

Office of the Minister of Corrections
Cabinet Legislation Committee

Approval to urgently introduce the Parole (Special Conditions Imposed on Extended Supervision Orders) Amendment Bill

Proposal

- 1 I seek Cabinet's approval for the introduction of the Parole (Special Conditions Imposed on Extended Supervision Orders) Amendment Bill (the Bill) to pass through all stages in the House of Representatives on the same day, either under urgency or by agreement of the Business Committee.

Policy: The Bill ensures public safety and the wellbeing of certain offenders on extended supervision orders (ESOs)

- 2 The Bill gives effect to policy decisions made by Cabinet on 7 August 2023 by amending the Parole Act 2002 (the Parole Act) in response to a recent High Court decision, *New Zealand Parole Board v Attorney-General* [CAB-23-MIN-0351 refers]
- 3 The Bill responds to the High Court judgment by amending the Parole Act in respect of offenders on an extended supervision order (ESO). Cabinet approved the policy intent as follows:
 - 3.1 enabling programme conditions and residential conditions to be delivered by the same provider
 - 3.2 including provisions for retrospective legislation to capture the 26 ESO offenders affected by the June 2023 High Court judgment, alongside future offenders
 - 3.3 clarifying that programme conditions must not have the effect of subjecting the offender to full-time residential restrictions or intensive monitoring, as defined in the Parole Act
 - 3.4 requiring the New Zealand Parole Board (the Parole Board) to undertake two yearly reviews of any offenders on an ESO who are subject to a combination of programme and residential conditions, and that the offender participate in these reviews to ensure that the Parole Board regularly considers whether conditions still match the risk level of the offender

The Bill gives more specificity to existing restrictions in the Parole Act that seek to ensure offenders rights are protected

- 4 Introducing provisions that programme conditions must be reviewed every two years better ensures compliance with existing s107k(3)(bb)(i). This section

relates to the requirement that offenders are not supervised, monitored or subject to restrictions for longer each day than is necessary.

5 These provisions also help to better ensure that important human rights are protected.

6 9(2)(h)

These amendments do not lessen existing powers exercised by Corrections and the Parole Board in managing these high-risk offenders

7 I am confident that these amendments are in keeping with current powers to manage ESO offenders who are residing with their programme provider and does not lessen the Parole Board and Corrections ability to support public safety. In summary, these amendments repeal the section in the Parole Act that the High Court found prevents offenders from living with their programme provider. The Bill then also, by introducing a new type of review by the Parole Board, provides greater specificity about how existing powers are to be reviewed in relation to the management of ESO offenders who are required to reside with their programme providers to better support human rights.

These changes are necessary in response to the June 2023 High Court judgment that resulted in daytime programme conditions being unenforceable

8 In 2014, the Parole (Extended Supervision Orders) Amendment Act came into force, inserting s107K(3)(bb)(ii) into the Parole Act 2002. This section states that:

when the Parole Board imposes special conditions under s107K, any condition requiring that the offender participate in a programme must not require the offender to reside with, or result in the offender residing with, any person, persons, or agency in whose care the offender is placed.

9 Corrections intention in 2014 was for this section to enable a single provider to deliver both residential and programme conditions, provided each condition was put in place separately and did not constitute intensive monitoring.

10 On 27 June 2023, the New Zealand High Court determined that the wording of s107K(3)(bb)(ii) of the Parole Act prevents the Parole Board from imposing residential conditions requiring, or resulting in, an ESO offender residing with their programme provider. The ruling means that the daytime programme conditions of 26 high-risk ESO offenders who Corrections currently manages are no longer enforceable.

11 I consider that this situation amounts to an unacceptable risk to public safety and is contrary to how Corrections intended s107K(3)(bb)(ii) to be applied.

12 To remedy this, the Bill aims to implement the original policy intent for the Parole Act and the status quo of Corrections' management of these 26 ESO offenders. This will allow ESO offenders to continue to receive the current

wraparound support that is in place whereby they have programme conditions and residential conditions delivered by the same provider.

An additional clarification was identified during the Bill drafting stage in relation to monitoring of affected ESO offenders

- 13 Recommendation 5, as agreed to by Cabinet, provided that the amendments to the Parole Act would clarify that programme conditions must not have the effect of subjecting the offender to restrictions equivalent to 24-hour monitoring or full-time residential restrictions.
- 14 During drafting, my officials identified that a clarification of the policy was needed to ensure that electronic monitoring is not captured by that policy intent. I ask Cabinet to note that the policy intent, which was conveyed in the previous Cabinet paper, was to provide more clarity that offenders subject to an ESO are to be managed in a way that is distinct from intensive monitoring as it is defined in s107IAC(2) of the Parole Act, and full-time residential restrictions as defined in s33(2)(c)(ii) of the Parole Act.
- 15 To give effect to the intended policy, the Bill requires that where an offender has a combination of programme and residential conditions/restrictions that requires or results in them living with their programme provider, the Parole Board must conduct reviews at least every two years to consider whether the programme condition is no more restrictive than is necessary for the purposes of attendance and participation in their programme (clause 107RC(5)(b) of the Bill). It must also consider whether the programme condition continues to offer the offender rehabilitation and reintegration that reduces the risk of further offending by the offender (clause 107RC(5)(a) of the Bill).
- 16 While the Parole Act already requires that programme conditions not be for longer each day than necessary, the new wording in the Bill specifies the importance of considering the impact of the programme conditions during reviews that must happen at least every two years. The Department of Corrections considers that the totality of the Parole Act as it stands after this change confirms the status quo, as it continues to make 24-hour monitoring unlawful outside of intensive monitoring or full-time residential restrictions under s33(3) or s107IAC(2) of the Parole Act.
- 17 I, in discussion with the Minister of Justice, have approved this change using my delegated authority from Cabinet [see CAB-MIN-2023-0351].

9(2)(h)



Implementation planning is underway within Corrections and the Parole Board to support these amendments

- 19 While the Bill will largely preserve the status quo for how Corrections and the Parole Board operate, both are working to update operational guidance for their respective employees.
- 20 This includes ensuring that the staff understand the new more specific requirements relating to the reviews that must occur at least every two years. In this case it may mean that Corrections must provide additional material to the Parole Board regarding the duration, success, and nature of programme and residential conditions. This will help minimise the risk that offenders on an ESO are experiencing conditions equivalent to intensive monitoring or full-time residential restrictions.

The Bill is not likely to be contentious, but potential limitations on human rights may generate debate

- 21 As noted in the Cabinet paper dated 7 August 2023, the Bill may result in a s7 report due to the potential limitations on the rights contained in s26(2) of BORA. Legislation for the ESO regime has always engaged BORA rights.
- 22 I restate that just as the changes to the Parole Act in 2014 were passed into law by Parliament, I consider that the legislative amendments in the proposed Bill are necessary considering the demonstrable risks to public safety from offenders on an ESO.

Urgent legislative change is necessary to support public safety

- 23 I propose that the Bill be introduced on either 29, 30, or 31 August 2023 (or a date agreed by the Business Committee) and passed through all stages on that day. The degree of the public safety risk requires the Act is clarified as soon as is possible. I consider moving at this speed is appropriate as the Bill:
- 23.1 affirms what I consider to be Parliament's original intention for the ESO regime, and
- 23.2 adds an additional safeguard for offenders' rights for relevant conditions to be reviewed every two years and not to equate to "intensive monitoring" or full-time residential restrictions.

Impact analysis

- 24 A Regulatory Impact Statement (RIS) was developed when policy decisions were sought from Cabinet on 7 August 2023, and therefore a RIS was not prepared alongside this Cabinet paper [CAB-MIN-2023-0351 refers].
- 25 A joint quality assurance panel made up of members from Corrections and the New Zealand Police reviewed that RIS and assessed that the RIS partially meet the Quality Assurance criteria.

Compliance

- 26 The Bill does not comply with the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee. This is to the extent that it retrospectively validates orders that are currently imposed under the Parole Act and that may have been invalidated by the June 2023 High Court judgment.
- 27 A disclosure statement for the Bill has been prepared noting the above and is **attached** to this paper.

Treaty of Waitangi

- 28 The Bill confirms the original policy intent for s107K(3)(bb)(ii). Consequently, the Bill does not raise new Treaty of Waitangi issues beyond those the ESO regime already creates.

Human Rights

- 29 The Bill has been vetted for compliance with the New Zealand Bill of Rights Act 1990 (NZBORA). The Bill may not comply with NZBORA because the courts have found that the ESO regime as a whole is inconsistent with the prohibition against double jeopardy.
- 30 Nevertheless, I consider these amendments are necessary to protect public safety and note that additional protections will be put in place by the Bill to minimise negative impacts on ESOs who have a combination of daytime programme conditions and residential restrictions.

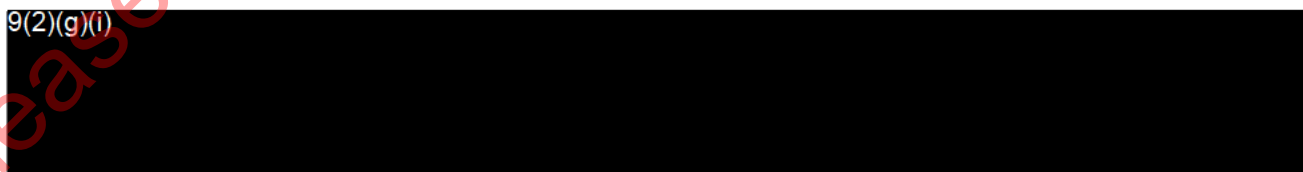
Privacy

- 31 The Bill does not have any privacy implications under the Privacy Act 2020.

Consultation

- 32 Corrections consulted with officials from the Ministry of Justice, New Zealand Police, Oranga Tamariki, the Treasury, and Crown Law in the preparation of this paper. No substantial feedback was provided to Corrections.
- 33 An exposure draft of the Bill will be shared with the Parole Board.

9(2)(g)(i)



Binding on the Crown

- 35 The Bill amends the Parole Act 2002, which is binding on the Crown.

Creating new agencies or amending law relating to existing agencies.

36 No new agencies will be created by the Bill.

Allocation of decision-making powers

37 The Bill impacts decision making by the Parole Board and does not change the allocation of decision-making powers.

Associated regulations

38 No regulations will be needed to bring the Bill into operation.

Other instruments

39 The Bill does not include any provision empowering the making of other instruments that are deemed to be legislative instruments or disallowable instruments (or both).

Definition of Minister/department

40 The Bill does not contain a definition of Minister, department (or equivalent government agency), or chief executive of a department (or equivalent position).

Commencement of legislation

41 The Bill will come into force the day after it receives Royal Assent.

Parliamentary stages

42 I seek Cabinet's approval for the Bill to be passed through all stages on the same day, either under urgency or by agreement of the Business Committee, to ensure that all individuals who are currently living with their programme providers have programme conditions that can be enforced as soon as possible.

Proactive Release

43 I intend to proactively release this paper on the Corrections website following the introduction of the Bill. Proactive release is subject to redaction as appropriate under the Official Information Act 1982. Release following introduction of the Bill on an expedited legislative process will help to mitigate risks to public safety that could arise from the 26 offenders subject to an ESO realising that their programme conditions are unenforceable. Should this paper be proactively released earlier, the risk will be present for a longer period of time.

Recommendations

The Minister of Corrections recommends that the Committee:

- 1 **note** that on 7 August 2023 Cabinet invited the Minister of Corrections to issue drafting instructions to the Parliamentary Counsel Office to amend the Parole Act 2002 as follows [CAB-MIN-2023-0351 refers]:
 - 1.1 to enable programme conditions and residential conditions to be delivered by the same provider
 - 1.2 that the amendments include provisions for retrospective legislation to capture offenders currently managed under an ESO, alongside future offenders
 - 1.3 the amendments include clarification that programme conditions must not have the effect of subjecting the offender to restrictions equivalent to 24-hour monitoring or full-time residential restrictions
 - 1.4 that to ensure that conditions are not more restrictive than necessary, the Parole Act 2002 require the New Zealand Parole Board to undertake two yearly reviews of any offenders on an ESO who are subject to a combination of programme and residential conditions and that the offender participate in these reviews

9(2)(h)



- 3 **note** that on 7 August 2023 Cabinet agreed that, subject to availability, the amendment bill should be introduced and passed through all stages on the same day, either under urgency or by agreement of the Business Committee, with this to take place in the final sitting block of the Parliamentary term

Additional clarifications were identified during drafting

- 4 **note** that on 7 August 2023 Cabinet authorised the Minister of Corrections, in consultation with the Minister of Justice, to make further decisions in line with the policy decisions agreed by Cabinet [CAB-MIN-2023-0351 refers]
- 5 **note** that the recommendation agreed to by Cabinet on 7 August 2023 in recommendation 1.3 above, relating to 24-hour monitoring, does not include electronic monitoring
- 6 **note** that to give effect to recommendations 1.3 and 5 above, the Bill will clarify that where offenders are on a combination of residential conditions or restrictions and programme conditions, the Parole Board must at least every two years conduct reviews to consider whether the programme condition:
 - 6.1 continues to offer the offender rehabilitation and reintegration that reduces the risk of further offending, and

- 6.2 requires that the offender be subject to supervision and monitoring for no longer each day than is necessary to ensure attendance and participation in their programme

9(2)(h)

I intend to introduce the Parole (Special Conditions Imposed on Extended Supervision Orders) Amendment Bill in August 2023

- 8 **agree** to introduce the Parole (Special Conditions Imposed on Extended Supervision Orders) Amendment Bill 2023
- 9 **agree** that the Bill will be introduced on either 29, 30, or 31 August 2023, that it be progressed through all stages under urgency or by agreement of the Business Committee on the same day as its introduction, and that it come into effect one day after the Governor-General gives Royal Assent.

Hon Kelvin Davis

Minister of Corrections