THE HUMAN RIGHTS LAWYERS ASSOCIATION AOTEAROA NEW ZEALAND

Submission by the Aotearoa Human Rights Lawyers Association

Public Safety (Public Protection Orders) Bill

to the

Justice and Electoral Select Committee

1 November 2013

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1. About the Aotearoa Human Rights Lawyers Association

1.1 This submission is by the Human Rights Lawyers Association of Aotearoa New Zealand (the "HRLA"), a non-partisan and non-governmental organisation. The HRLA was established in June 2012 to promote human rights through education and advocacy. It is made up of a network of legal practitioners with an interest in human rights and is governed by an advisory council of eminent lawyers and academics with human rights expertise. To this end, the HRLA routinely engages in educational projects (including, but not limited to, Continued Legal Education courses), provides amicus briefs, assists in legal analysis and the drafting of reports on human rights issues by other organisations, and undertakes shadow reporting for international organisations.

1.2 The HRLA believes that the vast majority of New Zealand's citizens pride themselves on being part of a fair, humane and just society, and on taking part in international efforts to ensure those same values worldwide. At present, New Zealand is a party to seven United Nations international human rights instruments and it has implemented various domestic laws to give the obligations it has assumed at international law both legal expression and protection. The ratification of the International Covenant on Political and Civil Rights (the "ICCPR") together with its Optional Protocols and the passing of the New Zealand Bill of Rights Act 1990 (the "NZBORA") signify New Zealand's commitment to high-standard and internationally-agreed human rights for all citizens.

1.3 In the face of changing political and legal landscapes in New Zealand and abroad, the HRLA believes it is crucial that the obligations New Zealand has assumed at international law are honoured and fulfilled. Statutes and regulations must strive for consistency with the NZBORA and the ICCPR, and domestic law must not depart from the obligations assumed unless it is the clear and express view of its citizens. There is no room in domestic law for the adverse impact of unrepresentative and populist political policy. In respect of criminal justice, the HRLA believes that New Zealand must be cautious in following international trends that have seen a progressive ratcheting-up of penalty levels and types without proper regard to theoretical and empirical research.

1.4 The HRLA's knowledge and experience has been drawn upon in the preparation of this submission.

1.5 We do not wish to appear before the Justice and Electoral Committee to speak to our submission.

2. Submission

2.1 The HRLA opposes the Public Safety (Public Protection Orders) Bill (the "Bill") in its current form as it may be inconsistent with certain rights affirmed under the NZBORA and certain international obligations assumed under the ICCPR.

2.2 The HRLA accepts that detention on the basis of the risk of future harmful acts is not necessarily inconsistent with the NZBORA and the ICCPR and that public protection is a legitimate objective within criminal justice. It is consistent with existing statutes and the common law, and criminal sentencing is itself partially directed at the protection of the community from the offender.[1] This objective is appropriately elevated in respect of serious sexual or violent offences.

2.3 The HRLA accepts that New Zealand courts in their criminal or civil jurisdictions routinely engage in risk assessments in respect of offenders and thereby advance public protection. The HRLA, however, is of the view that the Bill does not achieve sufficient proportionality between its public protection objective and ensuring that the rights of offenders under a public protection order (an "order") are subject to the least restrictive interventions necessary to achieve the objective.

2.4 The HRLA accepts that a 'critical issue' for the Committee is whether the provision for detention and other measures under the Bill 'in substance' amount to further punishment of offenders, contrary to rights against arbitrary detention and double jeopardy, or rather to a civil committal.[2]

2.5 The HRLA submits that a further important issue for the Committee is whether the Bill is contrary to other rights, including certain civil, democratic and procedural rights affirmed by the NZBORA and the ICCPR.

2.6 The HRLA is of the view that an order under the Bill is criminal in type and not civil. This turns largely on the fact that the Bill has a very real collateral punitive character, notwithstanding that punishment has been expressly disclaimed as an objective.[3]

2.6.1 Relevant here are decisions of the United Nations Human Rights Committee (the "UNHRC") that hold comparable civil detention/supervision orders in certain Australian states are punitive.[4] The HRLA disagrees with the Attorney

[1] AG Report, para 17; See for example: SA02, s 7(1)(g).
[2] AG Report, para 4.
[3] The Bill, cl 4.
[4] RIS, para 37-38, 64, 69; *Fardon v Australia* (Communication No. 1629/2007) and *Tillman v Australia* (Communication No. 1635/2007).

General's report under section 7 of the NZBORA (the "AG Report") regarding the comment that the Bill can be distinguished from these decisions as its includes a 'mental or behavioural threshold requirement' and its detention facility is a 'residence' and not a 'prison'.[5] The HRLA believes that is important for the Committee to be cautious in making distinctions based on terminology, or within a contextual vacuum; it is the foreseeable and practical affects of the Bill that must be squarely assessed when considering the Bill's penal value. This includes the giving of due attention to assessing the efficacy of the any safeguards and checks and balances provided for by the Bill.

2.6.2 The AG's Report appropriately notes some of the Bill's factors indicative penal character:

2.6.2.1 Orders would follow closely or even anticipate the completion of a sentence of imprisonment.[6]

2.6.2.2 While the Bill's threshold for making an order is very high,[7] its application is only to a minute number of offenders who have been imprisoned for a serious sexual or violent offence, or subject to an extended supervision order.[8] Some may even have been considered for, and declined, preventive detention at the time of their conviction for a prerequisite offence.[9] The Regulatory Impact Statement ("RIS") estimates that the number may be as few as five over a 10-year period.[10] The RIS also notes that the Bill's application is likely to decrease over time from positive impacts under other initiatives, such as the preventive detention regime under the Sentencing Act 2002 (the "SA02").[11]

2.6.2.3 The HRLA is concerned that the Bill is targeting, and possibly anticipating, a too highly specific group of offenders,[12] and also that the Bill's medium to long-term utility may be found wanting. With regard to the latter, it is difficult to empirically ascertain the extent of the problem underlying the Bill due to redactions in the RIS under the Official Information Act 1982; the RIS also states that it is 'not possible to accurately report recidivism data for such a small and unique subset of offenders'.[13] This is potentially problematic in an age where evidence-based policy predominates.

[5] AG Report, para 23.
[6] AG Report, para 26.1.
[7] AG Report, para 9.
[8] The Bill, Cl 7.
[9] AG Report, para 26.2.
[10] RIS, para 27.
[11] RIS, p 1.
[12] AG Report, para 26.1.
[13] RIS, p 1, and para 16-18, 28-29.

2.6.2.4 The HRLA believes that the strongest indicator of the Bill's penal value is the AG Report's third point that accepts the conditions of detention 'would be in part comparable to those applicable to sentenced prisoners'.[14] The collateral punitive character of the Bill stems from the reality that detention in a 'residence' may be equivalent to detention in a 'prison', dependent upon the nature, manner and degree of exercise of broad powers and discretions conferred on residence managers under the Bill.[15] Important factors are that custody remains with the Chief Executive of the Department of Corrections, residences are situated in the confines of a prison precinct, and residence managers possess prison-like administrative powers.[16]

2.6.2.5 The AG's Report also notes that residents would receive rehabilitative treatment only 'if there is a reasonable prospect of reducing the detainee's risk to public safety'.[17] As the Bill is intended to capture offenders who 'display few gains from rehabilitation or are unwilling to participate satisfactorily, usually as a result of low intelligence or other cognitive deficits', [18] this comment casts a shadow over the efficacy of the Explanatory Note's assertion that the Bill provides 'credible pathways for release'. The HRLA is of the view that such pathways can't truly be credible if their likelihood of being utilised is slim.[19]

2.6.3 The HRLA believes that the fact New Zealand courts have held the retroactive effect of the extended supervision order regime under the Parole Act 2002 ("PA02") to be punitive and akin to double jeopardy is relevant to assessing the penal value of the Bill.[20]

2.6.3.1 The Bill has the potential to go considerably further than the extended supervision order regime and similar conclusions may be drawn as to its punitiveness.

2.6.3.2 While the HLRA accepts the AG Report's note that the 'aim of the regime' is not decisive in determining whether a measure is penal or civil in type,[21] the HRLA believes that the real collateral penal character of the Bill means it falls squarely into the 'third category of legislative schemes the status of

[14] AG Report, para 13, 26.3.
[15] The Bill, Cl 41-63.
[16] RIS, Addendum, para 5.
[17] AG Report, para 13.
[18] RIS, para 24.
[19] The Bill, Explanatory Note, p 1.
[20] *Belcher v Chief Executive of the Dept of Corrections* [2007] 1 NZLR 507; *Chief Executive of the Dept of Corrections v Rimene* CIV-2004-485-174 HC Wellington 8 March 2005 Gendall J; *McDonnell v Chief Executive of the Dept of Corrections* [2009] NZCA 352.
[21] AG Report, para 22.

which is debatable', as cited in the AG Report.[22]

2.7 Taking into account the above, the HRLA believes, first, that section 25 of the NZBORA and article 14 of the ICCPR which proscribe minimum standards of criminal procedure for persons "charged" with an offence, may be engaged and breached by the Bill.

2.7.1 Notwithstanding the AG Report's discussion of certain US and European case law,[23] the HRLA believes that under New Zealand appellate decisions to date grounds for challenge of an order under the Bill may realistically turn on the actuarial nature of the risk assessment process undertaken by the High Court and the fact that the information relied upon by relevant health assessors will likely include prior and unproven offending.[24]

2.7.2 If engaged, the HRLA believes that the appropriate standard of proof and the procedural protections required under the Bill before an order can be made should be higher than those ordinarily applicable in the High Court's civil jurisdiction. If, as stated in the RIS,[25] the standards of proof and the procedural protections tend to converge for civil and criminal orders, then it is appropriate in such circumstances that the Bill defer to the highest standard available.

2.7.3 The HRLA is of the view that the AG Report's reliance on European decisions to distinguish the Bill's regime as civil is problematic.[26] Such decisions aren't necessarily consistent with New Zealand's common law tradition and they show an unsettled tension between a trend for the simplification of criminal justice (that emanated from Council of Europe from the 1980s) and a more contemporary trend for judicial activism (that aligns with often controversial political preferences for actuarial policies concerning public protection).[27]

2.7.4 Given the HRLA's perception of the collateral punitive character of the Bill, it submits that it is inappropriate for the Bill to structure around a need for rigorous rights scrutiny and compliance, standards of proof and related procedure by deferring to those ordinarily applicable a civil committal regime. The Committee should note that New Zealand appellate courts have not

[22] *Belcher v Chief Executive of the Dept of Corrections* (above n 20) at para 37.
[23] AG Report, para 22.1
[24] The Bill, cl 9-13.
[25] RIS, para 69.
[26] AG Report, para 22.1-23.2.
[27] See: *Engel v Netherlands* (1979) 1 EHRR 647; *Ozturk v Germany* (1984) 6 EHRR 409; *Benham v United Kingdom* (1996) 22 EHRR 293; *Clingham v Kensington and Chelsea LBC, R (McCann) v Manchester Crown Court* [2003] 1 AC 787; *Welch v UK* (1995) 20 EHRR 247; *Ibbotson v UK* (1999) 27 EHRR CD 332; *Smith v Doe* (2003) 538 U.S. 84; *Kafkaris v Cyprus* (2009) 49 EHRR 988, paras. 126-153; *M v Germany* (2010) 51 EHRR. 976; See also: Ashworth and Redmayne, *The Criminal Process* (2010) ch 13; Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice* (2012), 209-218, 871-882.

squarely considered these provisions in an inconsistency declaration context within the criminal jurisdiction. In respect of the extended supervision order regime, it was held that the rights applying to offenders in determining the imposition of orders are those that apply at sentencing (including sections 25(g) and 26(2) of the NZBORA) subject to them being clearly overridden by Parliament.[28]

2.8 Secondly, for similar reasons to those above, the HRLA believes that section 22 of the NZBORA and Article 9(1) of the ICCPR which prohibit arbitrary detention, and thirdly, section 26 of the NZBORA and Article 15(1) of the ICCPR which prohibit retroactive criminal laws, may be breached by the Bill.

2.8.1 The ordering of offenders' continued or indefinite detention in a punitive facility at or close to the end of a finite sentence, absent the commission of a further offence, is arbitrary and retroactive. It is counter to fundamental common law principles, including those in favour of a subject's knowing the type and duration of any sentence at the time of sentence, and liberty of the subject. It is inconsistent with sentiments expressed in the SA02, including the notion that penal enactments should not have retrospective effect to the disadvantage of offenders (hence increasing maximum penalties is regarded as repugnant to fundamental notions of fairness and justice).[29] While net-widening concerns are not elevated here given the Bill's very high threshold, it may also compromise to some degree the foreseeability, consistency and proportionality of sentencing.

2.8.2 The noted decisions of the UNHRC are relevant here as they held comparable civil detention/supervision orders of certain Australian states breached both prohibitions. Also noteworthy are the decisions of New Zealand appellate courts in respect of the extended supervision order regime. The RIS appropriately highlights that limiting the Bill solely to offenders is unlikely to change the compliance situation;[30] it is difficult to argue that as a matter of principle it is necessary to detain offenders who pose a very high risk of imminent and serious sexual or violent re-offending when those who have not offended but who pose the same risk cannot be detained.

2.9 Fourthly, the HRLA believes that sections 12 to 18 of the NZBORA which confer specified democratic and civil rights (including freedom of religion, freedom of association and freedom of movement), may be breached by the

[28] *Belcher v Chief Executive of the Dept of Corrections* (above n 23); *R v Dittmer* [2003] 1 NZLR 41, (2002) 19 CRNZ 710 (CA).
[29] SA02, s 6; *R v Pora* (2000) 18 CRNZ 259 per Williams J at p 265; *P v Poumako* [2000] 2 NZLR 695, (2000) 17 CRNZ 530, 5 HRNZ 652 (CA) per Henry J at p 706, p 542, p 669; *Morgan v Superintendent, Rimutaka Prison* [2005] 3 NZLR 1, (2000) 21 CRNZ 668.
[30] RIS, Addendum, para 9.

Bill.

2.9.1 While residents have the rights of persons with full capacity under the Bill,[31] as noted, these can be significantly curtailed or removed altogether. In particular, a residence manager may do so to the extent that he or she considers 'reasonably necessary' to prevent harm or the disruption of the orderly functioning of the residence.[32]

2.9.2 Of particular concern to the HRLA are the Executive's ability to monitor telephone calls of residents (consistent with the provisions that apply to prisoners under the Corrections Act 2004),[33] and residence managers' broad powers to monitor written communications and articles,[34] to decline visits and oral communications,[35] to place residents in seclusion,[36] and to restrain them (including by mechanical restraint).[37]

2.9.3 Also of further concern is residence managers' ability to deduct from residents' earnings any amount required to offset the cost of their care.[38] This seems unfair given that it is the Executive who has sought to continue such persons' detention retroactively and absent the commission of any offence.

3 The AG Report stresses the importance 'safeguards' at each of the stages of making, administration and review or cancellation of orders under the Bill, noting that their incorporation was necessary for a civil commitment regime.[39] It is arguable that such safeguards would also be necessary and prudent in a criminal regime.

3.2 The HRLA is of the view that some of the safeguards in the Bill need clarification or enhancement. One example is the requirement for independent reports by health assessors.[40] The HRLA believes that the Bill needs to be clearer as to what information may be relied on in the compiling of these reports, as it may have downstream consequences on the applicability of specific rights noted above. It is of concern too that there is little discussion in the RIS of the theoretical or empirical research underlying the characteristics stipulated by the Bill as indicative of 'severe disturbance in behavioural functioning', and how these connect to actuarial risk assessments made under the Bill.[41]

[31] The Bill, cl 24-37
[32] The Bill, cl 24.
[33] The Bill, cl 44-55.
[34] The Bill, cl 41-43.
[35] The Bill, cl 56.
[36] The Bill, cl 61.
[37] The Bill, cl 62-63.
[38] The Bill, cl 37.
[39] AG Report, cl 6, 27.1-27.3.
[40] The Bill, cl 9-12.
[41] The Bill, cl 13.

3.3 Another example is the complaints and investigation process applicable to the 'day-to-day administration' of an order. The HRLA is concerned that this process provides no statutory timelines so as to structure an expeditious investigation and response for residents. Further, the remedy merely requires that the residence manager to correct the deficiency in question; this may arguably be insufficient where a grave rights breach has been established. [42]

3.4 The HRLA remains unconvinced the safeguards nominated in the Bill are sufficient to remove the risk of violations of the rights affirmed New Zealand's domestic law and the obligations assumed at international law.

4 Taking into account the above, the HRLA is of the view that the 'status quo' regimes (composed of indeterminate sentences under the SA02, extended supervision regimes under PA02 and care orders under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003) best achieve proportionality between the Bill's public protection objective and ensuring that the rights of offenders under a public protection order (an "order") are subject to the least restrictive interventions necessary to achieve the objective.

4.2 To 'balance' respective stakeholders' rights (such as the rights of victims versus offenders) is a very difficult, and arguably erroneous, exercise to undertake because due regard must be had to ensuring the rights of all New Zealand citizens as assumed at international law; no hierarchy of rights is entrenched in New Zealand domestic law. Because the Bill's collateral punitive character is great and because it is one of the most onerous of equivalent international practices assessed, the potential for proportionality to be achieved between stakeholders' rights is severely disrupted.

5 Recommendation

5.2 The HRLA recommends that the Bill does not pass in its current form.

5.2.1 The HRLA believes that the attention of policy should shift to a more rigorous assessment of where improvements can properly be made within the 'status quo' regimes so as to 'sure up' the public protection concerns which are the subject of the Bill. This might see a focus, for example, on improving the quality of Police, Parole Board and Corrections' systems, interactions, and combined service delivery to criminal justice stakeholders.

[42] The Bill, cl 67-71.