New Zealand Law Society
Te Kāhui Ture o Aotearoa

Sentencing (Reinstating Three Strikes) Amendment Bill

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

23 July 2024

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Sentencing (Reinstating Three Strikes) Amendment Bill (**Bill**).

1.2 The Law Society acknowledges the work that has been done to address the concerns raised by the Supreme Court in *Fitzgerald v R* about the previous three-strikes regime.[1] However, the Law Society recommends that the Bill does not proceed. As we set out below, there is inadequate evidence to suggest that a three strikes sentencing regime provides general deterrence or increases public confidence in the criminal justice system. It is not likely to achieve its purposes.

1.3 If the Bill is to proceed, the Law Society's submission sets out drafting and workability concerns that should be addressed before it progresses.

1.4 This submission has been prepared with assistance from the Law Society's Criminal Law and Human Rights and Privacy Committees.[2]

1.5 The submission is set out as follows:

(a) Background to the Bill

(b) Likely efficacy of the regime

(c) Key Concerns

(d) Proposed amendments to the Sentencing Act 2002

(e) Proposed amendments to the Parole Act 2002

1.6 The Law Society **wishes to be heard** on this submission.

2 Background

2.1 The Bill is an omnibus Bill that seeks to address two core policy concerns. They are:

(a) Effective deterrence and denunciation of serious repeat offending; and

(b) Improving public confidence in the justice system.

2.2 The explanatory note states that the Bill "will increase certainty for offenders about the consequences of reoffending and may reduce offending through incapacitation and deterrence".

2.3 This Bill forms part of broader law and order reforms that have been signalled, including additional changes to the Sentencing Act 2002. However, there is presently no information through which to gauge how this Bill may complement or counter some of the other planned reforms, or whether those reforms could negate the perceived need for the reintroduction of a three strikes regime.

---

1 *Fitzgerald v R* [2021] NZSC 131.

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

2.4 The Law Society considers it crucial to assess whether the Bill's policy objectives will be met and if there is sufficient evidence to support the effectiveness of the proposed regime in achieving these objectives. This should be a primary consideration when developing legislative initiatives. Advice from the Legislation Design and Advisory Committee (LDAC) Guidelines states that "achieving the policy objective should drive the design of the legislation and all the detailed decisions made when drafting" and that "legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective."[3] We address this in more detail below.

3 Likely efficacy of the regime

Effective deterrence and denunciation of serious repeat offending

3.1 Both academic research and data from the previous New Zealand regime call into question the likely effectiveness of the proposed three-strikes regime in meeting its intended objective of deterring serious crime.

3.2 The 2018 Evidence Brief prepared by the Ministry of Justice found: "There is no substantial international or New Zealand evidence on the effect of three strikes laws on crime. The existing evidence is mixed, and more robust research is needed to understand the true effects of these laws."[4] The Cabinet Paper circulated together with the Bill suggests that mandatory sentencing regimes have limited impact on the reduction of offending, and carry adverse consequences to rehabilitation of offenders.[5]

3.3 A report from the Ministry of Justice to the Justice Select Committee considering the Three Strikes Legislation Repeal Bill 2022, on the impact of the previous three strikes regime, found "no consistent pattern to changing crime rates before and after the three strikes regime was introduced in 2010" and only a 1.4% reduction in the rate at which offenders progress from a first to second strike. This indicated no more than a very minor deterrent effect that is lost between second and third strikes.[6]

3.4 The report also clarifies that a crime reduction pattern cannot be linked to the three-strikes regime. As indicated in Figure 1 below, taken from the report, serious assaults increased by 75% between 2013 and 2020.[7] The recorded rate of sexual assaults is also shown as increasing at a more rapid rate between 2010 and 2020 than in the ten-year period from 2000 to 2010.[8]

---

3 Legislation Design Advisory Committee, Legislation Guidelines (2 November 2021) at 2.1 and 2.3.

4 Ministry of Justice "Three Strikes Law Evidence Brief" (December 2018) < https://www.justice.govt.nz/assets/Three-Strikes-Law-Evidence-Brief.pdf >

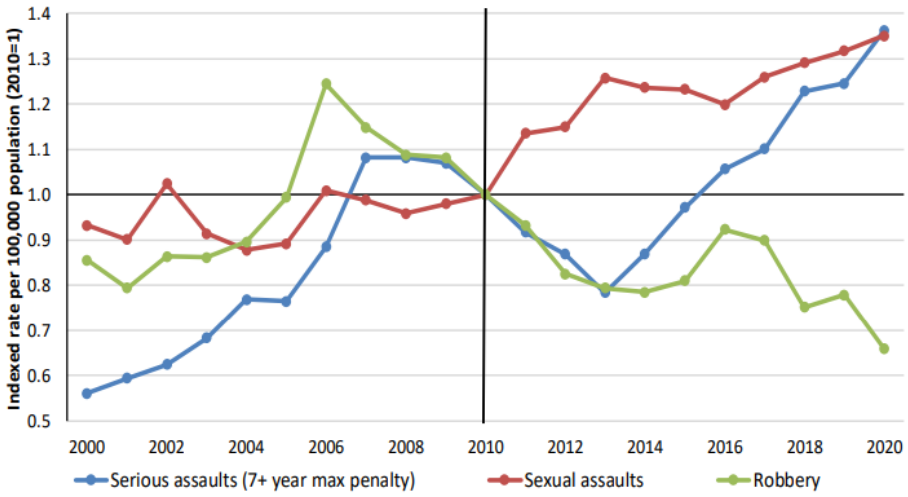
5 Cabinet Office Circular "Proactive Release – Policy decisions: Reinstating three strikes sentencing law" (11 June 2024) CO (23) 04 at [46] – [48].

6 Ministry of Justice "Three Strikes Legislation Repeal Bill: Impact of the three strikes regime on rates of serious crime" (2022) at [5].

7 Ministry of Justice, above n 6 at [9].

8 Ministry of Justice, above n 6 at [8].

Figure 1: Indexed rate of recorded offences per 100,000 population (2010=1) for serious assault, sexual assault and robbery three strikes offences: 2000 to 2020



3.5 While the Bill does propose an amended three strikes regime, the changes made do not alter the premise of the regime, nor address or improve its likely efficacy.

Certainty of Punishment and Deterrence

3.6 Based on current research, it is questionable whether the aim of increasing the certainty of punishment for offenders and thereby deterring future offending can be achieved. It appears to be presumed that violent offenders will consider the likely impact of the three strikes regime, before 'deciding' to offend.

3.7 Data on the issue of violent offenders' decision-making about offending is limited, but the information available does not suggest that potential penalties are taken into account or seriously regarded, as is presumed in rational choice theory. Rather, there appears to be an element of an immediate affective component that drives decision-making, which is not cognitive in nature.[9] The affective model discusses and considers the emotive knee-jerk responses that occur in fast-moving situations that are prevalent in many cases of serious offending.[10] This is consistent with lawyers' experiences in the courts on a daily basis. It is particularly true for individuals who are affected by addiction or mental health issues and, perhaps more commonly, acting in a state of high levels of anger or fear.[11]

3.8 Further, a meta-analysis from 2017 that reviews policy changes that affect levels of criminal deterrence identifies that the most effective deterrent measures are those that are immediate and salient, such as targeted policing and increasing policing manpower.[12] Sentencing regimes are not generally very effective at deterring prospective offenders.

---

9 Jean-Louis van Gelder and Reinout E. de Vries "Rational Misbehaviour? Evaluating an Integrated Dual-Process Model of Criminal Decision-making" (2014) 30 Journal of Quantitative Criminology 1 at 4-5.

10 Above n 9 at 5 and 21.

11 Ministry of Justice, above n 6 at [21].

12 Aaron Chalfin and Justin McCrary "Criminal Deterrence: A review of the Literature" (2017) 1 Journal of Economic Literature 55 at 37. The review also attempts to separate the bi-product of the incarceration effect.

While there may be some deterrent effect for those sentenced under the regime (for example, once a person has been sentenced under their first strike), even then the effect is minimised between the offender's second and subsequent experiences of the regime.[13] That is, they *may* be deterred from committing a second-strike offence, but not from a third or subsequent offence. This suggests any deterrent effect applies only to that offender, and there is no deterrent effect across prospective offenders in general. A further point the review raises is that a constrained labour-employment market (alongside wages) is one of the most strongly linked deterrent measures. In areas with weak labour markets with low wages and high unemployment, there is often an increase in crime and decrease in deterrence.[14]

3.9 It is also necessary to consider the typical development of the human brain and how that process affects the decision-making skills and risk assessment process in young adults (aged 18 to 25). Even in a brain that develops normally and is not stunted or delayed by the individual's life circumstances, upbringing and socioeconomic positioning, rational and considered risk assessment is one of the last skills that a developing brain acquires.[15] Individuals who have mental impairments such as Foetal Alcohol Spectrum Disorder, neurodiversity, or traumatic brain injuries are particularly likely to lack the ability to recognise and evaluate the consequences of conduct which may be criminal.

3.10 The proposed limitation of the regime to defendants aged 18 or older at the time of the commission of the offence is a positive move and is supported by the Law Society. However, the risk remains that stricter penalties more likely to be imposed, as a result of the Bill, on young adults aged 18 to 25 whose brains are not yet fully developed and able to assess risks adequately. The Law Society acknowledges the 'manifestly unjust' proviso, but notes that it sets a high threshold and may be an inadequate safeguard.

Incapacitation

3.11 The Explanatory Note to the Bill states that the three strikes regime may 'reduce offending through incapacitation and deterrence.' Simply put, incapacitation means that offenders who are serving long periods incarcerated cannot commit crimes because they are not free in society to do so. However, evidence suggests that this is a false dichotomy where incapacitation simply defers the repeat offending to a later date.[16] Overall, the RIS identifies that any incapacitation effect is likely to be small.[17]

---

13 Chalfin and McCrary, above n 12 at 26 and 27 and 38.

14 Chalfin and McCrary, above n 12 at 33, 35 and 38.

15 Social Wellbeing Agency "Te Atatū – Insights" (September 2023); Renee Zhang "Hanging off a Cliff Edge: The Case for a Welfare-based Approach for Young Adult Offenders with Care and Protection Backgrounds" (2022) 9 Public Interest Law Journal of New Zealand 148; Lambie "It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand" (12 June 2018) Office of the Prime Minister's Chief Science Advisor; Zoey Henley "Brain gain for youth: Emerging trends in neuroscience" (2016) 4 The New Zealand Corrections Journal 1 can be found at: < Brain gain for youth: Emerging trends in neuroscience | Department of Corrections >

16 Jennifer E. Copp "The Impact of Incarceration on the Risk of Violent Recidivism" (2020) 103 Marquette Law Review 775 at 787 and 790; RIS at [50] – [51].

17 RIS at [50] - [51].

3.12 Further, New Zealand already has, in a sentence of preventative detention, a very effective regime for the incapacitation of persistent sexual or violent offenders.

Public confidence

3.13 Finally, we note that the Bill is intended to increase public confidence. The Law Society agrees that public confidence in our justice system is an important aim.

3.14 However, the Regulatory Impact Statement (**RIS**) identifies numerous difficulties in making any conclusions about public confidence as a direct result of measures such as the proposed regime. This is an inherently fraught area of research and unlikely to be able to be clearly concluded either way. Some reports suggest that public confidence aligns more closely with media reporting of criminal events and case outcomes than with particular sentencing initiatives.[18]

3.15 Further, given that it seems unlikely the regime will effectively deter offending, any increased public confidence may be misplaced. There is also a risk of undermining public confidence in the justice system, through restricting the discretion of judges to respond to individual circumstances. More broadly, confidence may be undermined through the pursuit of justice policy for which there is insufficient evidential support.

4 Key Concerns

Disproportionality and manifest injustice

4.1 As the Court of Appeal has noted in two recent cases, it was an inherent feature of the previous three strikes regime that there would be conflict between that regime and normal sentencing principles.[19] The Bill takes some steps to address this, but retains the key feature that judges are to impose more severe sentences for a second and third strike than would otherwise be imposed for an offender who had no strike convictions, but otherwise similar aggravating and mitigating factors.

4.2 Further, mandatory minimum sentences undermine the existing purposes and principles of sentencing, including that the sentence imposed ought to be the least restrictive outcome appropriate in the circumstances.

Disproportionate impact on Māori

4.3 The Law Society notes Crown Law's advice to the Attorney-General on the consistency of the Bill with the New Zealand Bill of Rights Act 1990 (Bill of Rights). This advice concludes that the Bill is not inconsistent with the right to freedom from discrimination, protected by section 19 of the Bill of Rights.

4.4 As noted in the Law Society's Gangs Legislation Amendment Bill submission, our suggestion is not that the proposed measures would meet the current legal test for infringement of section 19, but rather that the provisions will in practice likely apply to groups differently, with disproportionate effect.

---

18 RIS at [65].

19 *Pearce v R* [2024] NZCA 60 at [85]; *Ratima v R* [2024] NZCA 254 at [52].

4.5 The RIS is clear that the application of the previous regime did disproportionately impact Māori, more than as represented by their proportion of the population, or even as represented by their disproportionate representation in the prison population.[20] This evidence necessitates careful consideration of how the regime is adjusted to avoid that disproportionate impact.

4.6 Given the evidence of the disproportionate impact of the previous regime, the Law Society is concerned by the lack of consultation with Māori throughout the development of the Bill. We note the concerns expressed in the Departmental Disclosure Statement (DDS) and RIS.[21] Consultation before drafting the Bill could have identified alternative options which may better mitigate the disproportionate impact of the Bill upon Māori. The lack of consultation exacerbates the risk that the proposed adjusted regime will repeat the disproportionate impact on Māori.

5 Proposed Sentencing Act 2002 amendments

5.1 Clause 7 inserts the proposed sections of the Sentencing Act 2002 relating to the additional consequences for three strikes offending, from proposed section 86J to 86X.

Section 86J

5.2 The Law Society supports the introduction of a sentencing threshold for strike consequences. One objection advanced under the previous regime, based on experience from the American experience, was that conviction for offending of only minor seriousness could result in a strike conviction and therefore minor offending could lead to grossly disproportionate sentences. *Fitzgerald v R* showed that this could and did occur in Aotearoa New Zealand. The schema of this proposal will greatly reduce the risk of truly trivial offending resulting in such unreasonable consequences.

5.3 However, the Law Society recommends that further consideration should be given to the threshold of a sentence of more than twenty-four months imprisonment. The reasons for setting the threshold at this level are unclear. It brings within its ambit offenders who would normally be given leave to apply for substitution of sentence to home detention. It includes, in other words, comparatively non-serious offending, where sentencing discretion is normally available.

5.4 This would mean, for example, that in the case of a second-strike offence, the difference of only a month or less in the sentence may be the difference between serving twelve months home detention and twenty-five months imprisonment without parole.

5.5 There is a real risk that setting the threshold too low may lead to other kinds of unintended consequences. Specifically, some defendants may plead guilty even if they are innocent because the standard guilty plea discount (25%) will eliminate the risk of a strike conviction and increase the likelihood of home detention.

5.6 A further risk may be that charging practices will be distorted by prosecutors avoiding strike offences proximate to the threshold. In practice, this may result in increasing plea bargaining and using charging combinations. Such an impact is likely to further increase

---

20 RIS at [55] – [57].

21 DDS at 3.2; RIS at [30].

court delays and is likely to undermine public confidence in the administration of criminal justice, contrary to the policy aim of the Bill.

5.7 The Law Society recommends increasing the threshold to at least five years. This would serve the purposes of the Bill without capturing offences that sit on the bridge between home detention and imprisonment. It would ensure that the offending captured is truly serious repeat offending.

Section 86Q

5.8 Proposed section 86Q requires any proceeding against a defendant charged with a third strike offence to be transferred to the High Court. All sentencings for third strike offences are to be by High Court judges. It is unclear what the rationale for this is. There is nothing in the Bill's explanatory note or the RIS to indicate why the District Court may not consider third strike offences. The Departmental Disclosure Statement records that the Ministry of Justice was not consulted about this proposal (at [3.4.1]).

5.9 Prior experience under the repealed strike regime indicates that a substantial proportion of such trials will involve multiple defendants facing a range of charges, and only some of the defendants will be facing more than a first-strike conviction.

5.10 To sever the trials of third strike defendants from others facing related charges under section 138 of the Criminal Procedure Act 2011 could pose real problems for the prosecution; and may severely impact complainants and other witnesses who would need to give evidence multiple times. It would also significantly increase the resources needed in terms of personnel, including judges.

5.11 However, the alternative, to try multiple defendants in a single High Court trial, where unreasonable delays in reaching trial already exist, could increase the time to resolution of cases substantially.

5.12 The Law Society recommends that this section is removed to allow sentencing by a District Court judge at third strike unless the trial is one which is to be heard in the High Court in the usual course of events.

Section 86T

5.13 Clause 7 inserts a new section 86T, designed as a guidance note to judges about how and when to apply the manifestly unjust exception. It states:

> 86T Guidance on application of manifestly unjust exception
>
> (1) This section applies to a court when determining whether it would be manifestly unjust to impose a sentence, or make an order, -
>
> (a) Under section 86O, 86P, 86R, or 86S; or
>
> (b) In the case of an offender who is convicted of a murder that is a stage-2 offence or a stage-3 offence, under section 102.
>
> (2) The court must give due consideration to –
>
> (a) Denouncing the conduct in which the offender was involved; and
>
> (b) Deterring the offender or other persons from committing the same or a similar offence; and

(c) Protecting the community from the offender.

(3) The court must not determine that imposing the sentence or making the order would be manifestly unjust merely because –

(a) Of the applicability of any 1 or more of the mitigating factors listed in section 9(2); or

(b) It would be disproportionate, unless it would be grossly disproportionate.

5.14 The statements in subsection (2) indicate that Parliament intends those three aims of sentencing to have priority. Given the sentencing judge would be dealing with a recidivist serious sexual or violent offender, it is unlikely that the judge would not have those firmly in mind in any case.

5.15 As currently drafted, it is not clear that the 'safety valves' (as described in Crown Law's advice) are sufficient to avoid a breach of section 9 of the Bill of Rights, particularly where consideration of section 9(2) mitigating factors is expressly precluded from being appropriately assessed. The inquiry undertaken by courts to determine the existence (or otherwise) of manifest injustice is presently an "intensely factual inquiry".[22] That factual inquiry will necessarily require consideration of factors that happen to also be listed as mitigating factors in section 9(2), for example, diminished intellectual capacity. The practical effect of proposed subsection 86T(3)(a) will be to prevent that inquiry from taking place. Further, it is entirely possible that one or two factors, which happen to also be mitigating factors in section 9(2), will be so significant as to render the mandatory sentence manifestly unjust.

5.16 *R v Harrison* provides a clear example of the need for section 9(2) assessment in determining manifestly unjust outcomes and sets out a comprehensive framework for determining what is 'manifestly unjust,' including consideration of 'grossly disproportionate' sentencing outcomes. A full bench of the Court of Appeal determined that the High Court correctly applied the manifestly unjust provision in the three-strikes regime in two cases of sentencing a second-strike murder offender (*Turner* and *Harrison*) by including section 9(2) mitigating factors. It is a high threshold, and the Court of Appeal stated that 'the case for a finding of manifest injustice must be clear and convincing.'[23] We consider section 86T(3)(a) is unnecessary, and risks undermining the changes made to ensure the three strikes regime does not result in manifest injustice.

5.17 Further, the Law Society considers subsection (3)(b) adds no value. A grossly disproportionate sentence will necessarily be manifestly unjust, and vice versa.

5.18 The Law Society recommends that, if the Bill proceeds, section 86T(3) is removed.

Section 86U

5.19 Proposed section 86U provides that any strike warning continues to have effect for the life of the offender unless the relevant conviction or sentence is quashed or varied by a court at a later date.

---

22 *R v Harrison* [2016] NZCA 381 at [108](f).

23 At [108](b).

5.20 The Law Society recommends that consideration is made to including a sunset or spent conviction clause, under which a strike conviction could be regarded as spent after a significant period of non-offending. For example, a first strike offence could be disregarded if the individual has not been sentenced to a term of imprisonment or home detention for seven to ten years after the expiry of the penalty imposed for the first strike offence.[24]

5.21 This may go some way to alleviating the risk of a period of youthful offending causing unreasonable results where an individual is guilty of a single episode of offending after a long period of lawful behaviour.

Additional matters

Effect of a pardon

5.22 Proposed section 86U(2) provides for the erasure of a strike following a successful appeal but does not cover the position where a convicted offender is pardoned for some or all offences for which strike warnings were given. It is recommended that a suitable provision for such rare cases is made.

Offending in another jurisdiction

5.23 The Bill implies that strike offences must have been committed against New Zealand law, whether they occurred in New Zealand or elsewhere, and resulted in a penalty imposed by a New Zealand court. Clarifying this explicitly may help the public understand why an offender with prior convictions for similar offences in other countries is not subject to the proposed regime. Counting overseas convictions as equivalent is not recommended due to differences in the definitions of offences and the criminal justice process compared to New Zealand.

6 Parole Act 2002 amendments

6.1 Clause 23 inserts Schedule 3 which provides amendments to the Parole Act 2002. The Bill indicates that these provisions will be retrospective, applying back to the date of the Three Strikes Legislation Repeal Act 2022 (16 August 2022). The Crown Law advice about the consistency of the proposed regime with the Bill of Rights examines the issue of retrospectivity in regard to the imposition of a sentence of life imprisonment without parole for murder. It concludes that this change does not affect anyone's rights, as it is simply meant to fix a drafting error from the repeal.

6.2 The information available on this matter is limited. It is not clear that any individuals will be practically affected. That is, it is unclear whether any individuals who were convicted of murder and sentenced to life imprisonment without parole under a third strike became eligible to seek parole during that sentence as a consequence of the Three Strikes Legislation Repeal Act. No individuals sentenced under the former three strikes regime were resentenced upon its repeal – they continued to serve the sentence received, without a parole eligibility date.

---

[24] Seven years, for example, would align with the time frame of non-offending required by the Criminal Records (Clean Slate) Act 2004.

6.3 Nonetheless, the Crown Law advice appears to suggest there may be relevant affected individuals, notwithstanding that it considers their rights are unaffected. If individuals were afforded a lesser penalty, whether by mistake or not, it may be considered a significant step to retrospectively increase that. As such, the Law Society recommends that the Select Committee seek to better understand the extent and nature of these issues, their function in terms of the parole process, and carefully consider any impact on any affected individuals and their rights.

Frazer Barton
President