

20 August 2021

Attorney-General

Advice under the New Zealand Bill of Rights Act 1990: Three Strikes Legislation Repeal Bill
Our Ref: ATT395/324

1. We have considered the Three Strikes Legislation Repeal Bill (**the Bill**) for consistency with the New Zealand Bill of Rights Act 1990 (**the Bill of Rights Act**). We advise that the Bill appears to be consistent with the Bill of Rights Act.

Purpose and effect of the Bill

2. The Bill repeals sections from the Sentencing Act 2002 and the Parole Act 2002 that create what is commonly known as the ‘three strikes’ regime. Under the three strikes regime, introduced by the Sentencing and Parole Reform Act 2010, a person convicted of:
 - 2.1 a first specified offence¹ is warned of the consequences if the person is convicted of another specified offence committed after that warning;
 - 2.2 a second specified offence is required to serve any prison sentence in full (i.e. without eligibility for automatic release for short-term sentences or the possibility of parole for long-term sentences) and receives a final warning; and
 - 2.3 a third specified offence is sentenced to the maximum penalty for that offence, and the term of imprisonment must be served without parole unless the Court determines that this would be manifestly unjust.
3. It also makes a number of consequent amendments to other enactments, due to the widespread use of the term “serious violent offence” introduced with the three strikes regime.
4. As drafted the Bill does not make any person convicted before 1 July 2022 eligible for release or re-sentencing as a consequence of any provision in the Bill, but this provision is to be considered by Select Committee.

¹ There are 40 qualifying three strike offences, comprising all major violent and sexual offences with a maximum penalty of at least seven years’ imprisonment, including murder, attempted murder, manslaughter, wounding with intent to cause grievous bodily harm, sexual violation, abduction, kidnapping, and aggravated robbery.

5. The Bill provides that the Crown is not liable to pay compensation or damages for any alteration of sentencing rules as a consequence of any provision in the Bill.
6. According to the Ministry of Justice, the purposes of repealing the three strikes regime include that:
 - 6.1 three strikes limits and then removes a judge’s ability to consider the individual circumstances and context of the offending when determining sentences for offenders who commit certain specified offences;
 - 6.2 three strikes results in sentences that are excessive and disproportionate to the crimes committed;
 - 6.3 there is no clear indication that three strikes deters individuals from committing qualifying offences;
 - 6.4 the Court of Appeal has found sentences imposed under the law may contravene the Bill of Rights Act;²
 - 6.5 the Courts already have the power to impose sentences equivalent to those imposed under the three strikes regime; and
 - 6.6 three strikes disproportionately impacts Māori.

Section 7 Report on three strikes regime when initially passed

7. The Sentencing and Parole Reform Bill was substantially amended through the Parliamentary process, such that it appears the Attorney-General did not advise on the consistency of the regime that was ultimately enacted with the Bill of Rights Act. That Bill as introduced required an offender, on conviction for a third strike offence, to be sentenced to life imprisonment and, absent manifest injustice, a 25-year non-parole period. The Attorney-General reported that the imposition of life sentences for offences other than murder could result in irrational disparities between offenders and gross disproportionality in sentencing.³ He considered this appeared to be inconsistent with s 9 of the Bill of Rights Act, which prohibits disproportionately severe treatment or punishment. The Attorney-General advised that he did not consider life imprisonment without parole for murder was in breach of s 9.
8. The Bill was amended to address the Attorney-General’s concern, changing the penalty for a third strike to be the maximum penalty for the offence committed, to be served without parole. However, there was another significant change at this stage, which appears not to have received the Attorney-General’s consideration. At introduction, an offender would only receive a ‘strike’ if they had been sentenced to at least five years’ imprisonment for the qualifying offence. Cabinet subsequently approved an amendment to require a ‘strike’ on conviction for a qualifying offence, regardless of the sentence ultimately deemed appropriate. The Attorney-General does not appear to have given advice on this amendment.

² See, for example, *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602; *Fitzgerald v R* [2020] NZCA 292, (2020) 29 CRNZ 350. The Supreme Court has not yet released its decision on Mr Fitzgerald’s appeal.

³ Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform Bill* (2009).

Discussion

Substantive provisions

9. The Courts have criticised the three strikes regime as being inconsistent with ss 9 and 19 of the Bill of Rights Act, including on the bases that:
 - 9.1 the inclusion of low-level offending has created irrational disparities in sentencing, resulting in gross disproportionality in sentencing for low-level offending; and
 - 9.2 the three strikes regime is predicated on the ability of recipients of warnings to understand and act on those warnings, and to regulate their conduct accordingly. New Zealanders with mental disabilities that affect their ability to understand and act on those warnings will be disproportionately exposed to the severe consequences prescribed for second and third strike offences.
10. The Bill will repeal the provisions that give rise to these outcomes, and the sentencing process will revert to including greater levels of judicial discretion, enabling the Courts to avoid disproportionate sentences.
11. Accordingly, the effect of passage of the Bill is likely to be more rights-consistent than the current regime.

Transitional arrangements

12. The Schedule to the Bill provides that, as currently drafted, the Bill does not contain any transitional provision for offenders sentenced on second and third strike offences before the Bill comes into force (cl 13) and excludes the possibility of the Crown being liable for any damages as a consequence of the change to sentencing rules as a result of the Bill coming into force (cl 14). The combination of those provisions potentially engages the right to be free from disproportionately severe punishment under s 9 and the right not to be arbitrarily detained under s 22 of the Bill of Rights Act, because offenders who were sentenced under the three strikes regime would be deprived of an effective remedy for an interference with their rights.
13. An offender sentenced under the three strikes regime may argue that, because there is no effective remedy for the length of their sentence, their detention has become arbitrary over time.
14. Ultimately, we do not consider the Bill appears to be inconsistent with the Bill of Rights Act, for the following reasons:
 - 14.1 The Crown is not liable for sentencing decisions made by the judicial branch of Government. Judges are immune from awards of damages under the Bill of Rights Act for actions undertaken in the course of performing their judicial function.⁴
 - 14.2 The Crown is not liable for legislation passed by Parliament. Assuming that the three strikes regime is inconsistent with the Bill of Rights Act, it is not

⁴ *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

unlawful for Parliament to have passed inconsistent legislation.⁵ The remedy available to a person who claims the legislation is inconsistent with the Bill of Rights Act is a declaration of inconsistency, and a declaration of inconsistency only.⁶

- 14.3 The Department of Corrections detaining a person sentenced under the three strikes regime does so pursuant to a lawful order of the sentencing Court, pursuant to a lawful warrant, and is unlikely to be capable of being held liable for detaining a person when it was required to do by law.
15. For these reasons, we do not consider those provisions of the Bill appear to be inconsistent with a person's right to an effective remedy under the Bill of Rights Act.

Review of this advice

16. In accordance with Crown Law's policies, this advice has been peer reviewed by Austin Powell, Senior Crown Counsel.



Vicki McCall
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~~Noted/Approved/Declined~~



Hon David Parker
Attorney-General
6 / 9 /2021

⁵ New Zealand Bill of Rights Act 1990, s 4.

⁶ *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.