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Criminal injustice and the proposed "three strikes" law

EXECUTIVE SUMMARY

This paper analyses the Sentencing and Parole Reform Bill and argues that Parliament should not enact it. The Bill sets out a "three strikes" sentencing regime, which imposes mandatory consequences on certain repeat violent offenders. There is no dispute that serious, repeat violent offenders deserve serious punishment; public concern about such offenders is justified. However, this paper argues that the Bill will not achieve its objectives and is likely to punish many more minor offenders unjustly.

The legislation lists just over 40 qualifying offences. On a first conviction for a qualifying offence (strike one), the court issues a first warning to the offender. On a conviction for a qualifying offence committed after a first warning (strike two), the court issues a final warning and the offender is ineligible for parole. A conviction for a qualifying offence committed after a final warning (strike three) has two consequences. First the court has to sentence the offender to the maximum for that offence: this is mandatory. Second the offender is not eligible for parole unless the court is satisfied that this would be manifestly unjust.

For the following reasons, Parliament should not enact the Bill.

- The Bill departs from the central principle of just sentencing, which is proportionate response to wrongdoing. The "three strikes" regime, to some extent on strike two and especially on strike three, ignores the nature of offences, which include conduct that ranges from the relatively minor to the very serious. The regime ignores almost all the aggravating and mitigating factors relevant to assessing the relative gravity of a criminal wrong. The application of the regime, especially at strike three, will often be unjust. Specifically, the regime will often impose grossly disproportionate punishments on relatively minor offences. It will also fail to distinguish relatively minor and very serious offences, which is unjust to victims as well as to offenders.
- The application of the regime is unlikely to deter would-be offenders in general, or the offender with one or two strikes in particular.
- There is no need to cancel eligibility for parole to establish that parole is a privilege and not an entitlement.
- Cancelling eligibility for parole for all second strike and most third strike offenders will not deter offenders but will undermine incentives for prisoners to reform or to refrain from further offending in prison.
- The regime will remove the incentive for offenders facing a strike three conviction to plead guilty (or to cooperate with authorities), which will sharply increase trial costs and impose unnecessary trauma on victims.
- The regime has a substantial fiscal cost, which would be better spent on (among other things) victim support, intensive policing, and improving parole supervision.

- There are more effective and promising ways to address recidivism, which include increased use of existing sentences such as preventive detention, principled reform of parole eligibility, and "front-loading" of criminal justice interventions to achieve maximum deterrence and rehabilitation.

The Bill is now a Government Bill and seems likely to be enacted in some form, despite the compelling arguments against it. If Parliament is to proceed to enact the Bill, it should at the very least be amended to:

- Authorise judges not to impose the maximum sentence on strike three if this would be manifestly unjust (this amendment would bring the legislation into line with the assertions being made by the ACT Party).
- Retain presumptive eligibility for parole, or if this is not done, authorise judges not to order the sentence be served without eligibility for parole on strike two if this would be manifestly unjust.
- Modify what counts as a strike from a conviction for a qualifying offence alone to at least a custodial sentence for a qualifying offence and preferably a custodial sentence of some length, say at least two years.
- Make provision for strikes to lapse over time (perhaps after ten years).
- Make specific provision in strike three sentencing to recognise a guilty plea, allowing judges to discount the maximum sentence by up to 25 percent, depending on when in the trial process the plea is made.
- Authorise the courts not to impose a life sentence for murder and manslaughter if this would be manifestly unjust.
- Specify that some instances of manslaughter (most notably accidents arising out of gross negligence) do not constitute a qualifying offence.

CRIMINAL JUSTICE AND THE PROPOSED "THREE STRIKES" LAW

The Detail of the Legislation

The Sentencing and Parole Reform Bill was introduced to Parliament as an ACT Party measure. In its initial form it provided for the imposition of life sentences, with a minimum non-parole period of 25 years, on third strike offenders. The Government decided to adopt the Bill and to use it as the vehicle to give effect to its campaign pledge to increase sentences on the worst murderers and to make the worst violent offenders ineligible for parole. In January 2010, the Minister of Police, the Hon Judith Collins, announced changes to the Bill agreed by Cabinet and became the Minister responsible for the legislation.[1] The Law and Order Select Committee issued its Final Report on the Bill on 26 March 2010. The Bill, amended to reflect the changes agreed by Cabinet and amended further in response to the Committee's deliberations, is to be debated in the House in the near future. This paper analyses and critiques the Bill as proposed by Cabinet and amended by the Committee.[2]

We note at the outset that there is reasonable and justified public concern over the problem of serious repeat violent offenders. The question is not whether these offenders deserve severe punishment—they do. It is also not a question of whether public safety is important—it is. And there is no dispute that victims deserve our compassion and our best endeavours to make sure that others do not suffer in the same way. But we believe there are serious question marks hanging over the proposed legislation, because of its potential to punish unjustly and its likely inability to achieve its goals. To see why, it is necessary to begin by setting out the details of the proposed scheme.

The proposed legislation ratchets up penalties on certain repeat offenders. The legislation sets out one regime for murder and another for other offences, with special provision for the sentencing of manslaughter. The stated rationale for the legislation is that it protects the public from dangerous offenders and maintains the confidence of victims and the public in the criminal justice system.[3] Leading supporters of the legislation, including the ACT Party and Police Minister Judith Collins (the Minister responsible for the legislation), also argue that it will deter repeat offending.[4]

The legislation specifies a list of over 40 qualifying offences, a list that includes many well-known violent and sexual offences (for example, murder, manslaughter, rape, robbery, aggravated robbery, aggravated burglary, indecent assault, wounding with intent to cause grievous bodily harm, wounding with intent to injure).[5]

On conviction for a first qualifying offence, the judge issues a first warning (strike one).[6] The offence must have been committed when the offender was over-18 and post-commencement, which means that the legislation is not retrospective.[7] If an offender is convicted for a qualifying offence committed after a first warning, then the judge is to:[8]

(a) issue a final warning (strike two); and
(b) order the sentence be served without parole (there is no discretion in this respect).

If an offender is convicted for a qualifying offence committed after a final warning (strike three) the judge is to:[9]

(a) sentence him or her to the maximum for that offence; and
(b) order it to be served without parole, unless this would be "manifestly unjust."

The third strike sentence thus varies by offence: seven years' imprisonment for indecent assault,[10] ten years for robbery,[11] fourteen years for kidnapping,[12] 20 years for rape,[13] or life for manslaughter.[14]

Note that although the judge has discretion not to order the sentence be served without parole if satisfied that it would be manifestly unjust to make that order, imposing the maximum sentence is mandatory. There is no discretion about sentence length for a third strike offence. The legislation makes this quite clear, per proposed section 86D:

> *(2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.*
>
> *(3) When the Court sentences the offender under sub-section (2), the Court must order that the offender serve*

> *the sentence without parole unless the Court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order.*

Note that the proviso "unless the Court is satisfied that … it would be manifestly unjust to make the order" quite clearly applies only to subsection (3), to the making of an order that the sentence be served without parole. If the judge thinks it manifestly unjust to make that order, and so declines to make it, the ordinary rules of parole eligibility apply, per the Parole Act 2002.

The limited scope of the "manifestly unjust" exception is important. It is simply not the case, as some have publicly maintained, that the judge has authority not to impose the maximum sentence if he or she thinks it manifestly unjust. The ACT Party in a widely distributed pamphlet has stated:[15]

> *The judge sentencing a Strike Three offender will have no option but to sentence the offender to the maximum sentence. The only exception is if the judge determines it would be 'manifestly unjust' to do so.*

This claim is quite plainly wrong.

Note further that "manifestly unjust" is not defined in the Bill but is used elsewhere in the law as a very strict test.[16]

If the third strike conviction is manslaughter, the court must impose a life sentence but does not have to order the sentence be served without parole. Instead, the court has to impose a non-parole period of at least 20 years unless this is manifestly unjust, in which case the period must be at least ten years.[17]

Note that an offender may accumulate "strikes" for quite different offences: indecent assault followed by robbery followed by wounding with intent to injure, for example.

An example may help clarify how the legislation works. An offender is convicted of indecent assault, receives a first warning and is sentenced to one year in prison. This is strike one. He subsequently commits and is convicted of robbery, receives a final warning and is sentenced to four years prison without any eligibility for parole. This is strike two. He then subsequently commits and is convicted of aggravated burglary. This is strike three and so the court sentences him to the maximum term of imprisonment for that offence, which is fourteen years in prison, and makes an order that he is to be ineligible for parole.

This example and the "three strikes" slogan itself may suggest that a third strike is always an offender's third qualifying conviction. However, an offender may commit several qualifying offences and still receive only one strike. What counts as a strike is the fact of a warning in court on conviction. A subsequent strike requires offending after having received a warning. This means that an offender who is convicted of one robbery, for example receives a first warning (or a final warning if he already has a first warning) but so too does an offender who is convicted of seven robberies. The multiple offences do not constitute multiple strikes—more than one offence can only constitute more than one strike if one or more takes place *after* a first or final warning. Therefore, a serial rapist who is convicted of raping ten women will receive a first warning. This is relevant to the claim that those on strike three are necessarily "the worst of the worst." The regime may not pick out the worst serial offenders. And some offenders on their third strike may be less apt to be termed repeat violent offenders than many who are on their second or even first strike.

The regime is different in respect of murder. The ordinary law is that murder is punished by a life sentence unless this is manifestly unjust.[18] If the court imposes a life sentence, it must impose a minimum non-parole period of at least ten years,[19] or in certain especially severe cases of at least seventeen years.[20] Under the proposed regime, if an offender commits murder after a first or a final warning (strike two or strike three), then the ordinary law no longer applies.[21] Instead, on strike two, the judge is to impose life without parole unless manifestly unjust. If this is manifestly unjust, the judge is instead to impose life with at least ten years without parole, or seventeen years in especially severe cases.[22] If the murder is a third strike conviction, the judge is to impose life without parole unless this is manifestly unjust. If it is manifestly unjust then the judge is instead to impose life and a minimum non-parole period of at least 20 years unless that too is manifestly unjust. If it is manifestly unjust then, as with second strike murder, the minimum is ten years or seventeen years in especially severe cases.

There are a few other features of the legislation that are worth noting. Strikes do not lapse over time: an offender's first or second strike could be 40 years ago. The courts cannot impose a third strike maximum

cumulatively on any other sentence.[23] The legislation authorises, but does not require, judges to impose a sentence of life without parole for murder before a first or final warning.[24]

Retribution and proportionality

To assess the proposed legislation one must consider the purposes of sentencing. The central purpose of just punishment is retribution: the law responds to the wrong the offender has done and restores the just order he or she disrupted.[25] Proportionality is implicitly affirmed by section 8 of the Sentencing Act 2002, which lists a number of factors relevant to sentencing. Among other things, these factors require the courts to consider the details of each case, and to tailor punishment accordingly.[26] In other jurisdictions it is commonly regarded as the primary rationale for sentencing, subject to the application of other sentencing rationales in defined situations.[27] The guiding question then is what this offender deserves for this offence. Retribution means judging and punishing the wrongful choices offenders make. The law should punish offenders equally, so that punishment is tailored to—is proportionate to—what the particular offence and offender deserve. It follows that consistency in sentencing is morally required. Our sentencing law should, to the extent that this is possible, treat like cases alike. Two offenders who make the same wrongful choice should be punished equally.

Retribution justifies punishment, but it also limits it.[28] Justified punishment must fit the crime, it must be proportionate to the wrong done. Other purposes hinge on retribution: we choose the means of just punishment with an eye to (a) deterring others, (b) safeguarding the public and (c) reforming the offender. One cannot justly do whatever would be efficient to deter others. That is, fair warning of consequences does not justify any or every response.

The law should aim to punish offenders justly—in proportion to the wrong they did—in a way that secures the secondary purposes of punishment if possible. Public or victim confidence is not a distinct purpose of sentencing in its own right. Instead, it is a consequence of just punishment, proportionate to the wrong. The concern of victims or the public about sentencing warrants lawmakers carefully considering whether the law punishes offenders properly. But it would be wrong to punish offenders disproportionately for the sake of public confidence.

Proportionality requires that we punish a person according to what he or she deserves and nothing more. This central principle of sentencing respects rule of law values, and places limitations on state power over offenders. It is also a recognition of the truth that what is done to the criminal is "a very real index to the degree of civilization."[29]

Nature of offences

The proposed legislation purports to be proportionate by making strike three consequences contingent on the relevant maximum sentence rather than imposing a mandatory life sentence. That is, the severity of punishment varies depending on the maximum sentence Parliament has imposed for that particular offence. However, this puts the statutory maxima to a purpose for which they were not designed and for which they are simply not fit—the scheme is at best a parody of proportionality. The proposed legislation is fundamentally at odds with the nature of criminal offences. Each statutory offence picks out some class of acts and imposes a maximum sentence. Judges then assess the particular wrong within that class and choose within the sentencing range. The maximum sentence shapes the range and is a rough proxy to relative seriousness.

It is very important to see that there are often many quite different types of act, of varying degrees of wrongfulness, that fall within the same offence category. For example, robbery might be a street robbery or an organised bank raid/home invasion. Some offences are similar, but one picks out a variant that has a more serious feature. This is the case, for example, with robbery and aggravated robbery, and burglary and aggravated burglary. Robbery is theft with violence or threats of violence;[30] aggravated robbery is robbery that involves grievous bodily harm, more than one person or the use of a weapon.[31] Burglary is unlawful entry intending to commit a crime;[32] aggravated burglary is burglary that involves having a weapon or using something as a weapon.[33] Not every aggravated robbery or aggravated burglary is worse than ordinary robbery or burglary. An unplanned street robbery by

two people (aggravated robbery) may be much less serious than a planned, aggressive home invasion by one person (robbery).

A carefully planned burglary in which the offender targets a frail little old lady, destroys her prized possessions and smears excrement throughout her house is much worse than an opportunistic decision to break into an empty warehouse with a knife (aggravated burglary). Burglary may be worse than aggravated burglary yet it is not a qualifying offence. In addition, many qualifying offences do not involve actual use of violence.

These last two points are significant because they suggest that the legislation's focus on this set of qualifying offences is a problem. The legislation ignores many serious violent and sexual offences, including arson, threatening to kill and bestiality. The legislation focuses on well known, high-profile crimes, but this will create grave disparities in how other serious violent and sexual wrongs are sentenced. Further, the legislation also overweighs the relative gravity of this class of offences. Obviously, serious sexual/violent offences are very serious wrongs. But there are other grave wrongs drug dealing, fraud, blackmail, corruption. Fraud can be worse than robbery—it is often much more calculated, vicious and devastating. There is a tendency in public discourse to treat all "sexual/violent" crimes as if they were one type, all markedly worse than others, as if all were the worst of the worst. But it is a mistake to think "violent and sexual" crimes are a uniquely bad class. We invite distortion if we ratchet up penalties for this whole class, because doing so will underweight punishment for the other classes.

Aggravating and mitigating factors

Our law requires judges to consider certain factors in order to fairly assess and punish the relative wrongfulness of the offender's particular offence.[34] Some factors make the offender's choice more wrongful; others make it less so. What is in question is the relative gravity of the offender's wrong. Some factors relate to the detail of the offence, while others concern the offender and are facts about him or her that mean we should be more or less lenient on him or her than on others.

The following factors, amongst others, may all serve to aggravate the seriousness of the wrong:[35]

- Abuse of a position of trust or authority in relation to the victim.
- Acting out of hatred for the victim's race or religion or other "enduring characteristic."
- The offence relates to the offender's participation in organised crime.
- The impact of the offence on the victim (the extent of the harm or loss inflicted).
- Brazen defiance of the law (offending while on bail or subject to another sentence).
- The offender's previous convictions, specifically their date, frequency and relevance.
- That the offence was premeditated.
- Particular cruelty in committing the offence.
- Efforts to conceal the offending, especially to coerce victims to silence.
- The scale/frequency of other offences for which the offender is being sentenced now.

The following factors may all serve to mitigate the wrong:[36]

- That the offender had limited involvement in the offending (he was a minor party).
- The conduct of the victim.
- The age of the offender.
- The offender's diminished intellect or understanding.
- The offender's previous good character.
- That the offender pleaded guilty, especially early on in proceedings.
- Evidence of remorse and any offer or arrangement by the offender to apologise to and to make amends with the victim (and the victim's response).
- Cooperation with the authorities.

All these factors are highly relevant. Fairness to the offender and to the victim requires that they be considered. It is unfair to ignore a particular offender's

limited involvement in an offence, his remorse (he may have turned himself in), and his apology or reparation to the victim. More obviously, it is unfair to the victim to ignore this particular offender's breach of trust or particular cruelty or premeditation. These factors should be acknowledged and graver offences punished more severely. It is sound then to punish a carefully planned and extremely violent armed robbery more severely than a street robbery by two people where violence is only threatened, but never used.

However, the "three strikes" law treats all of this as irrelevant. It ignores the detail of the wrong, the extent of the offender's culpability and so on. This is unfair to offenders and to victims (those who suffer more severe wrongs are, other things being equal, entitled to see those who wronged them punished more severely) and will undermine public confidence. It is also the reason why "three strikes" laws and other mandatory minimum sentencing models have been severely criticised in other jurisdictions, particularly by judges, who are concerned that they unduly restrict judicial discretion and lead to unjust sentences.[37]

The arbitrariness of the scheme

The fundamental failure of the scheme is to ignore the detail of the offender's wrong and to treat each offence in the same way. It is not true that all one needs to know to sentence an offender justly is a very simple criminal history—the fact of his or her conviction after a first and final warning. It is arbitrary to ignore all mitigating and aggravating factors other than criminal history. Further, it is arbitrary to treat criminal history in this simple, reductive way, ignoring all relevant detail (about what was done, when, and how). A relatively minor indecent assault and a very serious rape are each one strike, yet are of vastly different gravity. A street robbery and a series of vicious armed robberies count the same too. Further, it is wrong to take previous convictions to warrant treating this offence as if it were the most serious instance possible. Prior convictions may be relevant to the wrongfulness of the offender's choice. But what we must do is still punish this particular choice. The offender has already been punished for his or her first and second strikes.

The application of the legislation will yield unjust and anomalous outcomes. Specifically, there may often be:

- Much harsher punishment for the same offence on third strike than on second.
- Much harsher punishment for a less serious offence on third strike than for a much more serious offence on second strike.
- Identical punishment for offences of radically different seriousness.

It will be especially stark when one party (maybe the ringleader, who plans all, and is especially violent or cruel) receives a lesser sentence than another party to the offence (who pleads guilty, and cooperates) because the latter was on a third strike and the ringleader was not. If offences are treated in this undiscriminating way, so that a robbery is a robbery, actual wrongs are ignored and sentences become unjust. This will be clear to offenders, victims and the public.

Examples of injustice

It is worth considering possible cases in which the legislation will yield injustice. Setting aside for now the strike two consequence of no parole, with its potential for injustice,[38] we will instead focus on strike three consequences, namely imposition of the maximum sentence, and presumptively no parole eligibility. For each example, assume an offender has two relatively minor qualifying convictions, say an indecent assault (a drunken grope), wounding with intent (a pub brawl), or robbery (an unplanned street robbery with no actual violence) in which there were few if any aggravating factors and many mitigating factors. Assume further that in this third strike case, the offender entered a guilty plea early on in the proceedings and that he or she has shown remorse and made reparation to the victim. (Note that the third conviction may be very many years after the first two convictions.) For each example of a third strike offence, consider whether the sentence is just.

Example one:

A single count of indecent assault (a drunken grope) receives seven years' imprisonment. This could conceivably be higher than a sentence for rape (with guilty plea),[39] and is to be served without parole.

Example two:
An unplanned street robbery with no actual violence receives ten years. This would be to treat this as if it were as bad as or worse than a vicious, violent, planned invasion of a home or business with no guilty pleas or remorse. But for the proposed legislation, we would treat the latter as vastly more serious.

Example three:
A street robbery by two persons (therefore an aggravated robbery) with no actual violence or planning, receives fourteen years. But for the proposed legislation, the starting point would be three years.[40] Again, this should not be treated like a violent, planned, devastating armed robbery.

Example four:
Breaking into an empty warehouse with a knife or crowbar (aggravated burglary) without using violence or perhaps even inflicting any loss receives fourteen years. Recall that burglary may be much more invasive, hurtful and malicious yet the maximum for burglary is ten years[41] and it is not in this scheme at all.

Example five:
The courts recognise three types of grievous bodily harm, depending on context and injuries.[42] What might otherwise be a less serious type (with a starting point for sentencing of three years) must be treated as if it were the most serious, with significant aggravating factors and no mitigating factors. A woman who in a rage strikes and injures the man who abused her children must be sentenced to fourteen years, as if she were a mob enforcer who beat a witness half to death in order to corrupt a trial.

These examples are shockingly unjust. Yet the most obvious injustice in the scheme concerns manslaughter convictions. Manslaughter embraces a huge variety of wrongdoing: some is not "violent" in the ordinary sense of the word, but negligence leading to death. Imagine an offender who has two convictions in his early twenties, turns his life around, becomes a mechanic and 20 years later is grossly negligently in repairing someone's brakes. The car crashes, the driver dies and the mechanic is convicted of manslaughter. This scheme requires that the mechanic be sentenced to life imprisonment with no eligibility for parole for at least ten years (presumably 20 years will be manifestly unjust). Life imprisonment is a fit punishment for the worst cases of manslaughter but this legislation applies it to all cases, without considering the wrong done. It is grossly unjust to treat these offenders as if they were (the very worst) murderers.[43]

The scheme specific to murder is also deeply problematic. There are some murders where judges might not impose a mandatory life term: so-called "mercy killing," provocation,[44] and excessive self-defence. Imposing a strong presumption of life without parole in such cases is unjust. If it is unjust to send the offender to jail for life, his or her previous convictions do not change that. A second or third strike murder (killing in a pub fight) may end up being sentenced much more harshly than a more severe first strike murder (rape and killing of a child). If we are to impose differential sentences at all (that is, not just life without parole for all) then we must respond to particular wrongs. The proposed legislation will not allow this.

The scope of the proposal

It is very easy for a mandatory sentencing regime to expand over time. Indeed, the current trajectory for penal reform in many Western countries does seem to be towards greater use of mandatory/minimum sentences leading to longer periods spent in custody. This is deeply disturbing for many judges who criticise such sentences as being applied disproportionately against minorities; not acting as a deterrent; and contributing to prison overcrowding.[45] A trend towards greater severity in penal dispositions is already readily discernible. The changing scope of the "three strikes" policy seems to prove this point.

The initial legislative proposal targeted "the worst of the worst" by counting as a strike a *sentence* for a qualifying offence of five or more years in prison. But the proposal now is to count as a strike a *conviction* for a qualifying offence, even if the sentence for that offence is well below five years or even non-custodial.[46] The shift from qualifying sentence to qualifying conviction *radically widens* the scope of the proposed legislation, bringing far more offenders into the scheme.

The scale of the change is clear from the Government's cost calculations. The initial proposal

called for 132 more beds after 50 years.[47] If one assumes the same third strike consequence (life imprisonment, with a minimum 25 year non-parole period), the revised proposal called for 1280 beds.[48] That is an increased impact of almost ten times. The final estimate is for 725 beds after 50 years.[49] The reduction from 1280 is due to the reduction in the severity of the third strike consequence.

The estimated operating cost after 50 years is $66m per year.[50] Although this cost may not appear excessive in relative terms it can take no account of changes in criminal offending that will inevitably occur over that period. If the present drive towards increasing punitiveness in criminal justice continues, the final figures after 50 years may well exceed these estimates.

The legislation itself has been presented throughout as still focusing on "the worst of the worst," yet the scope of the scheme has been widened enormously.[51]

The change from qualifying sentence to conviction makes the least difference in respect of those offences that are very serious—murder, most rapes, etc. However, it makes a *very large difference* for relatively less serious violent offences. The shift from qualifying sentence to qualifying conviction, as was noted by the minority in the Select Committee report, means that "many of the qualifying offences can range from relatively minor offending to very serious offending."[52] Yet the proposals will not allow judges to take the seriousness of offending into account when imposing sentence. This means that every instance of a qualifying offence will be treated as if it were of equal seriousness. The significance of this shift in scope is that the regime is not in truth targeted on "the worst of the worst;" the regime is much broader than that. Furthermore, to the extent that judges are unable to temper penalty with humanitarianism, the "three strikes" model opens itself to the accusation that it is unduly punitive.[53]

Yet it is quite likely that there will be pressure on law-makers to widen the scope of the proposed regime even further. There have been arguments already to include burglary, drug dealing, some other assaults, and especially assaults on police officers and even to extend the regime to cover dangerous juvenile offenders.[54] To date these calls have been resisted.

The reason for the shift from qualifying offence to conviction may have been to avoid judges undermining the scheme by refusing to impose qualifying sentences. That would not have been an unjustified fear. Anecdotally, few judges would appear to support the proposals. Judges in other jurisdictions have striven to subvert these schemes precisely because they confront the injustice that mandatory sentencing of this kind can yield.[55] The motivation for the "three strikes" law may be in part impatience with judges. However, Parliament is able to increase sentences on the worst offenders without adopting mandatory sentencing laws of this kind.

In assessing our sentencing regime, one should not assume that New Zealand is especially lenient. We imprison more per head of population than any developed nation, bar America, although to be fair, New Zealand's imprisonment rate is still significantly lower than that of the US.[56] Sentences for serious crime and the prison population have both risen sharply in recent years, mimicking trends in other jurisdictions similar to New Zealand.[57] It is arguable that we already imprison too many people, causing our prison system to struggle to cope with the numbers of offenders coming into the system. We should at least be cautious about plans to imprison more offenders for longer.

The deterrence rationale

General deterrence

One purpose of punishment is to deter others and to deter the particular offender. But this is just one purpose and it is limited by proportionality. Punishing the offender to deter others is known as general deterrence. The existence of a criminal justice system is, in itself, a powerful deterrent. In fact, the criminal justice system has a powerful declaratory function which says, in effect, "Do not do X, or else." Yet despite this important declaratory function of the criminal law, the vast majority of criminal victimisations are never reported to the police and official crime statistics only disclose a fraction of crime which has actually occurred.[58] Evidently, a huge percentage of those who commit serious offences are not responsive to the warnings implicit in the system itself. Furthermore, there does not appear to be a strong relationship between severity of sentence and deterrence.[59] If the punishment is just and salient, then the likelihood and speed of conviction are the most important factors to deterring offenders[60] and can properly be applied without injustice.[61]

Individual deterrence

Individual deterrence is difficult, given evidence that it is an offender's belief about the likelihood of detection rather than the amount of punishment which is most likely to influence his or her behaviour.[62] In addition, the time between offences and the extent to which much violent/sexual offending is impulsive and irrational will also impact the effects of deterrence.[63] This is a particularly important consideration in the present context because the "three strikes" model is founded on the notion that judicial *warnings* will be effective in diminishing the tendency to commit further serious crimes. But if the *fact* of the existence of the criminal justice system itself is incapable of deterring *most* offending, why do we now think that a warning-based model like "three strikes" will be any more effective as a deterrent? Unfortunately, warnings often fail to change the behaviour of people, either because they are unnoticed, or because they are ignored, or because they are simply forgotten. The understanding, or insight, that an offender "brings to the table" will invariably be critical if a warning is to be effective.

Of course, there are rational offenders—fraudsters and such like—who undoubtedly have the capacity to plan and to learn from experience. But we would venture that a majority of those likely to be targeted by this legislation will not have that capacity, for reasons of their ability to learn from experience and the impact of drugs and other intoxicating substances. For many, the judicial warnings will simply fall on deaf ears. Also, recalling that negligent manslaughter is in the scheme, deterrence is likely to be irrelevant to this type of offending. The very nature of negligence is that it involves carelessness. That is a state of mind where a person simply has not thought about their conduct which produces harm. Such a person will not be deterred by a prior warning because the warning will be irrelevant to the mindset in which the negligent conduct occurred, even if the criminal negligence provides the basis for a third strike offence.

The minority view in the Final Law and Order Select Committee Report acknowledges that serious doubts have been raised as to whether there will be any notable deterrent effect from this legislation.[64] There is a clear conflict of opinion in this regard. If the "three strikes" law as it currently stands is not an effective deterrent, this may lead to further pressure to increase penalties in the hope of better achieving deterrence and greater incapacitation. This raises the spectre of entering, or continuing, a grim and wasteful cycle of increasing punitiveness.

Much reliance in some quarters has been placed on arguments from California about the deterrent effect of "three strikes." Legal writing is about equally balanced on whether "three strikes" does, or does not deter. The evidence is, at best, equivocal.[65] Crime rates were falling already and continued to fall when the scheme was introduced,[66] that is before first, second, and third strikers had time to progress.

In any event, our scheme is less harsh/sweeping, which means one cannot adopt outcomes in other jurisdictions.[67] That is, it is unfair to criticise the New Zealand proposal as though it were California, but equally it would be unfair (and unrealistic) to rely on California as providing a good model for the operation of "three strikes" here.

Parole and incapacitation

Under the proposed "three strikes" model there is no eligibility for parole on second offence, and almost none on third offence. The reasons for parole's (partial) abolition is to send the message that "parole is a privilege not a right" and obviate the risk of anyone on parole committing violent offences.[68] However, the Parole Act itself is already clear on that point. No offender has an entitlement to be released on parole. Eligibility for release on parole does not confer entitlement.[69] We do not need to abolish parole altogether to send that message.

In any case, it seems unlikely that removing eligibility to apply for parole will be an effective deterrent—it is simply far too remote. If there are concerns that the Parole Board is too weak, then a possible solution might be to review the Board's mandate with a view to enhancing its powers.

Yet even with a tougher Parole Board it is impossible to prevent some offenders acting wrongly on release. The challenge is to be able to so regulate the lives of parolees that the opportunities to commit further offences are severely limited. However, if we were serious in believing that parole should only be available if we could guarantee that an offender would *never* offend once released on parole, then we would

have to abolish all parole and also extend all sentences to life. Parole cannot guarantee non-offending.

Removing eligibility for parole also ignores the consequences on prisoners and guards. If we envisage a system that substantially diminishes the prospect of parole for violent offenders then we will inevitably make prisons more dangerous and less effective. The removal or suppression of parole will remove an important incentive for good behaviour from prisoners, and will also remove an important lever that prison officers have over prisoners. Earlier studies on the impact of "three strikes" laws also found that second and third felony offenders facing sentence, or even capture, were likely to react more violently or extremely than they might otherwise. This could include threatening, injuring or even killing witnesses who may testify against them, or even committing suicide in order to avoid being sentenced to life imprisonment without parole.[70] There are offenders who benefit from supervision and parole—it aids rehabilitation. Where parole officers have a pastoral mandate to engage offenders in their immediate lifestyle concerns (accommodation, employment, associates etc) parole may be instrumental in assisting an offender's reintegration into society. It also provides a structured form of release.[71]

Many support the idea of life without parole for the worst murderers. However, we would advocate keeping parole for the majority of serious offenders, in order to keep alive the prospect of rehabilitation and reintegration into society at a future time. Nevertheless, there may be legitimate concerns that some offenders are released too early, undermining just and proportionate punishment. One option to solve this problem would be to bring into force section 48(1) of the Parole Amendment Act 2007, whereby a new parole eligibility threshold of two-thirds of the nominal sentence, or twelve months, whichever is the greater, will be substituted for the present one-third rule.

Impacts on trial process and prosecution

Commentators have argued that third strike offenders will stop "pleading out" their cases and elect jury trial and that costs associated with jury trials and prison space for convicted offenders are too excessive.[72] More defended hearings seem inevitable. This is also acknowledged by a minority of the Select Committee. They also suggest that the Bill will result in more appeals against conviction and sentence, which will mean more victims having to undergo lengthy trials and appeals processes.[73]

Under the proposals any incentive to plead guilty to lower sentence would evaporate, because what is critical is the fact of the conviction, not the sentence imposed.

Hence, there is no encouragement for remorse and no incentive not to clog up system. One might as well take one's (legally-aided) chances. This may have the effect of forcing victims to testify in many cases when otherwise unnecessary, resulting in unnecessary anguish and distress. In addition, there would be no incentive to testify against other offenders, thus frustrating the prosecution of offences. This will prove to be very expensive in terms of both direct and indirect costs.

The changes will also result in a shift in the significance of prosecutorial discretion. Police and prosecutors will have enormous power in the framing of charges. Deciding whether or not to prosecute an offender for a listed, "strikeable" offence, rather than an unlisted offence or no offence at all, is a judgement that will carry very significant consequences.

We believe it is unsound to shift what are effectively discretionary powers over sentencing so decisively from the judicial to the executive branch. It creates a risk of arbitrary and selective law enforcement. It may also give the Police an unfair ability to pressure defendants, perhaps to force plea bargains. It also has the potential to further compound arbitrary, disproportionate sentences, since those on the cusp of two "strikeable" offences who make a deal are likely to be much less severely punished.

Presumably to mitigate some of these risks, it has been agreed, "that the Commissioner of Police would direct that all prosecutions involving charges that qualified for stage three of the proposed regime be referred to the Crown Solicitor for peer review."[74]

If this simply means that the Crown Solicitor will ensure that all elements of the charge are made out and that there is sufficient evidence to justify proceeding, it is hard to see how this will provide much of a safeguard. For example, the offences noted in our earlier examples should all still be charged under this reasoning.

The purported safeguard will only exist if the Crown Solicitor is active in screening out cases that he or

she deems will result in injustice. The Crown Solicitor would then avoid the injustice—an injustice that one should note follows directly from the straightforward application of the law—either by substituting a lesser charge or even laying no charge at all. For example, in our fourth example above, the prosecution might charge the offender with burglary, which is not a "strikeable" offence, rather than aggravated burglary. However, a screening exercise of this sort seems to go much further than "peer review" and does not remove, even if it may reduce, the risk of arbitrary or selective enforcement. Further, it is not always possible to lay an appropriate lesser charge. There is no "non-strikeable" counterpart to robbery or aggravated robbery. Thus in our second and third examples, the injustice may be avoided only by failing to lay charges at all. This is hardly consistent with the rights of victims or with the public interest in fair and certain law enforcement.

In any case, it is not open to the Police simply to decide not to enforce the law, or to refuse to prosecute a category of criminal conduct.[75] A policy of non-prosecution may well be successfully challenged on judicial review.

The basic problem is in the attempt to use prosecutorial discretion to avoid the natural and otherwise intended consequences of the proposed law. It would be better for Parliament to withdraw the Bill, or amend it so that the consequences it wishes to avoid cannot arise in the first place. This is particularly so given that the purported safeguards apply only to stage three offences. Further, they apply only to State prosecutors—private prosecutions remain entirely possible.

Costs and alternatives

After 50 years the operating cost is estimated to be $66 million per year and the capital cost will be at least a total of $290 million.[76] While these cost estimates may appear to be relatively low, they nonetheless represent a not insignificant expansion in prison use. Furthermore, these costs do not account for the financial burden of caring for an already growing cohort of geriatric prisoners, whose management within prisons is much more expensive than for "ordinary" inmates. In addition, there is no accounting for the likely increase in costs associated with a greater volume of defended hearings, with the additional burden in terms of expense and delay on the criminal justice system.[77]

- These are significant sums and we should ask whether this is the best use for them. Alternative uses for funds otherwise committed to facilitating the "three strikes" regime might include resourcing:
- Greater victim support/compensation.
- Earlier Police intervention (e.g. "broken windows" policy).
- Speedier resolution of cases (better deterrent, better for victims).
- Early intervention (intensive supervision of young offenders).
- More effective supervision/parole.

There can be little argument with funding lengthy detention for the worst offenders. But significantly increasing punishments for a large class of offenders in order to satisfy the demands of a novel and untested penal model is dubious economy.

In addition, we believe there are more effective and promising ways to address recidivism. These could include:

- Increased use of existing sentences (preventive detention, home detention, supervision).
- "Front-loading" of criminal justice interventions to achieve maximum deterrence and rehabilitation. This implies treating early criminal justice interventions for serious crimes with the utmost seriousness.
- Reform of parole eligibility, if limited and principled.
- Giving responsibility to a body charged with devising and implementing advisory guidelines for sentencing, to exercise more control over sentencing levels. This could be done through something like the Sentencing Council (which has been enacted: Sentencing Council Act 2007), with amendments to the form and operation of the Council if desired.
- Investigating the use of problem-solving courts (drug courts, mental health courts and domestic

violence courts) in order to break the cycle of addictive offending.

If we are to avoid entering, or continuing, a grim and wasteful cycle of becoming more punitive we need to think very carefully about what is just and about what works. Because of the types of people this legislation is targeted at rational debate may be hard to come by. Still, the issue is not whether paedophilic killers and other violent offenders deserve severe punishment. That is a given. It is simply whether the proposed model is the optimum way to achieve this. In particular, if we do go down this road we may well have to contend with the rules being applied to many offenders who are not always the worst, failing to serve as a deterrent and contributing to prison overcrowding and significant expansion of the Corrections budget.

In our view there is nothing wrong in principle with targeted increases in sentences for the worst offenders. However, the official response should be proportionate to the gravity of wrong and not dependent on the employment of arbitrary rules. The argument presented in this paper has been against a scheme that employs arbitrary rules that ignore the gravity of wrongdoing and that may produce many negative, unintended consequences.

Recommendations

The alternatives outlined above could help reform the criminal justice system to meet some of the concerns that underlie the Sentencing and Parole Reform Bill. However, given that Parliament is currently considering the Bill, we have focused these recommendations on that Bill. We recommend that:

1. Parliament should not enact the Sentencing and Parole Reform Bill. The "three strikes" regime will do injustice in many cases, is likely to fail to deter repeat offenders, and has many undesirable unintended consequences.
2. The Government should bring into force section 48(1) of the Parole Amendment Act 2007, which would shift eligibility for parole to two-thirds of the sentence, or twelve months, whichever is the greater. This will help to address problems with parole and meet the Government's manifesto commitment to tighten parole eligibility for the worst violent offenders.
3. If Parliament is determined to enact a "three strikes" sentencing regime in some form, which we do not recommend, it should consider amending the Bill in the following ways:
   - Judges should be authorised but not to required to order sentences be served without parole when they judge this to be necessary to denounce the offender's conduct and to safeguard the public. That is, the law should not rule out parole on second strike and presumptively rule it out on third strike, but instead retain presumptive eligibility for parole (after two-thirds of sentence has been served, if section 48(1) of the Parole Amendment Act is brought into force), with exceptions when necessary.
   - If this is not done, the court should have the discretion to order that a prisoner be eligible for parole on the second strike if it is manifestly unjust not to do so. The lack of such discretion on a second strike is anomalous given that it is available on the third. The lack of any such discretion may also lead judges to be unduly cautious in handing out lengthy sentences on strike two—that is, the mandatory cancellation of eligibility for parole may in fact result in many offenders not being punished as severely as they deserve. For example, no court will ever impose a life term on a second strike manslaughter, even if it is a very bad manslaughter where a life term would otherwise be appropriate, because the legislation gives no choice but for that sentence to be served without the possibility of parole.
   - The court should have discretion not to sentence the offender to the maximum sentence on a third strike if it would be manifestly unjust to do so. This would bring the legislation into line with the public assertions of the ACT Party and others. It would also enable judges to avoid some of the

most glaring injustices that the "three strikes" regime is likely to create.

- Only convictions for qualifying offences that attain a certain level of seriousness should count as strikes. The initial proposal counted as a strike, a sentence for a qualifying offence of five years or more in prison, which meant that the regime focused on relatively grave offences. It would be sound to restore this definition of a strike. However, if five years is thought too long, it would be sound to count as a strike either (a) at least a custodial sentence (so that very minor offences where there is no prison term imposed would not count) or (b) at least a sentence of two years imprisonment, a point which our law uses elsewhere to mark the difference between relatively minor and serious offences.[78] This modified rule would take some account of relevant mitigating factors, including guilty pleas.
- Strikes should lapse over time. Specifically, a strike should be removed from one's record (so that an offender is understood to have a first warning rather than a final warning, or no warning rather than a first warning) ten years after the offender has finished serving his or her sentence for the relevant offence. This will help avoid the scheme ensnaring offenders who may have had lengthy periods of good behaviour between strike offences (especially if the third strike is late in life and relatively minor).
- The court should be able to reduce the sentence imposed on a third strike by up to 25 percent to take into account the fact of a guilty plea. Retaining this discount would mitigate one obvious point of unfairness and would also avoid many unnecessary defended hearings, which are both expensive and the cause of trauma to victims who are forced to testify.
- The court should have discretion not to impose a life sentence for murder if doing so is manifestly unjust (as it may be in cases of so-called "mercy killing," provocation, or excessive self-defence). Specific amendments could be made to the provisions relating to manslaughter and murder. The Law Commission and the Government argued that it was sound to abolish the defence of provocation in part because it could always be taken into account in sentencing.[79] The proposed amendment is consistent with that argument.
- The court should have the same discretion not to impose a life sentence in respect of manslaughter. Further, the legislation should be amended to exclude accidental/negligent manslaughters from the scheme altogether. This is a difficult distinction to draw, but a legislative direction to this effect, even if vague, would help avoid some very obvious injstices.

ENDNOTES

1 J. Collins, "National and ACT agree to three-strikes regime," 19 January 2010, available at http://www.beehive.govt.nz/release/national+and+act+agree+three-strikes+regime (accessed 14 April 2010).

2 Clause 5 of the Bill would insert new sections 86A-86H into the Sentencing Act 2002 under the title "Additional consequences for repeated serious violent offending." The discussion that follows refers to those proposed new sections.

3 Law and Order Committee, Full Report "Sentencing and Parole Reform Bill," 1 (26 March 2010).

4 J. Collins, "National and ACT agree to three-strikes regime," 19 January 2010; R. Hide and D. Garrett, "Three Strikes Policy. The Sentencing and Parole Reform Bill," (Auckland: ACT Party, 2010), available at http://www.act.org.nz/files/features/three-strikes.pdf (accessed 14 April 2010).

5 Proposed new section 86A of the Sentencing Act 2002.

6 Proposed new section 86B of the Sentencing Act 2002.

7 Clause 9 of the Bill makes this clear.

8 Proposed new section 86C of the Sentencing Act 2002.

9 Proposed new section 86D of the Sentencing Act 2002.

10 Crimes Act 1961, section 135.

11 Crimes Act 1961, section 234.

12 Crimes Act 1961, section 209.

13 Crimes Act 1961, section 128B.

14 Crimes Act 1961, section 177.

15 R. Hide and D. Garrett, "Three Strikes Policy. The Sentencing and Parole Reform Bill."

16 The expression also occurs in section 102 of the Sentencing Act 2002 allowing for the presumption in favour of life imprisonment for murder to be rebutted where life imprisonment would be "manifestly unjust." In that context the expression requires the court to assess the circumstances of both the offence and the offender having regard to sentencing purposes and principles. See *R v Smail* (CA196/06, 15 September 2006), *R v Williams & Olsen* [2005] 2 NZLR 506 (CA).The obligation rests on a defendant to show why it would be manifestly unjust to impose life imprisonment and the threshold for departure from life imprisonment is high. See *R v Rawiri* (HC, Auckland T 014047, 16 September 2002, Fisher J). See also *R v Rapira & ors* (CA 318/02, 5 September 2003), at paras [121]-[124].

17 Proposed new section 86D(4) of the Sentencing Act 2002

18 Per section 102 of the Sentencing Act 2002.

19 Per section 103 of the Sentencing Act 2002.

20 Per section 104 of the Sentencing Act 2002 the judge is to impose at least a seventeen year, non-parole period if the murder has certain aggravating features, unless this is manifestly unjust.

21 Proposed new section 86E of the Sentencing Act 2002.

22 That is, the court reverts to sections 103 and 104 of the Sentencing Act 2002.

23 Proposed new section 86D(6) of the Sentencing Act 2002.

24 Per clause 7 of the Bill.

25 J. Finnis, 'Retribution: Punishment's Formative Aim', *American Journal of Jurisprudence* 44 (1999): 91-103.

26 Section 8 of the Sentencing Act 2002 states that the court:

(a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and

(b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and

(c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and ...

(h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe.

27 See A. Ashworth, *Sentencing and Criminal Justice - 4th edition,* (Cambridge: Cambridge University Press, 2005), 98-101.

28 C.S. Lewis, "The Humanitarian Theory of Punishment" *The Twentieth Century: An Australian Quarterly Review,* 3, no.3 (1949): 5-12; reprinted in *AMCAP JOURNAL* 13, no.1 (1987): 147-153.

29 J. Hall, "Nulla Poena Sine Lege" *The Yale Law Journal* 47 (1937): 165, 185.

30 Crimes Act 1961, section 234 (1).

31 Crimes Act 1961, section 235.

32 Crimes Act 1961, section 231 (1).

33 Crimes Act 1961, section 232 (1).

34 Sections 9 and 9A of the Sentencing Act 2002 specify particular aggravating and/or mitigating factors that a court must take into account to the extent that they are applicable in a particular case. Per section 9(4), this list is not exhaustive and is not to prevent the court from taking into account any other aggravating or mitigating factor that the court thinks fit.

35 Most of these factors are found in section 9(1) of the Sentencing Act 2002.

36 Most of these factors are found in section 9(2) of the Sentencing Act 2002.

37 For example, see N. Greenblatt, "How Mandatory are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences" *American Journal of Criminal Law* 36 (2008): 1, 4.

38 However, the consequences of a second strike are somewhat anomalous. Although the provision (the proposed new section 86C) requires that a judge must order that the offender serve the full term of a long-term sentence without parole, with no allowance made for manifest

injustice, subject to the constraints imposed by particular guidelines and precedents there would be nothing to prevent a sentencing judge from lowering the level of the penalty that might otherwise have been imposed to accommodate the fact that the sentence must be served without parole eligibility. This could have the effect of undermining the intended deterrent effect implicit in the second strike conviction.

39 See for exmple, *McKerrow v Police* (HC Christchurch, A74/02, 13 August 2002). A sentence of five years imprisonment imposed on a charge of sexual violation by rape reduced to two years with leave to apply for home detention. The Court gave credit for mitigating factors, in particular an early guilty plea and the accused's full and frank confession and remorse. Recently the Court of Appeal held that the starting point for sentencing "band one" rape cases is six to eight years: *R v AM* [2010] NZCA 114, paras [90], [93]-[97].

40 See *Smeed v Police* (HC Whangarei, AP 50 and 51/00, 24 October 2000, Chambers J). The Court held that the appropriate starting point for "non-aggravated" (meaning simple) robbery of a small shop like a dairy should be three years.

41 Crimes Act 1961, section 231.

42 See *R v Taueki* [2005] 3 NZLR 372; (2005) 21 CRNZ 769 and see discussion in Hall, *Sentencing—2007 Reforms in Context,* (Wellington: LexisNexis, 2007), 41-43.

43 In one English case, the Court of Appeal substituted a sentence of probation for a custodial sentence imposed upon a woman convicted of manslaughter after she killed her bullying partner. See *R v Gardner* (1992) 14 Cr App R (s) 364. In New Zealand, an aircraft maintenance engineer (with no prior convictions) was sentenced to 300 hours community work and payment of $10,000 of reparation, after conviction for manslaughter for failing "to take reasonable care in respect of the supervision and inspection of maintenance work carried out on a helicopter." *R v Potts and Horrell* (HC Nelson, CRI-2006-042-002896, 2 May 2008, Wild J).

44 Although provocation is no longer available as a defence to murder in New Zealand, the court may take evidence of provocation into account in sentencing in determining whether or not it would be manifestly unjust to sentence an offender to life imprisonment for murder (see Sentencing Act 2002, section 102(1)).

45 See V. Schiraldi, "Digging Out: As US states begin to reduce prison use, can America turn the corner on its imprisonment binge?" *Pace L Rev* (2004) 24: 563, cited in N. Greenblatt, "How Mandatory are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences", 4.

46 See the definition of a "qualifying offence" in proposed section 86A in the Sentencing and Parole Reform Bill 17-1 (as introduced). The definition of "qualifying offence," with its requirement of at least five years imprisonment, has been deleted by the Select Committee, and the revised Bill makes it clear that strikes are incurred on mere conviction alone.

47 J. Collins, "Changes to the Sentencing and Parole Reform Bill," Cabinet Paper obtained under the Official Information Act 1982, 16 December 2009, Table 4.

48 Author unknown, "Cost of alternative formulations of three stage regime in Sentencing and Parole Reform Bill," Scenario 5, documents obtained under the Official Information Act 1982.

49 Author unknown, "Financial implications for Corrections," document obtained under the Official Information Act 1982.

50 Author unknown, "Financial implications for Corrections," document obtained under the Official Information Act 1982.

51 For example, the Minister of Police has stated: "The regime will be harsh—but only for the small number of people in our community who show continued disregard for the law and contempt for society." J. Collins, "National and ACT agree to three-strikes regime." Similarly, the ACT Party states: "To keep our communities safe, we need to focus on the worst of them [repeat violent offenders], and lock them away longer, and without parole." R. Hide and D. Garrett, "Three Strikes Policy. The Sentencing and Parole Reform Bill."

52 Law and Order Committee, Final Report, "Sentencing and Parole Reform Bill," 13.

53 Hall, *Sentencing—2007 Reforms in Context,* 170.

54 For example, Family First and the Sensible Sentencing Trust have argued that "a 'qualifying offence' should be expanded to include aggravated assaults and the manufacture and/or sale of 'P' (methamphetamine)." Sensible Sentencing Trust and Family First, "Families Still At Risk Under 'Three Strikes,'" 10 March 2010.

55 See Greenblatt, "How Mandatory are Mandatory Maximums? How Judges can Avoid Imposing Mandatory Minimum Sentences," 2.

56 In 2002-2005, New Zealand's imprisonment rate was 168 per 100,000 compared to 714 in the US. In contrast Canada's was 116, England and Wales 142 and Australia 117. J. Tolmie & W. Brookbanks (eds.) *Criminal Justice in New Zealand,* (Wellington: LexisNexis, 2007), 65.

57 J. Tolmie, "Crime in New Zealand over the last ten years: a statistical profile" in J. Tolmie and W. Brookbanks (eds.) *Criminal Justice in New Zealand,* (Wellington: LexisNexis, 2007), 66.

58 J. Tolmie, "Crime in New Zealand over the last ten years: a statistical profile," 49.

59 A. Ashworth, *Sentencing and Criminal Justice - 4th edition,* 76.

60 See A. Ashworth, *Sentencing and Criminal Justice - 4th edition,* 76. Ashworth refers to a Home Office commissioned study which found that there was "better evidence of the deterrent effect of a (believed) high risk of detection than of (believed) penalties."

61 It has been pointed out that exemplary (deterrent) sentences by imposing "an undeserved portion of punishment on one offender in the hope of deterring others, are objectionable in that they penalize an individual in order to achieve a social goal – and do so without any real crierion of how much extra may be imposed." See A. Ashworth, *Sentencing and Criminal Justice - 4th edition,* 78.

62 A. Ashworth, *Sentencing and Criminal Justice - 4th edition,* 79. See also Canadian Sentencing Commission, *Legal Sanction and Deterrence,* (Ottawa: Minister of Supply and Services, 1988), 2-4.

63 See M.R. Gottfredson & T. Hirschi, "National crime control policies," *Society,* 32, 2, (1995): 30-37. The authors argue that persons with low self-control have reduced capacity to appreciate long-term consequences, such as imprisonment, which leaves them "unrestrained by the fear of detection" (at page 31).

64 Law and Order Committee, Final Report, "Sentencing and Parole Reform Bill," 14.

65 However, a recent study estimates that "three strikes" in California may have reduced participation in criminal activity by 20 percent for second strike eligible offenders and by 28 percent for third strike eligible offenders. But two unintended consequences of the law were found to follow. First, because "three strikes" "flattened the penalty gradient" as regards severity, criminals were more likely to commit violent

crimes. Secondly, because California's law was harsher than that of neighbouring states, the law had the effect of increasing the migration of criminals with second and thirds strike eligibility to commit offences in the neighbouring states. See R. Fisman, "Going Down Swinging" *Slate Magazine*, Posted Thursday, 20 March 2008. Fisman's article referred to a study by Radha Iyengar, "I'd rather be Hanged for a Sheep than a Lamb: The unintended consequences of three strikes laws" undertaken for the National Bureau of Economic Research, *NBER Working Paper No 13784,* issued in February 2008.

66 M. Vitiello, " Three Strikes: Can we Return to Rationality" *Journal of Criminal Law and Criminology,* 87 (1996-1997): 395, 433.

67 Ashworth states that the Californian "three strikes" law is "probably the broadest" cumulative sentencing law in the United States. It provides for "a doubled sentence on the second serious felony and 25 years to life on the third felony conviction. There is no restriction on the types of offence involved, and, although the first two convictions must be for 'serious felonies,' that category includes burglary." A. Ashworth, *Sentencing and Criminal Justice - 4th edition,* 207.

68 For example, the ACT Party states: "Offenders released on parole all too often commit further violent crimes." R. Hide and D. Garrett, "Three Strikes Policy. The Sentencing and Parole Reform Bill." The Sensible Sentencing Trust, in its submission on the Bill, states: "Parole must be a privilege—not a right …" G. MacVicar, "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill," (Napier: Sensible Sentencing Trust, 2009). And the National Party, prior to the 2008 general election, also stated, "Parole should be a privilege, not a right …" J. Key, "No parole for worst repeat violent offenders under National," 6 October 2008, available at http://www.national.org.nz/Article.aspx?articleId=28655 (accessed 20 April 2010).

69 Parole Act 2002, section 28(1).

70 L.E. Cowart, "Legislative Prerogative vs Judicial Discretion: California's three strikes law takes a hit," *DePaul Law Review* 47 (1997-1998): 615, 633.

71 J. Hall, "Sentencing" in J. Tolmie & W. Brookbanks (eds.) *Criminal Justice in New Zealand,* 293.

72 J. Hall, "Sentencing," 631.

73 Law and Order Committee, "Sentencing and Parole Reform Bill," 13-14.

74 Law and Order Committee, Final Report, "Sentencing and Parole Reform Bill," 3, note 1.

75 See R. Ekins, "'Light smacking' and discretion," (2009) NZLJ 427, 429, citing *R v Commissioner of Police of the Metropolis, ex p Blackburn* [1968] 2 QB 118.

76 Author unknown, "Financial implications for Corrections," document obtained under the Official Information Act 1982.

77 These factors are not listed as having been taken into account in calculating the costs of the "three strikes" policy. Department of Corrections, "Official Information Act Request—Three Strikes Policy," 19 March 2010.

78 This length of sentence is used to distinguish short-term sentences and long-term sentences in the Parole Act 2002.

79 In his foreword to the Law Commission's report on the subject of provocation, Sir Geoffrey Palmer says: "We thus remain of the alternative view that the partial defence of provocation should simply be repealed. We recommend that provocation should instead be dealt with as a sentencing issue. We acknowledge the importance and relevance of sentencing guidelines in this regard. In particular, a guideline will be desirable addressing departure from the presumption in section 102 of the Sentencing Act 2002 of life imprisonment for murder." Law Commission, "The Partial Defence of Provocation," (Wellington: Law Commission, 2007), 7. In Parliament it was argued for the Government that: "Allowing the sentencing judge to take account of provocation at the time of sentencing is the most appropriate course for the courts to be able to take in respect of [the intentional killing of another]." C. Borrows, 659 *Parliamentary Debates,* 8248, 24 November 2009, available at http://www.parliament.nz/en-NZ/PB/Debates/Debates/4/4/3/49HansD_20091126_00001679-Crimes-Provocation-Repeal-Amendment-Bill.htm (accessed 20 April 2010).

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