New Zealand Law Society
Te Kāhui Ture o Aotearoa

Parole (Mandatory Completion of Rehabilitative Programmes) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

16 April 2024

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Parole (Mandatory Completion of Rehabilitative Programmes) Amendment Bill (**Bill**).

1.2 The Bill proposes to amend the Parole Act 2002 (**PA**) to require that individuals in a corrections facility must complete rehabilitation programmes identified in their management plan before being considered for parole.

1.3 The Law Society acknowledges the importance of education and rehabilitation for prisoners, to reduce offending and repeated incarceration. To that end, the Law Society commends the overarching aim of the Bill to improve life outcomes for those in corrections facilities.

1.4 However, the Law Society recommends the Bill does not proceed.

1.5 As drafted, the proposed amendments are unlikely to create "an incentive for people in a corrections facility to participate in practical, educational and rehabilitation programmes in order to be better equipped with the skills to lead a more productive life upon release." Rather, they risk unintentionally operating as a bar to parole eligibility in circumstances over which prisoners have no control.

1.6 The Law Society's key concerns are:

(a) whether the legislative amendment is necessary;

(b) the absence of an obligation on the Department of Corrections (**Corrections**) to provide the necessary treatment and rehabilitation required for prisoners to be eligible for parole, in a timely manner;

(c) the potential impact on pre-sentence rehabilitation, and inconsistency with section 7(2)(a) of the PA; and

(d) the shift of responsibility and power to Corrections staff preparing management plans, irrespective of their expertise, and at the expense of the Parole Board's discretion.

1.7 This submission has been prepared with assistance from the Law Society's Criminal Law Committee, and Human Rights and Privacy Committee.[1]

1.8 The Law Society **wishes to be heard** in relation to this submission.

2 General Comments

Is the legislative change necessary?

2.1 Under the current legislative framework, the Parole Board (**the Board**) is not to release an offender on parole unless reasonably satisfied that the offender will not pose an undue risk to the safety of the community or class of persons.[2]

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1 More information on the Law Society's law reform committees and sections can be found here: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/

2 Parole Act 2002, s 28(2).

2.2 While the term 'undue risk' is not specifically defined in the PA, section 7(3) offers guidance as to what matters the Board must consider when assessing whether an offender poses an undue risk. This includes the likelihood of further offending and the nature and seriousness of any likely subsequent offending. Accordingly, the Board's role is to undertake a risk assessment of each offender appearing before it. The Board is comprised of judges, lawyers, experts (including psychologists and psychiatrists) and community members.

2.3 Consideration of undue risk necessarily requires the Board to consider an offender's rehabilitative needs (often with the benefit of a psychological assessment) and assess whether those rehabilitative needs have been sufficiently addressed.

2.4 An offender will often be required to participate in reintegrative activities (through "outside the wire" work, temporary releases and release to work programmes) to consolidate their learnings. Participation in these reintegrative activities assists in identifying whether an individual has meaningfully engaged in their rehabilitation or simply "ticked the boxes".

2.5 Indeed, the Board on its website records the following about its role:[3]

> The Board makes risk assessments on whether these offenders should be released to complete their sentence in the community, subject to parole conditions.
>
> Parole encourages people to address their offending and its causes, to rehabilitate themselves to live in society without being a risk to the community.

2.6 In practice, this means the Board will not release an offender in the absence of them having completed rehabilitation. An untreated offender is unlikely to be able to persuade the Board that they are no longer an undue risk to the safety of the community.

2.7 While rare, there are also circumstances in which an offender who has not completed prison-based rehabilitation might be released on parole. This can include offenders who have completed extensive treatment while on bail, or those who have been convicted of historical offending and spent a considerable time in the community before they were tried and convicted. It would not be appropriate to deny these offenders parole based purely on the non-completion of an in-prison rehabilitation programme.

2.8 As currently drafted, therefore, the proposed amendments will have limited practical effect on the extent to which the availability of parole for those offenders who are not rehabilitated is restricted – that is already the approach taken by the Board. It will, however, inappropriately fetter the Board's discretion, potentially resulting in unfairness to offenders who have been unnecessarily prescribed rehabilitative programmes by Corrections, those who have been unable to access programmes due to unavailability, and those who can potentially access more suitable interventions while on parole.

2.9 If, despite this, the Bill proceeds, the Law Society considers that an approach that preserves to some extent the Parole Board's discretion will better achieve the purpose of

[3] New Zealand Parole Board "What we do" (2024) New Zealand Government, accessed via What we do - New Zealand Parole Board

this Bill. This could be by the creation of a statutory presumption in favour of completing programmes before parole is given. For example,

> "An offender who has not completed a rehabilitative programme that has been identified in their management plan under section 51 of the Corrections Act 2004 by the date on which they are due to be considered for parole must not be granted parole unless:
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> (i) The Board considers it appropriate to do so; and
>
> (ii) The offender's outstanding rehabilitative needs can be addressed while on parole."

3 Amendments to the Parole Act 2002

Addition of new section 24A

3.1 Clause 5 inserts a new section 24A, requiring an offender who has not completed a rehabilitative programme identified in their management plan (prepared under section 51 of the Corrections Act 2004) not to be considered for parole. Instead, the Board must set a new date by which the offender must be considered for parole (which must not be more than 12 months after the date they were due to be considered) in order to provide time for the offender to complete the relevant programme.

Corresponding mandatory reciprocal provision

3.2 The Law Society is concerned, first and foremost, that the Bill does not contain a corresponding provision requiring Corrections to provide the necessary treatment and rehabilitative programmes in a timely fashion.

3.3 Section 52 of the Corrections Act currently provides that the Chief Executive must ensure the availability of rehabilitative programmes to those who will benefit from them, but only *'to the extent consistent with the resources available.'* Corrections' resources are already stretched and concerns about access to rehabilitation (including programmes and psychological counselling) have been voiced previously.[4]

3.4 If the legislation is to make rehabilitative programmes a requirement for the grant of parole, increased funding and resourcing will be necessary to pay for and run these programmes, so that they are both timely and accessible across the whole of the prison estate.

3.5 The transfer of prisoners away from programmes or education they are engaged in does happen, despite efforts by Corrections to minimise this occurrence.[5] The effect of this Bill could be to either restrict Corrections' ability to transfer prisoners, or otherwise penalise offenders who have been transferred away from necessary programmes due to operational requirements and population pressures. Conversely, if programmes are not widely available, prisoners may need to be transferred away from family and whānau, to

4 See for example Sir Ron Young's concerns which resulted in a letter to the Corrections Minister in January 2021 (Parole Board says prisoners waiting years for rehab, psychological help - NZ Herald), and more recently in respect of young offenders (Corrections 'failing' prisoners and public as lengthy delays for rehabilitation programmes continues, October 2023, NZ Herald).

5 For example, the transfer of prisoners from Arohata Prison in 2022

complete programmes that are necessary for parole.[6] This support is also necessary for rehabilitation and reintegration, and such an outcome might be counter-productive (particularly if appropriate programmes could be available to the offender in the community while on parole).

3.6 Without increased funding and resources, there is a real risk that prisoners will be required to serve the full term of their sentence without treatment at all, due to circumstances that are entirely outside of their control (creating a *de facto* minimum period of imprisonment and a substantial increase in costs to the taxpayer). This would not make economic sense. It would also be unfair and likely result in increased judicial review proceedings challenging individual prisoner management decisions, if not how Corrections gives effect to the underlying policy.

3.7 The Law Society recommends that if the Bill is to proceed, a mandatory reciprocal requirement should be added. This should include requirements for Corrections to provide and ensure access to rehabilitative programs within specific timeframes, availability of programmes across the prison estate, restrictions on the transfer of prisoners (to ensure transfer does not undermine access to programmes), as well as provision for prisoners to seek recourse if treatment is not made available.

Conflict with section 7(2)(a) of the Act

3.8 As drafted, the Bill undermines the recent shift towards encouraging individuals to participate in rehabilitation programmes prior to sentencing.

3.9 This means there will be individuals who have already participated in rehabilitation prior to being sentenced to imprisonment. If a case manager in charge of an offender's management plan decides to identify a drug treatment programme as being appropriate (notwithstanding an offender's prior completion of drug treatment) that individual will not be eligible for release, even though they may no longer be an undue risk to the safety of the community.

3.10 This brings the proposed legislative provision into conflict with section 7(2)(a) of the PA, which prohibits the detention of offenders for longer than is consistent with the safety of the community and potentially raises a conflict with section 25 of the Sentencing Act 2002 (which allows adjournment of sentencing for the participation in programmes).

3.11 We do not think this is intended. The Law Society recommends that if the Bill proceeds, consideration is given to specifying exceptions to proposed section 24A(1).

Shift of power in risk assessment from Parole Board to Corrections

3.12 As noted above, section 51 of the Corrections Act 2003 requires the preparation of a management plan for any offender who is sentenced to imprisonment for a term of more than 2 months or is in custody for a continuous period of more than 2 months on remand. This plan includes ways of addressing offending behaviour, preventing offending

6 In 2021, the Office of the Inspectorate reported that only 20% of prisoners were able to remain in their homes region to attend programmes. See Inter-Prison Transfers – The impact of moving prisoners in New Zealand, page 23.

behaviour, and preparation for release. However, those plans do not currently create mandatory obligations on offenders, with implications for the availability of parole.

3.13 The proposed amendment will effectively place sole responsibility for assessment of the rehabilitative needs of the prisoner on a Corrections case manager, who will often not have any specialised training or particular expertise in identifying the rehabilitative needs for an offender. It may also encourage offenders to be circumspect with their case manager, to avoid the identification of rehabilitative and therapeutic needs that may be specified in their management plan and therefore affect parole eligibility. This would be contrary to the objectives of the Bill.

3.14 The Board has several experts on it (including psychologists and psychiatrists) and there will regularly be times when the Board disagrees with the rehabilitative interventions outlined in a management plan. It may be that the proposed intervention is not necessary or indeed not sufficient to manage the risk. The Board has greater expertise, and the benefit of a national-level view of what courses are available and practices at different prisons.

3.15 Under the Bill, the Board would have no discretion to grant parole if items are outstanding on the management plan or if the Board disagrees with their suitability. This would prevent the Board from taking into account *why* a specified programme has not been completed, even where that is due to impossibility, as occurred throughout the COVID-19 pandemic and its aftermath. Further, there is no provision for what to do where the Parole Board disagrees with the Corrections officer's assessment of appropriate courses. Similarly, there is no provision for what to do if the offender disagrees with the Corrections officer's assessment. Given the significant consequences this Bill would create, there ought to be provision for formal review, beyond a standard complaints procedure.

3.16 The Law Society does not consider it appropriate to vest such power in an individual case manager who may be ill-equipped to identify appropriate rehabilitation pathways. Decisions such as this, which affect the length of time an offender remains in custody, are decisions for an independent court or tribunal. That is, the sentencing court and the Board.

Timeframe for reconsideration of parole applications

3.17 Section 21A of the PA currently sets out the timeframe where parole is declined and provides that a stand-down can be longer than 12 months. Section 21A(b) states:

> Where the date specified in paragraph (a) is more than 12 months after the date of the current hearing, may specify the relevant activities (if any) that the Board expects will be completed by the specified date.

3.18 Proposed section 24A(2) specifies that the next date of review must not be more than 12 months after the date they were due to be considered for parole. This means offenders who are yet to complete treatment will have to appear before the Board sooner. This will lead to more frequent Board appearances for offenders, increase administrative burden and risk increased delays in Board hearings.

Limitation on private counselling

3.19 The proposed provision may limit the ability of an offender to participate in private counselling rather than prison-based rehabilitative interventions.

3.20 There are situations where, because of the waitlists for participation in prison-based rehabilitation, certain offenders would have to wait years to begin a course. The Law Society is aware of examples where offenders have engaged in privately funded counselling sessions to get around this and address their rehabilitative needs.

3.21 Due to the drafting of the Bill, the Board would not have the ability to assess the sufficiency of any privately funded rehabilitative intervention, and this would result in further penalising those who cannot access prison-based rehabilitation in a timely manner.

Incentives to assert guilt despite innocence

3.22 Offenders who deny their offending are not able to access rehabilitative intervention. Some may not require rehabilitation but on the current drafting of the new provision, if a case manager considers they need a rehabilitation programme, they will never be eligible for release on parole.

3.23 For example, offenders convicted of historical offending but not charged until decades later may continue to deny their offending, and a psychologist may determine that they are at a low risk of reoffending based on the long period of time that they were in the community without issue. Such offenders could not achieve parole under the current formulation of this amendment (despite professional support for their low risk).

3.24 This could also have the unintended consequence of seeing offenders who are not guilty simply admit guilt to participate in programmes and achieve parole.

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