13 August 2014

Submission to the Law and Order Select Committee on the Parole (Extended Supervision Orders) Amendment Bill

Introduction

1. This submission, focussing on the Parole (Extended Supervision Orders) Amendment Bill has been prepared by the Wellington Community Justice Project.
2. The Wellington Community Justice Project (WCJP) (www.wellingtoncjp.org) is a student-led organisation at Victoria University of Wellington. The project, formed in 2010, has twin aims: to improve access to justice and legal services in the community; and to provide law students with an opportunity to gain practical experience. It pursues these goals by establishing community-based volunteer projects and working with other organisations that have similar goals.
3. The research for this submission was carried out by students Tan Chong Hui (Joshua) (LLB) and Emma Smith (LLB(Hons)/BA) as part of volunteer work for the project.
4. We support the aim of keeping the community safe from high-risk offenders. However, we have some serious concerns about the measures proposed in this Bill, in respect of offenders' rights and the aims of the penal system.

A: The Bill breaches Section 26 of the New Zealand Bill of Rights Act 1990

5. The Bill provides for the Department of Corrections to be able to renew Extended Supervision Orders **("ESO's")** indefinitely, and widens the scope of offenders eligible to be subject to ESO's to include sex-offenders against adults and violent offenders who are deemed to be "high risk:.

6. ESO's have been held to amount to criminal punishment.[1] We note that the Attorney-General of New Zealand has found that the Bill is inconsistent with the right to not be subjected to retroactive penalties and to be free from double jeopardy, contained in s 26 of the New Zealand Bill of Rights Act 1990. We urge the Committee to place weight on this view.

7. The Bill is problematic in that imposing ESO's, in particular those containing restrictive conditions, adds a further penalty to a sentence that has already been served. Many offenders who are eligible for an ESO would have been eligible for a sentence of preventive detention, but it was not imposed. Thus imposing an ESO at the end of a sentence constitutes an additional punishment following a final conviction, in breach of s 26(2).

8. The Attorney-General has considered that a future risk of offending can be addressed at the time of sentencing in other ways that do not infringe s 26, such as preventive or other forms of civil detention (for example using Public Protection Orders). He concluded that the breach of s 26 is not demonstrably justified in a free and democratic society.[2] We note that preventive detention has been subjected to criticism on human rights grounds, and that the Public Protection Orders legislation has not yet been passed. However, there are other mechanisms available to deal with risks of offending, such as treatment and rehabilitation programmes that do not breach offenders' s 26 rights.

9. The Bill aggravates the s 26(1) breach of the right to be free from retroactive penalties that already existed under the Parole Act ESO regime. An offender may be eligible for an ESO even where the qualifying offence was committed before the relevant Part of the Parole Act came into force.[3] The widening of the scope of qualifying offences under this Bill to include sexual offending against adults and violent offending expands this retroactive effect.

10. On the other hand, we note that the Bill contains some positive aspects. In particular, there are procedural safeguards against ESO's being imposed in certain cases, in that the Court must be satisfied that the offender has a pattern of serious sexual or violent offending, before an order is made.[4] We also commend the measure requiring regular review by the Parole Board of high impact conditions such as residential restrictions and electronic monitoring.[5] These aspects of the

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1 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) at [47].

2 Per the New Zealand Bill of Rights Act 1990, s 5.

3 Parole Act 2002, s 107C(2); Parole (Extended Supervision Orders) Amendment Bill 2014, cl 7.

4 Parole (Extended Supervision Orders) Amendment Bill 2014, cl 12.

5 Cl 20.

Bill make it somewhat less objectionable from a human rights perspective. The provision for review and cancellation of an ESO if the criteria for it are no longer present is important and should be retained if the Bill is to be passed.[6]

B: The scope of the proposed s 107B is too wide

13. The new section 107B according to clause 6 of Parole (Extended Supervision Order) Amendment Bill 2014 identifies an attempt or a conspiracy to commit serious sexual or violent offence as a relevant offence. We argue that this would extend eligibility for ESO's to cover a very broad category of offences without real justification.

14. *Serious Violent Offences:* We generally agree that there should be provision for protecting the public against real and ongoing threats of serious violent offending. However, the class of violent offences must be clearly defined to avoid any ambiguity. We also argue that the test for a real and ongoing risk should be stringent so that a minimal number of offenders are caught by the provision.

15. *Inchoate Offences:* We believe that the inclusion of conspiracy and attempts as relevant offences is inappropriate. While the relevant intent is considered equally culpable under the criminal law as the commission of full offence, attempts and conspiracies differ in that no harm actually occurs.[7] Therefore, including offenders charged with inchoate offences may risk punishing these offenders disproportionately and is unjust.

16. Conspiracy, in comparison with other offences that are subject to the ESO provisions is least likely to inflict actual harm to society. Further, conspiracy can be defined as "a decision, made by the parties to the agreement, to jointly pursue the object of a common intention."[8] In other words, a conversation is sufficient to find liability. This is very close to punishing a person's evil thoughts rather than their actions. Therefore the proposal to extend the ESO provisions to cover conspiracy to commit a serious sexual or violent offence is unjustified. The comparatively lower level of risk posed by offenders convicted of conspiracy offences does not warrant subjecting them to ESO's.

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6 Cl 16, 20.

7 AP Simester and WJ Brookbanks *Principles of Criminal Law* (3rd edition, Brookers Ltd, Wellington, 2007) at 218-219.

8 MacKinnon "The Contract as Conspiracy" (1978) 10 Ottawa L Review 448, 449.

C: The measures contained in the Bill undermine the goals of rehabilitation and reintegration

17. A primary objective in New Zealand's sentencing policy is to rehabilitate the offenders and subsequently assist them to reintegrate back to the society.[9] An offender who has "learnt their lesson" should not be kept in prison. Parole aims to "securing their return to decent citizenship" while supervising parolee's limited freedom.[10]

18. Allowing ESO's to be renewed an indefinite number of times, as the Bill provides, is akin to preventive detention in that an offender is subject to an indeterminate punishment. We argue that this is not an appropriate mechanism for rehabilitating offenders.

19. By law, once a person has completed their sentence, they are generally free to live wherever they choose. Telling a community about the presence of a person who has been released may have negative consequences for that person, their family and friends. It can also make rehabilitation and reintegration more difficult, which can lead to further reoffending.

20. There are better alternatives to rehabilitate the offender other than seeking an ESO. It is better to treat the underlying issues that cause the offending than subjecting offenders to continued supervision orders. For example, the Department of Corrections offers treatment and rehabilitation programmes to people with a history of serious violent or sexual offences, for example through the Kia Marama unit at Rolleston Prison, and the Te Piriti unit at Auckland Prison, as well as community providers' programmes and individual intervention through a psychologist.

21. We are concerned that offenders who are subject to ESO's may experience severe social stigma. Research carried out in Australia which assessed the relationship between Serious Sex Offender Monitoring Act 2005, media, and general public showed that the media tend to put more emphasis upon the culpability of an offender who is subject to particular orders, which reinforces the negative image among the general public on this kind of offender.[11] The classic

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[9] Sentencing Act 2002, s 7(h).

[10] Lord Longford *Crime, a challenge to us all: Report of the Labour Party's Study Group* (Labour Party, London, 1964) at 44.

[11] Lauren Ducat et al "Sensationalising sex offenders and sexual recidivism: Impact of the Serious Sex Offender Monitoring Act 2005 on media reportage" (2009) 44 AP 156 at 158. The Australian statute is the counterpart of the New Zealand Parole Act 2002, Part 1A.

example of the general public's reaction is: "If they are on parole the community is not being protected".[12]

22. If the offender is being rejected in the public, it makes it harder for him or her to be reintegrated back into society. Criminologists such as Howard S Becker have suggested that this may also lead the offender to view themselves negatively, and as someone who will always be a "criminal". Moreover, the stigma resulting from an ESO could cause considerable inconvenience to offenders' family members and communities. This may be particularly harmful in communities where the actions of an individual are seen as impacting on the community as a whole, for example some Māori communities. This harm is aggravated by the wide scope of offences that are caught by the Bill, as explained above.

Conclusion

23. Parliament should be wary of passing legislation merely to respond to fears held by the community. The safeguards contained in the Bill of Rights Act ought not to be lightly ignored. While we support the aim of keeping the community safe,[13] we cannot support this Bill in its current form. It breaches the rights of offenders to be free from retroactive penalties and double jeopardy, it casts the net too wide in terms of the type of offences it covers, and it seems to run counter to the aims of reintegration and rehabilitation of offenders. These issues compel greater scrutiny and amendments should be considered before the Bill is passed.

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[12] At 160.

[13] Parole Act 2002, s 107I(1). The object of the order is to protect the public from the real, ongoing threat exerted by the offender on parole.