

Appendix 2

Regulatory Impact Statement

Sentencing and Parole Reform Bill

Agency disclosure statement

This Regulatory Impact Statement has been prepared by the New Zealand Police.

It provides an analysis of two options to address serious repeat violent offending and reduce the uncertainty that victims face when an offender is sentenced to imprisonment with the possibility of parole. The scope is defined by the Government's policy to deny parole to the worst repeat violent offenders. Options are therefore restricted to those within that scope.

A Regulatory Impact Statement was initially prepared when the Sentencing and Parole Reform Bill was introduced early in 2009. The Statement has been revised as a result of changes in policy relating to the three stage worst repeat violent offender regime. The worst murders aspect of the Bill is unchanged, and is therefore excluded from this analysis. This Statement should be read in conjunction with the RIS prepared when the Bill was introduced.

The scope is defined by the Government's policy to deny parole to the worst repeat violent offenders. Options are therefore restricted to those within that scope.

None of the options considered in this Statement are likely to:

- impose additional costs on business during the current economic recession;
- impair private property rights, market competition, or the incentives on businesses to innovate and invest; or
- override fundamental common law principles.

Kevin Kelly, National Manager, Policy and Legal Services

Status quo and problem definition

At present, the sentence imposed on a convicted offender is determined by the sentencing judge. When sentencing an offender, the sentencing judge takes into account a range of information including:

- the maximum penalty for the offence;
- the seriousness of the offending in the particular case;
- relevant information about the offender, such as prior offending or a guilty plea;
- any information concerning the effect of the offending on the victim; and
- sentences imposed in similar cases.

The most serious sexual and violent offending may attract a sentence of preventive detention. The High Court may impose a sentence of preventive detention if—

- a) the offender is convicted of a qualifying sexual or violent offence;
- b) the offender was 18 or over at the time of committing the offence; and
- c) the court is satisfied that the offender is likely to commit another qualifying sexual or violent offence if the person is released at the expiry of any determinate sentence that the court is able to impose.

Preventive detention is akin to a life sentence. If the court sentences an offender to preventive detention, it must order that the offender serve a minimum non-parole period of at least five years.

Currently, an offender sentenced to two years' imprisonment or less is not eligible for parole and is automatically released after one half of the sentence. On release, he or she is subject to any conditions imposed by the sentencing court.

Any offender sentenced to more than two years' imprisonment is eligible for parole at one third of their sentence, unless the court imposes a longer non-parole period, which can be up to two thirds of the sentence or 10 years (whichever is less).

An offender convicted of murder will be sentenced to life imprisonment, unless that would be manifestly unjust. The sentencing judge must impose a minimum non-parole period of at least 10 years. In the worst cases, such as those involving lengthy planning, extreme brutality, home invasion, or more than one murder victim, the sentencing judge must impose a minimum non-parole period of at least 17 years unless this would be manifestly unjust. The sentencing judge, must take into account a range of information, including the views of the victim's family and other minimum non-parole periods imposed in similar cases.

Offenders sentenced to preventive detention or life imprisonment have no set release date. They are eligible to be considered by the Parole Board for release on parole after they have served their minimum non-parole period, but they may be detained indefinitely. The Parole Act 2002 states that the paramount consideration of the Board is the safety of the community.

The Government is concerned that some serious and violent offenders go on to commit further serious and violent crimes. These offenders are undermining public confidence in the criminal justice system and endangering public safety.

The re-imprisonment rate for violent offenders is high. A study of violent offenders imprisoned over a 12 month period in 2002-2003 suggests that within five years, 50% (650 offenders) were re-imprisoned (Nadesu, 2009). Of those re-imprisoned, 44% (287 offenders) were re-imprisoned for another violent offence.

In addition, the current system requires victims and their families to face the prospect of attending a long series of parole hearings, with no real certainty about when an offender may eventually be released.

The Government's policy is to remove parole eligibility for the worst repeat violent offenders. As sentencing and parole law is codified in the Sentencing Act 2002 and the Parole Act 2002, any changes require legislative amendments to these Acts.

Objectives

The Government's objectives are to:

- increase public confidence in the criminal justice system;
- enhance public safety and reduce violent crime through deterrence and incapacitation;
- contribute to truth-in-sentencing and increase certainty about release dates;
- encourage offenders to understand the consequences of repeat offending through increased certainty about these consequences;
- address the concerns of victims and their families facing uncertainty about when an offender may be released and the strain of attending multiple parole hearings for the offender.

Regulatory impact analysis

Option 1

Regime provided in the introduction version of the Bill

At introduction, the Bill created a three stage regime. An offender qualifies for each stage if he or she receives a determinate sentence of imprisonment of five years or more, life imprisonment or preventive detention (a qualifying sentence) for a serious violent offence specified in the schedule to the Bill (see appendix one). The three stages are as follows:

Stage 1: An offender receives a recorded first warning when he or she receives a first qualifying sentence for a specified offence committed after he or she turns 18.

Stage 2: An offender receives a recorded final warning when he or she receives a further qualifying sentence (other than life imprisonment for murder) for a specified offence committed after receiving the first warning. If the offender receives a determinate sentence, the court must also order that the offender serve the sentence without parole.

Stage 3: An offender receives a life sentence if he or she commits a further serious violent offence after receiving a final warning, and the court would otherwise have imposed a further qualifying sentence (other than life imprisonment for murder) for that offence. The court must impose a minimum non-parole period of 25 years on the life sentence unless satisfied that it would be manifestly unjust to do so (in which case it must impose a lesser non-parole period).

If the offender receives a sentence of life imprisonment for murder at stage two or three, the court must order that the offender serve the life sentence without parole, unless that would be manifestly unjust.

Option 2

The offender qualifies upon conviction for a qualifying offence and the penalty at stage three is the maximum penalty for the offence, served without parole

Under option two, an offender qualifies for each stage if he or she is convicted of a specified serious violent offence. There is no qualifying sentence requirement. The three stages are as follows:

Stage 1: An offender receives a recorded first warning when he or she is convicted of a qualifying offence committed after he or she turns 18.

Stage 2: An offender receives a recorded final warning when he or she is convicted of a further qualifying offence committed after receiving the first warning. If the offender receives a determinate sentence, the court must also order that the offender serve the sentence without parole.

Stage 3: If the offender is convicted of a third or subsequent qualifying offence, the court must impose the maximum penalty for that offence and order that the sentence be served without parole, unless a no parole order would be manifestly unjust.

If the offender receives a sentence of life imprisonment for murder at stage two or three, the court must order that the offender serve the life sentence without parole, unless that would be manifestly unjust.

The offences of incest and acid throwing are omitted from the schedule of qualifying offences.

Analysis

Options one requires the offence to meet some form of sentencing threshold before the offender will qualify under the regime. This addresses the fact that New Zealand has generic offences that can cover a range of conduct and seriousness. A number of the listed offences can encompass conduct ranging from relatively minor to very serious offending.

A threshold of at least five years imprisonment restricts the application of the regime to the most serious offending. Lowering that threshold to at least three years imprisonment or just a sentence of imprisonment increases the scope of

the regime, but still ensures that the offending is of sufficient seriousness to warrant a prison sentence.

Option two does not require the offence to meet a seriousness threshold. Removing the qualifying sentence requirement so that an offender qualifies for the three stage regime on conviction alone increases the regime's scope.

Increased certainty about consequences

Under option one it is not certain whether an offender is subject to the regime until sentencing. The regimes hinge on the exercise of judicial sentencing discretion. The court must make a decision about the sentence it would have imposed for the offending before applying the regime.

Option two provides the most certainty about whether or not an offender will be subject to the regime. A conviction-based system means that the consequences will generally be certain once the offender is convicted.

However, the conviction-based system will not eliminate all uncertainty. A particular set of circumstances will often fit two or more offences. For example, if a person injures another person in an attempt to flee from a crime scene, he or she could be charged with several different offences, including injuring with intent (maximum 5 or 10 years) or aggravated wounding or injury (maximum 14 years).

Without a qualifying sentence requirement, Police and prosecutorial decisions about charging assume greater significance. The charge laid could decide whether or not a person qualifies under the three stage regime.

In order to provide assurance that the appropriate charges are laid for any offence that has the potential to qualify for stage three, the Police are developing options for consideration. One of the options is for the Commissioner of Police to approve instructions that direct all prosecutions involving charges that qualify for stage three of the regime to be referred to the Crown Solicitor.

Public safety

Mandatory sentencing laws can theoretically reduce crime by incapacitation and/or deterrence. It is generally difficult to identify the extent to which a change in behaviour is due to incapacitation and deterrence as opposed to other factors, or whether a change is due to one effect rather than the other. For this reason, there are divergent academic views on the deterrent and incapacitatory effects of sanctions and increasing sanctions. One particular point of academic divergence is the extent to which offenders 'weigh up' the benefits and risks of offending.

There have been many studies on the effect of three strikes regimes in the USA. These studies have resulted in a range of findings due to differences in:

- what the study was trying to measure. In particular, some studies attempted to measure the deterrent effect of three strikes laws on individuals in the system, whereas others attempted to measure the effect of the laws on general crime rates;

- the data source. For instance, some studies used data from different counties within a particular state (usually California), whereas others compared state-level data across all 50 states;
- the methodology used. The simplest studies assessed the crime rate before and after the laws were passed and purported to draw a causal connection. More sophisticated analyses controlled for other key variables that influence crime rates, such as demographic factors, increases in police numbers and other criminal justice policies. Different studies also used different types of statistical analysis.

From an analysis of a number of leading studies on three strikes laws in the USA (see appendix one for a list of references), there is evidence that these laws:

- may have had an effect in reducing overall crime rates, which is more likely to be due to deterrence than incapacitation given the small number of offenders imprisoned under most states' laws. There is also evidence that any deterrent effect is no more pronounced in states with wider ranging laws, such as California, than in states with less severe laws;
- may have had a deterrent effect on individual offenders at risk of moving through the stages; and
- may have resulted in an increased rate of homicide. On the basis of the research to date, this cannot be ruled out.

Officials consider that these findings are generally applicable to New Zealand, although the actual effects are likely to be small given New Zealand's small population and the differences between the proposals and the three strikes laws in the USA.

Option two is most likely to have a deterrent or incapacitory impact as the wide scope of this option means that more people will be subject to the regime.

Effect on the prison population

Both options for the worst repeat violent offender policy will impact the prison population, and therefore have associated capital and operating costs. The financial implications for the Department of Corrections have been determined by estimating the number of additional beds required, modelled on conviction and sentencing data from 1980 – 2008.

While it is accepted that the policies may have some deterrent effect, this effect was unable to be quantified for these estimates. The estimates therefore assume no deterrent effect. The costs are based on a one-off capital cost of \$400,000 per bed and operating costs of \$91,000 per prisoner per year.

1. Regime provided in the introduction version of the Bill

Years after implementation	Estimated number of additional beds	Capital costs (total \$m)	Operating costs per year (\$m)
10	25	10	2.3
15	46	18.4	4.2
20	70	28	6.4
50	132	52.8	12.0

Appendix 2: References

Auerhahn, K (2002) Selective incapacitation, Three strikes, and the problem of aging prison populations: Using simulation modelling to see the future. *Criminology and Public Policy*. Vol. 1. No. 3 (Jul. 2002): 353 – 388.

Brown, B, and Jolivet, G (2005) A Primer: Three Strikes. The Impact after more than a decade. *Legislative Analyst's Office*.

Chen, Elsa Y (2008) Impacts of "Three Strikes and You're Out" on Crime Trends in California and Throughout the United States. *Journal of Contemporary Criminal Justice*, Vol 24, No 4: 345 – 370.

Cunningham, C, Triggs, S, and Faisandier, S (2006) New Zealand Crime and Safety Survey: Analysis of the Māori Experience. Wellington: Ministry of Justice. www.justice.govt.nz.

Harris, J C, and Jesilow, P (2000) It's not the old ball game: Three strikes and the courtroom workgroup. *Justice Quarterly*. Vol. 17, No.1: 185 – 203.

Helland, E, and Tabarrok, A (2007) Does Three Strikes Deter? A Non-Parametric Estimation. *Journal of Human Resources*. 42(2): 308-330.

Hook G (2009) The criminalisation of Māori and Pacific Islanders under the Domestic Violence Act 1995. MAI Review 3 2009. www.review.mai.ac.nz.

Kovandzic, T V, Sloan, J J, and Vieraitis, L M (2002) Unintended consequences of politically popular sentencing policy: The homicide promoting effects of "Three Strikes" in U.S. cities (1986 -1999). *Criminology and Public Policy*. (1)(3): 399 – 424.

Kovandzic, T V, Sloan, J J, and Vieraitis, L M (2004) "Striking Out" as crime reduction policy: The impact "Three Strikes" laws on Crime rates in U.S. cities. *Justice Quarterly*. 21(2): 207 – 239.

Levitt, S D (2004) Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not. *The Journal of Economic Perspectives*. Vol. 18. No. 1: 163 – 190.

Males, M, MacAllair, and Taqui-Eddin, K (1999) Striking Out: The Failure of California's "Three Strikes and You're Out" Law. *Justice Policy Institute*. March 1999.

Marvell, Thomas B, and Moody, C E (2001) The lethal effects of Three-Strikes Laws. *The Journal of Legal Studies*. Vol. 30, No.1: 89 – 106.

Maxwell G and Smith C (1998) Police Perceptions of Māori. A Report to NZ Police and the Ministry of Māori Development: Te Puni Kōkiri. Wellington: Victoria University.

Dance O (1987) The influence of Police perceptions of Maoris on decisions to arrest or prosecute.

Nadesu, A (2009) Reconviction patterns of released prisoners: A 60-months follow-up analysis. Wellington: Department of Corrections.

Ramirez, J R, and Crano, W D (2003) Deterrence and incapacitation: An interrupted time-series analysis of California's three-strikes law. *Journal of Applied Social Psychology*. Vol 33(1): 110-144.

Te Whāiti P, Roguski M (1998) Māori Perceptions of the Police. He Pārekereke/Victoria Link Ltd.

Walsh, J E (2007) Historical Guides to Controversial Issues in America: Three Strikes Laws. Greenwood Press.

Worrall, J L (2004) The effect of three-strikes legislation on serious crime in California. *Journal of Criminal Justice*. Vol 32(4): 283-296.

Zimring, F E, Hawkins, G, and Kamin, S (2001) Punishment and Democracy 'Three Strikes and You're Out in California'. Oxford University Press.

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