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Report of the

# ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill

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*Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 260, as varied by Sessional Order of 5 September 2002, of the Standing Orders of the House of Representatives*

1. I have undertaken an examination of the Parole (Extended Supervision) and Sentencing Amendment Bill (“the Bill”) for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”). Although the Bill seeks to address an important and significant social issue, I have identified the following provisions as being inconsistent with the rights and freedoms contained in the Bill of Rights Act:
    - 1.1 The imposition of significant restrictions of liberty under the proposed extended supervision regime on individuals who were convicted prior to the Bill coming into force (cl 10, new sections 107B and 107T) (unreasonable limit on right not to be subject to double jeopardy); and
    - 1.2 The statutory power to impose 24 hour electronic monitoring on individuals subject to an extended supervision order (cl 6 and cl 10, new section 107I) (unreasonable search or seizure).
- Without further amendment to the Bill, these provisions cannot be justified under s 5 of the Bill of Rights Act.
2. As required by section 7 of the Bill of Rights Act and Standing Order 260, I draw these inconsistencies to the attention of the House.

### **The Bill**

3. The Bill is made up of two parts designed to achieve the following:

#### *Extended Supervision Orders*

- 3.1 Part 1 of the Bill creates a new extended supervision regime for child sex offenders who have received a finite sentence of imprisonment for a relevant sexual offence. The regime is aimed at managing the long-term risks posed by child sex offenders when they are no longer subject to (parole) release conditions or recall from parole.
- 3.2 Following the proposed legislation coming into force, the provisions of the Bill are designed to allow Extended Supervision Order (“ESO”) applications to be made with respect to the following individuals:
  - 3.2.1 Offenders who are convicted and sentenced for a relevant offence after the Bill is in force (cl 10, new section 107B);
  - 3.2.2 Offenders who were convicted and sentenced for a relevant offence prior to the Bill coming into force, and who have remained in prison or under a release condition up until the time an ESO application is made by the Department of Corrections (cl 10, new section 107B);
  - 3.2.3 Offenders who were convicted and sentenced for a relevant offence prior to the Bill coming into force, and who had continued to remain in prison or under a release condition as at the date the Bill is introduced to Parliament (cl 10, new section 107T). These individuals may live unsupervised in the public

domain by the time the Bill comes into force and an application for an ESO is made;

- 3.2.4 Offenders who were convicted and sentenced for a relevant offence after the introduction of the Bill to Parliament, but prior to the legislation coming into force, and who completed their prison sentence and release conditions within 6 months of the Bill coming into force (cl 10, new section 107T). Although it would be for a limited amount of time, these individuals may have lived unsupervised in the public domain prior to any application for an ESO.

The latter two classes are referred to as “transitional eligible offenders” in the Bill (see cl 10, new section 107T).

#### *Technical Amendments to Sentencing and Parole Legislation*

- 3.3 Part 2 of the Bill makes a number of technical amendments to the Sentencing Act 2002 and the Parole Act 2002, which came into force on 30 June 2002. Since the new legislation has been in force, and its operation able to be observed, a number of minor issues have been identified where the original drafting could be improved to better reflect the legislation’s policy intent.

#### **The Government’s legitimate interest in preventing this type of re-offending**

4. The Government’s purpose in introducing this proposed legislation is to achieve a significant and important social objective. The state has a legitimate interest in preventing sex offences against persons under 16 years of age. The nature of child sex offending and the consequences for its victims will justify some level of preventive measures to reduce the likelihood of re-offending by individuals who have displayed historical tendencies towards this type of offending and who continue to present a risk to young persons in the short to medium term. However, preventive measures based solely on predictions of offending that has yet to, and may not, occur should be carefully constrained and reviewed in order to prevent potential abuse, disproportionate social stigma and infringements of basic rights and freedoms.
5. The importance of preventing this particular type of re-offending has been recognised in other countries. Both the United Kingdom and Canada have created legislation that strikes a balance between this important social objective and civil liberties, while still facilitating the on-going monitoring and supervision of child sex offenders who demonstrate a substantial risk of re-offending. However, the Bill contains two proposals that go further than either the United Kingdom or Canadian legislation, and without further safeguards being placed around these significant restrictions of liberty, I am unable to conclude that these two aspects of the Bill are consistent with the fundamental rights and freedoms contained in the Bill of Rights Act.

**“Transitional eligible offenders” and current inmates and parolees—retroactive punishment (s 26(2) NZBORA)**

6. A significant aspect of this Bill is the imposition of the ESO regime on individuals who were convicted for a relevant offence prior to the Bill coming into force. The courts have repeatedly demonstrated their aversion to retrospective laws or legal remedies that breach the more general concept of double jeopardy.<sup>1</sup> These are laws that punish or disadvantage an individual twice for the same event, or laws that increase the negative consequences for a decision that was taken before the relevant law was enacted. This reflects the fundamental view that in order for an individual within society to comply with the law, the individual must be able to reasonably anticipate the legal consequences of a particular activity.

7. Section 26(2) of the Bill of Rights Act states that:

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

Accordingly, the key question under s 26(2) is whether the ESO regime, applied to transitional eligible offenders and current inmates/parolees, is a “punishment” for the purposes of s 26(2).

8. The argument against s 26(2) being triggered would be that although an individual must have been previously convicted for a relevant sexual offence, the ESO is not imposed as a punishment for that offence. This argument would emphasise the rehabilitative and preventive objectives of the Bill: the ESO is not designed for any punitive purpose related to the individual’s original sexual offence and therefore cannot be considered to be imposing a second “punishment” for that offence.

9. This distinction between “criminal penalties” and “preventive measures” finds some support in decisions of the United Kingdom courts with respect to the imposition of “anti-social behaviour orders”<sup>2</sup> and “sex offender orders”<sup>3</sup> under the Crime and Disorder Act 1998. In addition, the UN Human Rights Committee did not view changes to parole laws requiring mandatory supervision as being a “penalty” for the purposes of Article 15(1) ICCPR, because of the social assistance objectives of such supervision.<sup>4</sup> The European Court of Human Rights has also determined that the police supervision of a suspected Mafioso was designed to prevent the commission of offences and did not involve the determination of a criminal charge.<sup>5</sup> Finally, it should be noted that New Zealand

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<sup>1</sup> For example, see *R v Pora* [2001] 2 NZLR 37 (CA), *R v Poumako* [2000] 2 NZLR 695 (CA), and *Daniels v Thompson* [1998] 3 NZLR 22 (CA).

<sup>2</sup> *R v Manchester Crown Court Ex p. M (A Child)* [2003] 1 AC 787 (HL).

<sup>3</sup> *B v Chief Constable of Avon and Somerset* [2001] 1 All ER 562 (QB).

<sup>4</sup> See *A.R.S. v Canada* Communication No. 91/81. Discussed in Joseph, Schultz and Castan “The International Covenant on Civil and Political Rights – Cases, Materials and Commentary” (Oxford University Press, Oxford, 2000) pg341.

<sup>5</sup> *Raimondo v Italy* (1994) 18 EHRR 237.

courts have also adopted a limited interpretation of “punishment” in s 26(2) to exclude *civil*<sup>6</sup> and *disciplinary*<sup>7</sup> preventive measures consequent upon conviction.

10. However, the UN Human Rights Committee view (referred to above) can be distinguished on the basis that it was considering parole changes that did not affect the individual’s total sentence, and the UK jurisprudence places quite some emphasis on the view that orders under the Crime and Disorder Act 1998 are civil in nature and based on information regarding the individual’s current public behaviour. In *Daniels v Thompson*<sup>8</sup> the New Zealand Court of Appeal also distinguished civil damages by stating that “punishment” in s 26(2) is connected to actions taken within the “ambit of the criminal process”.
11. The Bill clearly places the proposed ESO regime within the rubric of the criminal justice and penal system. In addition, the Bill continues to connect the imposition and conditions of an ESO with the previous conviction for a relevant sexual offence by:
  - 11.1 Requiring an ESO to be sought from the court that originally sentenced the individual for the relevant sexual offence (new section 107B(3));
  - 11.2 Requiring the Parole Board to take account of the views of the offender’s victims when considering the imposition or alteration of ESO conditions (new sections 107I(3) and 107L); and
  - 11.3 Making the imposition of successive ESOs dependent upon an intervening conviction for a relevant sexual offence (new section 107B).
12. The possible imposition of significant movement restrictions, electronic monitoring and home detention, strengthens the argument that the retrospective imposition of these aspects of the ESO on an individual who has been convicted of a relevant offence prior to the Bill coming into force should be viewed as a “punishment” for the purposes of s 26(2) of the Bill of Rights Act. Such individuals can be viewed as duly completing (or having duly completed) the penalty imposed for their previous offence; indeed, they may well have made decisions about how to plead to charges they faced on the basis that the only punishment they were thereby liable to was a term of imprisonment (of possibly relatively short duration – a significant factor if the defendant had been remanded in custody pending trial). But the Bill allows the further imposition of significant restrictions explicitly connected to the previous conviction. In the case of those already released into the community (ie the transitional eligible offenders and current parolees) this is being done without further evidence of inappropriate behaviour by them after they have been released into society.

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<sup>6</sup> *Daniels v Thompson* [1998] 3 NZLR 22 (CA).

<sup>7</sup> *Harder v Director of Land Transport Safety* (1998) 5 HRNZ 343; and *Chapman v The Institute of Chartered Accountants of New Zealand* HC Wellington, CP159/99, 28 July 2000, Ellis J. See also, *R v Linklater* (1983) 9 CCC (3d) 217.

<sup>8</sup> Above n6, pg 34.

13. I am also conscious that in *R v Poumako*<sup>9</sup> and *R v Pora*<sup>10</sup> (two decisions on the retrospective alteration of non-parole eligibility periods for home invasion murders), the Court of Appeal took a firm line that s 26(2) was triggered, even though the amendments in question only affected parole eligibility and not overall sentence length.
14. Accordingly, I consider that the provisions of the Bill that allow for the more significant restrictions of liberty (i.e. significant restrictions of movement and association, electronic monitoring, and 12 months home detention) available under the ESO to be (retrospectively) imposed on transitional eligible offenders and current inmates and parolees, constitute a *prima facie* infringement of s 26(2) of the Bill of Rights Act that is not capable of justification under s 5 of the Act.
15. I do note that if transitional eligible offenders and current inmates/parolees were only required to undergo less intrusive measures, such as, say, regular attendance at counselling sessions etc for the duration of an ESO, my conclusion on s 26(2) NZBORA could well have been different: measures such as counselling can be fairly described as plainly rehabilitative and not punitive, thereby avoiding inconsistency with s 26(2).

**Provision allowing electronic monitoring of persons subject to ESO—unreasonable search or seizure (s 21 NZBORA)**

16. Clause 6 of the Bill amends the “special conditions” set out in s 15(3) of the Parole Act 2002 to include a new power for the Parole Board to order, as a condition of release, that the offender submit to electronic monitoring (which may involve attaching equipment to the offender’s body) of compliance with any movement restrictions (new section 15(3)(f)).
17. In my view, 24 hour electronic monitoring of an individual in a criminal law enforcement context (even if there is also a rehabilitative element to the scheme) interferes with a person’s reasonable expectation of privacy and hence is a *prima facie* infringement of s 21 of the Bill of Rights Act (right to be secure against unreasonable search or seizure).
18. Assuming that the technology is safe, the use of electronic monitoring to ensure that an ordinary parolee complies with legitimate restrictions on movement can be legitimately considered to be justified and reasonable when compared to the alternative of 24 hour monitoring in prison. For that reason then s 15(3)(f) is not of itself a breach of s 21 of the Bill of Rights Act.
19. The situation in respect of persons subject to an ESO is, however, different. First, and most significantly, such persons are not subject to the more intrusive alternative of imprisonment – they have already “done their time”. Accordingly, extra caution has to be exercised in permitting continuous surveillance of their movements. Second, while it is acceptable to allow for an open-ended electronic monitoring regime in respect of ordinary parolees, the extension of this type of intrusive technology in relation to other situations marks a significant departure

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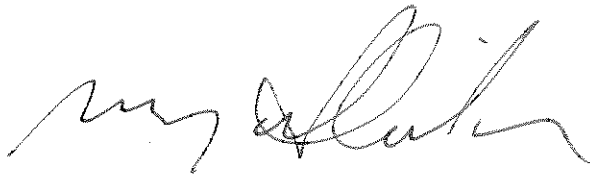
<sup>9</sup> [2000] 2 NZLR 695 (CA).

<sup>10</sup> [2001] 2 NZLR 37 (CA).

from the standard of civil liberties enjoyed in this country to date and should be carefully circumscribed. For example, the DNA/bodily samples legislation acknowledged its significant extension into pre-existing civil liberties and contained a highly circumscribed, careful scheme that tightly controlled its availability, use and procedure.

20. It could be argued that s 6 NZBORA (interpretation of legislation consistently with NZBORA), along with the requirements of s 15(2) of the Parole Act 2002, will operate to place appropriate safeguards on the statutory discretions relating to the imposition of electronic monitoring. But, "reasonableness" for the purpose of the s 7 vetting exercise, would require more detail regarding the proposed method of electronic monitoring and greater safeguards regarding the actual process to overcome this potentially significant breach of individual rights. In addition more information on why alternative means of monitoring would be less effective would be necessary. This is especially so given the groundbreaking nature of the proposed scheme.
21. A further significant factor contributing to the unreasonableness of this proposed power is the uncertainty regarding the accuracy of current electronic monitoring technology and its potentially experimental nature. Given that new section 107Q makes it an offence (with a 2 year imprisonment term) for non-compliance with an ESO condition, the potential for inaccurate electronic monitoring to result in further imprisonment or exposure to a further criminal trial gives some cause for concern.
22. Accordingly, in the absence of certainty or clarity as to:
  - 22.1 how electronic monitoring is to be achieved; and
  - 22.2 the accuracy of the technology and method used;

the unrestrained power to monitor and collect information of this kind regarding individuals subjected to an ESO is "unreasonable" and therefore inconsistent with the right to be secure from unreasonable search guaranteed by s 21 of the Bill of Rights Act. For this reason, clause 10 of the Bill (new section 107I(1)(a) of the Act) permitting the special condition in new s 15(3)(f) to be imposed on a person subject to an ESO is an unjustified breach of s 21 of the Bill of Rights Act.



Hon Margaret Wilson  
Attorney-General