Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Criminal Justice (Parole Offenders) Amendment Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 260(2) of the Standing Orders of the House of Representatives

1. I have considered the Criminal Justice (Parole Offenders) Amendment Bill ("the Bill"), a Member's Bill in the name of Mr Stephen Franks MP, for consistency with the New Zealand Bill of Rights Act 1990 ("BORA"). I have concluded that the proposed new sections 107P and 107U appear to be inconsistent with section 9 of the BORA. I set out the reasons for my conclusion below.

Background

2. The Bill uses a broader definition of parole than that at present in the Criminal Justice Act 1985 ("the Act"). In the Bill, offenders are referred to as being on parole during the unserved part of any sentence of imprisonment following release. At present, under the Act, parole refers to the period of discretionary release for certain categories of inmates and is separate from the final release date applicable to certain offences.[1] These are set out in the table below:

Sentence	**Parole Eligibility**	**Final Release Date**
12 months or less	Not eligible for parole	After half of sentence
More than 12 months for a non serious violent offence and not more than two years if for a serious violent offence	After serving one-third of sentence	After serving two-thirds of sentence (if not granted parole before this date)
More than two years for a serious violent offence	Not eligible for parole	After serving two-thirds of sentence or longer specified minimum period
15 years or more for a serious violent offence	After serving 10 years or longer specified minimum period	After serving two-thirds of sentence if not granted parole before this date
Life imprisonment: Preventive Detention (imposed on or after 1 August 1987)	After 10 years or a longer period as specified by the sentencing judge eg 13 years for home invasion	Not applicable
Life imprisonment: Preventive Detention (imposed before 1 August 1987)	After 7 years	Not applicable

3. At present prisoners released on parole may be recalled to serve their sentences prior to the final release date for their sentences.[2] Recall is considered by the Parole Board, which has a discretion and is open to appeal.[3] In making its decision the Parole Board is required

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1 Sections 2, 89 and 90 of the Act.

2 See, for example, sections 107I and 107L of the Act.

3 Sections 107L and 107M.

to consider whether a parolee has breached the parole conditions or has committed an offence or whether his or her conduct or circumstances make further offending likely.[4] The Board must consider the need to protect the public or any person or class of persons from the offender.[5]

The Bill

4. This Bill amends the Act. It seeks to impose additional punishment on persons who commit offences while on parole, as defined in the Bill, by several means:

   4.1 Automatic recall of persons who are convicted while on parole of offences that are punishable by more than three months imprisonment (section 107P of the Bill);

   4.2 Penalties for offending on parole would not be served concurrently with sentences for earlier offences or concurrently with the parole recall period of imprisonment, but rather cumulatively (section 107Q of the Bill);

   4.3 Sentences for offences committed while on parole not being reduced to take into account the parole recall period of imprisonment (section 107R of the Bill); and

   4.4 Offenders being recalled to serve any part of any earlier sentence of imprisonment not served by reason of discretionary early release on parole under section 89 or early final release under section 90 of the Act (section 107U of the Bill).

5. The sections proposed in the Bill all have the effect of increasing the period of actual imprisonment of an offender, with no judicial discretion to take account of particular circumstances or provision for amelioration by subsequent review.

6. Further, the Bill would apply in respect of a broad range of subsequent offences, many of which are relatively minor. Offences punishable by a maximum sentence of more than three months include, for example, the making of a false customs declaration and unlawfully opening mail.[6]

7. The practical effect of the Bill and the BORA concerns it raises may be illustrated by the following examples:

   7.1 Persons sentenced to life imprisonment or preventive detention who are released but at any time thereafter commit an offence punishable by more than three months' imprisonment face permanent incarceration without any consideration of the nature of the offending or any possibility for review (section 107P of the Bill).

   7.2 Persons face recall for sentences that have expired (section 107U of the Bill).

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4 Sections 107I(6) and 107L(2).

5 Section 107L(3).

6 Customs and Excise Act 1996, s 204; Postal Services Act 1998, s 23.

7.3 Previous unserved "parole periods" (as defined in the Bill) are reimposed without regard to whether they are proportionate to the offence committed (section 107U of the Bill).

Section 9 of BORA

8. Section 9 of the BORA is the primary section relevant to the Bill. It reads as follows:

> "Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment."

9. In this instance, the key issue is whether the Bill would result in disproportionately severe treatment or punishment.

10. The approach of the courts to section 9 BORA is to consider whether the treatment or punishment may be disproportionately severe in the particular circumstances.[7]

11. In *R v P*, Williams J interpreted section 9 BORA as prohibiting imprisonment that was "inappropriate, disproportionate and unsuitable". Both in that decision and in the decision of the Court of Appeal in *R v Leitch*,[8] the courts have endorsed the Canadian approach in this area, notably the decision of the Supreme Court of Canada in *Smith v The Queen*.[9]

12. In *Smith* Lamer J held:[10]

> "In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. If a grossly disproportionate sentence is 'prescribed by law', then the purposes which it seeks to attain will fall to be assessed under s.1. Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances, while s.1 permits this right to be overridden to achieve some important societal objective."

13. Justice Lamer stated further that the effect of the sentence actually imposed must be measured:

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7 *R v P* (1993) 10 CRNZ 250, 255 (HC).

8 [1998] 1 NZLR 420 (CA).

9 (1987) 40 DLR (4th) 435 (SCC).

10 Above, n. 9, 477.

> "One must also measure the effect of the sentence actually imposed. If it is grossly disproportionate to what would have been appropriate, then it infringes s.12. The effect of the sentence is often a composite of many factors and is not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied. Sometimes by its length alone or by its very nature will the sentence be grossly disproportionate to the purpose sought. Sometimes it will be the result of the combination of factors which, when considered in isolation, would not in and of themselves amount to gross disproportionality. For example, 20 years for a first offence against property would be grossly disproportionate,....."

14. As recognised in *Smith* it is not necessary for a penalty to be disproportionate to all particular factual cases. It suffices that there may be some cases in which treatment or punishment will be "grossly disproportionate".[11] The *Smith* case dealt with a seven year minimum sentence for importation of narcotics, where only some of the sentences under the legislation would be grossly disproportionate. It should also be noted that McIntyre J, who dissented in *Smith*, did so on the basis that the availability of parole could ameliorate the effect of the minimum sentence provision.

15. Similarly, in *Re Mitchell and the Queen*[12] the Ontario High Court considered whether the treatment or punishment was disproportionate to the offence and the offender. The Court considered that the treatment or punishment was unusually severe and excessive in the sense of not serving a valid penal purpose more effectively than a less severe treatment or punishment.

16. Applying the approach in the cases above, it is my view that the effect of the proposed sections 107P and 107U, in conjunction with the absence of judicial discretion, is *prima facie* inconsistent with the right in section 9 BORA. The absence of any provision for judicial discretion or subsequent review create a substantial likelihood of disproportionate punishment.

17. In *Smith*, above, and the later decision of *Lyons v The Queen*,[13] the Supreme Court of Canada also considered other related rights. As I have concluded that there is a clear breach of section 9 BORA, it is not necessary to evaluate the other sections of the BORA which may be relevant, such as the freedom from arbitrary detention under section 22.

Section 5 BORA Analysis

18. Rights affirmed by the Bill of Rights may be subject to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society.[14] The approach to section 5 BORA has recently been restated by the Court of Appeal in *Moonen v Film and Literature Board of Review*:[15]

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11 Above n. 9, 436.

12 (1983) 150 DLR (3rd) 449.

13 *Lyons v The Queen* (1987) 44 DLR (4th) 193, 218.

14 Section 5 BORA.

15 [2000] 2 NZLR 9.

18.1 The objective which the particular provision is endeavouring to achieve must be identified.

18.2 The importance and significance of that objective must be assessed.

18.3 The way in which the objective is statutorily achieved must be in reasonable proportion to the objective.

18.4 The means used must also have a rational relationship to the objective.

18.5 In achieving the objective there must be as little interference as possible with the right effected.

18.6 The limitation involved must be justifiable in the light of the objective.

19. Applying this approach to the Bill, the objectives of the Bill are clearly worthwhile. The Bill seeks to deter and punish offending during parole periods and to "prevent, deter and protect from crime". These objectives are important and significant.

20. However, the Bill does not achieve those objectives in a manner that is reasonably proportionate to or rationally related to those objectives. Further, it does not seek to achieve its objectives with as little as possible interference with protected rights. Finally, the limitation is not justifiable in terms of its objectives in all cases.

21. The absence of any judicial discretion or prospect of subsequent review under the Bill also gives rise to concerns under the International Covenant on Civil and Political Rights.[16] First, the absence of judicial discretion is analogous to mandatory sentencing legislation in force in Western Australia and the Northern Territory recently criticised by the Human Rights Committee as risking disproportionate punishments as raising "serious issues of compliance with various articles of the Covenant".[17] Second, the Committee and the European Court of Human Rights have both emphasised the need to retain the possibility of review of sentences to avoid injustice in particular cases.[18]

22. The Bill does not avoid the possibility of disproportionate punishment in respect of particular circumstances. As the New Zealand and Canadian courts, the Human Rights Committee and the European Court of Human Rights have recognised, penalties that are *prima facie* unjustifiable may nonetheless not breach human rights standards if tempered by judicial discretion and the opportunity for subsequent review. Such ameliorating features are absent from the Bill.

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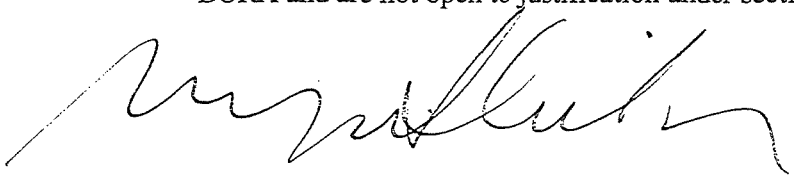
16 *New Zealand Treaty Series* 1978, No.19.

17 *Concluding Observations of the Human Rights Committee: Australia* 28 July 2000 CCP/CO/69/AUS, para. 17.

18 *Concluding Observations of the Human Rights Committee: New Zealand* 3 October 1995 CPR C/79/Add.47; A/50/40, para. 179; *X v United Kingdom*, Judgment of the European Court of Human Rights of 5 November 1981, Series A no.46, 22-23, para. 52.

Conclusion

23. I conclude that the proposed new ss 107P and 107U appear inconsistent with section 9 BORA and are not open to justification under section 5.



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