Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the *Returning Offenders (Management and Information)* 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 reviewed the Returning Offenders (Management and Information) Bill (the Bill) and found it appears to be inconsistent with the New Zealand Bill of Rights Act 1990 in one respect on which I reported to the House in 2009. [1]

Summary

2. From time to time, persons who commit offences overseas are returned to New Zealand as a result of their offending – sometimes at the end of a long term of imprisonment. Were they to have been convicted and sentenced in New Zealand, Police would hold information about them and if released from prison would be subject to conditions imposed under the Parole Act 2002 to assist their reintegration into society. The person convicted overseas and returned to New Zealand avoids these consequences. This Bill seeks to address that.

3. Part 2 subpart 1 of the Bill will apply to any person convicted of an offence overseas for conduct that would be an imprisonable offence if it happened in New Zealand. Upon their return to New Zealand and for a limited period thereafter, a constable may require them to provide identifying particulars, including basic biographic details, but extending to finger, palm and footprints. They can also be subject to a databank compulsion notice, requiring them to submit to the taking of a bodily sample.

4. Part 2 subparts 2 and 3 of the Bill will apply to prisoners convicted and sentenced to at least a year in prison overseas, and enable the imposition of standard and special release conditions equivalent to those that would be applied if they had served a sentence of imprisonment in New Zealand.

5. The application of standard and special release conditions to returning prisoners limits their right to freedom of movement and residence and the right to freedom of association but I consider the limitation to be demonstrably justified in a free and democratic society.

6. The power to obtain identifying particulars from offenders returned to New Zealand by reason of their offence is justified by the need to ascertain whether an offender is a returning prisoner. Although this is properly seen as a search power, it is consistent with the right to be secure against unreasonable search and seizure. The power to detain a person for a period reasonably necessary to gather the identifying particulars is also justified.

7. In 2009, I brought the Criminal Investigations (Bodily Samples) Amendment Bill to the attention of this House under s 7 of the Bill of Rights Act because it was inconsistent with the right to be secure against unreasonable search and seizure. This Bill will extend the application of that regime so once again I report it to the House.

8. In all other respects I am satisfied that the Bill is consistent with the rights guaranteed by the Bill of Rights Act.

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1 Report of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Criminal Investigations (Bodily Samples) Amendment Bill (2009).

Freedom of association and freedom of movement and residence.

9. Subparts 2 and 3 of Part 2 of the Bill provide for the imposition on returning prisoners of conditions similar to the standard parole conditions applied to those released from New Zealand prisons. A returning prisoner is defined in clause 17 as a person convicted of an offence in an overseas jurisdiction for conduct that would be an imprisonable offence in New Zealand who has been sentenced to a term of imprisonment of at least one year, and who returns or is returned to New Zealand within 6 months of their release from custody.

10. If the Commissioner of Police determines that a person is a returning prisoner he or she may serve a notice on the person to that effect. The Bill provides the returning prisoner is then subject to standard release conditions for a specified period, the length of which will depend on how long they were imprisoned for overseas. Those conditions will require them to report to a probation officer within 72 hours and comply with the standard release conditions applied to persons released from prison in New Zealand, set out in s 14(1)(b) to (i) of the Parole Act 2002. The standard conditions require the person to notify their residential address to the probation officer and restrict the person's ability to change their residential address without consent of or notification to the probation officer. They must also not engage in any employment the probation officer has forbidden nor associate with any person the probation officer has directed them not to associate with.

11. The imposition of these conditions, by way of the Commissioner's notice of determination, will limit the exercise of the returning prisoner's freedom of movement and residence, by interfering with their decision as to where in New Zealand they will live and their freedom of association by subjecting it to the prior approval of a probation officer. Section 5 of the Bill of Rights Act applies to both of these guaranteed freedoms so they are subject to such limitations as can be demonstrably justified in a free and democratic society. In order to be so justified, the measures that limit the right must be rationally connected to a pressing social objective and involve minimal impairment of the right.[2]

12. I am satisfied that the imposition of the standard conditions is a justified limitation on the returning prisoner's freedom of movement and residence and their freedom of association.

13. The standard release conditions are intended to reduce the risk of re-offending in the immediate period following release from prison. They serve an important social purpose of reducing crime and assisting reintegration of prisoners into society.

14. The standard release conditions are logically connected to the purposes they serve. If the probation service is to guide the offender away from re-offending in the critical time after release from prison they must be able to supervise their basic activities of choosing a residence, finding work and associating with others.

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2 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [69] per Blanchard J, at [125] per Tipping J and at [203] per McGrath J.

15. The impairment of the right is minimal. There are no absolute limitations and the standard conditions do not reach into any other aspects of the offender's life. Where a probation officer is required to exercise judgment on these matters, as a person exercising a public function they must act in a manner that is consistent with the Bill of Rights Act.

16. The application of the standard release conditions to prisoners released from New Zealand prisons causes no inconsistency with sections 17 and 18 and there is no material difference where the prison sentence was served overseas. The risk of re-offending and the need for assisted re-integration is no less. Indeed, it is probably greater for a prisoner who must cope not only with release back into the community but release into a community to which they may have little or no connection. Clause 28 of the Bill provides a Court with the power to discharge any release condition, which provides an appropriate safeguard.

17. Under subpart 3, the standard release conditions may also be imposed on a person who has been released from custody up to six months before their return to New Zealand and who was subject to release conditions for the relevant sentence before their return to New Zealand. The justification for limitation of the rights of such a person would be different but in such cases the standard conditions may only be imposed by a Court which will provide a sufficient assurance that the standard conditions will not be applied in a way that would cause an unjustified limitation of the relevant rights.

Special Conditions

18. In addition to the standard conditions, a returning prisoner is potentially subject to special conditions equivalent to those that could be imposed by the Parole Board under s 15(3) of the Parole Act 2002. The subject matter of these special conditions is not limited but may include a requirement for residence, adherence to curfews and electronic monitoring, all of which would cause a more significant limitation on the freedoms of movement and residence and association. They may only be imposed by a Court and only if they are designed to reduce the risk of re-offending, facilitate rehabilitation and reintegration or make reasonable provision for victims of the offender. By reposing the power to make special conditions in a Court, and providing the Court with a discretion as to what conditions are imposed, there are adequate safeguards against the infringement of guaranteed rights through the imposition of special conditions.

19. I am satisfied subparts 2 and 3 of the Bill are consistent with the Bill of Rights Act.

No double jeopardy

20. No person may be punished twice for the same crime. Protection from double jeopardy is provided by s 26 of the Bill of Rights Act and it applies whether the punishment is imposed here or overseas. If additional punitive measures are applied after a person is sentenced it can amount to double jeopardy[3] but under this Bill none of the standard or special conditions have a punitive character. In

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[3] *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).

the case of special conditions they can only be imposed if they are designed to reduce the risk of re-offending, facilitate rehabilitation and reintegration or make reasonable provision for victims of the offender. Furthermore they can only be imposed by a Court which is a further safeguard against any risk of a punitive measure being imposed.

The right to be secure against unreasonable search and seizure

21. When Parliament gives Police or any other law enforcement agency authority to demand from a person information in which that person has a reasonable expectation of privacy it is creating a search power.

22. Section 21 of the Bill of Rights Act guarantees the right to be secure against unreasonable search or seizure. In order for a statutory search power to be consistent with s 21 the intrusion into privacy must be justified by a sufficiently compelling public interest. The greater the intrusion, the greater will be the justification required. It must also be accompanied by adequate safeguards to ensure it will not be exercised unreasonably.

23. If a search power is inconsistent with s 21, s 5 of the Bill of Rights Act cannot save it. The creation of an unreasonable search power could never be demonstrably justified in a free and democratic society.

24. This Bill proposes the creation of one new search power, and extends the scope of an existing search power.

25. Clauses 7-13 of the Bill would empower the Police to obtain by compulsion the identifying particulars of any returning offender, defined as a person who has been convicted of an offence overseas that is also imprisonable in New Zealand which made them liable to deportation and results in their return to New Zealand. Identifying particulars are defined to include biographical information (for example name, address and date of birth); a photograph or other visual image and fingerprints, palmprints and footprints.

26. Clause 14 would extend the scope of the Criminal Investigations (Bodily Samples) Act 1995 to returning offenders, provided the offence for which they were convicted overseas would have qualified them under Part 3 of that Act if they had been convicted in New Zealand. Clause 14 therefore empowers a constable of the rank of inspector or above to issue a databank compulsion notice, requiring a returning offender to provide a bodily sample.

The power to obtain identifying particulars

27. The identifying particulars described in the Bill are those Police may compel any person they have arrested to provide, under s 32 of the Policing Act 2008.

28. The primary justification for the power to obtain particulars of an arrested person is to identify the person for the purpose of bringing charges against them.[4] The primary purpose of the power in this Bill is likewise to identify the returning

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[4] *Moulton v Police* [1980] 1 NZLR 443 (CA) 445 per Richardson J

offender for the purpose of ascertaining whether they are a returning prisoner and potentially subject to orders under subpart 2 or 3 of the Bill.

29. The power to make an order imposing release conditions on a returning prisoner is justified, and a power to require a returning offender to provide basic biographical information including a photograph or visual image is justified for the purpose of determining whether they are a returning prisoner. It may well be that fingerprint identification or other biometric information is also necessary in order to obtain further information from overseas about them.

30. The power to obtain this information is no more intrusive than the Police may exercise in respect of any person who comes into their custody in New Zealand and it is triggered only where a person returns to New Zealand as a result of having been convicted of an offence overseas for conduct that is also imprisonable in New Zealand.

31. I am satisfied that granting this power to Police is consistent with s 21 of the Bill of Rights Act.

The right not to be arbitrarily arrested or detained

32. Detention by the state profoundly limits the enjoyment of basic human rights of freedom, autonomy and dignity.[5] When a power to detain is conferred by legislation, it will be inconsistent with s 22 of the Bill of Rights Act if it does not provide safeguards to prevent arbitrary detention. There must be a sufficient justification for the detention and threshold for justification reflects the high value we place on freedom, autonomy and dignity. The power to detain must also be carefully circumscribed as to who may detain, for how long and under what conditions. Again there is no role for s 5 to play if an enactment is inconsistent with s 22. Parliament could not be demonstrably justified in authorising an arbitrary detention.

33. Clause 10 of the Bill authorises a constable to detain a returning offender on, or any time within 6 months after, his or her return to New Zealand. The sole purpose for this power of detention is to enable the exercise of the power to obtain identifying particulars. For the purpose of considering consistency with the Bill of Rights Act the two powers must be viewed in tandem.

34. As the power to obtain identifying particulars is consistent with s 21, a limited power to detain for a period and in a manner that goes no further than necessary for the purpose of obtaining that information is consistent with s 22. Although most of the identifying particulars can be obtained from a person without detaining them, the collection of biometric information and a photograph, if those were sought, requires attendance at a suitable place. Under clause 9 of the Bill the power to detain arises only if the returning offender refuses to supply the information on request.

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5 *R v Briggs* [2009] NZCA 244 at [85] (Arnold J)

The power to order a bodily sample from certain returning offenders for the DNA Profile Databank

35. Section 39 of the Criminal Investigations (Bodily Samples) Act 1985 created a power for a constable holding the rank of inspector or above to issue a databank compulsion notice to a person requiring them to submit a bodily sample for analysis and inclusion in the DNA Profile Databank. In 2009 I brought the amendment bill that expanded the scope of this regime to persons convicted of any imprisonable offence to the attention of this House because I found it to be inconsistent with s 21. My report to the House focussed on the absence of any judicial oversight or other safeguards of the kind that are found for such schemes in most comparable jurisdictions.

36. For the same reasons I gave in my report to this House on the Criminal Investigations (Bodily Samples) Amendment Bill, clauses 14 and 15 of the present Bill are inconsistent with the right to be secure against unreasonable search or seizure.

37. In all other respects I consider the Bill to be consistent with the Bill of Rights Act 1990.

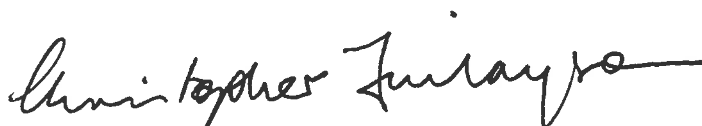
38. The matters addressed by this legislation are not easy ones and I thank the officials from a number of agencies who have worked hard to ensure this legislation complies with the New Zealand Bill of Rights Act 1990 in as many respects as possible.

39. One of the benefits of section 7 lies in its "soft power". What I mean by that is that its positive effect on the executive is often contained in the impetus to work to avoid a section 7 report. The very fact section 7 exists enables a ministry proposing legislation and the Parliamentary Counsel Office to:

    39.1 find ways to eliminate or mitigate limitations on right and freedoms; and

    39.2 establish the justifications for remaining limitation on rights and freedoms.

40. I find this happens constantly in government and this legislation has been no exception.



Hon Christopher Finlayson QC
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