Public Safety (Public Protection Orders) Bill

OFFICE OF THE ATTORNEY-GENERAL

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Public Safety (Public Protection Orders) Bill – Consistency with the New Zealand Bill of Rights Act 1990

Summary

1. I have considered this Bill for consistency with the New Zealand Bill of Rights Act 1990.

2. The Bill provides for the imposition of further and potentially indefinite detention and other restrictions on certain exceptionally dangerous offenders, despite those offenders having served their sentences. Detention would be imposed only if the High Court is satisfied both that the offender poses a very high risk of imminent serious sexual or violent offending and that the offender is shown by expert evidence to exhibit a severe disturbance in behavioural functioning. The Bill also provides a dedicated regime for the administration, review and cancellation of orders once made and for conditional release.

3. These powers are new and far-reaching: the explanatory note to the Bill states that it is possible that some detainees might never be released. Even those ultimately released would have been detained beyond, and possibly well beyond, their original sentences. As with extended supervision orders, on which I reported to the House in April 2009, the broad terms of the Bill raise difficult questions of consistency with the Bill of Rights Act.

4. The critical issue is whether the provision for detention and other measures under the Bill in substance amounts to further punishment of sentenced offenders, contrary to the longstanding rights against arbitrary detention and double jeopardy affirmed in ss 22 and 26 of the Bill of Rights Act, or to civil committal, as provided for in other New Zealand legislation and widely held to be compatible with these rights.

5. The risk of breach of ss 22 and 26 was raised at the time that the Bill was proposed. I concluded that, unless the Bill incorporated the key safeguards necessary for a civil committal regime, it would not be Bill of Rights compliant.

6. The Bill as introduced includes such safeguards at each of the stages of the making, administration and review or cancellation of orders. The Bill also contains broad interpretative principles to ensure its operation as a committal, and not punitive, regime. For those reasons, I conclude that it complies with the Bill of Rights Act.

7. This is a useful example of how early engagement on Bill of Rights issues can improve legislative proposals. The procedure under s 7 of that Act need not be only an "after the event" exercise, but can be a catalyst in the considered development of legislation.

The Bill

8. The Bill proposes a detention regime under which the High Court may, on application by the Chief Executive of the Department of Corrections, make protection orders to confine the subject to a residence or, if necessary, to a prison.[1] An order may be sought only for certain very serious offenders who are either nearing release from a finite sentence, who have served such a sentence in another country or who, having been released, are under a highly restrictive Extended Supervision Order.[2]

9. The threshold for the making of protection orders is very high. The Bill requires that an order may only be made if justified by the magnitude of the risk posed by the offender and, to that end, the Court must be satisfied both that there is a very high risk of imminent serious sexual or violent offending and that the subject has exhibited to a high level each of four behavioural characteristics.[3]

10. The Chief Executive must supply independent reports by at least two health assessors, one of whom must be a registered psychologist, supporting the existence of those behavioural characteristics, and both the Court and the subject of the application may seek further expert evidence.[4] The Court may also require the Chief Executive to consider whether the subject should instead be detained under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 or the Mental Health (Compulsory Assessment and Treatment) Act 1992.[5]

Detention under the Bill

11. The Bill provides for the making of orders for effective periods of five years for detention in a residence and for one year for detention in a prison.[6] Both categories of order could be renewed or cancelled and, during their term, would be subject to review by a dedicated expert panel and by the High Court both on a periodic basis and on application.[7] If an order were withdrawn, the Court must in its place issue a supervision order with such conditions as it considers necessary, which would be again subject to review over time.[8] The explanatory note to the Bill indicates that "it is possible that detainees will never be released", though also states that "there are credible pathways to release".[9]

12. The Bill also provides for the management of persons subject to orders.[10] Unless the Court had determined that a person can only manageably be detained in prison, detainees would be held in a secure residence. Such a residence would be within the precincts of a prison, but distinct from the parts of the prison that house offenders serving sentences of imprisonment. If detained in a prison, detainees would also be separated from sentenced prisoners.

13. The conditions of detention under the Bill would be in part comparable to those applicable to sentenced prisoners. A person detained under a public protection order

would be in the legal custody of the Chief Executive of the Department of Corrections and would be subject to restriction on their movement, visitors and day-to-day management. The manager of the residence would have powers to control detainees' correspondence and telephone calls, to administer drug and alcohol tests, to undertake searches, including strip-searches and to place detainees in seclusion and/or under forcible restraint. Detainees could work, but only within the residence or in a prison. Detainees could receive rehabilitative treatment if there is a reasonable prospect of reducing the detainee's risk to public safety.

14. There would also, however, be differences between prison conditions and detention. The Bill is directed to provide as much autonomy and quality of life as is possible while maintaining the order and safety. Residents would have the right to vote, to access newspapers and potentially approved internet sites and to provide input into the running of the residence.

Consistency with the Bill of Rights Act

15. Detention which is in substance a punishment for a given offence can be only imposed once. The later imposition of an additional punishment breaches the longstanding right against double jeopardy, as affirmed by s 26(2) of the Bill of Rights Act:

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

16. The application of a punitive measure to an offender under legislation not in force at the time of his or her offence also breaches the principle against retrospective application of the criminal law that underpins s 26. Because detention is permissible only under a sentence of imprisonment or where otherwise imposed for and in accordance with other compelling reasons, continued detention for punitive reasons is also necessarily arbitrary, contrary to s 22 of the Act.

17. However, detention on the basis of the risk of future harmful acts is not necessarily inconsistent with these rights, particularly where, as here, the concern is of imminent and grave risk to public safety. Criminal sentencing is itself partially, and legitimately, directed at protection of the community from the offender.[11] In addition, two forms of detention specifically directed at future harm have been upheld as consistent with affirmed rights.

17.1 The sentence of preventive detention may be imposed by a sentencing court following conviction and after receipt of expert psychological evidence, which allows for continuing or resumed detention if the offender remains at unacceptable risk of reoffending. The sentence of preventive detention has been upheld, other than in one limited respect that has been addressed, as consistent with the rights against double jeopardy and arbitrary detention.[12]

17.2 The courts may also order the involuntary committal of persons who, by reason of a severe mental health condition, pose an unacceptable risk to themselves or others. Such committal can occur following criminal charges, where the accused is found unfit to stand

trial or acquitted by reason of insanity,[13] but can also occur on the basis of a clinical assessment without any alleged criminal act.[14] Committal, while the subject of continuing controversy in some other respects, has again been upheld as consistent with the rights against double jeopardy and arbitrary detention.[15] In particular, and while New Zealand legislation does not necessarily extend in practice to persons who pose a risk by reason of certain conditions such as personality disorders,[16] committal schemes directed at such conditions have been upheld in other jurisdictions as consistent with these rights.[17]

18. It follows that the key question for me to consider is whether, in substance, the making of detention orders under the Bill amounts to a further penal sentence, in breach of the ss 22 and 26 rights, or to permissible civil committal.

19. The leading New Zealand decision on the distinction between penal and civil measures is *Belcer v Chief Executive of the Department of Corrections*, in which the Court of Appeal examined the consistency of extended supervision orders under the Parole Act 2002 with s 26(2) of the Bill of Rights Act.[18]

20. The Court usefully framed the issue as follows:[19]

"It is not uncommon for legislation to provide for restrictions on those who are at high risk of future criminal, dangerous or otherwise antisocial behaviour. Sometimes the power to do so is necessarily a part of the criminal justice system, as with the power to impose sentences of preventive detention. Sometimes the powers plainly have nothing to do with the criminal justice system (for instance, under the Mental Health (Compulsory Assessment and Treatment) Act 1992). As this case indicates, there is a third category of legislative schemes the status of which is debatable."

21. The regime in issue in *Belcher* at that time provided for the imposition of some significant restrictions upon released offenders, albeit short of detention.[20] The Court of Appeal found that the regime was in substance punitive, for a range of reasons, including the criminal procedural aspects of the regime and the use of criminal convictions as the "triggering event".[21] The Court went on to observe that, in light of those substantive characteristics, the aim of the regime was not decisive:[22]

"We do not see it as decisive that the aim of the ES scheme is to reduce offending and that the incidents of an ESO order are associated with this aim as opposed to the direct sanctioning of the offender for purposes of denunciation, deterrence or holding to account. The same is true (or partly true) of many criminal law sanctions (for instance, preventive detention and supervision) which are nonetheless plainly penalties."

22. *Belcher* also addressed but declined to follow the decisions of the United States Supreme Court in *Hendricks v Kansas* and the High Court of Australia in *Fardon Attorney-General (Qld)*.[23] The Court of Appeal observed that these decisions provided support for "a different conclusion," but considered that its own approach was "more properly representative of our legal tradition".[24] I agree that there are reasons not to follow either decision:

22.1 *Hendricks*, and subsequent decisions to the same point, deferred significantly to the government's own categorisation of the imprisonment scheme as civil in character.[25] These decisions also placed weight on the application of a criminal standard of proof.[26] In light of the observation in *Belcher* that I have cited above and the European and United Nations decisions below, I do not consider that either factor is decisive in the application of the rights provided in New Zealand.

22.2 *Fardon* was brought on the basis of the guarantee of judicial independence under the Australian constitution, which does not contain rights against arbitrary detention and double jeopardy. The majority decision did not, for that reason, address those rights and so is of little assistance here.[27] However, Justice Kirby (dissenting) considered whether the regime in issue could be characterised as committal. He concluded it could not because the statutory scheme plainly did not require a finding of "mental illness, abnormality or infirmity".[28]

23. The distinction between penal and committal regimes has also been addressed in other international and comparative jurisdictions. In particular:

23.1 The United Nations Human Rights Committee has found the continued imprisonment regime considered by the High Court of Australia in *Fardon* to breach equivalent rights under the International Covenant on Civil and Political Rights, but that regime did not contain a specific mental or behavioural threshold requirement of the kind found in the Bill and, further, provided simply for continuing imprisonment within the prison system.[29] The Committee has, by contrast, upheld civil committal regimes provided that they are grounded in expert evidence and are subject to ongoing review.[30]

23.2 The European Court of Human Rights has repeatedly concluded that further detention on the basis of apprehended risk is consistent with related rights under the European Convention, provided that that detention occurs in a distinct clinical and presumptively therapeutic context.[31] The German Constitutional Court has similarly recently concluded that a scheme for preventive detention of potentially recidivist offenders is compatible with such rights only where undertaken in such a context.[32]

Conclusions in respect of the Bill

24. The powers provided by the Bill are significant: not only do they permit further detention following completion of a sentence, but the explanatory note to the Bill anticipates that some detainees may never be released. I am also conscious that the potential for the Bill to give rise to further punitive detention was recognised in the course of its preparation and that the process of drafting has sought to address that risk.[33]

25. Whether detention under the Bill as now drafted amounts to a further penal measure, contrary to ss 22 and 26 of the Bill of Rights Act, or to permissible civil committal depends upon a careful assessment of the specific provisions of the Bill.

26. There are several aspects of the Bill that do connect detention orders to penal detention:

26.1 Detention orders would follow closely on or even anticipate the completion of a sentence of imprisonment or extended supervision order;

26.2 Detention would be available only for persons previously convicted of grave offences. Some of those subject to detention may have been considered for, and declined, a sentence of preventive detention at the time of their conviction for the prerequisite offence;

26.3 Custody of the detainee would remain with the Chief Executive of the Department of Corrections, with prison-like administrative powers such as search, monitoring of telephone calls and correspondence, seclusion and restraint. While detainees would, in general be placed in a separate residence, that residence would be within the precincts of a prison and prison custody would be available as a last resort.

27. I consider that those factors are displaced by distinct provisions at each of the stages of making, administration and withdrawal of detention orders which are characteristic of a committal, rather than a penal, regime:

27.1 The making of a detention order would require not only an overall determination of a very high risk of imminent offending, but also a distinct finding that the respondent "exhibits a severe disturbance in behavioural functioning" established by expert evidence of four particular behavioural characteristics.[34] I consider that this latter requirement, which is different from that in issue in *Fardon*, above, brings the Bill into line with the committal regimes described and upheld in the comparative caselaw outlined above. The proposed procedure for the making of orders is also distinct from the penal and parole system, unlike that considered in *Belcher*, above.

27.2 The day-to-day administration of a detention order would also be subject to distinct statutory provisions and entitlements:

27.2.1 The Bill states, as one of four guiding principles, that "persons detained … should have as much autonomy and quality of life as possible, while ensuring … orderly functioning and safety";[35]

27.2.2 That principle would be given effect through various specific entitlements of detainees and also through a "needs assessment" that is to reflect the detainee's "aspirations for … personal development";[36] and

27.2.3 Detainees would be given a "personalised management programme for … goals … that will contribute towards his or her eventual release" and, in particular, have a "right to rehabilitative treatment", provided that that treatment has a reasonable prospect of reducing the risk that a detainee poses.[37] This provision is broader than that provided in the Corrections Act 2004.[38]

I consider that these provisions create a distinct and non-punitive system of detention, again consistent with a committal regime.

27.3 Last, the Bill provides for a distinct system for regular review of every order by an expert panel which must include a current or former Judge of the High Court or District Court, health assessors and persons with experience as members of the New Zealand Parole Board.[39] I consider that dedicated and expert provision to be consistent with a committal regime.

28. In light of these provisions, I conclude that the Bill is consistent with the Bill of Rights Act.

Hon Christopher Finlayson

Attorney-General

Bookmarks

[1] Clause 72.

[2] Clause 7.

[3] Clause 13.

[4] Clauses 9-10.

[5] Clause 12.

[6] Clauses 15 and 74.

[7] Clauses 14-16 and 74-76.

[8] Clause 80.

[9] Explanatory note at p 1.

[10] Subparts 3 and 4 of Part 1.

[11] See, for example, s 7(1)(g) of the Sentencing Act 2002.

[12] See, for example, *Rameka v New Zealand* CCPR/C/79/D/1090/2002, [7.2]-[7.3].

[13] Criminal Procedure (Mentally Impaired Persons) Act 2003 and, in part, the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

[14] Mental Health (Compulsory Assessment and Treatment) Act 1992.

[15] See below at paragraph 23.

[16] See, among others, New Zealand Law Commission *Community Safety: Mental Health and Criminal Justice Issues* (NZLC R30, 1994), 54ff.

[17] See, for example, below at paragraph 23.2.

[18] *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507.

[19] Above n 18, 521 at [37].

[20] The extended supervision order regime was later extended to provide for home detention by the Parole (Extended Supervision Orders) Amendment Bill, and I made a report to the House on that Bill on 2 April 2009: see *Report of the Attorney-General on the Parole (Extended Supervision Orders) Amendment Bill*, AJHR J.4.

[21] Above n 18, 523 at [47].

[22] Above n 18, 523 at [48].

[23] 521 US 346 (1997) and (223) CLR 575 (2004).

[24] Above n 18, 522-523 at [45], [46] & [49].

[25] Above n 23 and see also *Kansas v Crane* 534 US 407 (2002).

[26] *United States v Comstock* 130 S Ct 1929 (2010), 7.

[27] See above n 23, [3] (per Gleeson CJ) "There are important issues that could be raised about the legislative policy of continuing detention of offenders who have served their terms of imprisonment, and who are regarded as a danger to the community when released. Substantial questions of civil liberty arise. This case, however, is not concerned with those wider issues …"; but see, to the contrary, [185] per Kirby J (diss).

[28] Above n 23 at [167]-[168].

[29] *Fardon v Australia* (CCPR/C/98/D/1629/2007) and see Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) s 13(4) (mental health assessments one factor in risk assessment) and 13(5) (order to have the effect of continued detention in custody); see also the decision of the Committee on another state scheme in *Tillman v Australia* (CCPR/C/98/D/1635/2007) at [7.4(2)].

[30] See, for example, *A v New Zealand* (CCPR/C/66/D/754/1997), [7.2]-[7.3].

[31] See above n 15.

[32] *Preventive Detention I/II*, 2 BvR 2365/09; 740/10, 2333/08, 1152/10 & 571/10, 4 May 2011.

[33] Department of Corrections, Regulatory Impact Statement *Management of High Risk Sexual and Violent Offenders at End of Sentence* (March 2012), [8]-[9].

[34] Clause 13(2).

[35] Clause 4.

[36] See cll 24 and 29-31

[37] Clause 33.

[38] See s 52.

[39] Clause 107.