

Returning Offenders (Management and Information) Amendment Bill

Government Bill

Explanatory note

General policy statement

This Bill aims to preserve the position generally understood to exist before the High Court's decision in *G v Commissioner of Police* [2022] NZHC 3514. In that decision, the High Court held that the Returning Offenders (Management and Information) Act 2015 (the **principal Act**)—

- was insufficiently clear that it applied to offenders whose substantive offending predated the principal Act's commencement on 18 November 2015; and
- requires the Commissioner of Police to provide notice and the right to be heard before making determinations as to a returnee's status as a returning prisoner.

The Bill ensures the continued application of the principal Act to offenders whose substantive offending predates the principal Act's commencement. The Bill also provides that the Commissioner of Police must not provide notice or the right to be heard to the affected person before making determinations about their status as a returning prisoner.

Those amendments will ensure that the principal Act continues to put all returning offenders in roughly the same position they would have been in had they offended in New Zealand. Accordingly,—

- the New Zealand Police will be able to collect information from returnees to establish their identity and support future investigations; and
- parole-like conditions will be available if a returnee has been deported after a prison sentence.

The continued application of the principal Act to returning offenders who offended or were sentenced before 18 November 2015 helps ensure public safety. In particular,—

- as at January 2023, 265 returning offenders were subject to management by the Department of Corrections under the principal Act. Of that cohort, 41 are being managed for convictions that predate 18 November 2015, with 21 considered to be at high risk due to their likelihood of reoffending, harming others, or both:
- returning offenders and New Zealand offenders reoffend at about the same rate. As at 30 November 2022, approximately 45% of offenders who returned to New Zealand have later been convicted of an offence in New Zealand:
- while many returning offenders who reoffend are involved in less serious offending, a small proportion is involved in serious violence and drug offending. That cohort is almost certainly contributing to organised crime in New Zealand.

Removing the requirement for notice and a hearing will prevent delays to imposing release conditions. Release conditions are currently usually set before a returnee arrives in New Zealand. Notice of release conditions is served on them (if practicable) on, or as soon as is reasonably practicable after (and in any event not later than 6 months after), their return to New Zealand.

The Bill confirms that the principal Act applies retrospectively even if retrospective application of the principal Act may be inconsistent with the following rights:

- the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty (*see* section 25(g) of the New Zealand Bill of Rights Act 1990, *and see also* section 6(1) and (2) of the Sentencing Act 2002):
- the right, of a person convicted of an offence, not to be punished for it again (*see* section 26(2) of the New Zealand Bill of Rights Act 1990).

The Bill also validates (authorises or makes lawful) past conduct under the principal Act that is consistent with the principal Act always having applied retrospectively.

Departmental disclosure statement

The Ministry of Justice is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

<http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2023&no=232>

Regulatory impact statement

A regulatory impact statement is not required for this Bill.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 relates to commencement. The Bill, if enacted, comes into force on the day after the date on which it receives the Royal assent.

Clause 3 indicates that the Bill amends the Returning Offenders (Management and Information) Act 2015 (the **principal Act**).

Part 1 Amendments to Parts 1 and 2 (preliminary and substantive provisions)

Part 1 amends Parts 1 and 2 (preliminary and substantive provisions).

Clause 4 inserts *new sections 3A and 3B*.

New section 3A ensures that a provision of the principal Act applies retrospectively to a person after the provision's commencement even if all or any of the things specified in *new section 3A(1)* occurred for that person before the provision's commencement. *New section 3A* does not affect or limit the validations in *new clause 8* of Schedule 1, or the exception to those validations in *new clause 9* of Schedule 1. *New section 3A* overrides any inconsistent other law (*new section 3A(3)*), including any law specified in *new section 3A(4)(a) to (c)*.

New section 3B ensures that the principal Act's provisions have effect even if they require or permit conduct that is double punishment of, or a sentence increase between the commission of, and sentencing for, an overseas jurisdiction offence. *New section 3B* applies to conduct mentioned in, or otherwise necessary for carrying out, or giving full effect to, a provision of the principal Act, and after the provision's commencement. *New section 3B(2)* gives examples of that conduct. *New section 3B(3)* provides that conduct must or may be done or omitted in accordance with the provision even if the conduct is, for an overseas jurisdiction offence for which the relevant person has been convicted and punished overseas, 1 or both of the following:

- punishment again:
- a variation and increase of penalty between commission of, and sentencing for, that offence.

New section 3B does not affect or limit the validations in *new clause 8* of Schedule 1, or the exception to those validations in *new clause 9* of Schedule 1. *New section 3B* overrides any inconsistent other law (*new section 3B(5)*), including any law specified in *new section 3B(6)(a) to (c)*.

Clause 5 amends section 4(1), which contains definitions. The amendment inserts a new definition of the provision's commencement or this provision's commencement, for a provision of the principal Act inserted, amended, or replaced after the principal Act's commencement. The definition ensures that that term includes—

- the principal Act's commencement; and

- the commencement of any other related provision of the principal Act inserted, amended, or replaced after the principal Act's commencement; and
- the commencement of any legislation inserting, amending, or replacing the provision.

Clause 6 inserts *new section 18A*, about a person being provided with notice and a right to be heard before the Commissioner of Police (the **Commissioner**) makes a determination that the person is a returning prisoner. *New section 18A(1)* requires the determination to be made without providing the person with notice or a right to be heard. *New section 18A(2)* ensures that *new section 18A* does not prevent a person providing voluntarily to the Commissioner, in response to a request that the Commissioner may (but need not) make, information—

- about whether the person is a returning prisoner; and
- adding to other information available to the Commissioner about that matter.

New section 18A(3) ensures that *new section 18A* also does not affect a returning prisoner's right to apply for—

- review under section 22 of the Commissioner's determination;
- judicial review of the Commissioner's determination.

Clause 7 amends section 22, which provides for a returning prisoner to apply to the Commissioner to review a determination under section 17. However, section 22 does not affect the right of a returning prisoner to apply for judicial review of the Commissioner's determination under section 17. Section 22(2) is amended so that a returning prisoner's application for a review under section 22 may be made at any time (rather than having to be made within 15 working days) after service on the returning prisoner of the determination notice.

Clause 8 repeals subpart 4 of Part 2 (amendments to other Acts and review), because that subpart is spent.

Part 2

Amendments to Schedule 1

(transitional, savings, and related provisions)

Part 2 amends Schedule 1 (transitional, savings, and related provisions).

Clause 9 inserts in Schedule 1 the *new Part 4* set out in the Bill's *Schedule*. *New Part 4* of Schedule 1 sets out provisions relating to the Amendment Act resulting from the Bill. *New Part 4* contains *new clauses 6 to 9* of Schedule 1.

New clause 6 defines the term Amendment Act.

New clause 7 ensures that the amendments made by the Amendment Act apply only to conduct after the Amendment Act's commencement. However, *new clause 7* is subject to *new clauses 8 and 9*.

New clause 8 contains validations of specified conduct and specified determinations.

New clause 8(1) provides that conduct by a person or court that is invalid (unauthorised or unlawful) is validated (made authorised or lawful) if—

- the conduct was purportedly done or omitted under a provision of the principal Act after the principal Act's commencement and before the Amendment Act's commencement; and
- the conduct would have been valid had the Amendment Act been in force when the conduct occurred.

The conduct is validated from when it occurred (*new clause 8(2)*).

New clause 8(3) gives examples of conduct that may be validated by *new clause 8(1)*.

New clause 8(4) provides that a determination that is invalid (unauthorised or unlawful) is validated (made authorised or lawful) if—

- the determination was purportedly made under section 17 of the principal Act after the principal Act's commencement and before the Amendment Act's commencement; and
- the determination would have been be valid if the person determined to be a returning prisoner had been provided with notice and a right to be heard before the determination was made.

The determination is validated from when it was made (*new clause 8(5)*).

However, *new clause 8* is subject to the exception in *new clause 9 (new clause 8(6))*.

New clause 9 provides an exception to the validations in *new clause 8*. *New clause 9* ensures that the validations in *new clause 8* do not—

- apply to the particular applicant in *G v Commissioner of Police* [2022] NZHC 3514 (whose effect was stayed, for persons other than the particular applicant, by an interim order made in *G v Commissioner of Police* [2022] NZHC 3628); or
- affect that judgment as it relates to that applicant; or
- affect any party's rights of appeal in respect of that judgment.

Hon Kiritapu Allan

Returning Offenders (Management and Information) Amendment Bill

Government Bill

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Part 2

Amendments to Schedule 1 (transitional, savings, and related provisions)

9	Schedule 1 amended	5
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Schedule

New Part 4 inserted into Schedule 1

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Returning Offenders (Management and Information) Amendment Act **2023**.

2 Commencement

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This Act comes into force on on the day after the date of Royal assent.

3 Principal Act

This Act amends the Returning Offenders (Management and Information) Act 2015.

Part 1

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**Amendments to Parts 1 and 2
(preliminary and substantive provisions)**

4 New sections 3A and 3B inserted

After section 3, insert:

3A Act's provisions apply retrospectively

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(1) A provision of this Act applies to a person after the provision's commencement even if all or any of the following occurred before the provision's commencement:

(a) the person's conduct overseas that constitutes an imprisonable offence in New Zealand:

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(b) the person's conviction for an overseas jurisdiction offence for that conduct:

(c) the person's having been sentenced to 1 or more terms of imprisonment overseas for the overseas jurisdiction offence:

(d) the end of the person's sentence of imprisonment overseas for the overseas jurisdiction offence:

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(e) the person's release from custody in a prison overseas or, if the person is detained in an immigration or other facility overseas following release from prison overseas, release from that facility overseas:

(f) the person's deportation or removal to New Zealand on grounds that are or include their conviction for the overseas jurisdiction offence:

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(g) the person's return to New Zealand:

(h) the person's conviction for the overseas jurisdiction offence being overturned:

(i) the person's being pardoned for the overseas jurisdiction offence:

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- (j) any other conduct of, or event relating to, the person that the provision requires to have occurred in order for the provision to apply.
- (2) This section does not affect or limit—
- (a) the validations in **clause 8** of Schedule 1:
 - (b) the exception to those validations in **clause 9** of Schedule 1. 5
- (3) This section overrides any inconsistent other law.
- (4) In particular, any **other law**, for the purposes of **subsection (3)**, includes any law in all or any of the following:
- (a) section 7 of the Interpretation Act 1999 (in force after this Act's commencement until the close of 27 October 2021): 10
 - (b) section 12 of the Legislation Act 2019 (in force after 27 October 2021):
 - (c) *G v Commissioner of Police* [2022] NZHC 3514.
- 3B Act's provisions override inconsistent other law**
- (1) This section applies to conduct—
- (a) mentioned in, or otherwise necessary for carrying out, or giving full effect to, a provision of this Act; and 15
 - (b) after the provision's commencement.
- (2) Examples of the conduct are—
- (a) making, amending, revoking, or revoking and replacing, a determination or other decision: 20
 - (b) requesting a person to provide identifying particulars and taking them if the person provides them in response to a request, detaining the person (using reasonable force if necessary) if the person refuses, taking the identifying particulars of a person who has been detained for the purpose of taking them, giving a direction related to exercising those powers, or entering, recording, and storing on a Police information recording system the identifying particulars of a person that are provided in response to a request or otherwise taken: 25
 - (c) issuing, amending, revoking, revoking and replacing, or serving a notice (for example, a databank compulsion notice under section 14, or a determination notice): 30
 - (d) applying for, issuing, or executing a warrant for entry to any premises to serve a determination notice:
 - (e) applying for, imposing, varying, discharging, or revoking, a standard release condition or a special condition (which, in this section, includes, without limitation, a condition imposed under section 33(1) and to which sections 26 to 31 apply under section 34): 35
 - (f) suspending under section 28(3) a standard release condition or a special condition:

- (g) administering a standard release condition or a special condition (for example, monitoring compliance with a standard release condition or a special condition, and investigating and prosecuting an offence of breaching a standard release condition or a special condition):
- (h) reviewing under section 22 a determination under section 17: 5
- (i) doing, or omitting to do, any other act or omission mentioned in, or otherwise necessary for carrying out, or giving full effect to, the provision.
- (3) The conduct must or may be done or omitted in accordance with the provision even if the conduct is, for an overseas jurisdiction offence for which the relevant person has been convicted and punished overseas, 1 or both of the following: 10
- (a) punishment again:
- (b) a variation and increase of penalty between commission of, and sentencing for, that offence. 15
- (4) This section does not affect or limit—
- (a) the validations in **clause 8** of Schedule 1:
- (b) the exception to those validations in **clause 9** of Schedule 1.
- (5) This section overrides any inconsistent other law.
- (6) In particular, any **other law**, for the purposes of **subsection (5)**, includes any law in all or any of the following: 20
- (a) section 6(1) and (2) of the Sentencing Act 2002:
- (b) sections 25(g) and 26(2) of the New Zealand Bill of Rights Act 1990:
- (c) *G v Commissioner of Police* [2022] NZHC 3514.
- 5 Section 4 amended (Interpretation)** 25
- In section 4(1), insert in its appropriate alphabetical order:
- the provision's commencement** or **this provision's commencement**, for a provision of this Act inserted, amended, or replaced after this Act's commencement, includes—
- (a) this Act's commencement; and 30
- (b) the commencement of any other related provision of this Act inserted, amended, or replaced after this Act's commencement; and
- (c) the commencement of any legislation inserting, amending, or replacing the provision
- 6 New section 18A inserted (Notice and right to be heard)** 35
- After section 18, insert:

18A Notice and right to be heard

- (1) A determination by the Commissioner that a person is a returning prisoner must be made without providing the person with notice or a right to be heard.
- (2) This section does not prevent a person providing voluntarily to the Commissioner, in response to a request that the Commissioner may (but need not) make, information— 5
- (a) about whether the person is a returning prisoner; and
 - (b) adding to other information available to the Commissioner about that matter.
- (3) This section also does not affect a returning prisoner’s right to apply for— 10
- (a) review under section 22 of the Commissioner’s determination:
 - (b) judicial review of the Commissioner’s determination.

7 Section 22 amended (Review of Commissioner’s determination)

In section 22(2), replace “within 15 working days” with “at any time”.

8 Subpart 4 of Part 2 repealed 15

Repeal subpart 4 of Part 2.

Part 2

**Amendments to Schedule 1
(transitional, savings, and related provisions)**

9 Schedule 1 amended 20

In Schedule 1,—

- (a) insert the Part set out in the Schedule of this Act as the last Part; and
- (b) make all necessary consequential amendments.

Schedule
New Part 4 inserted into Schedule 1

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Part 4	
Provisions relating to Returning Offenders (Management and Information) Amendment Act 2023	5
6 Interpretation	
In this Part, Amendment Act means the Returning Offenders (Management and Information) Amendment Act 2023 .	
7 Application of amendments	10
(1) The amendments made by the Amendment Act apply only to conduct after the Amendment Act's commencement.	
(2) However, this clause is subject to clauses 8 and 9 .	
8 Validations of specified conduct and specified determinations	
<i>Validation of specified conduct</i>	15
(1) Conduct by a person or court that is invalid is validated if—	
(a) the conduct was purportedly done or omitted under a provision of this Act after this Act's commencement and before the Amendment Act's commencement; and	
(b) the conduct would have been valid had the Amendment Act been in force when the conduct occurred.	20
(2) The conduct is validated from when it occurred.	
(3) Examples of conduct that may be validated by subclause (1) are—	
(a) making, amending, revoking, or revoking and replacing, a determination or other decision:	25
(b) requesting a person to provide identifying particulars and taking them if the person provides them in response to a request, detaining the person (using reasonable force if necessary) if the person refuses, taking the identifying particulars of a person who been detained for the purpose of taking them, giving a direction related to exercising those powers, or entering, recording, and storing on a Police information recording system the identifying particulars of a person that are provided in response to a request or otherwise taken:	30
(c) issuing, amending, revoking, revoking and replacing, or serving, a notice (for example, a databank compulsion notice under section 14, or a determination notice):	35

(d)	applying for, issuing, or executing a warrant for entry to any premises to serve a determination notice:	
(e)	applying for, imposing, varying, discharging, or revoking, a standard release condition or a special condition (which, in this clause, includes, without limitation, a condition imposed under section 33(1) and to which sections 26 to 31 apply under section 34):	5
(f)	suspending under section 28(3) a standard release condition or a special condition:	
(g)	administering a standard release condition or a special condition (for example, monitoring compliance with a standard release condition or a special condition, and investigating and prosecuting an offence of breaching a standard release condition or a special condition):	10
(h)	reviewing under section 22 a determination under section 17:	
(i)	doing, or omitting to do, any other act or omission mentioned in, or otherwise necessary for carrying out, or giving full effect to, the provision.	15
	<i>Validation of specified determinations</i>	
(4)	A determination that is invalid is validated if—	
(a)	the determination was purportedly made under section 17 of this Act after this Act's commencement and before the Amendment Act's commencement; and	20
(b)	the determination would be valid if the person determined to be a returning prisoner had been provided with notice and a right to be heard before the determination was made.	
(5)	The determination is validated from when it was made.	25
	<i>Exception to validations</i>	
(6)	However, this clause is subject to clause 9 .	
9	Exception for particular applicant and decision as it relates to them	
	The validations in clause 8 do not—	
(a)	apply to the particular applicant in <i>G v Commissioner of Police</i> [2022] NZHC 3514 (whose effect was stayed, for persons other than the particular applicant, by an interim order made in <i>G v Commissioner of Police</i> [2022] NZHC 3628); or	30
(b)	affect that judgment as it relates to that applicant; or	
(c)	affect any party's rights of appeal in respect of that judgment.	35