Regulatory Impact Statement

Management of High Risk Sexual and Violent Offenders at End of Sentence

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Department of Corrections. The RIS has been prepared in two stages with an addendum setting out and assessing an additional option of creating public protection orders.

It provides analysis of options for reducing the risk to public safety posed by sex offenders and violent offenders who, when released at the end of a finite prison sentence or while subject to an extended supervision order, are at very high risk of imminent and serious sexual or violent re-offending.

There are some constraints on the analysis in this RIS:

- Data – it is not possible to accurately report recidivism data for such a small and unique subset of offenders.
- Impacts arising from other initiatives – for example, the Sentencing Act 2002, which introduced expanded criteria for preventive detention, may reduce the need for the proposed measures over time**.**

The policy options identified:

- Will not impose additional costs on business.
- Will not impair private property rights, market competition, or the incentives on businesses to innovate and invest.
- Are likely to override fundamental common law principles (as referenced in Chapter 3 of the Legislation Advisory Committee Guidelines), specifically, the principles in favour of liberty of the subject, that the law should conform with both international law and treaty obligations and that statutes and regulations operate prospectively.

All of the policy options contained in this Regulatory Impact Statement align with the Government Statement on Regulation.

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[Signature] [Date]

Executive Summary

1 This RIS has been prepared in two stages. Stage two focussed on the development of an additional civil detention option (option 5) of creating public protection orders. Option 5 is outlined and analysed in the addendum to this RIS.

2 Under current legislation, public safety may be jeopardised by offenders who are assessed as presenting a very high risk of imminent and serious sexual or violent re-offending and who are released from prison on expiry of their finite sentence, or who are currently subject to extended supervision orders.

3 These very high risk offenders are currently supervised in the community following release for periods of either six months on parole style conditions or up to 10 years under an extended supervision order. While these offenders remain in the community they continue to pose a risk to public safety despite some being subject to the most intensive form of extended supervision.

4 International practices have been reviewed and the mechanisms used for dealing with these very high risk offenders in other jurisdictions, including civil commitment, have been examined. The options selected and our analysis of those options has been informed by international practice.

5 Five options have been identified for the management of offenders who, at the end of their sentence or while on the most intensive form of extended supervision order, remain at very high risk of imminent and serious sexual or violent re-offending:

- A strengthened version of the existing extended supervision order under which offenders would continue to be closely managed in the community until their risk is reduced.
- Expansion of the scope of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act) to enable offenders who are borderline intellectually disabled to be managed in a secure health facility until their risk is reduced.
- A new civil detention order under which people (including offenders) would be detained in a secure facility in the community until their risk is reduced**.**
- A continuing detention order under which offenders would be detained in prison until their risk is reduced.
- A new form of civil detention using public protection orders.

6 Both a strengthened extended supervision order and detention under the IDCCR Act would provide only a partial resolution for the problem because neither would cover the whole target group. The Ministry of Health advise that amending the definition of intellectual disability would make the legal threshold for intellectual disability inconsistent with the internationally accepted clinical definition. Mental health legislation is already used to the maximum extent permitted.

7 Civil detention orders are more likely to be able to be structured to comply with New Zealand's international obligations and the New Zealand Bill of Rights Act 1990 (BORA). Designing legislation that did not reference previous offending

and did not detain a larger group than the target group would be difficult. Such legislation is likely to provide less public safety improvement and to be more costly and more difficult to implement than continuing detention orders.

8 The introduction of a continuing detention order is likely to be controversial both in New Zealand and internationally, is likely to be found to be inconsistent with the BORA and New Zealand's international obligations, and may result in complaints to the UN Human Rights Committee. Despite this assessment, the introduction of a continuing detention order is recommended because it would provide the best means of improving public safety.

9 Public protection orders are also a form of new civil regime, similar to the civil detention order but varying slightly for reasons of practicality. The main differences are that public protection orders target the key population of concern and that detention facilities would be within a prison precinct.

10 Based on knowledge of high risk offenders as a group, the Department of Corrections estimates that over a 10 year period between five and 12 offenders, including some of those currently subject to the most intensive form of extended supervision order, would be made subject to an order.

11 Across the justice sector the proposals would be fiscally neutral and any additional cost imposed on agencies would be met from within current baselines or by the transfer of funding between sector agencies.

12 On balance, it is considered that public protection orders best meet the stated policy objectives.

The Status Quo and Problem Definition

Problem Definition

13 Under current legislation, public safety may be jeopardised by offenders who are assessed as presenting a very high risk of imminent and serious sexual or violent re-offending and who are released from prison on expiry of their finite sentence, or who are currently subject to extended supervision orders.

Status Quo

14 Offenders serving finite prison sentences may be released on parole after they have served the longer of one third of their sentence or the non-parole period. The Parole Board may only release a prisoner on parole if it is satisfied that the prisoner does not pose an undue risk to the safety of the community. If during the prisoner's sentence their risk level has not reduced sufficiently for them to be released on parole, the prisoner has to be released on their sentence expiry date. A very small number of prisoners may therefore be released while still at very high risk of imminent and serious re-offending.

15 There are three forms of supervision for offenders released at the end of their sentence. The first form of supervision is for child sex offenders assessed as being at high risk of re-offending who are managed under extended supervision

orders[1] for up to 10 years. These orders are not renewable. The intensity of supervision under these orders is determined by the risk the offender poses and may range from parole style supervision to very intensive supervision for those at very high risk of sexual re-offending against children and young people.

16 Offenders subject to the most intensive form of an extended supervision order[2] are monitored and/or accompanied at all times. Current law provides that they may only be monitored and/or accompanied at all times for a maximum of 12 months. However, child sex offenders subject to this form of the order are usually accompanied and/or monitored at all times for the rest of the order as part of an individual residential reintegrative programme.
Withheld under sections 9(2)(a) and 9(2)(c) of the Official Information Act 1982

17 The most intensive form of extended supervision order has not prevented further offending or breaches of the order which could have led to more serious offending.

Withheld under sections 9(2)(a) and 9(2)(c) of the Official Information Act 1982

18 Under the IDCCR Act, intellectually disabled offenders who would otherwise be released at the end of a prison sentence may be managed for up to three years (renewable) under care orders made by the Family Court. In 2010, 32 orders were made under the IDCCR Act. *Withheld under sections 9(2)(a) and 9(2)(c) of the Official Information Act 1982*

19 Thirdly, all other prisoners released at the end of their sentence are subject to parole style supervision in the community for a period of six months. This group may include a very small number of offenders who have offended sexually against adults (adult sex offenders) and very high risk violent offenders who pose an imminent and serious risk to public safety.

[1] A court may make an extended supervision order in respect of an offender serving a finite sentence who poses a real and ongoing risk of committing sexual offences against children or young persons. The order imposes standard conditions on the offender and the Parole Board may impose additional special conditions. Currently around 200 offenders are subject to this order, most for the maximum 10 year period.
[2] The most intensive form of an extended supervision order includes a special condition imposed by the Parole Board that requires the offender to be at a specified residence at all times and to be accompanied and monitored 24 hours per day by an authorised person.

20 In contrast to the very high risk offenders who have to be released from prison at the end of a finite sentence, offenders serving indeterminate sentences[3] for sexual and violent crimes can be held in prison until they no longer pose an undue risk to the safety of the community or any person or class of persons. If paroled, an offender sentenced to an indeterminate sentence, may be recalled to prison if they breach parole conditions or again pose an undue risk to public safety.

Objective

21 The objective is to minimise harm to the public from offenders who:

- are assessed as presenting a very high risk of imminent and serious sexual or violent re-offending, and
- are approaching release from prison at the end of a finite prison sentence for serious sexual or violent offending, or
- are subject to the most intensive form of extended supervision order.

22 For this purpose the following descriptions are proposed:

- "very high risk" means that offending is considered extremely likely,
- "serious" means that the predicted offending would cause serious physical and/or psychological harm to one or more other persons,
- "imminent" means that the offending is expected to occur when, provided with a suitable opportunity, the offender would immediately inflict serious harm on a vulnerable victim**.**

Target Group

23 A distinct sub-group of offenders presenting a very high risk of imminent and serious re-offending are identifiable by the presence of the following characteristics:

(i) an intense drive or urge to enact the particular form of offending, evident by (for example):

- recurrent and intense deviant fantasy
- compulsivity in relation to deviant urges
- a pattern of repetitive and opportunistic offending
- rapid re-offending following previous releases from custody

[3] There are two forms of indeterminate sentence; life sentences, which are mostly imposed on murderers, and preventive detention sentences that may be imposed on offenders convicted of sexual and violent offences specified in the Sentencing Act. Prisoners serving indeterminate sentences and who have served their non-parole period are detained until the Parole Board is satisfied that they "will not pose an undue risk to the safety of the community or any person or class of persons." Indeterminate sentences are imposed at sentencing.

(ii) very poor self-regulatory capacity, evident by:

- general impulsiveness
- high emotional reactivity
- inability to cope with or manage stress and difficulties

(iii) absence of understanding and concern for the impacts of their offending on actual or potential victims,

(iv) poor interpersonal relationships and/or social isolation.

24 Offenders of this type display few gains from rehabilitation or are unwilling to participate satisfactorily, usually as a result of low intelligence or other cognitive deficits.

25 Most of these offenders would be child sex offenders, although adult sex offenders may also fall within this group. A very small number of violent offenders may also have the identified characteristics and may meet the imminence test.

26 A psychological assessment of the offenders would be necessary to determine whether the characteristics that identify them as being at a very high risk of imminent and serious sexual or violent re-offending are present. This would include the use of psychometric and actuarial risk assessment procedures.

27 The Department expects that the number of offenders who, as they near the end of their sentence, present a very high risk of imminent and serious sexual or violent re-offending is likely to be very low. The Department expects these offenders to number between five and 12 over a 10 year period, including some of those currently subject to the most intensive form of extended supervision order.

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30 In general, high risk violent offenders typically do not meet the imminence test in respect of future violent re-offending. Widening the eligibility criteria by removing the imminence test would result in the detention of large numbers of violent offenders who might not otherwise go on to re-offend in a seriously

violent manner and some who would never re-offend in a violent manner at all. Widening the criteria is therefore unlikely to improve public safety but would incur very significant extra costs as a result of a significant increase in the prison population.

31 Well designed legislation with appropriate safeguards will be essential to ensure that net widening does not occur.

International Practice

32 In other similar jurisdictions there are two ways of protecting the public from very high risk offenders who are likely to re-offend soon after they are released at the end of finite sentence. They are distinguished by the timing of their imposition or activation.

33 The first and most frequently used way is to impose indeterminate sentences or extensions to finite sentences at the time the offender is sentenced. The UNHRC and the European Court of Human Rights have considered these measures and found that, subject to suitable safeguards, they do not breach international human rights obligations if they are imposed at sentencing.

34 All similar jurisdictions, except the United States, have an equivalent of New Zealand's preventive detention which is imposed at sentencing.[4] The degree to which they are used varies by jurisdiction.[5] In Canada and Scotland the courts may also at sentencing order that an offender sentenced to a finite term of imprisonment be subject to supervision in the community for up to 10 years from their release date.

35 The second means of protecting the public from very high risk offenders is for an order to be imposed at or close to the end of an offender's finite sentence. Measures imposed at the end of sentence are much more problematic from a rights perspective and have the potential to be found to breach BORA and international obligations. The options being considered in this paper would be imposed at the end of sentence.

36 In all similar jurisdictions authorities have recognised that some offenders who have served a full finite sentence may still pose a very high risk of re-offending sexually or violently soon after their release from prison. They have responded by detaining sex offenders in prison (Australian states), detaining sex offenders in medical facilities (United States), and by closely supervising sexual and violent offenders (England and Wales) or sex offenders (Scotland) in the community.

[4] The High Court may impose a preventive detention sentence when an offender is sentenced for one of the sexual or violent offences specified in the Sentencing Act. The court may only impose preventive detention if it is satisfied that the offender is likely to commit another specified sexual or violent offence if they were sentenced to a finite sentence and released. An offender serving a preventive detention sentence may be released when the Parole Board is satisfied that they "will not pose an undue risk to the safety of the community or any person or class of persons." Preventive detention sentences include a non-parole period set by the court that may not be less than five years.
[5] For example as at 30 June 2010, Victoria had 54 prisoners serving indeterminate sentences, Queensland 350 and New Zealand 719.

Australia – Further detention

37 Four Australian states have detention/supervision orders under which a high risk sex offender at the end of their finite sentence may be detained in prison indefinitely or for a finite period (renewable). Prisoners not considered dangerous enough to be detained in prison or those released after a period of detention may have a supervision order imposed on them for a period of up to 15 years.

38 The UN Human Rights Committee has determined that these orders breach the International Covenant on Civil and Political Rights.[6] The Australian Federal Government has yet to respond to this finding but intends to do so. At this stage no change to the state legislation is contemplated.

United States- Civil Commitment

39 In some states in the United States sexually violent predators are detained by civil commitment to a hospital, mental hospital or secure facility. Under this medical model, detention must be accompanied by some form of treatment although that requirement does not prevent untreatable offenders continuing to be detained. To be eligible for civil commitment an offender must have a history of violent predatory sexual offending and a "mental condition" (which is broadly defined to include personality disorders and "mental abnormality") that is likely to lead to further acts of sexual violence.

40 The form of civil commitment varies from state to state. In most states it is indefinite, but in California it is for two years, but is renewable. Decisions as to detention and release are made as part of a full court hearing process, which may include jury trial.

41 Civil commitment appears to be a means of preventively detaining offenders in a jurisdiction where indeterminate sentences are prohibited by the constitution. Although imposed at the end of a sentence it appears to be designed to indefinitely detain very dangerous offenders who in New Zealand would have been sentenced to preventive detention.

42 Civil commitment is very expensive, between four and eight times as expensive as detaining offenders in prison. There is no evidence that the treatments provided work. The conditions under which offenders are held are considered not to be conducive to rehabilitation. Few offenders are released and most of those who are, are released for reasons other than having been successfully treated.

United Kingdom – Multi Agency Protection Arrangements

43 In the United Kingdom high risk sexual and violent offenders are managed by police, prisons and probation (and in Scotland, health boards) who are required by law to establish joint arrangements to manage offenders in the community.

[6] The Human Rights Committee has found breaches of ICCPR Article 9(1) prohibiting arbitrary detention and ICCPR Article 15(1) prohibiting retroactive criminal laws in respect of two cases concerning Australian detention orders (*Fardon v Australia* (Communication No. 1629/2007) and *Tillman v Australia* (Communication No. 1635/2007).

The management of the very highest risk "few" offenders is monitored by a board of senior officials from the three agencies who have statutory authority to require other agencies to provide support.

44 Sex offenders are required to notify the police of their address and other personal details, and to advise 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. Breaches of notification requirements or protection orders are prosecuted on a zero tolerance basis and may result in the offender being reimprisoned for up to five years. Similar violent offender orders have recently been introduced in England and Wales although relatively few orders have been made.

Canada

45 In Canada high risk offenders released at the end of their sentence and who are not subject to long term supervision orders are not supervised although they may be monitored by the Police.

Policing

46 In all jurisdictions where very high risk offenders are released into the community the police play a major role in preventing re-offending by strategically deploying significant resources in the surveillance and interception of these offenders. The resulting detection of breaches of orders and notification requirements, or minor offending, usually then results in the offender being prosecuted and returned to prison.

Summary of International Practice

47 All jurisdictions are grappling with the problem of how to reduce the risks to public safety posed by offenders released from prison at the end of their sentence who pose a very high risk of re-offending sexually or violently. Of the regimes in place in these jurisdictions, only the continuing detention of sex offenders in Australia and civil commitment in the United States, have the potential to eliminate the public safety risk these offenders pose. International experience has informed the options considered in this paper.

Regulatory Impact Analysis

Non-Regulatory Options

48 Non-regulatory options cannot be applied because the post sentence management of offenders released from prison involves varying degrees of coercion and deprivation of individual liberty that must be authorised and governed by law.

49 Legislation authorises and governs extended supervision orders, release on conditions at the end of a finite sentence and the detention of intellectually disabled offenders. That legislation is already used to the maximum extent permitted. Any extension of the states powers to manage offenders after their release from prison would therefore require new legislation.

Regulatory Options

Enhancing Preventive Detention

50 Amendments to preventive detention legislation have been considered. Eligibility for preventive detention has been broadened over recent decades. The most recent broadening of the criteria occurred in 2002. Since 2002 courts have been able to sentence to preventive detention any offender who was aged 18 or older at the time they committed a serious violent or sexual offence. The court has to be satisfied that the offender is likely to commit another serious sexual or violent offence if they were sentenced to a finite sentence.

51 A residual group of very high risk offenders now being released at the end of a finite sentence may not have been eligible for preventive detention at sentencing or, if eligible, were not sentenced to preventive detention. Those who were not eligible may have been sentenced before the 2002 changes or may have been under the age of 18.

52 The number of future offenders not eligible for preventive detention could be reduced by lowering the minimum age at the time of the offence below the current 18 years. However, such a change would not entirely solve the problem because there will always be some offenders who were eligible for preventive detention at sentencing but who first display the characteristics outlined in paragraph 23 while serving the finite prison sentence imposed on them instead. Furthermore, lowering the age of eligibility for preventive detention is likely to be controversial both domestically and internationally and could be argued to be inconsistent with the United Nations Convention on the Rights of the Child.

53 This option alone would not therefore address the problem.

Options that might address the problem

54 Four alternative approaches have been considered to reduce the risk to public safety posed by prisoners who are released at the end of a finite sentence and who are assessed as presenting a very high risk of imminent and serious sexual or violent re-offending. All of these options would require legislative change.

Option One – Strengthen the most intensive form of extended supervision orders

55 In its current form an extended supervision order (the status quo):

- May be imposed by a court on an offender serving a finite sentence who poses a real and ongoing risk of committing sexual offences against children or young persons.[7]
- May be imposed for a term of up to 10 years from the time of their release from prison.

[7] Currently around 200 offenders are subject to an extended supervision order, most for the maximum 10 year period.

- Imposes standard conditions regarding residence, employment, reporting to a probation officer and non association with children under 16.

- May include special conditions imposed by the Parole Board. The most intensive of the special conditions may require that the offender be accompanied and/or monitored for up to 24 hours a day and for a maximum of 12 months.

56 For this option to address the problem, legislative amendments would be required to:

- Enable extended supervision orders to be renewed for further periods of up to 10 years.

- Extend the period offenders subject to an order may be accompanied and/or monitored to the full term of the order.

Option Two - Compulsory care orders

57 Compulsory care orders are made by the Family Court under the IDCCR Act. The original order may be made for a maximum term of three years but the court has power to extend the order.

58 A compulsory care order may:

- be made if an offender has an IQ score of 70 or less and has significant deficits in adaptive functioning in at least two of nine specified skills,

- require the offender to be detained in a secure facility or supervised in the community.

59 For this option to address the problem, the IDCCR Act would need to be amended:

- To change the criteria for intellectual disability by increasing the qualifying IQ score from 70 or less to 80 or less. Alternatively, the IQ score could be de-emphasised from being the primary criteria to being one of the 10 factors (i.e. the nine specified skills and the IQ score) three of which have to be in deficit for the offender to be eligible.

- To authorise the compulsory care of an offender who remains at very high risk of imminent and serious sexual or violent re-offending despite the offender being untreatable.

Option Three - Civil detention order

60 Civil detention orders are already used in New Zealand. For example, the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 provide for the compulsory assessment and treatment of mentally disordered individuals and intellectually disabled offenders respectively.

61 Legislation could be introduced to authorise the High Court in its civil jurisdiction to order the detention for periods of up to five years (renewable), of individuals who

- are at very high risk of imminent and serious sexual or violent re-offending, and
- are aged 18 years or older at the time the application is made.

62 If this is the preferred option further work would be required to develop additional criteria to ensure that the target group are eligible for a civil detention order.

63 If a civil detention order was made:

- The court could order rehabilitative programmes and treatment for those detainees who were expected to benefit from them but there would be no obligation to make such an order if the detainee would not benefit.
- The court would be required to review a detainee's order annually.
- The court could release a detainee into the community subject to a supervision order if their risk level reduced and cancel the supervision order when they no longer pose an undue risk to the community.
- If an offender was again found to be at very high risk of imminent and serious sexual or violent re-offending, the court could make a new detention order.

64 Although a civil detention order could be designed with the intent that it be human rights compliant there can be no certainty that it would be rights compliant until it is tested by a detainee taking a case to the UNHRC. To enhance the prospect of the order being found rights compliant it would have to include the following features:

- Detainees would have to be detained in facilities in the community, which may be secure but not punitive.[8]
- The primary determinant of a prospective detainee's eligibility would have to be the psychological and social characteristics which make them susceptible to further imminent offending and any link with prior criminal offending would need to be indirect, if included at all.

Option Four - Continuing detention order made at the end of a finite sentence

65 Legislation could be introduced to authorise the High Court in its criminal jurisdiction to order the indefinite detention in prison of offenders who:

[8] The basis of one of the four grounds upon which the UNHRC found that the detainees detained under the Australian orders were arbitrarily detained in breach of ICCPR provisions was that although the proceedings are characterised as civil proceedings they result in the detainee being detained in prison. The UNHRC found the Australian "civil" order to be a penal sentence and punitive in nature notwithstanding that it was imposed for protective purposes. To reduce the prospect of the proposed civil order being found to be non compliant on this basis detainees would have to be held in a facility that is not a prison.

- are at very high risk of imminent and serious sexual or violent re-offending, and
- are aged 18 years or older at the time the application is made, and
- are within the last six months of a finite prison sentence imposed for serious sexual offending or violent offending, or
- are subject to the most intensive form of extended supervision order.

66 If a continuing detention order was made:

- Rehabilitative programmes and treatment would be available for those detainees who were expected to benefit from them.

- The Parole Board would consider the detainee for release on parole at regular intervals in accordance with the provisions of the Parole Act 2002.

- A detainee would only be released by the Parole Board if their risk level reduced.

- If released on parole the offender could be recalled to prison by the Parole Board if they are found to again pose an undue risk to public safety.

- A detainee released by the Parole Board who had not, in the five years after their release, breached their parole conditions and had not been convicted of a serious offence could apply to the court for cancellation of the order.

Option 5 – Civil detention - public protection orders

67 This option is outlined and analysed in the Addendum.

Differences between civil detention orders and continuing detention orders

68 The main difference between a civil detention order and the continuing detention order is the place of detention. A person detained under a civil detention order would be detained in a facility in the community, which may have similar security features to a low security prison. The continuing detention order would be made by the court in its criminal jurisdiction and the detainee would be detained in a prison with a security level appropriate to the risk posed by the detainee.

69 In the Tillman and Fardon cases the majority of the UNHRC attached some importance to the Australian detention orders being civil orders implicitly on the basis that the standard of evidence, the procedural protections and standard of proof are lower for civil proceedings than for criminal proceedings. However, in reality the standard of evidence, the procedural protections and standard of proof for civil and criminal orders of this type tend to converge. For civil orders they tend to be higher than for ordinary civil litigation and for criminal orders lower than required for criminal trials.

Analysis of the options

70 Our analysis of the four options that are most likely to address the risk posed by offenders at very high risk of imminent and serious sexual or violent re-offending at the end of their sentence is set out in the table below:

	Option 1 **Strengthened intensive form of extended supervision order**	**Option 2** **Compulsory care order under an amended IDCCR Act**	**Option 3** **Civil detention order (with new facility in the community)**	**Option 4** **Continuing detention order**
Public safety	Greatest risk The offender would be in the community, although constantly accompanied and/or monitored.	Reduced risk to public safety The offender would be detained in a secure facility in the community.	Reduced risk to public safety The offender would be detained in a secure facility in the community.	Virtually no risk to public safety The offender would be detained in prison.
Rights Issues	Less impact The offender is in the community but their freedom is severely circumscribed. The legislative amendments required may be inconsistent with the New Zealand Bill of Rights Act 1990 (BORA) and the International Covenant on Civil and Political Rights (ICCPR) on grounds of double jeopardy, imposition of a heavier penalty and arbitrary detention.	Limited impact Amendments to extend the scope of the IDCCR Act beyond internationally recognised standards are likely to be controversial and may be argued to constitute arbitrary detention. It is also likely to be inconsistent with the ICCPR on grounds of retrospective application, imposition of a heavier penalty and arbitrary detention.	Limited impact It may be possible for a civil detention order to be structured in a way that may be compliant with BORA and the ICCPR.	Significant impact Likely to be inconsistent with rights recognised in BORA. Likely to be inconsistent with the ICCPR.
Cost of deten-tion	Expensive For child sex offenders the current average is $265,000 p.a. ranging from $112,000 p.a. to $385,000 p.a. depending on risk level.	Possibly most expensive Average cost of providing secure care for an IDCCR Act offender is $747,000 p.a.; however the offenders in question may be less expensive to manage. Average cost of providing supervised care for an offender in the community outside a secure facility is approximately $205,000 p.a. (including cost of treatment programmes).	More expensive The average cost of detention is likely to be significantly higher than in prison, since it would be outside prison, due to a lack of scale and the inability to use new facilities to their full capacity because of the need to separate categories of detainee. The estimated cost of new beds is likely to be similar to that for secure IDCCR facilities - $750,000 per bed – due to lack of scale, obtaining resource consents etc. Specialised rehabilitative	Least expensive Average cost of detention in prison is $91,000 p.a. Average cost of new beds required is $400,000 per bed. Detainees would have access to the full range of rehabilitation services and treatments available in a prison. The cost of these services and treatments is included in the average operating costs.

	Option 1 **Strengthened intensive form of extended supervision order**	**Option 2** **Compulsory care order under an amended IDCCR Act**	**Option 3** **Civil detention order (with new facility in the community)**	**Option 4** **Continuing detention order**
			treatment may be required to mitigate right issues. Rehabilitation programmes and treatment are likely be logistically difficult to provide and therefore more expensive because of the relatively small number of detainees in each facility.	
Other agency costs (Courts, Legal Services, Crown Law, Police)	Less expensive Court renewal orders required every 10 years. Reviews are rare – initiated by the offender no more frequently than every two years.	Most expensive Court renewal order required every three years. Six monthly reviews by the court.	More expensive Court renewal order required at least every five years. Annual reviews by the High Court.	Least expensive No renewal required. Regular review by the Parole Board (approximately $2,500 per hearing, including legal aid.)
Implementation	The capacity of external providers to provide supervision for additional offenders is unknown.	Implementation is likely to be delayed by need to build new facilities and obtain resource consent.	Implementation is likely to be delayed by need to build new facilities and obtain resource consent. Implementation is also likely to be costly because violent offenders and adult sex offenders may need to be detained in different facilities from those in which child sex offenders are detained.	Rapid implementation once legislation is passed.

71 A strengthened version of the most intensive form of an extended supervision order would not reduce the risk of violent and adult sex offenders re-offending because they could not be safely managed under the order. It would deliver little, if any, improvement in public safety and would be more expensive than either continuing detention or civil detention.

72 Broadening the eligibility for a care order under the IDCCR Act is not a viable option because some of the target group may not be eligible because they would not meet the broadened criteria.

73 The Ministry of Health advise that amending the definition of intellectual disability would be likely to have the unintended consequence of rendering the IDCCR Act inoperable, as the legal threshold for intellectual disability would be inconsistent with the internationally accepted clinical definition.

Public Safety

74 The two remaining options, a civil detention order and a continuing detention order, would both provide public safety benefits. However, to enhance the prospect of it being rights compliant, a civil detention facility is unlikely to have the same level of physical security as a prison and is likely to be staffed by personnel who have less of a security focus than prison officers.

Human Rights

75 The introduction of a continuing detention order is likely to be controversial both in New Zealand and internationally, and is likely to be found to be inconsistent with the BORA and New Zealand's international obligations. If continuing detention is introduced it is likely that an individual upon whom an order is made may pursue a complaint before the UN Human Rights Committee. Criticisms, or findings of breach by New Zealand of its international commitments following complaints to the Human Rights Committee, would have no binding effect, but would have implications for New Zealand's international reputation.

76 Civil detention may be able to be designed to both meet the public safety objective and be human rights compliant.

Implementation

77 Continuing detention could be easily and quickly implemented because offenders could be detained in available existing prison facilities. No additional prison beds would be needed in the immediate future.

78 By contrast civil detention (as described in option 3) would require the building of new facilities which are likely to have to be built in the community and be subject to a full resource consent process. This is likely to delay construction and drive up the capital cost of providing new beds. The need to detain child sex offenders and other violent and adult sex offenders separately would increase the per capita cost of civil detention at least initially because of the small number of orders expected to be made.

Financial Implications

79 The cost to the Department of Corrections of detaining offenders under a continuing detention order and providing new beds would be similar to the cost for prisoners serving sentences. The cost of detaining detainees under a civil detention order is likely to be considerably higher than the average operational cost of detaining prisoners in prison because of the higher staff to detainee ratio required for small civil detention facilities.

Cost to other Agencies

80 From the perspective of other justice sector agencies continuing detention orders are likely to be more cost effective than civil detention orders. Although the costs related to the original application are likely to be similar for both options continuing detention would, unlike the other options, not have to be renewed or reviewed by the court.

81 The original application for a continuing detention order (and for any of the other options) may result in extensive litigation including appeals to the Court of Appeal and the Supreme Court. The court costs, legal costs and legal aid costs of the court proceedings for the original application and any appeals are likely to be similar for both options. However, because the offender in respect of whom orders would be sought is by definition almost certain to re-offend if released, these costs would be offset by avoiding the investigation, prosecution and trial costs that would be incurred if the offender was released, offended again and was subsequently tried and convicted.

82 If a continuing detention order or a civil detention order is introduced:

- The Ministry of Justice would meet any additional court costs and legal aid costs within baselines given the projected numbers of likely orders.

- Crown Law have estimated the additional costs at $225,000 in year 1, $88,000 in year 2 and $21,000 in out years. They would not be able to meet these costs within baselines for the first two years mostly as a result of reviews of the most intensive continuing detention orders.

83 The Department of Corrections would meet Crown Law's additional costs from within its baselines as it expects these costs to be offset by the reduced cost of managing offenders who would otherwise be subject to the most intensive form of extended supervision order in prison rather than in the community.

Eligibility of offenders aged 18 at the time of application.

84 The proposal to make offenders aged under 18 at the time of their offending but 18 or over at the time of the application for a detention order, eligible for continuing detention or civil detention is considered necessary because:

- On the basis of the profiles of offenders currently subject to the most intensive form of extended supervision order a quarter of future candidates would otherwise not be eligible for the order and would have to be released irrespective of the public safety risk they posed.

- As the impact of broadening of the criteria for preventive detention in 2002 takes effect those who committed otherwise qualifying offences under the age of 18 are likely to become the majority of the small number of offenders being released at the end of their sentence at very high risk of imminent and serious sexual or violent re-offending.

85 It should also be noted that although an offender can only be sentenced to preventive detention if they were 18 at the time of the offence, they can be sentenced to life imprisonment at any age.

Consultation

86 The following agencies have been consulted and their comments taken into account in the preparation of this paper: Ministry of Justice, Ministry of Foreign Affairs and Trade, Crown Law, New Zealand Police, Treasury, State Services

Commission, Ministry of Social Development, Ministry of Health, Te Puni Kōkiri and the New Zealand Parole Board. The Department of Prime Minister and Cabinet have been informed.

87 The public would have an opportunity to comment on the option chosen by Cabinet when legislation is placed before a Select Committee.

Implementation

88 Either a civil detention or continuing detention option would be included in a separate, stand alone Bill.

89 The legislation would make it clear that it applies to prisoners serving sentences for serious sexual or violent offences and offenders subject to the most intensive form of extended supervision order when it comes into force, as well as to offenders imprisoned after it comes into force.

90 Consequential amendments to the Sentencing Act 2002 and the Parole Act 2002 would also be required as a result of the Bill.

91 Practical implementation of a continuing detention order would be relatively uncomplicated because it would be procedurally similar to the preventive detention sentence.

92 The Department's role in the process of applying for detention orders would be similar to its role in applying for extended supervision orders or orders that a prisoner not be released on parole and would draw heavily on the skills and expertise the Department has developed in relation to those orders. The Department already provides expert advice and reports for the Parole Board for parolees on indeterminate sentences and could provide similar support in respect of detention orders.

93 The courts, Crown Law and Crown Solicitors would, in dealing with detention orders, be able to draw on experience, procedures and precedents relating to applications for preventive detention, extended supervision orders and orders that a prisoner not be released on parole.

Implementation Risks

94 The main implementation risks are that the new legislation might be interpreted in a manner that results in too many orders or too few orders being applied for, or made by the courts. Either outcome may result in a need to amend the law, as interpreted by the courts, to align it with the original policy intent.

Monitoring, Evaluation and Review

95 This policy would be monitored and evaluated against the criteria used to assess the options by the Department of Corrections and the Ministry of Justice.

96 The Department and the Ministry would in particular monitor the number of orders being made and any patterns in the use of the orders.

Addendum

Additional Option - Civil Detention through Public Protection Orders (Option 5)

Purpose

1 This addendum discusses an additional option to create a new form of civil detention order to be called a public protection order.

Public protection orders

2 Under a public protection order the High Court would be able to order the detention of an offender who, having completed a finite prison sentence for serious sexual or violent offending, would present a very high risk of imminent and serious sexual or violent offending.

3 Public protection orders are very similar to civil detention described in option 3 (paragraphs 58 – 62) but vary slightly for reasons of practicality.

4 First, public protection orders would be indefinite, rather than fixed, but would be reviewed by the High Court at intervals of no more than five years (moving to no more than 10 years after the second review).

5 Secondly, individuals detained under a public protection order would be detained in separate, secure facilities within a prison precinct, not in a community detention facility. The purpose would remain protective rather than punitive.

6 Thirdly, although the primary determinant of a prospective detainee's eligibility would have to be the psychological and social characteristics, they would also need to have been convicted of an offence punishable by preventive detention.

Analysis of the options

7 We have analysed public protection orders against the same criteria used for the other four options:

	Public Protection Orders
Public safety	Virtually no risk to public safety The offender would be detained in prison precincts.
Rights Issues	Significant impact Public protection orders apply to people already convicted of, and punished for, a criminal offence. This option therefore raises similar human rights issues to continuing detention.
Cost of detention	Relatively low The average cost of detention is likely to be higher than in prison due to a lack of scale. The average cost will be less expensive than option 3 because it will be located in prison precincts and able to use prison resources.

	Public Protection Orders
Other agency costs	Moderately expensive High court review required every five years. Annual reviews by a separate panel of the Parole Board. Legal aid cost in 2012/13 would be $56,481 increasing to $71,079 in 2013/14.
Implementation	Implementation is likely to be faster than option 3 (which would require new facilities). It will not be as fast as continuing detention because it will require some modification to the purpose of existing facilities.

Human Rights

8 Public protection orders raise human rights issues similar to continuing detention. In particular, its application only to individuals who have been imprisoned for a serious criminal offence, or subject to the most intensive form of extended supervision order, could lead courts and international human rights bodies to determine that the order is criminal rather than civil. If so, the proposal may be found to infringe the rights to not be subjected to retroactive penalties or double jeopardy affirmed in section 26 of BORA and articles 14 and 15 of International Covenant on Civil and Political Rights.

9 Limiting the orders solely to offenders risks the detention being found to be arbitrary, irrespective of whether or not it is considered civil or criminal, in breach of s 22 of NZBORA and article 9 of the ICCPR. It is difficult to argue that, as a matter of principle it is necessary to detain offenders who pose this level of risk when those who have not offended but who pose the same risk cannot be detained. Remedies for those arbitrarily detained could include an order for release from detention and/or compensation.

Financial Implications

10 The cost to the Department of Corrections is expected to be greater than the average cost of keeping a person in prison ($91,000 per year) but less than the average annual cost of supervising an offender on the most intensive form of extended supervision ($265,000 per year). The Department of Corrections will seek to use existing capacity to provide facilities, though some adaptation of facilities is likely to be needed. This will be met from within baselines.

11 Initial applications for a public protection order may result in extensive litigation including appeals to the Court of Appeal and the Supreme Court. However, because the person is by definition almost certain to offend if released, or remains in the community, these costs are likely to be offset by avoiding the costs of investigation, prosecution and trial that would be incurred if the person offended.

12 If a public protection order is introduced Crown Law has estimated the additional litigation costs at $225,000 in year 1, $88,000 in year 2 and $21,000 in out years could not be met within baselines for the first two years. The Department of Corrections would meet Crown Law's additional costs from within its baselines.

13 The Ministry of Justice estimates that the short-term legal aid cost in 2012/13 would be $0.056m $56,481 increasing to $0.071m in 2013/14. This estimate is based on the assumption that orders are sought in respect of four people in 2012/13 and six in 2013/14, all requiring legal aid and a psychiatric report. It also assumes that appeals would be heard in the Court of Appeal in all cases and that leave would be granted for one appeal to the Supreme Court.

Conclusions and Recommendations

14 A continuing detention order provides an immediate improvement in public safety, and has a lower cost than other options, but is likely to be inconsistent with the BORA and New Zealand international obligations.

15 The introduction of a civil detention order as described under option 3 would improve public safety and is less likely to breach New Zealand's international obligations, although implementation would be delayed by the time required to build a new facility. Designing legislation that did not reference previous offending and did not detain a larger group than the target group would also be difficult.

16 On balance, public protection orders (option 5) appear to best meet the policy objective. Public protection orders protect the community from future harm from a very small number of high risk offenders who are clinically assessed as being at imminent risk of serious sexual or violent re-offending, by detaining these individuals in a secure facility, under a civil detention order. They target only the group of concern (offenders at the end of a sentence and offenders who have been subject to the most intensive form of extended supervision order) without extending beyond that target group.

17 However, the risks of public protection orders from a human rights perspective are essentially the same as continuing detention. Public protection orders are targeted solely at convicted offenders – rather than being more widely applicable to individuals in the community who display the same characteristics. While this has other civil rights advantages for those who have not yet committed any crime, it contains a link to prior offending, which is not consistent with a civil regime.