

Report of the

ATTORNEY-GENERAL

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

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 261 of the Standing Orders of the
House of Representatives*

1. I have considered this Bill for consistency with the New Zealand Bill of Rights Act 1990. I conclude it appears to be inconsistent with the rights against retroactive penalties and double jeopardy and against arbitrary detention which are affirmed by ss 26 and 22 of that Act.

The proposed changes to the Extended Supervision Orders regime

2. The Bill proposes to amend the Extended Supervision Order ("ESO") regime under the Parole Act 2002. The existing regime allows for orders to be made imposing a range of conditions and restrictions for up to 10 years on persons who have previously been convicted of certain sexual offences against children and young persons¹ and who have completed their sentences, including any parole period. The conditions which can currently be imposed on an offender under an ESO include residential restrictions in the nature of home detention for the first twelve months and ongoing parole type conditions such as regular reporting, participation in programmes, prohibitions on entering certain places or areas and electronic monitoring where necessary to monitor compliance with conditions.
3. An ESO is quite different from the sentencing or parole regimes. It is imposed, not because of the offending for which the person has been convicted (although that is a necessary pre-condition), but rather on an assessment of the likelihood of that person committing other listed offences in the future.² It is imposed after the sentencing process is complete.
4. The ESO regime was introduced in 2003 in the Parole (Extended Supervision) and Sentencing Amendment Bill. That Bill was the subject of a report under s 7 by the then Attorney-General on 11 November 2003.
5. The Bill will give the Parole Board power to impose residential restrictions in the nature of electronically monitored home detention, but short of 24 hours per day home detention, on an offender for the full period of the ESO which can be for up to 10 years.³

Section 26 of the Bill of Rights Act

6. The prohibition against retroactive penalties and double jeopardy in s 26 applies if the nature of the ESO regime is characterised as penal, rather than civil. That was

¹ Section 107B – which also includes offences relating to sexual offending against persons with significant impairment.

² Section 107I.

³ The explanatory note to the Bill suggests this power existed in the scheme as initially enacted in 2003, but was inadvertently removed by the 2007 amendments. However, this Bill has the appearance of introducing a new power. The pre-2007 scheme did not contain explicit power to impose such conditions for longer than 12 months. Rather, the Board could impose residential restrictions "as if the person were on home detention" for the first 12 months, and otherwise could only impose on-going special conditions under s 15 of the Parole Act 2002. Section 15 included (prior to 2007) the power to prohibit the offender from entering or remaining in certain areas. I doubt that s 15 could have been extended to allow what would be effectively long term home detention. I therefore consider the proposed power did not exist under the pre-2007 regime.

the view taken in the 2003 s 7 report which has been confirmed in *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA). Recent comparative jurisprudence is consistent with a view that such schemes may be characterised as civil rather than penal.⁴ However, I think the amendments proposed by this Bill, in particular the inclusion of a power of long term detention, would tip the balance of the argument in favour of characterising this regime as penal, even if it is not so regarded in its present form.⁵

7. The proposed power to impose part time residential restrictions over the full term of an ESO is an addition to the present range of conditions and restrictions in the current regime. Under s 107C(2) the new power will apply retrospectively, and therefore, if considered penal, the new power directly conflicts with the protection against retroactive penalties under s 26(1) of the Bill of Rights Act.
8. Regardless of whether it applies retroactively, the new power contravenes the prohibition against double jeopardy in s 26 that “no person who has been finally...convicted of...an offence shall be...punished for it again”. The imposition of residential restrictions appears to be an additional sentence for the same criminal offending which is imposed at the end of the first sentence.
9. The restrictions under the ESO regime are broadly the same as those available on parole for offenders sentenced to preventive detention. Further, the ESO regime applies only to offenders who, although in principle eligible for preventive detention,⁶ did not receive that sentence. Rather it gives a second opportunity for such conditions to be obtained against the offender and is therefore inconsistent with s 26(2).
10. I therefore conclude the Bill gives rise to apparent inconsistencies with s 26 of the Bill of Rights Act on the basis the power proposed by the Bill is likely to be considered penal.

Arbitrary Detention

11. Regardless of whether the regime is civil or penal in nature, the new power also raises an issue of arbitrary detention under s 22 of the Bill of Rights Act. The new

⁴ See, for example, the cases referred to in fns 5 and 9 below, and *Gough v Chief Constable of Derbyshire* [2001] 4 All ER 289 and [2002] 2 All ER 985, *Field v Young* [2003] 3 All ER 769, *Martineau v Minister of National Revenue* [2004] 3 SCR 737, *Smith and Botelho v Doe* (2003) 538 US 84.

⁵ The difference between the ability to impose conditions simply restricting the freedom of movement of the offender and the power to actually detain the offender by way of home detention is critical. See, for example, the discussion of the impact on this question of possible imprisonment for refusing to be bound over to keep the peace, contrasted with the restrictions on freedom in anti-social behaviour orders in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 (HL). Orders restricting sexual offenders were considered in *B v Chief Constable of the Avon and Somerset Constabulary* [2001] 1 All ER 562 (QB) where the lack of immediate penalty as opposed to mere restriction was significant. For a recent discussion on the critical differences between restrictions on freedom of movement and deprivation of liberty in the context of crowd control, see the decision of the House of Lords in *Austin v Commissioner of the Police of the Metropolis* [2009] UKHL 5. See also *Secretary of State for the Home Department v JJ* [2007] UKHL 45 for a discussion of what will amount to detention in the context of control orders against suspected terrorists.

⁶ Section 87(5) of the Sentencing Act 2002 and s 107B of the Parole Act 2002.

powers authorise the Parole Board to impose what is in effect electronically monitored home detention for anything less than 24 hours a day for the entire period of the order, which may be up to 10 years. This significantly extends the restrictions on personal liberty the Board may lawfully impose. Under this proposal the Parole Board will be able to effectively detain, rather than just restrict, offenders.⁷

12. The Parole Board's power to order what is effectively long term detention of offenders is based on the assessment of the risk of their future offending. The proposal in effect allows for long term detention without charge or trial.
13. I acknowledge that the protection of children and other vulnerable members of society from sexual offenders is a very important objective and restrictions on freedom of movement and freedom of association imposed by an ESO are justifiable under s 5 of the Bill of Rights Act. However, it does not address the concern that the new powers will allow the Parole Board to order long term detention.
14. There is a difference between ordering detention as a response to proven criminal offending and ordering detention solely as a precaution against possible future offending. I think detention which is imposed solely on the basis of possible future offending, rather than proved past offending, is inherently problematic. The argument detention for the prevention of future offending was not arbitrary in nature (in terms of Article 5 of the European Convention on Human Rights) was described by the European Court of Human Rights as leading to conclusions "repugnant to the fundamental principles of the Convention".⁸
15. Recent decisions of the House of Lords which relate to control orders restricting suspected terrorists have considered home detention of 14 hours or more per day is a detention which, based solely on risk to the public, is arbitrary and in breach of Article 5 of the European Convention.⁹
16. The Supreme Court of the United States in *Kansas v Hendricks* (1997) 521 US 346 has upheld a civil commitment regime for precautionary detention of sexually violent predators,¹⁰ but then detention was allowed only on the basis of proof of a further element of mental illness. Justice Thomas, for the majority, noted at 358:

⁷ See fn 5 above.

⁸ *Lawless v Ireland* (1961) A3 at para 14, in the context of detention of a suspected member of the IRA arrested and detained in accordance with the Offences Against the State (Amendment) Act 1940 which authorised detention on preventive grounds to restrain him from engaging in activities prejudicial to the preservation of public peace and the order or security of the State.

⁹ *Secretary of State for the Home Department v JJ* [2007] UKHL 45. See also UN Working Group on Arbitrary Detention 2003 report (E/CN.4/2003/8) para 61 onwards – prolonged preventive detention of terrorist suspects in Guantanamo Bay without charge or review by a competent court is incompatible with Article 9 of the ICCPR.

¹⁰ See also High Court of Australia in *Fardon v AG for the State of Queensland* (2004) 223 CLR 575, esp at [3], [80] and [126].

“A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as “mental illness”... These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control... [This] narrows the class of persons eligible for confinement to those unable to control their dangerousness.”

17. While detention without trial on the basis of concerns about future conduct is occasionally permitted (see, for example, the mental health regime and the preventive detention regime), these are tightly controlled exceptions to the general principle. Preventive detention is imposed as part of a sentence addressing proved criminal offending. Mandatory regular review and judicial oversight are regarded as critical safeguards.¹¹ Similarly, the ability to detain persons under mental health legislation is circumscribed and is subject to careful limits and rights of review.¹²
18. The powers to detain proposed in this Bill are separate from the sentencing process. They lie within the usual discretion of the Parole Board under s 15 of the Parole Act 2002 and the actual extent of the detention imposed on any offender will not be subject to ordinary appeal rights.
19. Further, as noted in paragraph 9, a sentencing court in each case has not ordered preventive detention for these offenders. Even if the regime is not regarded as penal (and so the double jeopardy principle does not apply), to impose a further detention where the sentencing court has already declined to do so is inherently disproportionate and so arbitrary.
20. For these reasons I conclude the new power to impose residential restrictions after 12 months also raises apparent inconsistencies with s 22 of the Bill of Rights Act as authorising arbitrary detention.

Is the apparent inconsistency justified?

21. It is not settled whether justification under s 5 is available for inconsistencies with either s 22 or s 26.¹³ However, it is not necessary to determine that point here,

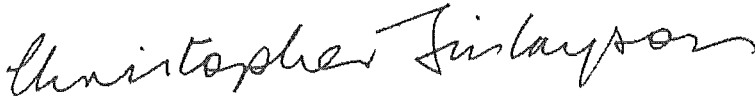
¹¹ New Zealand’s preventive detention regime was considered by the UN Human Rights Committee in *Rameka v New Zealand* (CCPR/C/79/D/1090/2002, 15 December 2003). The Committee emphasised the importance of the compulsory annual reviews by the Parole Board, with the power to order the prisoner’s release if he or she is no longer a significant danger to the public, and that the decisions of the Board are subject to judicial review.

¹² The Mental Health (Compulsory Assessment and Treatment) Act 1992 allows for temporary detention for assessment, and for compulsory treatment orders to be made by the Court. Compulsory treatment may include detention by way of an inpatient order. Compulsory treatment orders expire after six months. The Act sets out extensive safeguards and guidelines.

¹³ In relation to s 22, see *Butler & Butler The New Zealand Bill of Rights Act* (2005) at 123, and similarly *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC), 788 (search that has been found unreasonable under s 21 of the Bill of Rights Act not open to justification). In relation to s 26, see *Zaoui v A-G (No 2)* [2006] 1 NZLR 289 (SC) at n 4, [40] and [51] and also *R v Williams* [2007] 3 NZLR 207 (CA), 239, noting however that the point was left open

because the important objectives of this Bill could be achieved in a rights consistent manner.¹⁴

22. It would appear to be possible for the imposition of restrictions amounting to long term detention to be achieved in a rights consistent way through use of the preventive detention regime or through amendment to the Sentencing Act 2002 to allow courts to impose an extended parole period as part of the sentence following conviction for specific offending. This is broadly the scheme which was adopted in Canada.¹⁵
23. That this Bill's goals could be achieved without contravening the right against arbitrary detention or double jeopardy does not provide justification for these inconsistencies. The state should not detain citizens solely on the basis of preventing future offending, nor should it punish offenders twice for the same offence.



Hon Christopher Finlayson
Attorney-General
2 April 2009

¹⁴ *R v Hansen* [2007] 3 NZLR 1 (SC) at [70], [123], [203]-[204] and [271].

¹⁵ Criminal Code RSC 1985, Part XXIV Dangerous Offenders and Long-Term Offenders (s 753) [Canada].