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2009 Sheehan, C T

Three strikes and you're out! The sentencing and parole reform bill

Christopher Thomas Sheehan

Three Strikes and You're Out!

The Sentencing and Parole Reform Bill

Submitted for LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2009

Victoria

UNIVERSITY OF WELLINGTON

Te Whare Wānanga

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I INTRODUCTION

This essay will focus on the "Three Strikes" law. A "Three Strikes" law is a three-chance system for violent offenders. If a person commits two crimes from a defined list, and then goes on to commit a third crime on the list, they will be incarcerated for an extended period of time. The Bill proposed for New Zealand is formally known as the Sentencing and Parole Reform Bill. The Bill began as ACT's law and order policy. ACT stated that they would introduce a Bill designed to target the worst offenders.¹ National went on to win the 2008 election, bringing ACT into power with it. This has resulted in the Sentencing and Parole Reform Bill. The Bill is aimed at violent offenders only. On conviction for a second "strike" offence, the criminal will receive the maximum penalty for that offence, and a warning of the consequences of a third "strike" conviction. A person convicted of a third "strike" offence will go to jail for 25 years to life. There is no judicial discretion.² This essay will look at the current sentencing laws in New Zealand, explore the mechanics of the proposed bill, its potential benefits and drawbacks, and discuss inconsistencies of the proposed legislation with human rights law. The effects of the California Three Strikes Law will be examined, and whether similar effects on New Zealand's court system or correctional system are likely. I will weigh these factors in concluding whether the "Three Strikes" law proposed would be a desirable addition to New Zealand's sentencing laws.

¹ ACT party website www.act.org.nz (accessed 26/4)

² Ibid

II THE BILL, ITS BASE IN "THREE STRIKES" LAW, AND HOW THE BILL FITS IN WITH CURRENT SENTENCING LAW

A "Three Strikes" laws

"Three Strikes" laws are characterized by two factors. The first of these are strike offences. For offences to come under "Three Strikes" legislation, they must be recorded as strike offences. This can be done with a specific list of offences, or in some jurisdictions, any felony will be covered. The second of these factors is the punishments. An offender, on commission of a first offence, will receive the normal sentence, and a warning that repeated offences will lead to increased sentences. If a second offence is committed, an extended sentence will be given. The third offence, or strike, will result in an even longer sentence of up to life imprisonment. The length will be determined by the jurisdiction. In California, it is twenty-five years to life, with no release before serving eighty percent of the sentence.³

Formally, "Three Strikes" laws are known as "habitual-offender laws".⁴ They have been around in one form or another throughout the twentieth century. In England and parts of the United States there were laws that could impose life imprisonment on the third felony offence.⁵ However, judges were able to use their discretion when determining a sentence, and rarely handed down these extended sentences.⁶

Washington was the first State in the US to turn these laws into the "Three Strikes" format. In 1993, the voters of that State approved Initiative 593. This law

³ Zimring, Franklin, Hawkins, Gordon, Kamin, Sam *Punishment and Democracy Three Strikes and You're Out in California*, Oxford University Press, 2001, 7.

⁴ Ibid, 4.

⁵ Ibid

⁶ Ibid

focussed on selected crimes, with a life sentence on the third offence.⁷ California followed with its version of the law in 1994.⁸ By 1999 almost half the States had some form of “three strikes” law.⁹

The idea of the law is sufficiently fluid as to allow for variations between jurisdictions. In California, one must be convicted of two “serious or violent” crimes before the law will apply. Then on the third breach of the law, a twenty-five year to life sentence will be imposed.¹⁰ California stands out from other jurisdictions that have enacted three strikes legislation. Jones and Newburn point out that while most jurisdictions passed three strikes laws as a largely symbolic measure, California has drafted theirs in such a way that it operates more broadly than the title suggests.¹¹ In some States such as Washington, the law has been carefully drafted so that few offenders will be affected by it, while still attracting votes from the public.¹² This shows that the law can be tweaked and changed to suit specific jurisdictions.

B Current Sentencing Law in New Zealand

The Sentencing Act 2002¹³ is the current sentencing law in New Zealand. It sets out the general purposes and principals to be used when sentencing. Section 8 sets out the principles of sentencing offenders. There are ten principles which Judges must follow when sentencing an offender. These principles are varied, and range from section 8(c), which states that the Judge must impose the maximum sentence if the

⁷ Washington Legislature <http://www.leg.wa.gov/legislature> (accessed 25 May 2009)

⁶ Legislative Analyst's Office California <http://www.lao.ca.gov> (accessed 25 May 2009)

⁹ Three Strikes.org www.threestrikes.org (accessed 25 May 2009)

¹⁰ Zimring, Hawkins, Kamin above n 3, 8

¹¹ Jones, T Newburn, T *Three Strikes and You're Out* 2006 46 British Journal of Criminology 784, 791

¹² Ibid, 791

¹³ Sentencing Act 2002

offence is within the most serious cases of that kind of offence,¹⁴ to the impact of the crime on the victim in section 8(f).¹⁵

Section 8 of the Sentencing Act must be followed. In addition, a judge must have regard to section 9, which concerns aggravating and mitigating factors. An aggravating factor in the commission of a crime, such as particular cruelty in the commission of the offence, or premeditation on the part of the offender may lead to a harsher sentence.¹⁶

Conversely, under section 9(2), the court must take mitigating factors into account, such as whether the offender pleaded guilty, and if there is evidence of the offender's previous good character.¹⁷ Within these guidelines, the court will weigh up all the factors relevant and sentence the offender to what it considers an appropriate term.

However, within the act there are various ways for the court to tailor the sentence in order to suit the offender and the crime committed. Section 9(4) is one such example: "Nothing in subsection (1) or subsection (2) prevents the court from taking into account any other ... factor that the court thinks fit; or implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account."¹⁸

The court is free to make the sentence that it believes is best. The judge presiding is given discretion as to how to apply the act to the particular facts before

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid s9

¹⁷ Ibid

¹⁸ Ibid, s9 (4)

him. There is no mandatory minimum sentence that must be applied, with limited exceptions, such as the minimum non-parole period for murder.¹⁹

C The Sentencing and Parole Reform Bill

The Sentencing and Parole Reform Bill²⁰ proposes a form of “Three Strikes Law” in New Zealand. The bill works as follows. There is a list of “serious violent offences”²¹ under section 86A. Commission of any of these offences will count as a “strike”. If an offender is convicted of a “serious violent offence” they will receive the normal sentence for that crime. Section 86B(2)(a) provides that the offender must be given a warning of the consequences of further offending. It must be noted that only those over 18 can receive a first warning and thus a first strike, as detailed further below.

If the offender goes on to commit a second “serious violent offence”, and the court sentences them to determinate imprisonment, the consequences will be severe. The maximum possible sentence will be handed down, and the sentence must be served without parole.²² A final warning will also be given to the offender under section 86C(3). If the second strike offence is murder, the punishment is even more severe: Under section 86E, the court must impose a sentence of imprisonment for life, with a minimum imprisonment period of 25 years, unless it would be manifestly unjust to do so.²³

If an offender, after the two warnings given, is convicted of a third “serious violent

¹⁹ Ibid

²⁰ Sentencing and Parole Reform Bill, no 17-1

²¹ Ibid s86A

²² Ibid s86C

²³ Ibid s86E

offence”, they will receive a third “strike”. Section 86D states:²⁴

- (1) This section applies if-
 - (a) an offender who has a record of a final warning commits a serious violent offence; and
 - (b) the court would, but for this section, impose a further qualifying sentence, other than a sentence of imprisonment for life for murder for that offence.
- (2) If this section applies, the court must-
 - (a) impose a sentence of imprisonment for life...

D Preventive Detention

This is against the background of legislation that already exists, which is aimed at the worst repeat offenders. Section 87 of the Sentencing Act 2002 allows a court to impose preventive detention. The section gives the purpose as, “The purpose of preventive detention is to protect the community from those who pose a significant and ongoing risk to the safety of its members.”²⁵ It also has criteria:²⁶

- 2. This section applies if—
 - (a) a person is convicted of a qualifying sexual or violent offence (as that term is defined in subsection (5)); and
 - (b) the person was 18 years of age or over at the time of committing the offence; and
 - (c) the court is satisfied that the person is likely to commit another qualifying sexual or violent offence if the person is released at the sentence expiry date (as specified in subpart 3 of Part 1 of the Parole Act 2002) of any sentence, other than a sentence under this section, that the court is able to impose.

²⁴ Ibid s86D

²⁵ Sentencing Act 2002 above n 13 s87(1)

²⁶ Ibid s87(2)

New Zealand therefore already allows for a more severe penalty for repeat violent offenders, serving the same purpose as "Three Strikes" legislation. The difference is the discretion available to the judges. Of course, the courts must look at various factors.²⁷ It seems the Parole and Sentencing (Reform) Bill will replace this. The discretion and flexibility of sentences is taken away and replaced with a "one size fits all" approach, regardless of the circumstances of the offender.

The Law Commission has advocated the widening of preventive detention laws, instead of enacting this Bill.²⁸ This seems to be a good solution. Preventive detention laws allow the offender to be punished more stringently, but within the system of checks and balances of the court system. Discretion being taken away from the judiciary and given to the legislature and the executives skirts the checks and balances put in place by the separation of powers.

III POSSIBLE MOTIVATIONS BEHIND THE BILL IN NEW ZEALAND

The ideas behind this law are straightforward. Specifically, it is to keep repeat offenders off the streets. The idea is that once a person has committed two offences, and still hasn't learned, or doesn't want to change their behaviour, then they should be punished more than usual. This is both general and specific deterrence. General deterrence aims to set an example so other would-be offenders will make different choices. Specific deterrence is aimed at the individual offender, to persuade them to change their behaviour. When using individual deterrence and incapacitation as rationales for sentencing, the court must assess the risk of the criminal re-offending. This is known as risk assessment. Risk assessment means trying to predict the chances

²⁷ Ibid s87(4)

²⁸ Stuff website www.stuff.co.nz (accessed 9/6/09)

of a given offender committing further crimes, which can be notoriously difficult.²⁹ Risk assessment is discussed further in section V.

There is also an element of selective incapacitation inherent in these laws. Studies have shown keeping high rate offenders imprisoned longer than low rate offenders can reduce crime.³⁰ However the problem lies in accurately predicting which offenders come under which category. Because of things like social forces, situational factors, unstable patterns, unreliability of records and the fact that criminality often declines with age, it is very difficult to measure accurately criminal propensity.³¹ In New Zealand this is dealt with by making previous convictions an “aggravating factor” in sentencing, where it has been shown that there is a “settled determination to break the law”, as well as rewarding those without previous convictions, using lack of a criminal history as a “mitigating factor”.³² Selective incapacitation goes above and beyond the “just deserts” theory of punishment. This is further analysed in section V.

There is a clear link between the ACT party and this legislation. However it could not have reached this stage without support from the National party, who also made campaign promises to toughen up sentencing.³³

National voted along with ACT and United Future on the first reading of the bill in Parliament. On the 18 February 2009 the bill was sent to the select committee

²⁹ Kemshall H *Understanding Risk in Criminal Justice* Open University Press England 2003, 65

³⁰ Haapanen, R *Selective Incapacitation and the Serious Offender* Springer Verlag New York 1990, 5

³¹ *Ibid*, 143

³² Ministry of Justice, *Sentencing Policy and Guidance*, Wellington, 1997, 99 - 100

³³ National Party website <http://www.national.org.nz> (accessed 26/4/09)

after it passed the vote 64 to 58. The Labour party, the Maori party and the Greens voted against it.³⁴

As campaign promises go, "Three Strikes" is a particularly good one. It is crystal clear and unashamedly tough. It vows to get serious on crime, and particularly violent crime, which people fear most.³⁵ However, there are dangers involved in basing policies around populism instead of facts and results.

"Populist punitiveness" is a phrase that refers to political parties using, for their own gain, what they believe to be the public's punitive stance.³⁶ That is, they tap into the perceived punitive nature of the public when forming policy. The problem with this is that instead of forming policy based on the law reform commission and advisory bodies, it is instead based on public pressure and the media.³⁷ While arguably more democratic, it can lead to laws that do not target the source of the problem, look good on paper but have few practical effects, or are costly but ineffective.³⁸ In terms of sentencing law, public opinion has led to various pieces of legislation in different jurisdictions, including sex-offender registration, community notification schemes, "three strikes" provisions, and increased mandatory sentence lengths.³⁹

³⁴ TVNZ website <http://tvnz.co.nz/politics-news/> (accessed 1/6/09)

³⁵ Walters, R Bradley, T *Introduction to Criminological Thought* New Zealand 2005

³⁶ Freiberg A, Gelb K *Penal Populism, Sentencing Councils and Sentencing Policy* Hawkins Press 2008, 3

³⁷ Ibid

³⁸ Ibid

³⁹ Ibid

However John Pratt notes that while there is overall public endorsement of increased punitiveness in general terms,⁴⁰ most members of the public, when asked their opinion on specific cases or specific policy give far more “nuanced and reflective”⁴¹ answers. In fact a 2006 opinion poll shows there is strong public support for community based sentencing, rather than building more prisons.⁴²

This shows that when political parties attempt to tap into the perceived punitiveness of the public, based on media reports and lobby groups, they may be heading in the wrong direction. But public sentiment is often based around perceived problems with crime, regardless of the actual realities of the situation, and pandering to that sentiment wins electoral votes.⁴³

Hon Clayton Cosgrove of the Labour party states that it is little more than a “political pamphlet”, designed to “play on the heartstrings of victims.”⁴⁴ Here he is pointing out that it is a clear populist policy to appear tough on crime. But the actual effects of the bill will be negligible, not having an effect on any criminal for 15 to 20 years.⁴⁵

IV POTENTIAL BENEFITS OF THE BILL

A Truth in Sentencing

⁴⁰ Pratt, J *The Dark Side of Paradise* 2006 46 *British Journal of Criminology* 542

⁴¹ *Ibid*

⁴² *Ibid*

⁴³ *Ibid*

⁴⁴ Hansard (18 February 2009) 642 NZPD 1420

⁴⁵ *Ibid*

Truth in sentencing refers to the average time served compared to the sentence handed down. For example, a prisoner who receives a 9-year sentence with no minimum parole period could be out in 3 years, one third of the sentence. If time served before the trial is added in, it could only be 18 months of a sentence served.

Simon Power MP is the Minister for Justice. In his speech to Parliament he spoke in favour of the “three strikes” component, stating: “Under this legislation, the public and victims will be spared uncertainty about when or whether these violent offenders will be released on parole—they will not be.”⁴⁶ His focus is on the victim – by taking away discretion, and having a fixed sentence, the victim will be “spared uncertainty.”⁴⁷

Under the Parole Act 2002, on average, inmates are serving around 62 percent of their sentence, which is longer than the average time served under the previous legislation.⁴⁸ But this has not stopped, as the Law Commission puts it, “the oft-repeated criticism that New Zealand lacks “truth in sentencing”, which in turn undermines the credibility of the system and public confidence in it.”⁴⁹

The problem with this is that not releasing prisoners early can have undesirable consequences. There is the issue of prison capacity, and the notion that leaving offenders in prison to serve their full term can have negative impacts in the pursuit of criminal justice.⁵⁰ Early release can be an effective tool in prison discipline, as an

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Sentencing Guidelines and Parole Reform, Report 94, Law Commission, Wellington 2008, 47

⁴⁹ Ibid 48

⁵⁰ Ibid, 51

incentive to better behaviour. It can also be used for "risk management", aiding in both rehabilitating offenders and preventing further offending.^{51 52}

These goals can be met through different forms of truth in sentencing. One possible approach mooted by the Law Commission is changing the way the judge articulates the sentence. The judge would state both the actual sentence and the parole component. In addition, by shifting the parole component to two thirds of the sentence, the time offenders spend in jail would increase to 80% of the sentence, increasing "truth in sentencing" while still allowing the positive effects of early release.⁵³

B Protecting the Public

Protecting the public is another potential benefit. Simon Power MP states that these offenders have "...shown contempt for the safety of others". By imposing greater sentences, he hopes to "...protect the public from the worst repeat offenders."

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David Garrett MP of the ACT party argues that less murders will be committed if this bill is passed.⁵⁵

We know that this bill will work, because right now there are 77 murderers in jail who committed a murder at a time when they had three or more violent offences under their belt—77 people...

⁵¹ Ibid, 52

⁵² Appleton and Grover showed this in their article "The Pros and Cons of Life Without Parole" Appleton, C and Grover, B *The Pros and Cons of Life Without Parole* 2007 47 *British Journal of Criminology*

⁵³ Law Commission above n 48, 57

⁵⁴ Hansard above n 44

⁵⁵ Ibid

Their victims would be alive today if, at the time they were killed, this bill had been enforced.

This statement fails to note many of the concerns about this legislation. Legislation cannot be enacted without fully comprehending all of the consequences. David Garrett MP fails to acknowledge the issues of human rights, the questionable effects of deterrence on offenders, and the costs involved that could be better spent on other policies. He goes on to say that there are “thousands” of violent offenders in the community with “dozens of violent convictions”.⁵⁶

He states that others will join those 77 murderers in jail.⁵⁷ Crime is a part of every society. But deterrence alone is not the way to reduce crime.⁵⁸ Simply filling up our prisons will not reduce our crime rate. As Dame Sian Elias noted recently, different approaches need to be tried, such as greater spending and focus on early childhood education, more study on what makes a person offend, and rehabilitating offenders.⁵⁹

As well, these facts have been disputed by some. As reported by the NZPA,⁶⁰

... Information provided under the Official Information Act to Rethinking Crime and Punishment's Kim Workman, an opponent of the policy, showed of the 423 prisoners serving life sentences not one would have been stopped by the proposed three-strikes law.

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Walters and Bradley above n 35, 57

⁵⁹ Dame Sian Elias, Supreme Court Chief Justice “Blameless Babes” (Annual Shirley Smith Address, New Zealand, 2009)

⁶⁰ Stuff website www.stuff.co.nz accessed 8/7/09

None of the prisoners would have reached three-strikes before being given their life sentence...

David Garrett MP replied to this by stating that the original bill put forward by ACT would have had the stated effects, but not the bill sent to the select committee, as it had been changed by the National party.⁶¹

C Being Tough on Repeat Offenders

This is the idea that repeat-offenders have been given chances to reform and have not, and therefore need to be treated more harshly. David Garrett MP puts forth the idea of giving people chances, but still being tough about it:⁶²

Kiwis are fair people; we do not want people to have no chances. This time he will get 12 years and he will serve 12 years. But if "Mr. Scumbag" comes out of prison and commits another such offence again, he will go away for a sentence of 25 years to life. That is it. There is nothing magical or unfair about it...

The problem here is the lack of discretion. It must be "manifestly unjust" for the court not to hand down the required sentence, which is a very high threshold to meet.⁶³ This is discussed further in section V.

D Deterrence

⁶¹ Ibid

⁶² Hansard, above n 44

⁶³ Sentencing and Parole Reform Bill above n 20 s86D(3)

Deterrence is the idea that punishing offenders harshly deters them from committing crimes in the future. Here, a clear deterrence aim is announced. David Garrett MP states:⁶⁴

It will be costly but I support trying to stop people from becoming three-strikers... What sensible person would want people to be locked up for 25 years or for life? The aim is to get felons to see where they are going, to decide they do not want to spend from 25 years to a lifetime in jail, and to change their ways. I am all for rehabilitation if it can work, but this bill is designed to protect people, and we know it will work because of the 77 in jail now.

The problem with this is many offenders are not “sensible person(s).” Offenders when committing a crime do not always weigh up the costs and benefits of their actions.⁶⁵ On the contrary, much violent crime is committed in “hot blood”, in the spur of the moment.⁶⁶ Bradley and Walters further note that a deterrence model based on increasing the length of imprisonment often does not deter the criminal. Other factors need to be taken into account.⁶⁷ This is discussed further in section V.

Ms Turei from the Green party highlights this further: “there is little, if any, evidence that such provisions will act as a deterrent to offenders, or that offenders will even understand the consequences of this legislation in the process of their offending.”⁶⁸

V POTENTIAL DRAWBACKS OF THE BILL

⁶⁴ Hansard above n 44

⁶⁵ Walters and Bradley above n 35, 57

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Hansard above n 44

A *Lack of Discretion*

What sets "Three Strikes" laws apart is the lack of discretion given to the judiciary in sentencing. The Judge presiding over one of these cases will not be allowed any discretion in determining the sentence. This can be a problem in some cases where the ability to consider all the facts of the case is required. The Law Society has been negative towards this aspect of the bill, labelling it a "blunt instrument."⁶⁹ Spokesman for the society Jonathan Krebs has told the select committee that discretion should be left to the judiciary.⁷⁰ The lack of discretion given to judges is illustrated by the proposed section 86D:⁷¹

[If s86D1 applies the court must]...

- (a) impose a sentence of imprisonment for life; and
- (b) order that the offender serve a minimum period of imprisonment under that sentence.
- (3) The court must impose a minimum period of imprisonment of 25 years unless the court is satisfied that it would be manifestly unjust to do so.

The judge will now have no discretion when sentencing. As detailed in section II, the judge currently has guidelines to sentencing, but the final sentence handed down will be a matter of discretion. Now, she is forced by the legislation to impose a minimum twenty-five year sentence, unless "it would be manifestly unjust to do so".⁷² This is a check on the rule to avoid unjust results.

⁶⁹ Stuff Website www.stuff.co.nz (accessed 9/6/09)

⁷⁰ Ibid

⁷¹ Sentencing and Parole Reform Bill above n 20 s86D

⁷² Ibid

The term “manifestly unjust” has been defined in two recent cases, *R v Slade*⁷³ and *R v Williams*.⁷⁴ In *R v Slade*, the Court of Appeal found that it would have been “manifestly unjust” to impose a 17 year non-parole period. They cited various factors including the defendant’s age, upbringing, and role in the attack (which was far less callous than the ringleader.)⁷⁵

In *R v Williams* the court noted that it was a “matter of overall intention” based on “demonstratable factors that withstand objective scrutiny.”⁷⁶ That is, the circumstances of the offence must be such that the case does not fall within the band of culpability of a qualifying murder.⁷⁷

These two cases illustrate that there must be something special about the offender, or the offence, that makes the sentence “manifestly unjust.” The same standard will most likely be applied in “Three Strikes” cases.

B Lack of Flexibility

In terms of the proposed “Three Strikes” legislation, this lack of discretion may create issues of flexibility. In the majority of cases, the court would no longer be able to look at specific circumstances relevant to each offender and tailor a sentence to fit. The sentence must be set down as stated in the bill, and very few cases will be able to meet the threshold required, as noted later in this essay.

It is also well documented that without discretion available to the courts, illogical

⁷³ *R v Slade*, [2005] 2NZLR526

⁷⁴ *R v Williams* [2005] 2NZLR506

⁷⁵ *R v Slade* above n 73 para 53

⁷⁶ *R v Williams* above n 64 para 67

⁷⁷ *Ibid*

sentencing results may occur. This is well illustrated by a number of US cases: for example, Kevin Weber had two previous convictions for burglary and assault with a deadly weapon. He then attempted to rob a restaurant safe, and managed to get away with four biscuits. For this offence, he received a sentence of 25 years to life.⁷⁸ Similarly, Leandro Andrade stole 9 videotapes from two different K Marts in 1995. He had previously been convicted of petty theft, burglary, transportation of marijuana and escape from prison. As any felony can count under California's three-strike law, he was sentenced to two consecutive terms of 25 years to life.⁷⁹

Although extreme, these cases illustrate potential problems in utilising mandatory penalties. The specific list of offences in the proposed New Zealand legislation will ensure that such marked problems do not occur, but the core of the problem remains; offenders will be mandatorily punished disproportionately for their offending should this bill be passed.

C Problems with Parole

Clause 11 of the Bill amends section 20 of the Parole Act 2002:⁸⁰

Parole eligibility date

Section 20 is amended by adding the following subsections:

(5) If an offender is required, by an order under **section 86C(2)** of the Sentencing Act 2002, to serve a sentence without parole, the offender—

(a) does not have a parole eligibility date in respect of the sentence; and

(b) may not be released on parole in respect of that sentence.

⁷⁸ CNN <http://edition.cnn.com> (accessed 8/6/09)

⁷⁹ *Lockyer v. Andrade*, 538 U.S. 63 (2003)

⁸⁰ Parole Act 2002 s20

(6) If an offender is required, by an order under **section 86E(2) or 103(2A)** of the Sentencing Act 2002, to serve a sentence of imprisonment for life without parole, the offender may not be released on parole.

This means that any life sentence given under the Sentencing and Parole Reform bill will result in life imprisonment without the possibility of parole. Currently this does not exist – all offenders are allowed parole, unless they have been sentenced to preventive detention. This is much harsher than current sentencing law. Currently the non-parole period for life imprisonment is ten years, unless the court imposes a minimum period.⁸¹

So the discretion of the courts to impose minimum non-parole periods on offenders has been dropped in respect of three-strike offenders, in favour of a strict code which imposes a life long sentence, no matter how rehabilitated the offender becomes. This is very overbearing, and it means no matter what, a prisoner convicted of a third strike offence can never be released. This is an example of going beyond “just deserts”.

D Beyond “Just Deserts”

“Just Deserts” is a goal for sentencing. The idea is that the criminal should be punished for the offence(s) committed and nothing else. It is a punishment for wrongdoing and focuses directly on the offender. Proportionality is a big part of this rationale, and ‘just deserts’ does not claim to punish for possible future offending. “Three Strikes” laws go beyond ‘just deserts’ and punish more harshly for past crimes, and perceived future crimes. The sentencing rationales being used here are incapacitation, and deterrence.

⁸¹ Ibid s84(3)

Deterrence has long been used as a rationale for sentencing, and is an essential part of most criminal justice systems.⁸² However, there has always been a lack of empirical support as to its effects on crime, and there is still lack of agreement between criminologists on both the "nature and magnitude of deterrent effects."⁸³

Using California's Proposition 8 as a guide, Webster, Doob and Zimring (WDZ) studied any deterrent effect it may have had. Proposition 8 added 5 years to a person's sentence if they had a prior felony conviction, and one year if they had any conviction, whichever was greater. It also stipulated that the court could look back indefinitely into the persons past, erasing the previous 10 year limitation, and required judges to set the sentence consecutively, not concurrently.⁸⁴

Obviously this is very harsh on repeat offenders, and it would seem that people would be unlikely to re-offend, given such harsh consequences. However, WDZ found no real evidence of a decrease in crime. They concluded that there is "little support for marginal general deterrence of sentence severity."⁸⁵

They further noted an interesting anomaly: "Harsher penalties such as sentence enhancements or the increased use of imprisonment ... seem to follow, rather than precede, declines in crime rates."⁸⁶ This shows there is often no connection between increased sentence severity and decreased crime rates.

⁸² Webster, Doob, Zimring *Proposition 8 and Crime Rates* 2006 5 *Criminology and Public Policy* 418

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Ibid, 439

⁸⁶ Ibid, 440

E Offences Covered by the Proposed Law

For an offence to be a strike offence, it must be classified as a “serious violent offence.”⁸⁷ These are defined in the act, under section 86A (1)-(37). This is good as it narrows the scope of the act, making it harder for non-serious offenders to fall under the three strikes provision, as well as increasing certainty of sentencing, which as noted above is important to notions of deterrence. The only offence that is not violent is incest.

This list is comprehensive. It covers what most people would consider the most serious offences. There are some notable exceptions however. Common assault, theft and burglary are three crimes not included in the bill. To reach the threshold of a “serious violent crime” something more is required.

The emphasis is on violent crime, signalling the importance of physical integrity and other harms. This is illustrated by the fact that a number of non-violent offences that could be categorised as “serious” by virtue of their high maximum penalties are not included. For example, drug offences are not included. Supplying class A drugs such as methamphetamine (P) or heroin is very serious. People who manufacture, import or supply drugs can indirectly cause far more damage than someone who commits a direct crime, for example, aggravated burglary (a “serious violent offence under section 86A).⁸⁸ Yet these kinds of offences are not included on the list.

⁸⁷ Sentencing and Parole Reform Bill above n 20, S86A

⁸⁸ Ibid

Similarly, no "white collar" crime is included on this list. White collar crime can be more serious and can affect more people than "street crime". However as it is not classified as "violent" in nature, it will not be included in this legislation, despite the effects it can have on peoples lives. "White collar" crime has always been viewed as less serious than violent and property crime.⁸⁹ A popular misconception is that "white collar" crime is either victimless or lacks seriousness.⁹⁰ But despite the damage and cost "white collar" crime has inflicted in New Zealand⁹¹, crime-reducing methods are limited to violent crime. This reflects Reiman's argument that the public believes that the model for crime is one person harming another, due to media portrayals and political rhetoric, and therefore accepts a legal system that leaves them unprotected against greater dangers.⁹²

F The Warning System

As the consequences of receiving a conviction under the proposed bill are very serious, checks and balances have been placed to soften the harsh effects. One of these is the warning system. Section 86B states:⁹³

(1) This section applies to a qualifying sentence for a serious violent offence imposed on an offender...

⁸⁹ Walters and Bradley above n 35, 155

⁹⁰ Ibid

⁹¹ Ibid, 158

⁹² Ibid, 159

⁹³ Sentencing and Parole Reform Bill above n20 s86B

(2) When the court imposes the qualifying sentence, the court must

(a) advise the offender that the court is imposing a sentence to which this section applies and warn the offender of the consequences of receiving a further qualifying sentence for a further serious violent offence...

An offender must be given warning that she has committed a serious violent offence. This is to increase the deterrence effect aimed for (deterrence cannot hope to be effective if the consequences of further offending are unknown), as well as notions of fairness.

Another warning must be given after conviction for the second offence, under section 86C:⁹⁴

Final warning on receiving second qualifying sentence for serious violent offence

... (3) When the court imposes the qualifying sentence, the court must

(a) advise the offender that the court is imposing a sentence to which this section applies and warn the offender of the consequences of receiving a further qualifying sentence for a further serious violent offence...

Again, this serves to let the offender know the specific consequences he faces. However, there is no time limit on the warnings, as noted in s86F:⁹⁵

Continuing effect of warnings

(1) An offender continues to have a record of a warning or a record of a final warning regardless of the effect of the sentence to which the record relates.

⁹⁴ Ibid s86C

⁹⁵ Ibid s86F

They continue on indefinitely, unless one of the criteria of section 86F(2) is met, namely, the conviction is quashed, or the defendant successfully appeals his case. This means an offender, once he has committed and been convicted for one "serious violent offence" must be careful not to commit any listed crime for the rest of his life.

This could be viewed as extensive punishment. Even after an offender has served his sentence, he will have this continued warning hanging over him until he dies, no matter what the subsequent choices he makes in his life are. However, it does fit the context of the bill, going beyond just deserts. Repeat offenders will be punished, no matter how far apart the commission of the offences are.

Youth offenders are not covered by this bill. Section 86B states:⁹⁶

(1) This section applies to a qualifying sentence for a serious violent offence imposed on an offender who, at the time of committing that serious violent offence,

(a) did not have a record of a warning given under this section; and

(b) was 18 years of age or over.

This means a first warning cannot be given until the offender is 18. This is an interesting decision. Young offenders have been convicted of these kinds of serious crimes in the past. If they can be sentenced for murder or manslaughter at a young age, it seems interesting that they cannot be given a first warning. This decision subscribes to the "welfare model" for dealing with young offenders.⁹⁷ The welfare model aims to rehabilitate young offenders, and focuses more on their needs than

⁹⁶ Ibid s86B

⁹⁷ Cunneen C, White R *Juvenile Justice and Crime in Australia*, 3rd ed Oxford University Press 2007, 105

punishment,⁹⁸ as opposed to the “justice model”, which focuses on due process and just deserts, with rehabilitation as a secondary goal.⁹⁹

G Effects of the “Three Strikes” Law in California and the Likelihood of Those Effects Being Felt Here

We can examine the effects of the law in other jurisdictions where it has been enacted. As discussed earlier in this paper, the manifestation of the ideas behind the law, and therefore the law itself, will be different from place to place. California is the most famous example of the “Three Strikes” legislation. Although the overall intention remains the same, an extended sentence on the second offence, followed by a larger extended sentence on the third strike, the California law punishes different offences than the proposed New Zealand legislation. The provision is more broadly drafted, including all felony offences, not just those of “serious violence”.

1 Effect on Prison Population

At the time of implementation of the “three strikes” law in California, there were fears that the prison population would grow uncontrollably. Some estimates saw the prison population reaching 250,000 inmates by 1999.¹⁰⁰ Other estimates projected that it would increase the population by 100,000 inmates by 2003, taking the population to 215,000.¹⁰¹

⁹⁸ Ibid, 106

⁹⁹ Ibid

¹⁰⁰ Zimring Hawkins and Kamin above n 3, 134

¹⁰¹ Legislative Analyst’s Office above n 6 (accessed 8/6/09)

However, by 2004 the prison population had only increased by some 60,000 offenders, not as large an increase as many had feared. Still, since the implementation of the three strikes law, the California prison population has grown rapidly.¹⁰² From 1994 – 2004, over 87,500 second or third strike offenders were sent to prison. In 2004, there were still 43,000 of those inmates in prison, making up 26% of the offenders – clearly a large increase.

This less than expected increase has been put down to several factors; one example being put forward is the use of discretion by prosecutors.¹⁰³ The prosecutors are accepting plea deals for lesser, non-felony offences in order to avoid the legislation.

Also note in California that 56% of these three-strikes offenders are in jail for non-serious or non-violent crimes, such as theft.¹⁰⁴ This could not occur in New Zealand because of our strict list on the bill. A possible reason for this is given by the Legislative Analyst's Office: "It is likely that these figures somewhat under-report the percentage of strikers whose current offense activity was actually serious or violent. This could occur in some cases because district attorneys choose to prosecute strikers for non-serious, nonviolent offenses that may be easier to prove in court, presumably to make it easier to secure a conviction, knowing that the Three Strikes sentence enhancement will still apply. The extent to which this occurs is unknown."¹⁰⁵ This will affect the crime rate statistics – if prosecutors are processing violent crimes as

¹⁰² Ibid (accessed 8/6/09)

¹⁰³ Ibid (accessed 8/6/09)

¹⁰⁴ Ibid (accessed 8/6/09)

¹⁰⁵ Ibid (accessed 8/6/09)

non-violent crimes, the number of violent crimes recorded will appear to be lower than it actually is.

The prison population will certainly increase because of the increased length of sentences. The Sentencing and Parole (Reform) Bill provides that the offender must be given the maximum sentence on the second strike, and 25 years to life on the third strike. This means prisoners will be staying in prison for longer. In California this has been noted too – from 1994 when the law was implemented, to 2004, the average prison stay increased 19%.¹⁰⁶ As well, the average age of prisoners has increased, from 32 in 1994 to 36 in 2004, as well as a trebling of prisoners aged over 50, up to 16,300.¹⁰⁷

This is against a background of New Zealand being one of the most punitive nations in the world, using the data of prison population per 100,000 people. In fact New Zealand as of 2008 has the seventh highest population per capita in the OECD with 155 people per 100,000 currently incarcerated.¹⁰⁸ 75% of OECD countries have rates less than 140 people per 100,000 imprisoned. In 2005, New Zealand had a rate of 184 per 100,000 people in jail, the second highest in the world behind only the United States.¹⁰⁹

John Pratt argues in his article “The Dark Side of Paradise” that New Zealand has always been a punitive country, despite often having equal or lower crime rates than

¹⁰⁶ Ibid (accessed 8/6/09)

¹⁰⁷ Ibid (accessed 8/6/09)

¹⁰⁸ New Zealand Statistics www.stats.govt.nz (accessed 7/7/2009)

¹⁰⁹ Pratt above n 40, 542

other countries such as England.¹¹⁰ From 1990 – 2000 there was a decline in crime rates and in 2000, the rate of homicides was far lower in New Zealand than in Australia and England, yet imprisonment rates stayed level, or rose.¹¹¹

John Pratt links this latest rise to populist forces, including lobby groups such as the Sensible Sentencing Trust, talk-back radio, “victims turned heroes”, and fringe political parties allowed in by MMP.¹¹² This means that even as crime rates fall, the symbolic importance of punishment increases.¹¹³

A 2008 Law Commission paper states that without a 25% reduction in sentence lengths, 1137 additional beds would be required.¹¹⁴ The “three strikes” law will increase the lengths, not decrease them, meaning far more space for prisoners will be required. This will result in increased costs to the public.

In California, the cost for keeping these prisoners behind bars is estimated to be \$1.5b US annually. Taking into account those that would be in prison anyway, the cost drops to about \$500m US, as well as the construction of 7 new prisons, at a cost of \$1.8b US.¹¹⁵ However, there are always problems with estimating the costs, such as apportioning increases to different laws.¹¹⁶

¹¹⁰ Ibid 545

¹¹¹ Ibid

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ *Sentencing Guidelines and Parole Reform* NZ Law Commission Website www.lawcom.govt.nz accessed 7/7/2009

¹¹⁵ Legislative Analyst's Office above n 6 (accessed 8/6/09)

¹¹⁶ Ibid (accessed 8/6/09)

There will be other indirect cost effects, such as taxes which would have been paid, or costly (in terms of health care for the victim, court processes and so on) crimes that may have been committed had the offender not been in jail. These factors are difficult to measure.¹¹⁷

John Pratt argues public money should not be spent this way. The increased rate of incarceration, as well as the extra burden on our penal system, comes at a cost to our health and education spending. He goes on to say that privatising prisons will not save the public money, and that “no responsible government can give such blank-cheque guarantees in the global credit crisis.”¹¹⁸ There is no need for this huge expense when the laws needed are already in place.

2 *Effect on the courts*

There were two main effects on the courts in California. One was the pressure put on the Supreme Court, which had to decide the scope and legality of the new law.¹¹⁹ This will not apply to the same extent in New Zealand, because our Supreme Court cannot rule on legislation. However, all the courts will feel the effects because of offenders pursuing their cases far more vigorously. More offenders will fight their convictions harder, because of the decreased incentives for pleading guilty, and the more severe punishment that will follow a guilty verdict.¹²⁰

¹¹⁷ Ibid (accessed 6/8/09)

¹¹⁸ Stuff Website above n 28 (accessed 9/7/09)

¹¹⁹ Zimring Hawkins and Kamin above n 3, 125

¹²⁰ Ibid

Early estimates for the effect on the California court system were dire. It was projected that jury trials would more than double in the first two years.¹²¹ What actually transpired was far less. The additional workload of the courts varied from 10% to 25%.¹²² This is partially because prosecutors were flexible, accepting plea bargains for lesser offences.¹²³ The offender would plead guilty in exchange for the offence being changed to a non-strike offence, reducing the amount of trials needed. This could also hold true in New Zealand, for example reducing a charge of wounding with intent to assault in return for a guilty plea.

However, in New Zealand, the court system is already under considerable stress. Cases can take months to begin, and then more time for the case to be resolved. In 1997, 76 percent of cases were disposed of within 52 weeks; that figure fell to 63 percent in 2000, and 67.5 percent in 2002.¹²⁴ There are many reasons cited for this, included under-prepared and under-informed litigants and defendants, overall workload, and the unavailability of judge time.¹²⁵ A 10 – 25% increase in the number of cases could have a huge effect on the court system, resulting in further increased delays, greater inefficiency and higher costs.

Ten years on, the amount of court cases has increased by 10%.¹²⁶ Again, the reason given is more offenders going to trial, given the lesser incentives for pleading guilty, and the hope that they can avoid the conviction altogether.¹²⁷ In New Zealand,

¹²¹ Ibid 126

¹²² Ibid

¹²³ Ibid 127

¹²⁴ NZ Law Commission Website www.lawcom.govt.nz accessed 7/7/2009

¹²⁵ Ibid

¹²⁶ Legislative Analyst's Office above n 6 (accessed 6/8/09)

¹²⁷ Ibid (accessed 6/8/09)

where the median waiting time for a trial in 2007 was 290 days in the High Court and 256 days in the District Courts¹²⁸, this could be a serious burden.¹²⁹

3 *Effect on Crime Rates*

Crime rates have dropped in California since 1994. From 1994 to 1997, homicides dropped 40.2%, rapes dropped 17.1%, and robberies dropped 38.7%.¹³⁰ Between 1994 and 1999, the crime rate fell 43%.¹³¹

It is hard to estimate how much of this is attributable to the “Three Strikes” law though. For example, the overall crime rate was already declining – from 1990 to 1994 it dropped 10%.¹³² As well as this, the crime rate actually increased from 1999 – 2004, by 11%.¹³³

The national crime figures also show declines in crime over this period. National crime rates fell 31% between 1991 and 2003, with violent crime dropping 37%.¹³⁴ Comparing Los Angeles to other cities shows that crime has dropped just as much without the “Three Strikes” laws. In New York, it fell even further.¹³⁵

Kim Workman, director of Rethinking Crime and Punishment, puts it this way:¹³⁶

¹²⁸ Voxy News Website www.voxy.co.nz (accessed 9/8/09)

¹²⁹ Law Commission above n 124

¹³⁰ Zimring Hawkins and Kamin above n 3, 86

¹³¹ Legislative Analyst’s Office above n 6 (accessed 6/8/09)

¹³² Ibid (accessed 6/8/09)

¹³³ Ibid (accessed 6/8/09)

¹³⁴ Ibid (accessed 8/6/09)

¹³⁵ Zimring Hawkins and Kamin above n 3, 89

¹³⁶ Scoop NZ www.scoop.co.nz/ (accessed 6/8/09)

California's decline in crime compared with the national average, presents another picture. New York, not California, showed the sharpest decline in crime during the time in question. New York does not have three strikes legislation. Canada experienced a similar national crime drop. It does not have three strikes, and imprisons people at a rate half that of New Zealand.

There is also conflicting evidence from California itself.¹³⁷

Even in California, the results were unclear ... Californian counties that aggressively enforced the law had no greater declines in crime than did counties that used it far more sparingly. One study found that crime dropped by 21.3% in the six most lenient 'three strikes' counties, compared to a 12.7% drop in the toughest counties.

Workman states on the effects: "If the truth be known, no one really knows."¹³⁸ It is very difficult to tell the overall effect of the legislation then, given the overall drop in crime throughout the nation, and the inconsistent results within California.

John Pratt points to evidence in the crime rates in the United States which show that crime has decreased, but has also decreased in Canada, with no three strikes laws and a prison rate of only 116 per 100,000 of population, far lower than the 753 per 100,000 in the USA. He also notes that the biggest drop in violent crime in the USA has been in New York, with no three strikes legislation.¹³⁹

H Possible Effects of Life Without Parole

Another effect the bill could have is on offenders who have just committed their third offence, but have not been apprehended. Faced with life imprisonment

¹³⁷ LA Criminal Defense Blog www.lacriminaldefenseblog.com (accessed 6/8/09)

¹³⁸ Scoop NZ above n 136 (accessed 6/8/09)

¹³⁹ Stuff Website above n 28 (accessed 9/7/09)

instead of the previous sentence for the offence, some these offenders will try anything to avoid capture. They have nothing to lose at this point, as apprehension and conviction will see them in prison for the rest of their lives. They may go on to commit several more offences to evade arrest, putting the public at more risk, as well as the police trying to apprehend them.¹⁴⁰

The bill will have massive consequences for those convicted and imprisoned for life without parole. Life without parole is frequently cited as the second harshest punishment possible, behind only the death penalty.¹⁴¹

The purpose of a sentence of life without parole is protection of the public. It has a populist motive as well, as shown in Alabama, where it was made into law in order to stop the "revolving door".¹⁴² However difficulties often lie in predicting future dangerousness based on past crimes. Different systems use different methods of risk assessment. Some use actuarial methods, looking at statistics of offenders in similar circumstances, while some use psychological reports. Some systems, such as in England, combine the two.¹⁴³ However, it is noted that risk factors are by nature imprecise, particularly when dealing with violent and sexual offenders.¹⁴⁴ Studies show that in some cases a sentence of life with out parole would not have protected or benefited society, while incurring large costs.¹⁴⁵

¹⁴⁰ Ibid (accessed 8/6/09)

¹⁴¹ Appleton and Grover above n 52, 597

¹⁴² Ibid, 603

¹⁴³ Kemshell above n 23, 70

¹⁴⁴ Ibid, 72

¹⁴⁵ Appleton and Grover above n 52, 604

Two effects of a life without parole sentence are shown in the article "The Pros and Cons of Life without Parole."¹⁴⁶ The first is the problem of aging prisoners. If a prisoner has no chance of parole, they will inevitably grow old and die in jail. This leads to an increasing need for medical and geriatric care. There is virtually no public safety in keeping these elderly people in prison, but it is very costly too the public.¹⁴⁷

The second problem is "superinmates."¹⁴⁸ These are defined as uncontrollable inmates who have nothing to lose, and nothing to gain. The key issue is providing constructive and safe schemes for these prisoners, as well as the prisoners in jail with them. This can be very difficult, as there is no incentive of parole to ensure good behaviour.¹⁴⁹

Appleton and Grover go on to say that life without parole is seen as a good political alternative. It is not as harsh as the death penalty but is still viewed as being "tough on crime".¹⁵⁰ Some argue that there is effectively no distinction between the two – both take a life and render it useless to society.¹⁵¹

I Human Rights Issues

The Sentencing and Parole Reform Bill is inconsistent with the Bill of Rights Act 1990, section 9 in particular.

¹⁴⁶ Ibid, 597

¹⁴⁷ Ibid, 604

¹⁴⁸ Ibid

¹⁴⁹ Ibid

¹⁵⁰ Ibid, 605

¹⁵¹ Ibid, 606

Section 9 of the Bill of Rights Act 1990 provides: “Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.”¹⁵² In *Tawnoa v Attorney-General*, the Supreme Court held that the “disproportionately severe” meant punishment grossly disproportionate to the circumstances.¹⁵³

The Attorney-General, Hon Christopher Finlayson has written a report on the inconsistencies of the bill with section 9 of the Bill of Rights Act. He notes some of the consequences of the bill:¹⁵⁴

An offender who is subject to s 86D who commits a third listed offence and would otherwise be sentenced to imprisonment for five years, and who does not satisfy the high threshold of manifest injustice, will receive a life sentence with a 25 year non-parole period...

He goes on to point out that two people convicted of the same offence, but at different stages in their criminal career, will receive sentences varying from 5 years to life imprisonment, while parole eligibility could be from one year eight months to 25 years.¹⁵⁵ He concludes that:¹⁵⁶

I consider that the differential treatment for offenders, and in particular the imposition of a life sentence for offences that would otherwise be subject to a penalty of as little as five years, based on whether they have been previously convicted of listed offences and warned in terms

¹⁵² Bill of Rights Act 1990, s9

¹⁵³ Hon Christopher Finlayson “Interim Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform Bill” Published by Order of the House of Representatives, Wellington, 2009

¹⁵⁴ Ibid, part 11

¹⁵⁵ Ibid, part 12

¹⁵⁶ Ibid, part 15

of cl 5 may result in disparities between offenders that are not rationally based. The regime may also result in gross disproportionality in sentencing. For these reasons I consider the proposed regime raises an apparent inconsistency with the Bill of Rights Act.

The Attorney-General, however, thinks that if the second or third strike offence is that of murder, the punishment will not be grossly disproportionate:¹⁵⁷

The distinction in treatment between offenders who may otherwise have received a sentence of life with a minimum parole period of 10 years, but who instead receive a minimum non parole period of 25 years, is disproportionate. I am not however satisfied that this would meet the test of grossly disproportionate in terms of s9.

This is questionable. I would argue that 15 years extra of non-parole time based on prior conduct is severely disproportionate. That, of course, will be up to the Supreme Court to decide if the situation arises.

Chief Human Rights Commissioner Rosslyn Noonan has misgivings about the bill. She notes that the bill breaches the Bill of Rights Act, and possibly the International Covenant on Civil and Political Rights.¹⁵⁸ However because of New Zealand's almost unique constitutional make up, legislation can be passed even if it is inconsistent with our Human Rights legislation. It is still interesting to note these problems however.

VI CONCLUSION

¹⁵⁷ Ibid, part 18

¹⁵⁸ Stuff Website above n 28 (accessed 9/6/09)

There are many problems with the Sentencing and Parole (Reform) Bill. It began as a “get tough on crime” campaign promise by the ACT party, and has become a very controversial bill.

It is certainly tough on crime, but disproportionately so. It is inconsistent with the Bill of Rights Act. It is based on an unproven deterrent policy, and has had questionable effect in jurisdictions where it has been enacted. It takes sentencing discretion out of the hands of those who are most experienced at it, the courts, and gives it to the legislature. It will raise costs for both the prison system and the court system, without proven benefits.

It seems to be an unapologetically populist campaign tool to get votes, while ignoring the real issues of repeat -offenders.

My recommendation is to scrap the bill. This country already has the power to punish repeat offenders in the Sentencing Act 2002, but with far greater flexibility and the ability to tailor the sentence to the crime. The “three strikes” bill is a blunt instrument, which will be ineffective at curtailing crime in New Zealand.

Word count: 8510 not including title page, footnotes, table of contents and bibliography.

Bibliography:

ACT party website www.act.org.nz

Appleton, C and Grover, B *The Pros and Cons of Life Without Parole* 2007 47 British Journal of Criminology

CNN <http://edition.cnn.com>

Dame Sian Elias, Supreme Court Chief Justice "Blameless Babes" (Annual Shirley Smith Address, New Zealand, 2009)

Freiberg A, Gelb K *Penal Populism, Sentencing Councils and Sentencing Policy* Hawkins Press 2008

Hansard (18 February 2009) 642 NZPD 1420

Hon Christopher Finlayson "Interim Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform Bill" Published by Order of the House of Representatives, Wellington, 2009

Jones, T Newburn, T *Three Strikes and You're Out* 2006 46 British Journal of Criminology

Kemshall H *Understanding Risk in Criminal Justice* Open University Press England 2003

LA Criminal Defense Blog www.lacriminaldefenseblog.com

Legislative Analyst's Office California <http://www.lao.ca.gov>

Ministry of Justice, *Sentencing Policy and Guidance*, Wellington, 1997, 99 – 100

National Party website <http://www.national.org.nz>

NZ Law Commission Website www.lawcom.govt.nz

New Zealand Statistics www.stats.govt.nz

Pratt, J *The Dark Side of Paradise* 2006 46 British Journal of Criminology

Sentencing Guidelines and Parole Reform NZ Law Commission Website www.lawcom.govt.nz

Scoop NZ www.scoop.co.nz/

Sentencing Guidelines and Parole Reform, Report 94, Law Commission, Wellington 2008, 47

Stuff website www.stuff.co.nz

Three Strikes.org www.threestrikes.org

TVNZ website <http://tvnz.co.nz/politics-news/>

Voxy News Website www.voxy.co.nz

Walters, R Bradley, T *Introduction to Criminological Thought* New Zealand 2005

Washington Legislature <http://www.leg.wa.gov/legislature>

A5741
MUN
A66
S5541
2009

Webster, Doob, Zimring *Proposition 8 and Crime Rates* 2006 5 *Criminology and Public Policy*

Zimring, Franklin, Hawkins, Gordon, Kamin, Sam *Punishment and Democracy Three Strikes and You're Out in California*, Oxford University Press, 2001, 7.

Cases:

R v Slade, [2005] 2NZLR526

R v Williams [2005] 2NZLR506

Lockyer v. Andrade, 538 U.S. 63 (2003)

Legislation:

Sentencing Act 2002

Sentencing and Parole Reform Bill, no 17-1

Parole Act 2002

Bill of Rights Act 1990



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