to a fair and public hearing by an independent and impartial court.

38. Section 27 of the BORA affirms the right to 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 principles of natural justice include the concept that the decision maker should not be biased (*audi alteram partem*).

39. In our view, the structure and role of the proposed Sentencing Council does not breach either of ss 25(a) or 27 of the BORA. Whilst care should be taken in drawing comparisons in this area, particularly in the light of the different constitutional contexts in which Sentencing Councils operate, our view is reinforced by the

decisions of the United States Supreme Court in relation to the federal sentencing guidelines and Sentencing Commission.

40. In the United States, the federal Sentencing Commission is also composed of judicial and non-judicial members. Whilst the Bill proposes appointment of judicial members by the head of bench in consultation with the Chief Justice with limited powers of removal,[23] the President of the United States appoints the judicial members to the Commission and is able to remove them. The Commission produces guidelines that are considerably more rigid and prescriptive than those intended to be developed by the Sentencing Council under the Bill.[24] They included minimum and maximum sentences for offences based upon certain factors. The US legislation directs that a court '*shall* impose a sentence of the kind, and within the range" established by guidelines developed by a Sentencing Commission. The ability to depart from the guidelines is considerably more limited than is proposed by the Bill.[25]

41. In *Mistretta v. United States*, 488 U.S. 361 (1989),[26] the Supreme Court rejected a challenge to the constitutionality of the federal Sentencing Commission and the guidelines produced by it. One of the principal grounds for the challenge was that the Commission breached the principle of separation of powers.

42. The majority of the Supreme Court recognised that the Sentencing Commission was a 'peculiar institution' within the framework of government. Although formally placed by the Act within the judicial branch[27] 'it is not a court and does not exercise judicial power. Rather, [it is] an "independent" body comprising seven voting members including at least three federal judges, entrusted by Congress with the primary task of promulgating sentencing guidelines'.[28] The Court recognised that the powers of the Commission were, at least to some extent, 'political or quasi-legislative'.[29] The Court stated, however, that:[30]

Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation. Setting to one side, for the moment, the question whether the composition of the Sentencing Commission violates the separation of powers, we observe that Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary.

43. The majority of the U.S. Supreme Court went on to hold that the Sentencing Commission did not violate the separation of powers principle by placing the Commission in the Judicial Branch, by requiring federal judges to serve on the Commission and to share their authority with non-judges, or by empowering the President to appoint Commission members and to remove them for cause. The Court held that the Constitution's structural protections, including the separation of powers principle, did not prohibit Congress from delegating to an expert body within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction, or from calling upon the accumulated

wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the knowledge of judges.

44. Whilst the Sentencing Council proposed by the Bill is not placed within the Judicial Branch of government, like its US counterpart its activities are not purely judicial. Some of its functions have a significant 'executive' tinge, such as the provision of policy advice, informing Members of Parliament and policy makers, and informing and educating the public. Accordingly, the question arises as to whether involvement of the judicial members in such non-judicial activities affects their independence and impartiality as judges.

45. In our view, judicial independence is not affected by the structure, membership or role of the Sentencing Council proposed by the Bill. As is made clear by the decision of the United States Supreme Court, there is no constitutional impediment to the judicial branch of government being involved in an independent statutory body that develops sentencing policy. We also note that, in contrast to the legislation establishing the US federal Sentencing Commission, the Bill includes a number of provisions that expressly preserve the independence of judicial members of the Sentencing Council:

45.1 Appointment is by the Governor-General upon recommendation of the head of bench and there are limited powers of removal of judicial members: see in particular clauses 4, 7 and 8 of Schedule 1 to the Bill.

45.2 All rights and privileges as a judge are expressly protected: clause 3(1) of Schedule 1 to the Bill.

45.3 If a judge considers any function or activity of the Council to be incompatible with his or her judicial office he or she may withdraw from participating: clause 3(2) of Schedule 1 to the Bill.

46. There may be individual cases where a judge's membership of the Sentencing Council gives rise to a challenge to his or her exercise of related judicial functions on the ground of conflict of interest or a perceived lack of independence or impartiality. The most obvious case is where a person seeks to judicially review the sentencing guidelines. In such a situation, any potential breach of either s 25(a) or s 27 of the BORA can be avoided by the recusal of the judge concerned. Practical mechanisms exist for any potential conflict to be dealt with on a case by case basis.

Nature of the Sentencing Guidelines

47. The mandatory and prescriptive nature of the United States federal sentencing guidelines has given rise to other potential breaches of criminal process rights in the United States.[31] As a result the Supreme Court has held that the provisions making the guidelines mandatory are unconstitutional and invalidated those provisions, rendering the guidelines to be advisory only.[32]

48. Such issues do not arise under the Bill as the guidelines are neither mandatory nor prescriptive in the same way as the United States federal sentencing guidelines.

49. The Bill expressly provides for a broad discretion to depart from the guidelines 'in the interests of justice'. Furthermore, whilst the Bill does not prescribe the form of the guidelines to be developed by the Sentencing Council, the explanatory note makes clear that it is intended that they will look much more like the current guideline judgments of the superior courts of New Zealand, than the grid systems employed in the United States.

Compulsory Medical Treatment

50. A number of the provisions of the Bill enable the Court, as part of the special conditions imposed in respect of community based sentences, to order the offender to participate in programmes. This includes attendance at medical, psychological and therapeutic programmes.[33] Unlike orders requiring the offender to take prescription medication, there is no express requirement that the offender consent to the order.

51. These provisions have the potential to breach the right to refuse to undergo medical treatment as protected by s 11 of the BORA. However, in our view the provisions can be applied consistently with the BORA by the Court not imposing such conditions upon an offender against their wishes except where it is justifiable to do so under s 5 of the BORA.

52. In practice such conditions are unlikely to be imposed where the offender does not agree to participate in the programme. However, we anticipate that there may be some situations when it is appropriate to impose a community based order with such a condition notwithstanding the offender's unwillingness to participate in the programme, such as where the offender is also the subject of a compulsory treatment order pursuant to the Mental Health Act. In such cases it may well be justifiable under s 5 of the BORA to make the order.

Miscellaneous Matters

53. Clause 38 of the Bill imposes a limit on use of the sentence of home detention. This mirrors s 18 of the Sentencing Act 2002 which prohibits courts from imposing a sentence of imprisonment on persons who, at the time of committing the offence, were under the age of 17 years other than for purely indictable offences. Whilst the provision is a *prima facie* limit on the right to be free from discrimination (s 19 of the BORA), it is justifiable pursuant to s 5 as it is protective in nature and is consistent with New Zealand's obligations under the Convention on the Rights of the Child.[34]

54. Many of the provisions engage the rights of freedom of association and freedom of movement. However the limitation of these rights in the circumstances is justified under s 5 of the BORA.

Yours faithfully

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APPENDIX I: Table setting out changes to entitlements to release and eligibility for parole

Sentence Imposed	**Sentence imposed immediately prior to 30 June 2002 ('pre-cd sentence')**	**Sentence imposed between 30 June 2002 and commencement date of new provisions ('initial period')**	**Sentence imposed after commencement date of new provisions**
12 months or less	Entitlement to release after serving half of sentence: s 105 Parole Act 2002 and s 90(1)(a) Criminal Justice Act 1985. Release is not subject to conditions but offender is liable to recall. No earlier eligibility for parole - automatic entitlement at one half	Entitlement to release after serving half of sentence: s 86(1) Parole Act and clause 120 of Bill. Release is subject to any release conditions imposed by the court on that sentence: s 18(1) Parole Act. Release is not subject to recall. No eligibility for parole - automatic entitlement at one half	No entitlement to release - release date is sentence expiry date: clause 120 No parole.
More than 12 months and up to 24 months	*Offences other than serious violent offences*: Entitlement to release after serving two-thirds of sentence: s105 Parole Act 2002 and s 90(1)(b) Criminal Justice Act 1985 subject to, if a specified offence, any order to serve full sentence made under s 107 Parole Act 2002 Eligibility for parole after serving one-third: s 20(2) Parole Act 2002 and s 89(3) Criminal Justice Act	Entitlement to release after serving half of sentence: s 86(1) Parole Act and clause 120 of Bill. Release is subject to any release conditions imposed by the court on that sentence: s 18(1) Parole Act. From 7 July 2004, all sentences of 12 months or more are subject to court imposed conditions, unless the court orders otherwise (see s 93 Sentencing Act 2002). Release is not subject to	No entitlement to release - release date is sentence expiry date: clause 120 Eligibility after serving two-thirds: clause 119

	1985 Release is subject to conditions (107A Criminal Justice Act 1985) and to recall. *Serious violent offences*: Entitlement to release after serving two-thirds of sentence: s 105 Parole Act 2002 and s 90(1)(d) Criminal Justice Act 1985 subject to, if a specified offence, any order to serve full sentence made under s 107 Parole Act 2002 No earlier eligibility for parole for sentences of less than 15 years. If sentence is 15 years or more, eligible for parole after serving 10 years: s 20(2) Parole Act 2002 and s 89(4) Criminal Justice Act 1985. Release is subject to conditions (s 107A Criminal Justice Act 1985) and to recall.	recall. No earlier eligibility for parole	
More than 24 months	*Offences other than serious violent offences*: Entitlement to release after serving two-thirds of sentence: s105 Parole Act 2002 and s90(1)(b) Criminal Justice Act 1985 subject to: 1. Any loss of remission imposed for Prison	No entitlement to release Eligibility for parole after serving minimum period of imprisonment imposed by the sentencing court. If no minimum period imposed, after serving one-third: s84(1) Parole Act 2002. Where parole is granted, offender is subject to recall.	No entitlement to release - release date is sentence expiry date: clause 120 Eligibility for parole after serving two-thirds: clause 119

	Disciplinary offences (power to do so only before 30 June 2002) 2. If a specified offence, any order to serve full sentence made under s105 Criminal Justice Act 1985 or s107 Parole Act 2002 Eligibility for parole after serving one-third: s20(2) Parole Act 2002 and s89(3) Criminal Justice Act 1985 Release is subject to conditions (107A Criminal Justice Act 1985) and to recall. *Serious violent offences*: Entitlement to release after serving any minimum term of imprisonment imposed under s80(4) Criminal Justice Act 1985, or two-thirds of sentence if no minimum term is imposed: s105 Parole Act 2002 and s90(1)(d) Criminal Justice Act 1985. Subject to: 1. Any loss of remission imposed for Prison Disciplinary offences (power to do so only before 30 June 2002) 2. If a specified		

	offence, any order to serve full sentence made under s105 Criminal Justice Act 1985 or s107 Parole Act 2002 No earlier eligibility for parole for sentences of less than 15 years. If sentence is 15 years or more, eligible for parole after serving 10 years: s20(2) Parole Act 2002 and s89(4) Criminal Justice Act 1985. Release is subject to conditions (107A Criminal Justice Act 1985) and to recall.		

Footnotes

1 Clauses 75-77 of the Bill.

2 See *Morgan v Superintendent of Rimutaka Prison* [2005] NZSC 26 and authorities discussed therein.

3 For Tipping J, the maximum penalty extended to the 'effective maximum', having regard to the automatic release provided for in the Criminal Justice Act 1985 i.e. in that case the effective maximum was considered to be two thirds of the statutorily prescribed maximum.

4 In *Mist* the Court unanimously held that s 4 of the Criminal Justice Act (in different terms to s 6 of the Sentencing Act) applied to preclude the situation where a change in circumstance of the offender (age) between commission of the offence and sentencing resulted in the sentence of preventive detention being available. Whilst Elias CJ and Keith J considered that the same result would apply under s6 of the Sentencing Act, the majority of the judges declined to express a concluded view. However, that case turned not on the issue of what constituted a 'penalty', but on whether the right extended beyond variations by amendment to the legislation to variations resulting from the crossing of the age limit between the date of commission of the offence and the date of sentencing.

5 The general principles relating to Article 7(1) were recently reiterated by the Grand Chamber, comprising 17 judges, of the European Court of Human Rights: *Achour v France* Application No. 76335/01, 29 March 2006 at paras 41 to 43. The majority comprised 16 judges, although one judge delivered a concurring opinion. One judge dissented.

6 Every Court of Appeals to consider the issue has reached the same conclusion. See *United States v Barton* (6th Cir. Aug. 3, 2006); *United States v Farris* (7th Cir. 24 May 2006); *United States v Thomas* (11th Cir. Apr. 26, 2006); *United States v Pennavaria,* No. 04-3556, 2006 WL 1061956, at 4 (3d Cir. Apr. 24, 2006); *Unites States v Williams* (4th Cir. Apr. 11, 2006); *United States v Alston-Graves*, 435 F.3d 331, 343 (D.C. Cir. 2006); *United States v Owens* (7th Cir. Mar. 17, 2006); *United States v Cross* (7th Cir. Nov. 23, 2005); *United States v Vaughn*, 430 F.3d 518, 525 (2d Cir. 2005); *United States v Egenberger*, 424 F.3d 803, 806 (8th Cir. 2005); *United States v Rines*, 419 F.3d 1104, 1106-07 (10th Cir. 2005); *United States v Dupas*, 419 F.3d 916, 921 (9th Cir. 2005); *United States v Lata,* 415 F.3d 107, 112 (1st Cir. 2005); *United States v Scroggins*, 411 F.3d 572, 576 (5th Cir. 2005); *United States v Duncan*, 400 F.3d 1297, 1308 (11th Cir. 2005); *United States v Jamison* 416 F. 3d 538 (7th Cir. 2005).

7 *United States v Barton* (6th Cir. Aug. 3, 2006).

8 See *Farris* at p4 citing *United States v Paulus* 419 F 3d 693, 698 (7th Cir. 2005).

9 See for example *United States v Jamison* 416 F.3d 538 at 539.

10 See *United States v Barton* (6th Cir. Aug. 3, 2006), particularly the comments in footnote 4.

11 As held by the Supreme Court in *Booker.*

12 Subject to certain exceptions, particularly the ability of the Department of Corrections to apply under s105 of the Criminal Justice Act 1985 or s 107 of the Parole Act 2002 for an order that the offender serve the full sentence: see s 104 Parole Act 2002.

13 The Bill amends the definitions of long-term and short-term sentences. A short-term sentence is presently two years or less, but is reduced under the Bill to twelve months or less: clause 80(2). However, this is offset for persons who have already been sentenced by halving their sentence for the purpose of determining whether they are serving a short-term or long-term sentence: clause 80(6).

14 See ss 93-96 Sentencing Act 2002

15 Since July 2004, the standard conditions are deemed to have been imposed unless the court specifies otherwise: s 93 Sentencing Act 2002.

16 Prior to 30 June 2002 when the Parole Act came into force, there was the power under the Penal Institutions Act 1954 to extend the release date as a penalty for prison disciplinary offences. This power was removed at the same time as the Parole Act was enacted.

17 Elias CJ delivered a dissenting judgment in which she took a broader view of what constituted a penalty and, accordingly, also disagreed with Tipping J's 'modified approach': see para 5 of the judgment.

18 Gault J at para 32; Henry J at para 115.

19 The release regime under the Criminal Justice Act 1985 provided no guarantee than an offender would not serve their full sentence. Whilst released from prison, an offender was not released from the sentence until the sentence expiry date. Their release from prison was subject to conditions and they were vulnerable to recall to prison where they could serve the full term. A further point, not considered in the *Morgan* judgments, is that the administration of sentences was also governed by the Penal Institutions Act 1954. Pursuant to that Act, the date on which an offender was entitled to release could be postponed as a penalty for disciplinary offences committed whilst in prison. It was entirely possible that an offender would not be entitled to release after serving two-thirds of the sentence. Indeed, whilst practically speaking it was highly unlikely, it was theoretically possible that an offender could behave so badly in prison that he/she would not be entitled to release until the sentence expiry date.

20 Even applying the broader view to the right taken by Elias CJ or the 'effective maximum' approach expressed by Tipping J, the expected corresponding change to sentencing practises resulting from the Sentencing Council has the potential to offset the changes in the parole regime. Elias CJ appears to accept that if changes in parole amount to a variation of a penalty, the changes should not be considered in isolation. In considering whether the penalty has been increased, it is appropriate to have regard to any accompanying changes in sentencing policy and the ability to take account of the parole regime when sentencing (*Morgan* judgment para 21).

21 No breach can occur where the offence carries a maximum penalty of imprisonment as the new community based sentences are not harsher than imprisonment.

22 See clauses 75-77.

23 Clause 11.

24 The explanatory note to the Bill expressly states that 'the guidelines issued in New Zealand are likely to look and operate quite differently from the "grid systems" employed for this purpose in the United States'.

25 Whilst the Supreme Court has subsequently invalidated some of the statutory provisions thereby rendering the guidelines as advisory only, at the time the Court considered the challenge to the constitutionality of the Commission, the guidelines were regarded as mandatory.

26 The majority judgment has since been re-affirmed by the Court in the judgment of Justice Stevens in *United States v Booker* 543 US 220 (2005).

27 The Commission was said to be established "as an independent commission in the judicial branch of the United States".

28 At p385.

29 At p394.

30 At p385.

31 Particularly, the right to trial by an impartial jury. This was as a result of the guidelines being so prescriptive as to the factors that determined the sentencing range that the factors effectively became akin to elements of the offence. This meant that if they were taken into account on sentencing without having been determined by the jury or admitted by the accused, the right was breached.

32 *Booker v United States* 543 US 220.

33 See clause 50 (proposed ss 54F and 54G); clause 65 (proposed ss 80D and 80O).

34 Whilst a provision in such terms is not required, the Convention includes a number of general protections for children in criminal proceedings, including the principle that imprisonment of children should be a last resort (see in particular Articles 37, 40)
