

Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Electronic Monitoring of
Offenders Legislation Bill

Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 265 of the Standing Orders of the
House of Representatives

1. I have considered whether the Electronic Monitoring of Offenders Legislation Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). I have concluded that the Bill appears to limit the freedom of movement and the rights against unreasonable search and seizure and double jeopardy affirmed in sections 18(1), 21 and 26(2) of the Bill of Rights Act. The limitations cannot be justified under s 5 of that Act. As required by s 7 of the Bill of Rights Act and Standing Order 26~~6~~, I draw this to the attention of the House of Representatives.

The Bill

2. The main purpose of the Bill is to allow electronic monitoring of offenders sentenced to intensive supervision or released from a prison sentence of two years or less.
3. The Bill also makes minor amendments to provisions in the Parole Act 2002 allowing electronic monitoring and related administrative conditions to be imposed on offenders subject to extended supervision orders (ESOs) or release conditions. These amendments are intended to clarify the limited circumstances in which electronic monitoring can be imposed and to allow probation officers to impose reasonable administrative obligations on offenders regarding the electronic monitoring equipment. Those administrative obligations are currently specified by the Parole Board or sentencing court.

Section 18 of the Bill of Rights Act (freedom of movement)

4. Section 18(1) of the Bill of Rights Act affirms the right of everyone lawfully in New Zealand to move and reside freely within this country.
5. Electronic monitoring does not restrict an offender's movements. It may, however, indirectly limit the freedom of movement because it necessarily enables the state to constantly track those movements. This constant tracking may discourage offenders from fully and freely exercising their freedom of movement, within the confines of any other conditions as to their whereabouts. While this limitation is indirect I do not consider it to be insignificant.
6. Previous reports to the House have found the ESO regime to be inconsistent with the Bill of Rights Act.¹ A right or freedom cannot be justifiably limited under the Bill of Rights Act by a measure taken to implement a regime found to be inconsistent with that same Act. The limitation electronic monitoring places on the freedom of movement when imposed as a condition, and to monitor compliance with other conditions, of an ESO therefore cannot be said to be justified.
7. The Bill's amendments to the Parole Act do not themselves constitute a breach of section 18. They do, however, restate and facilitate the imposition of conditions

¹ Reports of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill (2003), Parole (Extended Supervision Orders) Amendment Bill (2009) and Parole (Extended Supervision Orders) Amendment Bill (2014).

unjustifiably limiting the freedom of movement protected by that section. I therefore consider the Bill gives rise to inconsistencies with section 18(1) of the Bill of Rights Act.

Section 21 of the Bill of Rights Act (unreasonable search and seizure)

8. Section 21 affirms the right to be free from unreasonable search and seizure, whether of the person, property, correspondence or otherwise. The right applies in a law enforcement context and covers non-physical interferences with privacy.
9. Electronic monitoring constitutes a search and seizure.² The reasonableness of a search and seizure should be determined with reference to the purposes for which the information is gathered and used. Electronic monitoring of an offender subject to an ESO will monitor compliance with the conditions imposed under that ESO. As the ESO regime is inconsistent with the Bill of Rights Act I do not consider conditions of an ESO, including electronic monitoring, can be rights-consistent. It also follows that electronic monitoring of compliance with other conditions cannot be a 'reasonable' search and seizure.
10. Again the Bill's amendments to the Parole Act do not themselves constitute a breach of section 21. Nevertheless, for the same reasons I gave regarding section 18, I also consider the Bill appears inconsistent with the right against unreasonable search and seizure affirmed by section 21 of the Bill of Rights Act.

Section 26(2) of the Bill of Rights Act (double jeopardy)

11. Section 26(2) affirms that no one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.
12. I consider the ability to impose electronic monitoring on offenders subject to ESOs limits section 26(2) as ESOs are imposed after an offender has served the full sentence originally imposed for their offending. This constitutes punishing the offender again. Because the policy for imposing ESOs may be centrally preventative³ it may be argued electronic monitoring in this context is not punishment. In line with the Court of Appeal in *Belcher v Chief Executive of the Department of Corrections* and my previous reports to the House I consider the ultimate nature of the ESO regime is punitive.⁴ If, as I indicated above, the characterisation of sentence conditions should be informed by the context in which

² Commentary and case law are clear that section 21 covers non-physical interferences with privacy, including monitoring by tracking device and compulsory provision of information: see Andrew Butler & Petra Butler, *The New Zealand Bill of Rights Act: a commentary* (Wellington, New Zealand; LexisNexis NZ Limited, 2005) at 18.11.7. The then Attorney General in her section 7 report on the introduction of the ESO regime also found 24 hour electronic monitoring of an individual subject to an ESO to constitute (an unreasonable) search and seizure: see Report of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill (2003) from paragraph 16.

³ Parole Act, s 107I(1).

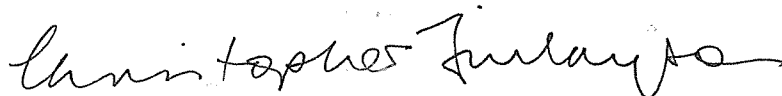
⁴ See *Belcher v Chief Executive of the Department of Corrections* (2006) CA184/05, at para 47; Reports of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill (2009) and Parole (Extended Supervision Orders) Amendment Bill (2014).

they are imposed, electronic monitoring of an offender's compliance with conditions of an ESO must also be considered a punishment.

13. Again, the limitation of section 26(2) cannot be reasonably justified if the regime under which the limitation occurs is inconsistent with the Bill of Rights Act. Following my approach in respect of the rights considered above I also consider the Bill's amendments to the Parole Act to be inconsistent with section 26(2) of the Bill of Rights Act.

Conclusion

14. While the amendments to the Parole Act are minor they nevertheless facilitate and restate the ability to impose electronic monitoring of an offender's compliance with an ESO. The ESO regime has been found inconsistent with the Bill of Rights Act in several previous reports to the House under that Act.⁵ Any amendment to the ESO regime, short of removing the inconsistencies with the Bill of Rights Act, will therefore engage the rights limited by the imposition of an ESO. A corresponding conclusion is any limitation on rights imposed by a condition of an ESO is unlikely to be demonstrably justified in a free and democratic society.
15. For the above reasons, I have concluded that the Bill appears to limit sections 18, 21 and 26(2) of the Bill of Rights Act. These limitations cannot be justified under section 5 of that Act.



Hon Christopher Finlayson

Attorney-General

4 May 2015

⁵ Reports of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill (2003), Parole (Extended Supervision Orders) Amendment Bill (2009) and Parole (Extended Supervision Orders) Amendment Bill (2014).