LEGISLATION NOTE: THE RETURNING OFFENDERS (MANAGEMENT AND INFORMATION) ACT 2015

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The Returning Offenders (Management and Information) Bill 2015 was introduced to Parliament on 17 November 2015, and became an Act on 18 November 2015. It was passed under urgency, though with a clause requiring a select committee to provide a review on its operation after 18 months (s 37).[1] This note can be seen as an early commentary as to matters that should be examined as part of this review; it also discusses various issues that might be raised in arguments testing the application of the Act.

I. THE STATUTE OUTLINED

Section 3 of the Returning Offenders (Management and Information) Act 2015 states that the Act's purpose "is to obtain information from returning offenders and establish release conditions for offenders returning to New Zealand following a prison sentence of more than 1 year in an overseas jurisdiction". This and other preliminary provisions are set out in Part 1 of the Act. The substantive provisions are contained in the four sub-parts of Part 2. First, sub-part 1 deals with returning offenders; this is a broadly defined group, who are made subject to a regime for collecting information, as is noted below. Secondly, sub-part 2 covers returning prisoners, a sub-group of returning offenders. It subjects those covered to New Zealand parole release conditions. Sub-part 3 is concerned with returning offenders who have been out of custody for more than 6 months but have been monitored in that period by reason of parole conditions or some other regime. Finally, sub-part 4 amends the Parole Act 2002 and the Public Safety (Public Protection Orders) Act 2014 to provide for the making of extended supervision orders and public protection orders against returning prisoners who meet the criteria set out for those provisions.

The more demanding provisions in sub-parts 2-4 are summarised first. Sections 16 and 17 set out the process for designating someone as a returning prisoner. It is carried out in the name of the Commissioner of Police. In essence, a person the New Zealand police determine to have been sentenced overseas to more than 1 year in prison for conduct that is imprisonable in New Zealand and who is returning within 6 months of release from custody overseas is a returning prisoner. This is given an extended meaning in that, first, the sentence can be a cumulative one comprised of various sentences of less than 1 year and 1 day but adding up to at least the relevant figure; secondly, the release can be at the end of the sentence or from immigration detention that is imposed after release from the prison sentence. Sections 18 to 23 deal with the time-scale for making the determination that a person be designated as a returning prisoner (6 months after return to New Zealand), service of the notice of determination (which can include obtaining a

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[1] The Bill suggested a review after 2 years.

court warrant to enter premises to serve it), the contents of the notice, and a process to seek a review by the police of their determination (which is expressly without prejudice to any right to seek a judicial review of the determination).

Under ss 24 to 30, once the notice has been served, it has various consequences. The returning prisoner is subject to release conditions for at least 6 months (if the underlying sentence was not more than 2 years), rising to 5 years if the sentence was indeterminate (ie life or the equivalent of preventive detention). The conditions are, as a minimum, the standard ones that arise under the Parole Act 2002 in relation to domestic prisoners: this is the statutory consequence of the service of the notice of determination that the person is a returning prisoner. In addition, the person can be made subject to any special conditions of the sort that arise under the 2002 Act. This requires a court order on the application of the Chief Executive of the Department of Corrections rather than the New Zealand Police. Breach of the conditions carries a penalty of up to 1 year in prison: s 31.

Sub-part 3 allows a court to impose release conditions on those who are outside the definition of a returning prisoner because they have been out of custody for more than 6 months. This is possible if the person was subject to parole conditions or ongoing monitoring such as under the overseas equivalent of an extended supervision order or public protection order either immediately before their return to New Zealand or before being detained and then returned to New Zealand. As noted already, sub-part 4 amends domestic legislation to allow these further monitoring or detention orders to be made in respect of a returning prisoner. Both options involve applications by the Department of Corrections to the High Court.

The broader category of returning offender is defined in s 7 as being any person convicted of an offence for conduct that would be an imprisonable offence in New Zealand. All returning prisoners are expressly included in this, but clearly some returning offenders might be outside the definition of a returning prisoner. Returning offenders may be required within 6 months of their return to New Zealand to provide such "identifying particulars" – including photographs and fingerprints – as may be taken from people in police custody in New Zealand, and the person may be detained for that purpose and commits an offence carrying 6 months' imprisonment for failing to comply with any direction to cooperate, including by providing false information (for example, of biographical details).

These provisions allow rather than require the obtaining of information: s 8 states that the police may obtain the information for it to be used "for any lawful purpose". Bodily samples may also be taken if the offence overseas equates to one that would allow samples to be taken under the Criminal Investigations (Bodily Samples) Act 1995.

II. The Background to the Statute

The Regulatory Impact Statement of 12 October 2015 from the Ministry of Justice[2] describes as the background to the Bill the "increasing number of New Zealand citizens returning back to New Zealand following criminal offending in another jurisdiction". This was the predictable outcome of changes to Australian law that were implemented in 2014. As such, it is hard to see why this issue was dealt with in a rushed response.

Under s 501 of the Migration Act 1958 (Cth), the Australian Commonwealth authorities may cancel a visa on grounds of the person not meeting a test of good character. A person fails that test on the basis, inter alia, of having a substantial criminal record, or committing certain offences, or there being reasonable suspicion of involvement in a criminal group. A "substantial criminal record" is defined in s 501(7) as involving a sentence of 12 months or more, including on a cumulative basis. It also includes being found not guilty by reason of insanity and ordered to be detained or being found unfit to stand trial but to have committed the act charged and ordered to be detained. Aspects of this definition were amended by the Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth), which also added s 501(3A) to require the cancelation of a visa if the "substantial criminal record" involved a sentence of 12 months or more.

The consequence of this for New Zealand is traced in the October 2015 Regulatory Impact Statement to the Bill, which records an increase in deportations from Australia from 5 per month previously to 25 per month since June 2015. Placing this in its context, the average of returned offenders in previous years had been 60-100 deportations per year, 80% of whom were from Australia; on the revised figures, it would seem that there would be more than 300 per year, with an even higher percentage from Australia. The Statement also suggests that 70% of offenders returned since 2013 had been convicted of offences of violence or burglary; this might well be different in light of the changed approach in Australia, which will catch less serious offending. It is also recorded that for offenders deported in the period 2000-2002, the reconviction rates in New Zealand were 48% within 2 years.

The stated rationale for the then proposed legislation is that the offenders being returned pose a risk to New Zealand and so need to be placed under supervision in the same way as those released from prison in New Zealand. What is not commented upon in the text of the Regulatory Impact Statement is information which may appear to contradict the assumption that such supervision will reduce offending. Mentioned in a footnote is the fact that the reconviction rate for those deported in 2000-2002 is lower than the reconviction rate of those who had been convicted in New Zealand and, accordingly, released on the supervision conditions that apply to domestic detainees.[3]

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[2] Ministry of Justice *Management of Offenders Returning to New Zealand* (12 October 2015) <http://www.justice.govt.nz/policy/regulatory-impact-statements>.

[3] At 3, fn 2: the reconviction rate for domestic prisoners released in 2002-2003 was 55.4%.

III. The Propriety of the Terms of the Legislation

Some aspects of the legislation will be noted first, since they may help to inform any question as to the propriety of having the legislation at all.

A. The Incomplete Overlap between the Australian Policy and the New Zealand Legislation

An initial point arising from the description of the position in Australia is the definition of a returning prisoner. The Australian legislation leads to obligatory removal on the basis of a sentence of 12 months or more; but the core provisions of the Returning Offenders Act relate to people sentenced to more than 12 months (ie at least 12 months and 1 day). Since a sentence of 12 months is likely to be much more common than one of 12 months and a day, it seems likely that some mandatory deportees from Australia will not be returning prisoners and so cannot be subject to release conditions. They will be subject only to the Part 2, sub-part 1 regime as to the provision of information on the basis of being a returning offender. It is not clear whether this was a deliberate choice rather than simply an error in drafting: if the former, the rationale for the different treatment of those who are deported on the basis of the minimum term that produces that outcome under the Australian regime is not clear. The Parole Act 2002 refers to sentences of "more than" 12 and 24 months (see definition of "long-term sentence" in s 4): it may be that this was assumed to be the formula used in Australia.

B. The Definition of a Returning Offender

Turning to the returning offender definition in s 7: there are numerous issues as to its coverage. Before mentioning those, there is the question of how any challenges might be brought.

1. The process of challenge

Since there is an imprisonable offence of failing to comply with the directions of a police officer who is taking information on the basis that someone is a returning offender (s 13, carrying up to 6 months' imprisonment), it may be that some of these issues will have to be resolved if a defendant argues that the police were not exercising powers that existed on a proper understanding of the statute.

In addition, given that, as noted above, the provisions give the police a power to obtain information rather than mandating it, this confers a public law discretion that might be open to challenge via judicial review in relation to the outcome of the determination made pursuant to the statute or the process followed in considering its application. The fact that the language does not direct the police to obtain the relevant information suggests that there are circumstances in which it might not be proper to obtain the information. In this context, the obvious starting point is that a general discretion should have the limit imposed on it that the discretion should be used for the purpose for which it has been conferred.

Section 8 provides that the purpose of the information-obtaining powers – which may involve detention whilst the police exercise them, which in turn should bring into play the rights accorded by the New Zealand Bill of Rights Act 1990 in relation to detention – is to enable the police to obtain that information for any "lawful" police purpose. In relation to the bodily samples provisions, the purposes applicable to that legislation govern. This structure should allow arguments to be raised as to the limits of the police collating information merely for the sake of doing so. In other words, the fact that the person happens to be within the statute is a necessary but not necessarily sufficient precondition for its exercise. One can perhaps expect that policies should be formulated as to when it is disproportionate to obtain the information; certainly, such policies should exist to guide the exercise of the discretion by possibly junior officers involved in the process.

One can only hope that the legal aid funding agencies will take a view that the potential problems with this legislation are such as to merit funding the relevant arguments when they arise.

2. The basic definition

The definition covers a person convicted overseas on the basis of conduct that is an imprisonable offence in New Zealand and has led to the deportation or removal of the person. It does not require that there has been a custodial sentence imposed abroad; indeed, it could cover conduct that is not in fact imprisonable in the overseas country, so long as it is imprisonable in New Zealand.

3. Removal and visa cancellation

One question arising is whether "removal" covers people whose visas have been cancelled following a conviction of any such offence in the overseas country, leaving them with no option but to leave. If the aim of the statute is public protection, the propriety of such wide coverage is an obvious question to ask.

4. Challenging the propriety of the conviction

A second question arising in relation to this definition of a returning offender is whether doubts as to the safety of the conviction can be raised. Does the New Zealand government simply accept the propriety of the conviction, or can the returning offender argue that he or she should not have been convicted and so should be outside the definition of a returning offender? This may involve questions of substantive law, evidence or procedure. For an example of the former, what is the situation if the provisions for self-defence in the overseas country are stricter than those set out in s 48 of the Crimes Act 1961 and self-defence might well have been accepted here? Can that be raised and, if so, how can it be evaluated whether the conviction would be merited in New Zealand? The conduct of assault may be the same, but if there would not have been a conviction in New Zealand owing to the width of the domestic provisions for self-defence, there is no dual criminality.

The problem of evaluating the evidence leads to the more general question of the ability to challenge the original conviction. Transnational enforcement of overseas criminal law also arises in the context of extradition law; obviously, this is a distinct area of law, but there may be some analogous value in light of the subjection of someone in New Zealand to consequences arising from overseas criminal processes. In an extradition situation, the New Zealand courts will investigate the adequacy of the evidence in some situations when the person is accused of an offence (s 24 of the Extradition Act 1999). Will they do so if a returning person suggests the evidence simply was not enough for the conviction recorded against them?

Clearly, there is no equivalent statutory language to that appearing in the extradition context, but if the underlying purpose of the Returning Offenders Act is to deal with the risks of overseas criminals, this purpose is not met by action against those who should not have been convicted. Since the right to justice exists as a fundamental right by virtue of its inclusion in s 27 of the New Zealand Bill of Rights Act 1990, the question could be rephrased as whether public authorities in New Zealand are not able to look beyond the fact of an overseas conviction. Take what will no doubt be seen as an extreme example and suppose that the conviction related to a conviction in a country that is notorious for the corruption of its police officers or the inadequacy of its court system, that the trial was attended by observers or a New Zealand diplomat and that the information provided by them is that the conviction was simply not justified by the evidence. Although an extreme example, it helps to illuminate the existence of a principle that a person subject to compulsion in New Zealand on the basis of an overseas conviction that is not sufficiently based on evidence should be able to raise that point.

If, however, it is not possible to read in a right to challenge the propriety of an overseas conviction on the terms of the legislation as it stands, that may be a matter that should be considered when the legislation is reviewed.

Similar arguments would arise in relation to whether there is scope for challenging a conviction that arose through a trial process that does not meet the standards of the NZBORA? For example, what if the procedural rights include adverse inferences from silence, or inadequate legal aid or representation, or the defendant faced a difficult practical decision that led to a guilty plea (for example, to avoid the risks of overcharging or the delays of a contested trial)? Would the actions of the police in giving respect to such a conviction and providing for consequences arising from it be the act of a public body that is a reasonable restriction on the right under s 5 of NZBORA? If not, could the statute be interpreted so as to include an implied condition that only convictions that respect human rights standards are to be respected?[4]

[4] If the analogy with extradition is valid, it should be noted that procedural matters may be raised in that context, including where there has been a conviction, such as significant problems of bias in relation to the prosecution or the conduct of the trial (s 7 of the 1999 Act) and possible restrictions on surrender if it would be unjust or oppressive to extradite in light of such matters as the trivial nature of the offence of the time since it occurred. The policy reasons that justify these limitations

5. Mental disorder

Other questions might arise in other circumstances. For example if the person has a mental disorder and would not have been convicted in New Zealand but the overseas system has a more stringent insanity or unfitness to stand trial procedure: is such a person covered by the definition of a returning offender? At first sight, the requirement is an overseas conviction and conduct that would amount to an imprisonable offence avoids the question of whether the person would be convicted in New Zealand: but the conduct would not constitute a criminal offence in New Zealand if the defence to a conviction of insanity as understood in New Zealand was present. A similar argument could be raised that the conduct does not amount to an imprisonable offence if the defendant cannot be convicted because he or she is unfit to stand trial by New Zealand standards.

6. Children and youth

Equally, as the definition of a returning offender applies to any "person", it appears to cover those in the youth court jurisdiction. A question may therefore arise as to those under 14 if the overseas jurisdiction does not use the presumption of doli incapax, as found in s 22 of the Crimes Act 1961. The argument would be that the conduct is not criminal in New Zealand unless that additional element has also been proved. Similarly, in relation to a child under the age of criminal responsibility in New Zealand but convicted abroad in a country that has a lower age of responsibility, the argument would be that they have a defence based on their age and so do not meet the dual criminality requirement. The contrary argument in all these situations, however, is that the focus is on the conduct being criminal (which perhaps focusses on actus reus elements) and the conviction abroad, rather than any defence based on a personal characteristic such as age or mental disorder.

C. The Returning Prisoner Provisions

1. The definition of a returning prisoner

A returning prisoner is someone who has been convicted of conduct amounting to an imprisonable offence in New Zealand; in addition, there must have been a sentence of more than 1 year (and so at least 12 months and 1 day); and the person is returning to New Zealand within 6 months of release from custody abroad. This has some similarities to, but also differences from, the definition of a returning offender. Note that the definition of a returning offender expressly includes all returning prisoners, and so irrespective of whether there is a complete overlap, the provisions relating to the taking of information apply to returning prisoners. The overlapping element of the definition is that it involves a conviction abroad in relation to conduct that would be an offence in New Zealand: as such, all the arguments noted above in relation to this aspect of the definition of a

on enforcing overseas criminal law are also valid in the situation of the offender returning to New Zealand rather than being sent overseas.

returning offender apply. The supplemental element is the need for a sentence of more than 1 year in prison, which has been discussed above as it does not match completely the Australian position. (It should also be recalled that the Australian statute allows but does not mandate return if the sentence led to a hospital disposal.)

The definition is, however, wider than that of a returning offender in one respect: there is no requirement that the person be deported or removed from the overseas country. Rather, it is simply indicated that the person is returning to New Zealand within 6 months of release from custody, whether from the sentence or from immigration detention imposed after release from the criminal custody. In short, there is no need for any compulsion in relation to the return to New Zealand. This, of course, means that if the person involved is at liberty, he or she merely needs to remain away for 6 months and one day. There is an exception to this in the case of a person who is under monitoring after release: sub-part 3 allows an application to be made to a court for the imposition of conditions in such a case (or for an extended supervision order of public protection order if the criteria for those orders are made out).

2. What is the process?

The provisions relating to returning prisoners are not in discretionary terms. The police must make a determination that someone is a returning prisoner on being satisfied that the person is within the definition. The determination turns on whether "the Commissioner is satisfied" as to the criteria (s 17(1)), with a provision to allow the person to seek a review by the Commissioner of that conclusion (s 22). As has been noted above, the consequence of the determination is that someone is subject to parole release conditions (and possibly to imprisonment for breach of them) and might be subject to the provisions of an extended supervision order or public protection order. As such, the determination is important. That in turn means that any uncertainty about the process to be followed may need to be clarified, and routes to challenge the conclusion may have to be considered.

No doubt the determination made can be challenged in various processes: (i) by judicial review if it is argued that the police have erred in their determination; (ii) through the court process if special parole conditions or the use of an extended supervision order or public protection order are sought, if it is argued that there is no jurisdiction to make an order because the person is not a returning prisoner; or (iii) if an allegation is made of breach of the conditions, the offence under s 31, and it is argued that the person should never have been subject to them.

An obvious question is whether the determination is an investigative judgement to which the concept of a burden and standard of proof is inapplicable? Or, if there is a question raised as to the criteria being met, is it a matter that has to be proved a suitable legal standard? And to the civil standard or to the criminal standard, given that the consequence of the determination is that the person is subject to a regime equivalent to a released prisoner?

It is suggested that there are two separate matters. First, there are questions of law as to the meaning of the definition and hence who is included within it in light of that meaning. These are matters of legal judgment on which the Commissioner has to reach a conclusion. Secondly, there are questions of fact as to whether someone is within the meaning as interpreted. If there are denials of the facts – such as the length of the sentence imposed or the time limits for return after release from custody – those matters have to be resolved and are suitable for a standard of proof.

Having set out this position, it must be noted that there are conflicting approaches in other contexts where bodies have to be satisfied of something. First, in relation to the extended supervision order regime that arises under the Parole Act 2002: this requires that the court making the order on the application of the Department of Corrections has to be satisfied as to risks of further offending (s 107I(2)). In determining what was meant by being "satisfied" in the context of this section, the Court of Appeal in *McDonnell v Department of Corrections*[5] concluded that this involved a judicial judgment rather than something which had to be proved.[6] The Court expressly rejected the view of the High Court that it was necessary to be satisfied to the criminal standard that the relevant risk pertained.[7] There is also the context of detention in the mental health system, which is based on satisfaction as to whether a person is mentally disordered and whether compulsion is needed, which in turn depends on the level of risk to the patient or others. Whilst it has been determined that the process is inquisitorial and does not involve a burden of proof on those calling for detention,[8] it has been determined that the relevant tribunal – the District Court or the Mental Health Review Tribunal – should reach its conclusion that the disorder in question exists and is such as to justify detention by applying the balance of probabilities.[9]

There are good arguments for the latter approach: in the context of the right to liberty, the risks of error in making an assessment of danger can be reduced by ensuring that the risk should not be borne by the person whose liberty is lost. Indeed, a burden of proof may also be important here. In English case law, the Court of Appeal found incompatible with the right to liberty a provision in its Mental Health Act 1983 which contained an indication that discharge should only follow if the patient demonstrated that the criteria for detention were not made out: *R (H)*

[5] *McDonnell v Department of Corrections* [2009] NZCA 352.

[6] The Court applied the conclusion previously reached in relation to whether the court was "satisfied that it is expedient" for public protection that a sentence of preventive detention should be imposed under the then applicable s 75 of the Criminal Justice Act 1985: see *R v Leitch* [1998] 1 NZLR 420 (CA).

[7] *McDonnell v Department of Corrections* at [71]-[75].

[8] See *In the matter of C* [1993] NZFLR 877 (DC) at 889-890 and *In the matter of D* [1995] NZFLR 28 (DC) at 32. There had been alternative case law previously. See further K Gledhill "'Risk and Compulsion" in J Dawson and K Gledhill (eds) *New Zealand's Mental Health Act in Practice* (Victoria University Press, Wellington, 2013) at 62-76.

[9] *Re GM (mental health)* [2001] NZFLR 665 (DC) at 670-671; *In the matter of T* [1994] NZFLR 946 (MHRT) at 955.

v Mental Health Review Tribunal.[10] The conclusion was that the detaining authority should show the need to detain. As to the standard of proof to be applied in England and Wales, it was determined in *R (AN) v Mental Health Review Tribunal*[11] that a standard of proof usefully expressed the degree of certainty necessary in relation to the evaluative judgments involved in the test for detention. It was also held that the normal civil standard was appropriate. In the US, it has been determined that a higher standard is appropriate to protect the right to liberty in the mental health context: see *Addington v Texas*,[12] which sets a test of "clear and convincing" evidence of the criteria for detention being met, an intermediate standard between the civil and criminal approach.[13]

In addition to this conflicting case law as to what to do when matters of judgment are involved, it is arguable that there is a clear difference between the *McDonnell* situation and the current one in that the test for an extended supervision order relates to the existence of a risk, which is essentially a matter of judgement. As such, it differs from a finding of fact of the sort that has to be made in the context of the 2015 Act, namely whether the criteria for someone being a returning prisoner are established. After all, the test for a jury in a criminal case is whether it is satisfied as to the facts that reveal that a defendant is guilty of an offence. Accordingly, it is suggested that the police should attach a standard of proof as to whether they are satisfied as to whether the criteria are met.

It is further suggested that the criminal standard is appropriate to the finding that someone is a returning prisoner because the consequence of the finding is that the returning prisoner is subject to conditions that apply to a prisoner who has been convicted in a criminal context in New Zealand and is being released on parole. In other words, as the determination amounts to the imposition of such a regime, it should be seen as a further penalty. This approach is consistent with case law as to extended supervision orders, which involve further supervision at the end of a sentence and have been classified as an additional penalty: *Belcher v Chief Executive of the Department of Corrections*.[14]

IV. The Propriety of Introducing the Legislation

The 2015 Act sets up a monitoring system.[15] However, in relation to those who are within the definition of a returning prisoner, the elements of this monitoring

[10] *R (H) v Mental Health Review Tribunal* [2001] EWCA Civ 415, [2002] QB 1, [2001] Mental Health Law Reports 48.

[11] *R (AN) v Mental Health Review Tribunal* [2005] EWCA Civ 1605, [2006] 2 WLR 850, [2006] Mental Health Law Reports 59.

[12] *Addington v Texas* (1979) 441 US 418.

[13] The criminal standard was rejected as impractical.

[14] *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA), (2006) 22 CRNZ 787 at [47]-[56]. Obviously, note the case of *McDonnell*, discussed above, in which it was concluded that there was no standard of proof and that the classification of a matter as a penalty did not mean that a criminal standard was applicable.

[15] In the debate on the Bill before Parliament, there was discussion about the adequacy of service provision for those who have been returned to New Zealand, often despite having much closer links to Australia and having limited family or whanau in New Zealand. Hansard, vol 710, p15 (17

system – breach of the conditions of which are criminal – amount to a penalty; see the analogy with an extended supervision order, noted above. As such, the question of retrospectivity arises. In *Belcher v Chief Executive of the Department of Corrections*,[16] it was determined that the applicability of the ESO regime in a retrospective fashion was a breach of the prohibition on retrospective penalties set out in s 25(g) and 26(2) NZBORA, albeit not one that could be rescued by the interpretive obligation under s 6 of the statute.[17]

It is worth noting that there was no report from the Attorney-General under s 7 of the NZBORA to indicate that there a problem of compatibility; nor was there a report from Crown Law to indicate that there was no such problem.[18] Nevertheless the retrospectivity is fairly clear in two ways. First, the possibility of such an order being made in New Zealand was not in place at the time of the original offending which led to the overseas conviction. Moreover, the order under the New Zealand statute may arise even if the overseas sentence has completely expired. For example, if someone received a fifteen-month sentence in Australia, served half of that and was then held in immigration detention for 8 months and then returned to New Zealand, he or she would still be a returning prisoner and subject to a further six-month period of supervision in New Zealand: this amounts to an extension of the penalty imposed in Australia on a retrospective basis (as it was not available at the time of the offending). An alternative analysis might be that it amounts to the imposition of a further penalty in New Zealand for the same conduct and so is problematic on double jeopardy grounds.

There is also a wider question of whether it is appropriate for New Zealand legislation to give support to a problematic Australian policy. The approach by the Australian authorities clearly results in disproportionate breaches of the right to family life of those deported and, more importantly, of their family members who remain in Australia. One argument against the policy is that it results in released persons not being supervised: but this problem has now been filled by New Zealand.

Naturally, the counter-argument is that the New Zealand government is responding to the real-life problem caused by the new Australian policy rather than endorsing it. However, the question arises as to whether the blanket imposition of a retrospective penalty on anyone within the definition of a returning prisoner is a justified approach, particularly as there are alternatives such as crafting a statute that allows an application to court in a case of urgent need. It is not suggested, however, that the use of a court order would rescue the legislation from any human rights complaint. It should be noted that at the international level, the prohibition

November 2015). The sensible point arising is that those left without adequate support may be more likely to reoffend.

[16] [2007] 1 NZLR 507 (CA), (2006) 22 CRNZ 787.

[17] The Court of Appeal subsequently declined to issue a declaration of inconsistency: *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174.

[18] No report relating to the Bill appears on the relevant website that collates both the s 7 reports and the advice that there is no problem: <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>.

on the retrospective increase in penalties which arises under Article 15 of the International Covenant on Civil and Political Rights 1966[19] is a right that cannot be derogated from even in the context of a national emergency: see Article 4(2). This makes it difficult to suggest that the breach is proportionate for the purposes of s 5 of the NZBORA. The focus should rather have been on providing support mechanisms than on the imposition of a regime that amounts to a further criminal penalty.

[19] 16 December 1966, 999 UNTS 171, entered into force 23 March 1976.