PAROLE (EXTENDED SUPERVISION) AND SENTENCING AMENDMENT BILL 2003 (2004 No 88-2)

As reported from the Justice and Electoral Committee: 14 June 2004

Bills Digest No. 1115
PURPOSE

The aim of the Bill is to amend the Parole Act 2002 and the Sentencing Act 2002 to introduce a new extended supervision regime to manage child sex offenders and to make other amendments to both those Acts.

*The Bill as introduced is described in* Bills Digest No 1039.

*Supplementary Order Paper 2004 No 230 was released on 29 June 2004.*

MAIN PROVISIONS

**Parole Act 2002**

**Extended supervision orders and electronic monitoring**

The Select Committee has recommended greater detail in relation to what constitutes electronic monitoring where its imposition is made a condition of an extended supervision order.

Electronic monitoring may be imposed only on an offender who;

- is subject to a sentence of preventive detention; or
- is subject to an extended supervision order; or
- is or will be on parole, and electronic monitoring of the offender is necessary in order to provide the supervision required to ensure that the offender does not pose an undue risk to the community or any person or class of persons; or
- is or will be subject to release conditions imposed by the Board, having been released at the offender’s “statutory release date”, or under Section 104 (the offender’s “final release date”) or on the expiry or revocation of an order made under Section 107 (an order that an offender not be released) *(Part I, Clause 6A, New Section 15A(1)).*
However Supplementary Order Paper No 230 proposes the deletion of New Section 15A(1) from the Bill because the provision allowed the Parole Board only to impose electronic monitoring conditions in “limited circumstances”. “The effect of omitting the subsection is to allow the Parole Board to impose an electronic monitoring condition on any offender (including any offender released on parole) who is subject to a condition about whereabouts”\textsuperscript{1}.

**Purposes of electronic monitoring**
The Select Committee recommended that for the purposes of the Privacy Act 1993, electronic monitoring may be used for one or more of the following purposes:

- to deter the offender from breaching conditions that relate to his or her whereabouts, and to monitor compliance with those conditions;
- to verify compliance with any release conditions, detention conditions, or conditions of an extended supervision order;
- to detect non-compliance with any conditions and the commission of offences;
- to provide evidence of non-compliance with conditions and the commission of offences (Part 1, New Clause 6A, New Section 15A(2) – (5) of the Parole Act 2002).

**Retrospectivity and “transitional eligible offenders”**
The Select Committee has recommended amendments to the definition of “transitional eligible offender” to include those persons who may have become, and then ceased to be, eligible offenders between the date on which this Bill was introduced (11 November 2003) and the date on which it comes into force. It is recommended that it be clarified that an extended supervision order may be made in relation to an offender who has ceased to be an “eligible offender”, as long as the individual was an “eligible offender” when the application for the order was made (Part 1, Clause 10, New Part 1A of the Parole Act 2002, New Sections 107G(2A) and 107T, definition of “transitional eligible offender”).

**Comment**
The Select Committee made the following comment on the report of the Attorney-General on this Bill under the Bill of Rights Act 1990\textsuperscript{2}:

“The key question for the ‘double jeopardy’ finding is whether retrospective application of an extended supervision order should be considered ‘punishment’. The Attorney-General considered that the retrospective application of the provisions that allow for the more significant restrictions of liberty on someone convicted before the bill came into force should be viewed as a punishment.

---

\textsuperscript{1} Supplementary Order Paper, Parole (Extended Supervision) and Sentencing Amendment Bill, Explanatory Note, p. 4.

\textsuperscript{2} Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill, 2003 A to J E.63.
“It is possible to consider retrospective application of the extended supervision regime not to be ‘punishment’. Some eligible offenders may welcome the protection afforded by an extended supervision order. They may recognise that the intensive monitoring will assist them to remain in the community, and provide an element of self-protection. They may consider the restrictive conditions of an order to be rehabilitative rather than punitive. The ‘search and seizure’ concern expressed by the Attorney-General focused on the need for additional information about the proposed method of electronic monitoring, and uncertainty regarding the accuracy of current electronic monitoring technology. We acknowledge that Global Positioning System (GPS) or other new technology will allow for the collection of information that could be irrelevant to compliance with extended supervision order conditions. We consider that the provisions in new clause 6A around the purpose and use of information collected through electronic monitoring adequately meet this concern.”

This retrospectivity provision seems to be clearly drafted. Thus it could be seen to operate as an implied amendment of Section 4(2) of the Criminal Justice Act 1985. This section provides that no Court shall have the power to make any order in the nature of a penalty that it could not have made against an offender at the time the offence was committed. Judicial comment was made on this section in relation to retrospective criminal sanction provisions of a 1999 statute in *R v Pora [2001] 2 NZLR 37*. The 1999 amendment to Section 80 of the Criminal Justice Act provided for a mandatory 13-year minimum non-parole period for murder involving “home invasion” even if the offence was committed before the date on which Section 80 was amended. Pora was sentenced in 2000 for a murder committed in 1992. The 13-year mandatory minimum non-parole order made against Pora was an order in the nature of a penalty that the Court could not have made against him at the time the offence was committed. The majority of the Court of Appeal (Elias CJ, Tipping and Thomas JJ) upheld the appeal.

“The Chief Justice and Tipping J held that s 4 specifically states that, with two express exceptions, s 4 overrides any enactment or rule of law to the contrary, s 80 was not added to the express exceptions and therefore Section 4 overrides it. Their Honours acknowledge[d] that their interpretation [went] against canons of interpretation such as implied repeal, the specific overriding the general, and the rule that Parliament cannot bind its successors. However, Their Honours considered that the language of s 4 and the prominence of [the] place it was accorded in the Act suggested that it was a dominant provision and, therefore, the subordinate s 80 amendment must give way. That was not to say that Parliament [could not] legislate in contravention of fundamental rights, simply that it must speak plainly to do so as “general or ambiguous words will seldom be sufficient” (emphasis added)”

It is very likely that the Select Committee is wrong in its opinion that retrospective application of an extended supervision order should not be considered as relating to a ‘punishment’ or penalty in terms of Section 4(2) of the Criminal Justice Act 1985. However, it appears that the drafting is sufficient to convey Parliament’s clear intention.

---

3 Parole (Extended Supervision) and Sentencing Amendment Bill, 2004 No 88-2, As reported from the Justice and Electoral Committee, Commentary, pp 4 and 5.
Extension of extended supervision orders
The Bill as introduced provides that an extended supervision order may be made for any period up to ten years. The Select Committee has recommended that the Department of Corrections be able to apply to the sentencing court for an order of less than ten years to be extended up to the 10-year maximum where the offender has been convicted of breach of conditions within the previous 12 months (Part 1, Clause 10, New Part 1A of the Parole Act 2002, New Section 107KA).

Attempts included in definition of “relevant offence”
The Select Committee has recommended that the Bill be amended to make it clear that the definition of “relevant offence” (an offender is eligible for extended supervision if they have been convicted of such an offence) includes an attempt to commit such an offence, and conspiracy to commit such an offence. The Select Committee has also recommended the inclusion in the definition of “relevant offence” of certain offences under the Films, Videos, and Publications Classifications Act 1993 related to child pornography (Part 1, Clause 10, New Part 1A of the Parole Act 2002, Section 107B, new subclause (1), definition of (“relevant offence”) and subclause (3)).

The role of the victim
The Select Committee has recommended that there be provision made in the Bill for consultation with victims on such matters as extending supervision orders (with the leave of the court), imposition of special conditions (with a right to make submissions to the Parole Board), advising victims of the death of an offender subject to an extended supervision order, and also when an offender’s order expires, and to enable the Parole Board to provide notification to the offender's victims of any release or detention conditions, and to withhold advice if disclosing the condition would unduly interfere with the privacy of any other person (other than the offender) (Part 1, Section 10, New Part 1A of the Parole Act 2002, New Sections 107I and 107RA; New Clauses 39A and 39B).

Evidence
The Bill as introduced provided that the normal rules of evidence apply at hearings relating to extended supervision orders. The Select Committee has recommended that the courts be able to take into account evidence or “information” “whether or not it would be admissible in a court of law”.

Comment
The Select Committee justifies this as follows: “We are advised that it is not unusual for the court not to apply the rules of evidence in situations outside a criminal trial, and that while there is no general rule that illegally obtained evidence is inadmissible, Judges may exclude evidence that has been unfairly obtained”5.

It might be argued that the loss of the benefit of the normal rules for admissibility of evidence could be a considerable diminution in the rights of a defendant.

© NZ Parliamentary Library, 2004

5 Parole (Extended Supervision) and Sentencing Amendment Bill, 2004 No 88-2), As reported from the Justice and Electoral Committee, Commentary, p. 11.