Ombudsman
Fairness for all

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Committee Secretariat
Justice Committee
Parliament Buildings
Wellington

Tēnā koe

Submission on the Parole (Mandatory Completion of Rehabilitative Programmes) Amendment Bill

1. Thank you for the opportunity to provide a submission on the *Parole (Mandatory Completion of Rehabilitative Programmes) Amendment Bill* (the Bill). I do so in my capacity as Chief Ombudsman, and, in particular, in the context of my role under the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) which New Zealand ratified in 2007 and is given effect through the Crimes of Torture Act 1989 (COTA).

2. I am designated under COTA to examine the conditions applying to, and treatment of, persons detained in prisons and otherwise in custody of the Department of Corrections (Corrections). My role in this respect is preventive. By providing independent oversight of places of detention, I help to ensure that New Zealand is meeting international human rights obligations, both in principle and in practice.

Feedback

3. In my view, the amendments in this Bill are not necessary in order to achieve the policy objective of incentivising people in custody to participate in rehabilitation. In addition, the amendments give rise to a range of interrelated concerns outlined below, including the risk of unintended consequences and unfair treatment of people in custody.

Purpose

4. The Bill, in its 'General policy statement', states an intention to require people in custody to complete mandatory skills and rehabilitative programmes prior to being considered for parole, and to incentivise participation *'in practical, educational and rehabilitation programmes in order to be better equipped with the skills to lead a more productive life upon release'.*

5. The Bill seeks to achieve this via Clause 5, which inserts a new section 24A into the Parole Act 2002 to require that *'an offender who has not completed a rehabilitative programme identified in their management plan under section 51 of the Corrections Act 2004 must not be considered for parole'*.

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6. If the purpose of this new clause is to incentivise people in custody to undertake rehabilitative programmes, I note that the New Zealand Parole Board (the Parole Board) already takes participation in rehabilitation into account when considering eligibility for parole and any 'undue risk' to community safety.[1] This leads me to the view that this new provision, in its current form, should not be necessary.

7. I understand that, currently, in many cases people in custody present to the Parole Board without having had the opportunity to undertake rehabilitative activities and that, often in such cases, it is the recommendation from the Parole Board that leads to Corrections facilitating access to such activities. If the intention of the amendment is to address this issue by putting an additional and new onus on Corrections to provide programmes prior to parole eligibility, I suggest redrafting the amendments to make this requirement clear.

8. Additionally, if this Bill seeks to address economic costs related to reoffending, the costs of implementation and the potential for prolonged detention of people in custody, resulting in further cost and possible legal challenges, must be considered.

Fairness and access to rehabilitative programmes

9. I am concerned that the Bill, as it is currently drafted, risks unfair treatment of people in custody who may have no control over their access to, or participation in, rehabilitative programmes due to Corrections' resourcing or operational constraints.

10. I have frequently raised my concerns regarding barriers, or lack of access, to rehabilitative programmes for people in custody, through both my OPCAT examination function and my complaints and investigative role under the Ombudsmen Act 1975.

11. In my recent investigation into Corrections, '*Kia Whaitake | Making a Difference: Investigation into Ara Poutama Aotearoa | Department of Corrections*',[2] I highlighted that over the years, I have made a number of recommendations relating to the provision of constructive activities and programmes for people in custody, and have seen limited progress.[3]

12. Ongoing staffing shortages, limited hours of unlock, lack of available spaces, and a high remand population (who spend extended periods of time on remand),[4] remain key barriers

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[1] New Zealand Parole Board. https://www.paroleboard.govt.nz/about_us/parole_process#:~:text=The%20most%20important%20consideration%20for,before%20parole%20can%20be%20granted and https://www.paroleboard.govt.nz/about_us/faq: '*The process aims to oversee an offender's sentence, and help them address their offending to make a positive transition from prison to community. This can include courses and programmes, as well as counselling*' and '*The Board is able to specify relevant activities it expects an offender to complete before the next scheduled parole hearing. That is, a programme for rehabilitation or reintegration to be implemented by the Department of Corrections.*'

[2] *Kia Whaitake | Making a Difference: Investigation into Ara Poutama Aotearoa | Department of Corrections*. Office of the Ombudsman. 28 June 2023. https://www.ombudsman.parliament.nz/resources/kiawhaitake-making-difference-investigation-ara-poutama-aotearoa-department-corrections

[3] Ibid. Appendix 2. Refer to reports 9, 10, 11, 12, 14, 16, 24, 26, 29, and 45.

[4] Ibid, page 79, para 243.

to people in custody's access to programmes.[5] The Office of the Inspectorate has made similar findings,[6] as have international oversight bodies.[7]

13. I hold serious concerns that resourcing and operational constraints, rather than a lack of individual incentives, already have a significant impact on the ability of people in custody to access rehabilitative activities and, in turn, their eligibility for parole. Unless these constraints are addressed, which would require significant investment, the provisions in this Bill may exacerbate the impacts on the parole eligibility of people in custody. It would be concerning if any individual was denied parole for the sole reason of not completing a rehabilitative programme, in circumstances where they wish to undertake rehabilitative activities but their access to such activities has been impeded by resourcing or operational constraints.

14. Such situations may also place individuals at risk of arbitrary detention,[8] due to elements of inappropriateness, injustice, a lack of due predictability and due process,[9] as well as elements of reasonableness, necessity and proportionality.[10] Detention must not only be lawful but reasonable in all the circumstances. Consideration for parole or other forms of early release must be in accordance with the law and such release must not be denied on grounds that are 'arbitrary' within the meaning of article 9 of the International Covenant on Civil and Political Rights, of which New Zealand is party to.

Risk of legal challenge / inconsistency

15. It appears to me that the manner in which the Bill presumptively restricts eligibility to parole may be inconsistent with the right to be free from arbitrary detention in section 22 of the New Zealand Bill of Rights Act 1990 (NZBORA).

16. The Parole Act requires that the substantive justification for continued imprisonment of an offender beyond their parole eligibility date is that their release on parole would be inconsistent with community safety.[11] The United Nations Human Rights Committee has held[12] that to ensure that an offender's continued detention beyond their parole eligibility date does not become arbitrary, there must be *'regular periodic reviews of the individual*

[5] See, for example, my reports on Auckland Prison (2020), Northland Regional Corrections Facility (2019), Auckland South Corrections Facility (2018), Otago Corrections Facility (2022), Manawatu Prison targeted inspection (2022), Waikeria Prison (2019), and Whanganui Prison follow up (2021).

[6] Ibid. Appendix 2. Refer to reports 3, 4, and 46.

[7] For example, the UN Committee against Torture (CAT/C/NZL/CO/7, paras 27-28(b)); the UN Working Group on Arbitrary Detention (A/HRC/30/36/Add.2 para 105(d)); and Special Rapporteur on Torture (A/HRC/55/52. 20 February 2024, para 52(b)).

[8] The concept of arbitrariness applies both to the law under which a person is arrested and to the application of the law.

[9] Please see the Working Group on Arbitrary Detention's definition of arbitrary detention.

[10] General Comment No. 35 CCPR/C/GC/35, para. 12; Gorji-Dinka v. Cameroon, para. 5.1; 305/1988, Van Alphen v. Netherlands, para. 5.8. Also see *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3].

[11] Section 7(2)(a).

[12] See *Rameka v New Zealand* (2004) 7 HRNZ 663 at 7.3.

case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public'.

17. The Parole Act currently ensures this by setting out the requirement for regular periodic reviews of the risk a prisoner poses to the community. The Bill removes a persons' eligibility for an assessment of release on parole on presumptive grounds which may, in some circumstances, be an unjustifiable limit on their rights. For example, a prisoner may be willing to undertake rehabilitative programmes but none are available,[13] or the prisoner may have otherwise addressed the risk of harm they pose to society without undertaking mandated programmes. The Bill could result in these kinds of prisoners being unable to have their parole eligibility assessed for extended periods without any good reason, which in turn may render their detention arbitrary. I encourage the Committee to seek further advice on this point.

18. I also note that the proposed amendments do not include reference to sections 20 and 21 which outline parole eligibility dates and when the Parole Board must consider offenders for release on parole. The lack of clarity as to how the proposed section 24A relates to these provisions could lead to difficulties or differences in interpretation and therefore potential for legal challenge, especially in light of the apparent rights inconsistency outlined above. I encourage the Committee to seek further advice as to how the new clause 24A will interact with existing provisions within the Parole Act.

Obligations under Te Tiriti o Waitangi | The Treaty of Waitangi[14]

19. Explicit consideration should be given to whether the Bill would be compliant with Te Tiriti o Waitangi | The Treaty of Waitangi, and its principles, including those articulated in the Waitangi Tribunal's report '*Tū Mai Te Rangi! The Report on the Crown and Disproportionate Reoffending Rates'* (Wai 2540). These principles include kāwanatanga, rangatiratanga, active protection, equity, partnership and reciprocity.

20. I draw attention, in particular, to the Crown's obligations of active protection[15] and equity[16] given that Māori are overrepresented at every stage in the criminal justice system and, as of 18 July 2023, comprise 52% of people in prison, despite being only approximately 15% of the New Zealand population.[17]

21. The New Zealand Parole Board Chair, Sir Ron Young, has previously raised concerns that Māori and Pacific people in custody are not released on parole as early as other groups as

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[13] The High Court recently criticised Corrections for relying on a lack of resources as a justification for limiting rights: *Wallace v Chief Executive of the Department of Corrections* [2023] NZHC 2248 [18 August 2023], at para 106

[14] I acknowledge there are two texts with different meanings.

[15] Active protection requires the Crown to protect Māori interests as far as is reasonable in the circumstances.

[16] Equity is the obligation to act fairly and which, like active protection, can require positive intervention by the Crown to reduce and eliminate disparities.

[17] Ministry of Justice. 18 July 2023. https://www.justice.govt.nz/justice-sector-policy/key-initiatives/key-initiatives-archive/hapaitia-te-oranga-tangata/#:~:text=M%C4%81ori%20are%20overrepresented%20at%20every,of%20the%20New%20Zealand%20population.

they are less likely to have completed rehabilitative programmes, or to have suitable accommodation for potential release, and also less likely to have employment.[18] Further, the Working Group on Arbitrary Detention has advised the New Zealand government to give specific consideration to *'the disproportionately negative impacts on Māori of criminal justice legislation that extends sentences or reduces probation or parole'*.[19]

22. People in custody have frequently raised concerns with my inspectors about access to cultural support and programmes, specifically around te reo Māori and tikanga. I have made multiple recommendations to Corrections in this regard and often expressed the view that prison management should build and maintain relationships with iwi to ensure greater support is available to Māori, including through the delivery of culturally appropriate services in prisons.[20]

23. As such, I am concerned that the Bill may exacerbate these disparities and have a disproportionate impact on Māori. Equity of access to rehabilitative programmes, as well as access to and availability of tikanga-based and culturally appropriate programmes are relevant matters to consider.

24. I encourage the Committee to seek further advice as to how the Bill will address Crown obligations under Te Tiriti o Waitangi | The Treaty of Waitangi and ensure any potential disproportionate impacts on Māori are mitigated.

Summary

25. In my view, the Bill, as it is currently drafted, poses a risk of unfairness and unintended outcomes, and to be effective would require significant investment in order to ensure timely access to rehabilitative programmes. If the Bill proceeds, the Committee may want to look at amendments that mandate the Parole Board's consideration of access to, and participation in, rehabilitative activities when deciding whether to release a person in custody on parole, rather than imposing a barrier to appearing before the Parole Board at all.

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[18] New Zealand Herald. 11 August 2021. https://www.nzherald.co.nz/nz/parole-board-says-prisoners-waiting-years-for-rehab-psychological-help/GJRGISQNAINT4HPGOYBZ64TPME/

[19] Paragraph 61, United Nations General Assembly, Human Rights Council, Report of the Working Group on Arbitrary Detention: Addendum: Mission to New Zealand, A/HRC/30/36/Add.2, 6 July 2015

[20] See, for example, my reports on Auckland Prison (2020), Christchurch Men's Prison (2017), Northland Regional Corrections Facility (2019), Auckland South Corrections Facility (2018), Arohata Prison (2017), and Whanganui Prison (2018).

Nāku, nā

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