

REGULATORY IMPACT STATEMENT

Enhanced Extended Supervision Orders

AGENCY DISCLOSURE STATEMENT

This revised Regulatory Impact Statement has been prepared by the Department of Corrections in two parts. This is a revised version of the Regulatory Impact Statement dated 21 November 2013.

Part 1 provides an analysis of measures to reduce the risk of serious harm to the public posed by a small number of high risk sexual offenders and a very small number of very high risk violent offenders, who have completed a finite sentence but do not meet the criteria for a public protection order.

Part 2 considers implications of the preferred approaches to enhancing extended supervision orders proposed in Part 1, and passage of the Public Safety (Public Protection Orders) Bill to establish public protection orders.

There are some constraints on the analysis in this Regulatory Impact Statement. In particular, the low rate of re-offending by sex offenders against children generally and the relatively small numbers of offenders on extended supervision orders make it difficult to draw definitive conclusions about the extent of the impact of any changes to the management of this group of offenders on re-offending outcomes. There is also little research evidence from other jurisdictions on best practice in relation to long term monitoring of high risk offenders in the community after their release from prison.

Estimated numbers of offenders who would be subject to extended supervision orders under the proposed enhancements are approximate, based on offender risk profiles and preliminary risk assessment of offender populations in 2013 and 2014. Decisions to apply for orders will depend on static and dynamic risk assessments of individual offenders by Corrections psychologists, and the decision to impose or renew orders will ultimately be made by the courts.

Given the criminal rather than civil nature of extended supervision orders, the proposed enhancements may be deemed to be in conflict with sections of the New Zealand Bill of Rights Act 1990. In his March 2014 report to Parliament, the Attorney-General found that the Bill appears inconsistent with the Bill of Rights Act (specifically s 26 relating to retroactive penalties and double jeopardy) on the basis that extended supervision orders (ESOs) remain a criminal penalty.

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EXECUTIVE SUMMARY

- 1 This Regulatory Impact Statement has been prepared in two parts:
 - Part 1 focuses on measures to reduce the risk of serious harm to the public posed by a small number of high risk sexual offenders and a very small number of very high risk violent offenders, who have completed a finite sentence but do not meet the criteria for a public protection order
 - Part 2 considers the use of the most intensive forms of management of offenders on an extended supervision order and the relationship with public protection orders.
- 2 Extended supervision orders are currently used to manage a small number of sex offenders against children who pose a high risk of serious harm after being released from prison at the end of their sentence. An order is made by the court on application from the Department of Corrections, for a term of up to ten years.
- 3 It is proposed in Part 1 that extended supervision orders be enhanced by:
 - enabling orders to be renewed for as long as they are needed, with regular mandatory review by the courts
 - expanding the scope of orders beyond high risk sex offenders against children to include a small number of high risk sex offenders against adults and a very small number of very high risk violent offenders
 - amending the ESO standard condition in respect of access to children by an offender who is subject to an ESO.
- 4 In Part 2, enhancements are proposed to:
 - replace the current legislative provisions for the most intensive forms of management on an extended supervision order with a new special condition involving intensive supervision and support that:
 - is set by the court (rather than the Parole Board) at the time the extended supervision order is made by the court
 - is limited to the first twelve months of an order
 - require that the same Judge preside over applications for public protection orders and extended supervision orders, where an extended supervision order is made as a contingent application to be considered if the public protection order application is unsuccessful
 - authorising a court to impose an interim ESO while it is considering an ESO application.

- 5 Legislation for extended supervision orders has previously been found to be non-compliant with the New Zealand Bill of Rights Act 1990.¹ Courts have determined that the order is criminal, rather than civil, in nature. Proposals to enhance extended supervision orders need to carefully consider the human rights balance of the regime, weighing the rights of the individual against the right of the public to be safe from harm.
- 6 Given the risk of serious harm posed by these offenders, there is a strong argument that the proposed enhancements strike an appropriate human rights balance.

STATUS QUO

- 7 There are three sentences and orders for managing the highest risk offenders: preventive detention, extended supervision orders and public protection orders (not yet in force).² The primary purpose of all three is to protect the public from further serious sexual and/or violent offending. The key elements of these sentences and orders are summarised in Table 1.

Table 1: Sentences and orders for managing the highest risk offenders

	Preventive detention	Extended supervision orders	Public protection orders
Type of offender	Violent and/or sexual offenders	Sex offenders against children	Violent and/or sexual offenders
Risk level of offenders	Any offender who is likely to commit another qualifying sexual or violent offence if released	Any child sex offender who is likely to commit any (of the relevant) sexual offences against children when released	Any offender who is at a very high risk of imminent and serious sexual or violent re-offending if released.
Location of offenders	<ul style="list-style-type: none"> • Prison • Offenders on preventive detention who have been given parole can be recalled back to prison for life if they pose an undue risk to the community. 	<ul style="list-style-type: none"> • Community, with conditions (full-time or part time residential restrictions may apply) • Breaching conditions is an offence, with a maximum penalty of two years' imprisonment. If an offender is imprisoned, their order is suspended until the 	<ul style="list-style-type: none"> • Separate civil detention facility within a secure prison perimeter (or prison cells if their behaviour poses such a high and unacceptable risk that they cannot be safely managed in the civil facility). • May be released when an offender is no longer at a very high risk of imminent

¹ When introduced to Parliament in 2004, the extended supervision order legislation was also found to be non-compliant with the New Zealand Bill of Rights Act 1990 for multiple reasons, including retroactive penalties, double jeopardy and arbitrary detention. Amendments to the legislation in 2009 to give the Parole Board the power to impose partial residential restrictions for the full term of the extended supervision order were also found to be non-compliant with the New Zealand Bill of Rights Act.

² The Public Safety (Public Protection Orders) Bill was referred to the Justice and Electoral Select Committee on 18 September for consideration.

	Preventive detention	Extended supervision orders	Public protection orders
		offender is re-released into the community	serious sexual or violent offending. If so, subject to a protective supervision order.
Time limit	Life time sentence	Maximum 10 year time limit	Indefinite, with reviews.
When imposed	At sentencing	Near the end of a finite prison sentence	Near the end of a finite prison sentence or whilst on an extended supervision order (with most intensive form of management)
Jurisdiction	Criminal (confirmed in legislation)	Criminal (confirmed by the Supreme Court)	To be created as a civil order by legislation
Number of offenders	At 31 October 2013: <ul style="list-style-type: none"> 273 offenders in prison 22 offenders in the community on parole 	At 31 October 2013: <ul style="list-style-type: none"> 242 child sex offenders (including 26 in custody for breaching an order or a new offence) 	Estimated in the first 10 years of the regime: <ul style="list-style-type: none"> 5-12 offenders

8 However, despite these measures, there are gaps in the Department's ability to effectively managing the long-term risk of serious harm to the public posed by the highest risk offenders, as:

- preventive detention must be applied at sentencing, and offenders may have been too young to be eligible, their on-going risk to public safety may not have been fully apparent at this time, or they were sentenced before preventive detention was expanded in 2002³
- public protection orders (once they come into force) will target only a very small number of offenders who meet more stringent legislative criteria with a very high risk of imminent serious re-offending
- some offenders on extended supervision orders may continue to pose a high risk of serious sexual offending after they have reached the ten year maximum period for the order.

International Practice

9 Similar jurisdictions have recognised that some offenders pose a very high risk of re-offending on completion of finite sentences, and have introduced mechanisms to reduce the risks to public safety posed by these offenders.

Australia

³ The ability of the court to impose preventive detention was expanded in 2002 through legislative amendments that increased the number of qualifying sexual and violent offences, removed the requirement of a previous conviction for a qualifying offence, and lowered the age of eligibility for preventive detention from 21 to 18.

- 10 New South Wales, Queensland, Victoria and Western Australia have an order similar to an extended supervision order under which the offender is released into the community subject to conditions. These orders can apply to sex offenders against children and adults. In 2013, New South Wales Parliament passed the Crimes (Serious Sex Offenders) Amendment Act 2013 to expand post-sentence supervision to high risk violent offenders (as well as sex offenders).
- 11 In deciding whether to grant these orders, courts in Australia look to the nature of the offence (whether the offending is “exceptional”) and the ability to ensure the safety of the community. The duration of the orders range from five years (renewable) to indefinite, with regular reviews.
- 12 No evaluations are available on the effectiveness of these orders.

United Kingdom

- 13 In the United Kingdom, police, prisons and probation (and health boards in Scotland) are required to establish joint arrangements to manage high risk sex offenders and violent offenders in the community.
- 14 Sex offenders are required to notify the police of their address and other personal details, and to advise of changes to those details, within three days. The police can also apply for a sex offender protection order which imposes restrictions (and in Scotland obligations) on an offender. Similar orders for violent offenders have recently been introduced in England and Wales, although relatively few orders have been made and data on their effectiveness is not yet available.

PART 1: MINIMISING HARM FROM HIGH RISK OFFENDERS

Problem definition

- 15 Public safety is jeopardised because:
 - an extended supervision order may only be imposed for up to a maximum term of ten years, but some offenders on extended supervision orders are expected to continue to pose a high risk of serious re-offending beyond that period
 - there are no long term options for managing the risk of serious harm posed by a small number of high risk sex offenders against adults and a very small number of very high risk violent offenders after completing a finite sentence, if the offender does not meet the criteria for a public protection order
 - the current standard condition leaves open the possibility for even the highest risk child sex offenders on the most intensive form of management under an ESO having regular contact with young children.

Policy objective

- 16 The primary objective is to minimise the risk of serious harm to the public caused by offenders who, following completion of a finite sentence, are considered to pose a high risk of committing serious sexual offences or a very high risk of serious violent offences.
- 17 Secondary objectives include cost effectiveness and justice sector integrity, including the human rights of offenders, the rights of the public to be free from harm and public confidence in the justice system.

Regulatory impact analysis

Non-regulatory options

- 18 When offenders are considered at the end of their sentence for an extended supervision order, they will have been offered the opportunity to undertake rehabilitative treatment during their sentence. The offenders targeted by this proposal will have either not participated in or completed rehabilitative treatment, or the treatment has not been successful at reducing their risk of serious sexual or violent offending.
- 19 The post-sentence management of offenders released from prison involves varying degrees of coercion and deprivation of individual liberty that must be authorised by law. Once subject to an extended supervision order, offenders are offered assistance and support to prevent serious re-offending.
- 20 A non-regulatory option might involve voluntary participation by offenders (after release from prison) in activities and support networks that reduce their risk of serious re-offending. However, such options are unlikely to be effective in managing or reducing the likelihood of serious harm being caused, as offenders would be able to opt out of such activities at any time and there would be no further overarching monitoring and management. As such, non-regulatory options would not be sufficient.

Regulatory options

- 21 To address the serious risks to public safety posed by the highest risk offenders at the end of a finite sentence, enhancements to extended supervision orders have been considered that would:
 - enable extended supervision orders to be applied for as long as they are needed, subject to an offender's risk of re-offending, with mandatory review by the courts every five years
 - expand the scope of extended supervision orders beyond high risk sex offenders against children to include a small number of high risk sex offenders against adults and a very small number of very high risk violent offenders.

- 22 Extended supervision orders are authorised and governed by the Parole Act 2002, and these enhancements would require legislative amendment.

Length of extended supervision orders

- 23 Relative to other offender groups, the period before sex offenders re-offend can be longer. At the time extended supervision orders were introduced, ten years was considered to be a reasonable length of time to manage these offenders. However, more is now known about the re-offending patterns and behaviours of sex offenders against children than in 2004. Both New Zealand and overseas studies indicate that, although there is a levelling off of risk over time as offenders 'age out', some sex offenders against children continue to pose a high risk of re-offending for a much longer period of time than other offenders⁴ and can have significant periods of time between convictions.⁵
- 24 Two approaches were analysed in relation to the maximum length of extended supervision orders, as set out in Table 2:
- a (preferred approach) enable the court to make an extended supervision order for a period of up to ten years, and renew orders for subsequent periods of up to ten years at a time on an on-going basis
 - b (alternative option) increase the maximum term of an extended supervision order to 20 years.
- 25 For both approaches it is proposed the court be required to review an order at least every five years, and that offenders or the Department of Corrections be able to apply to the court for a cancellation at any time. A five year period for mandatory review by the court is considered appropriate in light of the proposed longer maximum length of these post-sentence orders.
- 26 It is expected that approximately six offenders per year would be considered of sufficient risk to public safety to warrant an order for longer than ten years. Three offenders per year would be expected to warrant an order for longer than a twenty year period.

Table 2: Analysed approaches relating to the maximum length of extended supervision orders

⁴ Sex offenders against children can continue to re-offend sexually twenty years following release from prison, although there is a tendency for those at highest risk of sexual re-offending to re-offend more quickly in the first five years following their release. Skelton, A, Riley, D, Wales, D and Vess, J. (2007) *Assessing risk for sexual offenders in New Zealand: Development and validation of a computer-scores risk measure*. Journal of Sexual Aggression: An international, interdisciplinary forum for research.

⁵ Nadesu, A. (2011) *Reconviction rates of sex offenders – a five year study*. Department of Corrections.

Approach	Preferred approach - extended supervision orders could be renewed by the court for periods of up to ten years at a time for as long as an offender's risk of serious harm warranted it, with five-year mandatory review	Alternative option – extended supervision orders could be applied for up to 20 years, with five-year mandatory review
Contribution to public safety	<ul style="list-style-type: none"> Public safety would be maximised, as offenders would remain on an order for as long as they pose a high risk of serious re-offending. Consistent with offenders' pattern of offending, particularly sex offenders against children, whose risk of re-offending can remain high for long periods. 	<ul style="list-style-type: none"> Increases public safety relative to status quo, as provides up to an additional 10 years for managing the risk posed by offenders on extended supervision orders But, public safety would be compromised by offenders who continue to pose a significant risk of serious harm after a 20 year period.
Integrity of the justice system	<ul style="list-style-type: none"> Ability to manage an offender on an extended supervision order potentially indefinitely (subject to offender risk) would be consistent with the preventive detention and public protection orders. But, extending the time limit so that there is no legislated maximum length may raise concerns relating to offender human rights. Requiring a court to renew an order every ten years and undertake five-yearly reviews would mitigate this risk by ensuring offenders do not remain on an order unless the court considers their risk of serious re-offending warrants it. 	<ul style="list-style-type: none"> While this approach would raise less concerns regarding the human rights of offenders than the preferred approach, the integrity of the justice system may be seen as being reduced if offenders, who continue to pose a serious risk of harm, re-offend after reaching the end of their 20 year orders.
Cost	<p>Additional costs relating to:</p> <ul style="list-style-type: none"> managing offenders on orders for longer, including offenders on more intensive conditions⁶ regular court review of orders (estimated \$5,000 per review) possible court challenges to increased time limit, (estimated \$160,000 for first case, with fewer costs for any subsequent challenges). <p>There would be a small amount of savings to the justice sector as a result</p>	<ul style="list-style-type: none"> Same additional costs as the preferred approach, until offenders begin reaching the 20 year limit of their orders (from 2025). No offenders would be managed beyond a 20 year period (reducing costs for expected two offenders per year who would remain on orders for longer than 20 years, some of whom may have been on the most intensive conditions). Some legal costs associated with

⁶ Average cost of an offender on an extended supervision order is approximately \$27,000 per offender per annum (based on 2012-13 costs). The costs vary significantly between offenders depending on the type of conditions imposed by the Parole Board. For example, offenders with the most intensive type of support and management conditions cost on average approximately \$300,000 per offender per annum.

Approach	Preferred approach - extended supervision orders could be renewed by the court for periods of up to ten years at a time for as long as an offender's risk of serious harm warranted it, with five-year mandatory review	Alternative option – extended supervision orders could be applied for up to 20 years, with five-year mandatory review
	of reduced re-offending by offenders on orders for longer. ⁷	possible court challenges to increased time limit (but fewer than the preferred approach).

- 27 Both approaches are preferable to the status quo on public safety grounds. Enabling extended supervision orders to be renewed on an on-going basis is the preferred approach as it provides for the greatest level of public safety, while mitigating potential human rights concerns through regular mandatory court review and incurring additional costs only in relation to the on-going management of those offenders that continue to pose a high risk of serious harm.
- 28 It is anticipated that for most offenders, their risk of re-offending will have decreased after a ten year period on an extended supervision order so that they would not warrant an extension of their order. Those offenders requiring management for longer than ten years are likely to be of a higher risk and require greater management, for example, partial residential restrictions and GPS monitoring. It is possible that some of these offenders could pose a high risk of serious re-offending for the rest of their lives.

Scope of extended supervision orders

- 29 If a sex offender against adults or a violent offender does not meet the stringent criteria for a public protection order, there are currently no other tools available to manage them at the end of a finite sentence. They would be unmanaged in the community as they have finished their sentence.
- 30 Two approaches relating to the scope of extended supervision orders have been analysed, as set out in Table 3:
- a (preferred approach) enable extended supervision orders to be made in relation to a small number of sex offenders (against children and adults) who pose a high risk of serious re-offending, and a very small number of violent offenders who pose a very high risk of serious re-offending

⁷ Savings related to reduced re-offending by offenders on extended supervision orders are difficult to quantify given the relatively low rate of re-offending by sex offenders against children and the very small number of offenders who would be managed on a longer order. Potential savings are also limited by higher costs associated with higher levels of management on extended supervision orders.

- b (alternative option) enable extended supervision orders to be made in relation to sex offenders (against children and adults) who pose a high risk of serious re-offending (but not violent offenders).⁸
- 31 Both approaches would establish legislative criteria (set out in Appendix 1) that would require that offenders:⁹
- have been convicted of a threshold offence
 - have demonstrated a pervasive pattern of serious sexual or violent offending
 - pose a high risk of serious sexual re-offending, or very high risk of violent re-offending
 - display certain characteristics that identify their risk of serious harm.
- 32 This would align the legislative criteria for sex offenders against children and sex offenders against adults, ensuring a consistent approach to the assessment of sex offenders for extended supervision orders. It would also help clarify in legislation that orders would only be applied to high risk offenders. This may help mitigate human rights concerns with the enhancements (particularly with the increased time limit and greater flexibility to set conditions).
- 33 It is intended that a higher re-offending risk would be required for orders for violent offenders than for sex offenders. Widening the eligibility criteria would result in the inclusion of large numbers of violent offenders, some of whom may not otherwise go on to re-offend in a seriously violent manner. Widening the criteria is therefore unlikely to significantly improve public safety but would incur very significant extra costs as a result of a significant increase in the number of offenders who would be managed on an order.
- 34 It is estimated that, under the preferred scope, a total of approximately 29-41 offenders would be placed on extended supervision orders each year, comprising:
- 25-30 high risk sex offenders against children per year
 - 4-9 high risk sex offenders against adults per year
 - 1-2 very high risk violent offenders approximately every five years.

Table 3: Analysed approaches to the scope of extended supervision orders

⁸ Another approach, whereby orders could be made for violent offenders but not sex offenders against adults, would raise similar issues to the alternative approach discussed in Table 3.

⁹ For the alternative option, which excludes violent offenders, criteria relating to violent offenders and risk of violent re-offending would not be included.

Approach	Preferred approach - extended supervision orders would apply to high risk sexual offenders and very high risk violent offenders	Alternative option – extended supervision orders would apply to high risk sexual offenders, but not to violent offenders
Contribution to public safety	<ul style="list-style-type: none"> Public safety significantly improved as high risk sex offenders against adults and very high risk violent offenders released after a finite sentence would be subject to on-going supervision. 	<ul style="list-style-type: none"> Improved public safety by addressing current gap in management options for sex offenders against adults. But, there would be no tools to manage the long term risk posed by a very small number of very high risk violent offenders released after a finite sentence.
Integrity of the justice system	<ul style="list-style-type: none"> Expanding to sex offenders against adults and violent offenders is consistent with preventive detention and public protection orders. 	<ul style="list-style-type: none"> Not including violent offenders is inconsistent with preventive detention and public protection order regimes.
Cost	<p>Additional costs relating to:</p> <ul style="list-style-type: none"> managing sex offenders against adults on orders managing one or two new violent offenders on an order every five years. <p>As with the extended time limit, there would a small amount of savings to the justice sector as a result of reduced re-offending by sex offenders against adults and violent offenders who are subject to orders.¹⁰</p>	<ul style="list-style-type: none"> Additional costs relating to managing sex offenders against adults on orders.

35 Both approaches would be preferable to the status quo on public safety grounds. Including sex offenders against adults and violent offenders in the scope of extended supervision orders is the preferred approach as it provides the best means of reducing the risk of serious harm to the public. Excluding very high risk violent offenders does not allow for the Department to manage the risks posed by these offenders. Including violent offenders has very little impact on the cost, given the very small number of violent offenders expected to receive an order.

36 The Parole Act 2002 currently does not specify the level of re-offending risk that an offender must pose to be eligible for an extended supervision order. When the policy was introduced, the Department of Corrections advised Parliament that offenders who pose a medium-high to high risk of sexually offending against children would be considered for an extended supervision order. In practice, the courts have only imposed extended supervision orders on offenders assessed as posing a high risk of re-offending.

37 In applying an extended supervision order on the basis of an offender's likelihood of future serious harm, there is always a possibility that an offender subject to an extended supervision order would not have

¹⁰ These savings are difficult to quantify given the small number of sex offenders against adults and violent offenders who would be subject to orders, and the costs of managing offenders on orders compared to the cost of offenders who have re-offended and have been re-imprisoned.

seriously re-offended had they been released (a false positive). There is also a possibility that an offender who could have been subject to an extended supervision order, but was not, seriously re-offends (a false negative).

- 38 There is a risk of both false positive and false negative outcomes under the current extended supervision order legislation and with the proposed enhancements. Rigorous assessment of offenders for extended supervision orders, using well-established actuarial risk assessment tools combined with assessments of dynamic risk and clinical factors by trained psychologists, reduce this risk. The proposed enhancements also provide greater mitigation by establishing more robust legislative criteria and ensuring regular mandatory reviews of orders by the courts. In addition, the Department is currently improving the effectiveness of its risk assessment tools for sex offenders.

Standard conditions relating to visiting children under 16

- 39 The standard condition for ESOs allows an offender subject to an ESO to have contact with a child under the supervision of a person approved by a probation officer. The condition only allows a probation officer to approve the person supervising contact, but not to prevent or limit the frequency or circumstances of contact between a high risk offender on an ESO and a child under 16. For some of the highest risk offenders, particularly those with a predatory and highly manipulative nature, regular supervised contact with a child may pose a serious risk of harm to the child.
- 40 It is proposed that the condition relating to an offender's access to children be amended so that any contact between an offender on an ESO and a child under 16 must be approved by a probation officer. For the highest risk ESO offenders subject to intensive monitoring, the Chief Probation would be required to authorise contact with a child. In both cases contact between an offender and a child would still have to be supervised by a suitable person approved by the Department of Corrections.
- 41 Under the proposed new condition the interests of the child would be paramount, but it would not prevent an offender on an ESO having contact with a child if the offender does not pose any risk to the child.

PART 2: CLARIFYING THE USE OF THE MOST INTENSIVE FORMS OF EXTENDED SUPERVISION ORDERS

Problem definition

- 42 Discussion and proposals in this section assume agreement to the preferred approaches proposed in Part 1 and passage of the Public Safety (Public Protection Orders) Bill to establish public protection orders.
- 43 Enabling extended supervision orders to be renewable on an on-going basis and expanding the scope (as proposed in Part 1) would mean that

more offenders could be subject to the most intensive forms of management on an extended supervision order, involving long-term care for the purposes of a programme imposed by the Parole Board, for longer. This would have human rights implications for individuals on orders with these forms of management and would have significant cost implications for the Department.

- 44 Offenders who are eligible for a public protection order will also be eligible for an extended supervision order. There is an opportunity to improve the process by which the court considers, in turn, applications for public protection orders and extended supervision orders to establish consistent judicial oversight of the most appropriate post-sentence management of an individual according to their risk of serious harm.

Policy objective

- 45 The primary objective is to ensure the most appropriate form of post-sentence management of individuals who have completed a finite prison sentence and continue to pose a risk to public safety.
- 46 As in Part 1, the approaches in Part 2 have been analysed against the objectives of public safety, cost effectiveness and justice sector integrity.

Regulatory impact analysis

Non-regulatory options

- 47 Extended supervision orders are authorised by law. Changes to the legislative provisions relating to the most intensive forms of management on an extended supervision order require regulatory change.
- 48 Changing operational practices by the Department of Corrections relating to use of the most intensive forms of management on an extended supervision order would not provide the same safeguards or mitigation of human rights concerns as legislative change.
- 49 Regarding the interaction between applications for extended supervision orders and public protection orders, the process by which Judges are selected for court hearings is a matter of scheduling. It may be possible to reach an agreement with the High Court that the same Judge preside over an application for an extended supervision order where it is contingent on a public protection order application being unsuccessful. However, without clearly establishing this process in legislation there is no guarantee this would occur.

Regulatory options

- 50 Offenders on extended supervision orders are subject to a set of standard conditions, applied automatically and set out in legislation, and special conditions that may be imposed by the Parole Board.

- 51 The most intensive forms of management on extended supervision orders are special conditions that may be imposed by the Parole Board, and are provided for by legislative provision in the Parole Act 2002, being:
- full-time accompaniment and monitoring imposed under section 107K(2), if the offender is also on full-time residential restrictions (which is limited to the first twelve months of an order), or
 - long-term full-time placement in the care of an appropriate person or agency for the purposes of a programme under section 16(c), which can be applied for the duration of the order.
- 52 The Public Safety (Public Protection Orders) Bill, as referred to the Justice and Electoral Select Committee (see footnote 1), provides for individuals on an extended supervision order who are or have been subject to either of these special conditions to be eligible for consideration for a public protection order.¹¹
- 53 For individuals reaching the end of a finite prison sentence, if an application for a public protection order is declined by the High Court, it is expected that Corrections would in turn make an application for an extended supervision order. In practice, Corrections may make a contingent application for an extended supervision order at the same time as an application for a public protection order. In effect, the court would consider an individual for a public protection order according to legislated criteria, and if declined, then consider the individual for an extended supervision order against similar, but less stringent, legislated criteria.
- 54 Approaches have been identified to ensure that the post-sentence management of high risk individuals is appropriate to their risk of serious harm and balances the human rights of offenders and the right of public to be safe from harm.
- 55 The impacts of the three approaches identified below have been analysed as set out in Table 4:
- a (preferred approach) replace existing legislative provisions relating to the most intensive forms of management on extended supervision orders with a new, single special condition that provides for intensive support and personal supervision for up to 24 hours day and which:
 - could only be set by the court, and at the time that an extended supervision order is made
 - would be limited to up to the first twelve months of an order (and limited to once only for each individual)

¹¹ See clause 7(1)(b) of the draft Public Safety (Public Protection Orders) Bill being considered by the Justice and Electoral Select Committee. An individual on an extended supervision order must either be, or have been, subject to a special condition under section 107K(2), or be subject to a special condition under section 16(c), to be eligible for a public protection order.

- o would have other special conditions be set by the Parole Board.
- b (preferred approach) require that, when the Department of Corrections makes an application for an extended supervision order at the same time as, and contingent on, an application for a public protection order being unsuccessful, legislation provides for the same judge of the High Court to consider each application in turn, in the appropriate court jurisdiction for the respective orders (being civil for public protection orders, and criminal for extended supervision orders)
- c (alternative approach) status quo, with existing legislative provisions relating to most intensive forms of management on an extended supervision order and process for courts considering post-sentence management of individuals.

56 The preferred approaches ('a' and 'b') are complementary.

Table 4: Analysed approaches relating to the most intensive forms of extended supervision orders

Approach	(a) Preferred approach – new “intensive support” special condition set by court for up to first 12 months	(b) Preferred approach – same judge presides over extended supervision order and public protection order applications	(c) Alternative approach – status quo with existing legislative provisions
Contribution to public safety	<ul style="list-style-type: none"> · Clear delineation between being detained on a public protection order and intensive management on extended supervision order will help ensure individuals suitable for a public protection order (at a very high risk of imminent serious offending) are given the most appropriate post-sentence management. · May be risk to public safety if individuals who do not meet the criteria for a public protection order require on-going intensive management <u>after</u> a twelve month period. · To mitigate this risk, additional support and management, that does not involve long-term personal supervision, would be provided for these individuals. 	<ul style="list-style-type: none"> · Consistent judicial decision-making for most appropriate form of management of very high risk individuals at the end of a finite sentence, according to their assessed level of risk, improves public safety. 	<ul style="list-style-type: none"> · Status quo enables most intensive forms of management on extended supervision orders for full length of order, which provides for increased public safety of offenders managed in the community on an extended supervision order
Integrity of the justice	<ul style="list-style-type: none"> · Improves human rights balance of proposed regime given preferred approaches 	<ul style="list-style-type: none"> · Consistent judicial oversight of post-sentence management 	<ul style="list-style-type: none"> · Maintains current legislative authority for imposition of special

Approach	(a) Preferred approach – new “intensive support” special condition set by court for up to first 12 months	(b) Preferred approach – same judge presides over extended supervision order and public protection order applications	(c) Alternative approach – status quo with existing legislative provisions
system	<p>in Part 1 by increasing judicial oversight of imposition of most intensive form of management and limiting to twelve months.</p> <ul style="list-style-type: none"> Clearly establish in legislation that most intensive form of management has reintegrative as well as supervisory purpose. 	<p>options according to judicial assessment of an individual’s risk of serious harm.</p>	<p>conditions relating to most intensive forms of management.</p> <ul style="list-style-type: none"> Proposed enhancements expanding scope and extending maximum length would enable most intensive conditions to be applied to more individuals for longer thereby having an impact on the human rights balance of the regime
Cost	<ul style="list-style-type: none"> Limiting the most intensive form of management of an extended supervision order, that involves on-going personal supervision, would significantly reduce costs of managing these offenders. 	<ul style="list-style-type: none"> May improve efficiency with which court considers contingent applications, as presiding Judge would be familiar with individual. 	<ul style="list-style-type: none"> With proposed enhancements, unrestricted use of most intensive conditions would have significant cost implications for Corrections (approximately \$20 million over ten years)

- 57 Creating a new special condition set by the court for up to the first twelve months of an order is the preferred approach. This provides judicial oversight of the most intensive form of management on an extended supervision order that involves on-going personal supervision. Particularly in light of the enhancements proposed in Part 1, having the court set the most intensive condition, and limiting it to a single twelve month period, will improve the human rights balance of the regime.
- 58 Having the same judge of the High Court consider the application for a public protection order and then, if that is unsuccessful, an extended supervision order, is also preferred as it creates consistent judicial oversight of the post-sentence management of individuals according to their level of risk.
- 59 Judicial decisions on an application for a public protection order would be based on the legislated criteria in the Public Safety (Public Protection Orders) Bill, being that the individual poses a very high risk of imminent serious sexual or violent offending, established by evidence of behavioural characteristics. It is not proposed to amend the criteria for a public protection order.
- 60 As is current practice, the Department of Corrections would work with the Parole Board and other agencies (including Police and non-government organisations) to mitigate the risk of offenders managed on extended

supervision orders. If an individual continues to pose a very high risk to public safety after twelve months with a court imposed “intensive support” special condition, but does not meet the criteria for a public protection order, additional oversight and support would be provided, such as supported accommodation, GPS monitoring, and more intensive community support.

Interim Extended Supervision Order

- 61 Public safety may be jeopardised if the court is unable to make or renew an ESO before:
- an eligible offender living overseas returns to New Zealand, or
 - the expiry of an existing ESO or custodial sentence.
- 62 It is proposed that the court be able make an interim ESO where an application for a new ESO or renewal of an existing ESO is under consideration and where the offender would otherwise be released into the community without supervision appropriate for their level of risk. The proposed provisions would mirror provisions in the PPO Bill (clause 93) that provides for the court to make an interim PPO.
- 63 An interim order with appropriate conditions would both protect the public from harm and reduce the impact on the civil rights of offenders of the other alternatives for managing the offender such as returning them to prison or placing them on bail.
- 64 Under an interim ESO the offender would be subject to standard ESO conditions and any special conditions imposed by the court including electronic monitoring and residential restrictions.

CONSULTATION

- 65 The following agencies have been consulted and their comments taken into account in the preparation of this paper: Ministry of Justice, Ministry of Social Development, Ministry of Health, Ministry of Women’s Affairs, Ministry of Education, New Zealand Police, the Treasury, State Services Commission, and Te Puni Kōkiri. The Department of the Prime Minister and Cabinet and the Crown Law office have been informed.

CONCLUSIONS AND RECOMMENDATIONS

- 66 It is proposed to enhance extended supervision orders by:
- enabling orders to be applied for as long as they are needed, with regular mandatory reviews by the courts

- expanding the scope of orders beyond high risk sex offenders against children to include a small number of high risk sex offenders against adults and a very small number of very high risk violent offenders
- strengthening the ESO standard condition in respect of access to a child by an offender who is subject to an ESO to ensure that the interest of the child are paramount.
- clarifying in legislation the use of the most intensive form of management on an extended supervision order and making the court responsible for imposing such a condition
- authorising a court to impose an interim ESO while it is considering an ESO application.

67 These proposed enhancements would create a more cohesive suite of management options to reduce the risk of serious harm posed by sexual and violent offenders at the end of a finite sentence. A court would have clear oversight of, and responsibility for, determining the most appropriate management of an individual at the end of a finite sentence according to their level of risk.

68 The enhancements would enable the Department of Corrections to manage in the community sexual and violent offenders placed on extended supervision orders for as long as is necessary. This would reduce the significant risk of serious harm to the public posed by these offenders. The long-term management of such offenders would be in keeping with their assessed level of risk if they did not warrant a public protection order.

69 Given the criminal nature of the extended supervision order legislation, the proposed enhancements may be considered further punishment of sentenced offenders contrary to human rights in the New Zealand Bill of Rights Act. However, given the risk of serious harm posed by these offenders, there is a strong argument that the proposed enhancements strike an appropriate balance between the rights of the public to be free from harm and the rights of offenders.

70 Revising the legislated criteria to more clearly establish that only the highest risk offenders would be eligible for an extended supervision order may also help justify the enhancements in accordance with section 5 of the New Zealand Bill of Rights Act.¹²

71 Over the first five years following implementation, the enhancements are estimated to cost an additional \$2.5 million more than the status quo. This is due primarily to more offenders being subject to extended supervision orders as a result of expanding scope and extending the

¹² Under section 5 of the New Zealand Bill of Rights Act, the rights and freedoms in the Act may be subject to reasonable limits prescribed by law “as can be demonstrably justified”.

maximum length. Over ten years, there are not expected to be any further additional costs resulting from the enhancements.

IMPLEMENTATION

- 72 Extended supervision orders are authorised and governed by the Parole Act 2002. Implementation of the enhancements would therefore require amendments to this Act.
- 73 Sex offenders against children subject to an extended supervision order when the amended legislation came into force would be eligible to have a new order imposed upon them by the court. Offenders will begin reaching the ten year limit of their current orders in 2015. These existing offenders would remain on their existing order until its expiry or a new order is made for them. An existing order would be automatically cancelled when a new order took effect.
- 74 The Department would make applications to the court for new orders for those offenders that it assesses as continuing to pose a high risk of serious re-offending against children. When considering whether to renew an existing order, the court would need to be satisfied that the offender meets new legislative risk and criteria requirements.
- 75 Offenders serving a prison sentence for a threshold offence when the amended legislation comes into force would be eligible for an order under the new regime. Enhancements may increase pressures over time on Corrections resources, particularly psychologists and probation staff. These pressures would need to be managed within baselines and balanced against resources freed up by overall reductions in crime and re-offending.

MONITORING, EVALUATION AND REVIEW

- 76 The Department would monitor the number of extended supervision orders made, the type of offenders being subjected to orders, the use of special conditions, compliance with orders, and re-offending rates.
- 77 An evaluation of the effectiveness of the revised extended supervision order regime would be undertaken by the Department of Corrections after five years of operation.

APPENDIX 1: PROPOSED CRITERIA FOR ENHANCED EXTENDED SUPERVISION ORDERS

1. The court is empowered to impose an extended supervision order where:
 - the offender has been convicted for a relevant offence to meet the threshold for an extended supervision order;¹³ and
 - the court is satisfied that the offender:
 - has demonstrated a pervasive pattern of serious sexual or violent offending; and
 - poses a high risk of serious sexual offending, or very high risk of violent offending.
2. A psychological assessment of the offenders would be necessary to determine whether they have the characteristics that identify a person as being at a high risk of serious sexual offending or very high risk of serious violent offending. This would include a comprehensive risk assessment.
3. In determining whether an offender poses a high risk of serious sexual offending, the court must be satisfied that an offender displays the following behavioural characteristics:
 - a) an intense drive, desire or urge to commit serious sexual offences, evident by (for example):
 - recurrent and intense deviant fantasy; and/or
 - compulsivity in relation to deviant urges; and/or
 - a pattern of repetitive and opportunistic offending; and/or
 - rapid re-offending following previous releases from custody
 - b) a predilection or proclivity for serious sexual offending;
 - c) limited self-regulatory capacity, evident by (for example):
 - general impulsiveness and an inability to control that impulsiveness; and/or
 - high emotional reactivity; and/or
 - inability to cope with or manage stress and difficulties;
 - d) (i) a lack of acceptance of responsibility and/or remorse for past offending; and/or
 - (ii) an absence of understanding and/or concern for the impact of their sexual offending on actual or potential victims.

¹³ Being the current offences for extended supervision orders in addition to the threshold offences for preventive detention and proposed for public protection orders.

4. In determining whether an offender poses a very high risk of serious violent offending, the court must be satisfied that an offender:
- a) displays severe disturbance in behavioural functioning, established by:
 - behavioural evidence of intense drive, desires or urges to commit acts of violence; and/or
 - evidence of extreme aggressive volatility; and/or
 - persistently harbouring vengeful intentions towards one or more other persons;
 - b) (i) displays behavioural evidence of clear and long-term planning of serious violent offences to meet a premeditated goal; or
(ii) has limited self-regulatory capacity, which may include:
 - high emotional reactivity; and/or
 - general impulsiveness and an inability to control that impulsiveness, and/or
 - c) an absence of understanding or concern for the impact of their violence on actual or potential victims.