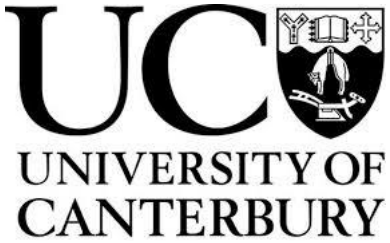

Three-Strikes Sentencing in New Zealand

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Abstract

The issue of reducing reoffending has been an age-old challenge in criminological research and sentencing policy. Three-strikes sentencing purports to achieve this goal by imposing mandatory minimum sentences for repeat offenders.

This thesis examines the efficacy of three-strikes sentencing methods at reducing violent reoffending. This thesis begins by examining the objectives behind the introduction of New Zealand's three-strikes regime. It then goes on to analyse the application of the regime in practice as seen in case law. Expanding upon this analysis, this thesis goes on to discuss the impact of the regime on criminal lawyers, and defendants who are subject to the regime.

Following from that, this thesis goes on to analyse the theoretical basis of the three-strikes regime, and whether New Zealand's implementation and application of the regime is theoretically justified. Finally, this thesis discusses the potential repeal of New Zealand's three-strikes regime, how a potential repeal may be implemented, and the practical implications of such a repeal.

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List of Abbreviations

NZBORA: New Zealand Bill of Rights Act 1990

MPI: Minimum Period of Imprisonment

Chapter 1. Introduction

1.1 Background

1.1.1 Introduction to Three-Strikes Regimes

Three-strikes laws enact enhanced penalties against offenders who have been previously convicted of certain crimes (usually serious violent offences), which might include restrictions on parole eligibility. Such laws are intended to reduce reoffending "by imprisoning the worst repeat violent and sexual offenders for longer periods",[1] and thereby "protect[ing] the public from the worst repeat offenders."[2] Three-strikes laws are distinguished from the common sentencing practice of consideration of prior offences because they impose mandatory minimum sentences rather than allowing for judicial discretion.

1.1.2 New Zealand's Three-Strikes Regime

In May 2010, New Zealand implemented three-strikes legislation in the form of the Sentencing and Parole Reform Act 2010. The Act introduced a "three-strikes" regime into the Sentencing Act 2002, which imposes increasingly severe consequences for repeat violent offenders. The regime applies to offenders who commit 'serious violent offences' as defined in s 86A Sentencing Act 2002. A slightly different regime operates for those committing murder as their second or third offence.

For a stage-1 offence — that is, the first time an offender commits a 'serious violent offence' — s 86B Sentencing Act provides that offenders are sentenced normally, and are given a warning of the consequences of the regime.

For a stage-2 non-murder offence — that is, the second time an offender commits a 'serious violent offence' — s 86C provides that offenders are to be sentenced normally, but must serve that sentence without parole.

For a stage-3 non-murder offence, s 86D provides that offenders must be sentenced to the maximum sentence for the offence, and must serve that sentence without parole unless this would be 'manifestly unjust'.

For a stage-2 or stage-3 murder offence, s 86E provides that an offender must be sentenced to life imprisonment without parole unless this would be manifestly unjust.

1.1.2.1 Manifest Injustice

Sections 86D and 86E Sentencing Act are both subject to a 'manifest injustice' exception — that is, the Court may avoid making a non-parole order if it is satisfied that such an order would be manifestly unjust. In Chapter 3, this thesis will examine how the Courts have interpreted and applied this 'manifest injustice' exception.

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[1] Law and Order Committee *Sentencing and Parole Reform Bill (17-2) and Petition 2008/4 of Rosa Chow and 7,076 others* (26 March 2010) at 1.
[2] (18 February 2009) 652 NZPD 1420 at 1421.

1.2 Research questions

This thesis will address the following research questions:

1. What were the objectives behind the introduction of the three-strikes regime?
2. Has the three-strikes regime been effective in practice?
3. Does sentencing theory suggest that a the three-strikes regime can be effective?
4. What should the future of the three-strikes regime in New Zealand be?

1.3 Importance of the research

The issue of reducing reoffending has been an age-old challenge in criminological research and sentencing policy. A wide variety of sentencing methods have been attempted in pursuit of this goal, and this thesis hopes to contribute to the field by examining the efficacy of one such attempt.

1.3.1 Repeal attempt

This research is particularly relevant now due to the fact that in recent years, the New Zealand Government has signalled its interest in repealing our three-strikes regime. In May 2018, the Hon Andrew Little, who was at the time the Minister of Justice, announced plans to repeal three-strikes regime[3] because it "had not reduced crime rates and failed to act as an effective deterrent", and had not made a difference in the eight years since its enactment.[4] However, this attempt at repeal was unsuccessful as Mr Little was forced to withdraw his proposal due to a lack of political support from their coalition partners in the New Zealand First Party.[5]

Although Mr Little signalled his intention to re-introduce the issue of repealing the three-strikes regime together with the bulk of the criminal justice reforms taking place in 2019, this did not ultimately happen.

In October 2020, following the 2020 New Zealand General Election, the Labour Party once again vowed to repeal the three-strikes regime, with caretaker Minister of Justice Andrew Little[6] saying that:[7]

[3] Tova O'Brien "Exclusive: Govt to repeal three strikes law in two weeks" *Newshub* (30 May 2018) <https://www.newshub.co.nz/home/new-zealand/2018/05/exclusive-govt-to-repeal-three-strikes-law-in-two-weeks.html>.
[4] Maddison Northcott "Andrew Little says three strikes law will be repealed" (1 November 2017) Stuff <https://www.stuff.co.nz/national/98466153/andrew-little-says-three-strikes-law-will-be-repealed>.
[5] Andrew Little "Three Strikes repeal not going to Cabinet" The Beehive <http://www.beehive.govt.nz/release/three-strikes-repeal-not-going-cabinet>.
[6] Following the 2020 New Zealand General Election, the current Minister of Justice is the Honourable Kris Faafoi: "Ministers | Beehive.govt.nz" The Beehive <http://www.beehive.govt.nz/ministers>.
[7] Edward Gay "Labour set to repeal three strikes law, which sees repeat offenders get max sentence" (25 October 2020) Stuff <https://www.stuff.co.nz/national/crime/300140023/labour-set-to-repeal-three-strikes-law-which-sees-repeat-offenders-get-max-sentence>.

> Labour has committed to repeal the three strikes law which is leading to absurd results and instead focus on building a criminal justice system that ensures less crime, less offending and fewer victims of crime who are better supported.[8]

This attempt at repeal may be more successful than the 2018 attempt as the Labour Party's commanding win in the 2020 General Election allowed it to govern without a coalition partner.[9] For this reason this research considers the practical consequences of repeal in the final chapter.

1.4 Limitations

Despite the use of three-strikes regimes in other jurisdictions, there is limited data available as to its success. Limited empirical studies have been performed, and any studies available are influenced by a large number of variables (such as the effect of other policies introduced concurrently) which will need to be isolated. Therefore, this thesis will primarily focus on the implementation and application of New Zealand's three-strikes regime through examining primary materials including Parliamentary debates and submissions, case law, and a small empirical study.

1.5 Structure of the thesis

This thesis is divided into 6 chapters. Following on from this introduction, chapter 2 sets out the background and history of New Zealand's three-strikes law, by examining the evolution of the Sentencing and Parole Reform Bill as it moved through the legislative process. It will then examine Parliamentary debates on the Bill, and the arguments made in favour of and against the Bill. Finally, this chapter will analyse the public sentiment about the Bill by examining the submissions made on the Bill by members of the public.

Chapter 3 goes on to analyse the application of the regime as found in case law. It will first examine the consistency of the three-strikes regime with the New Zealand Bill of Rights Act 1990. Next, it will discuss the application of the manifest injustice exception in the leading case of *R v Harrison; R v Turner*,[10] and how this was applied in subsequent decisions. Finally, this chapter will examine the application of the manifest injustice exception to s 86C (stage-2 non-murder offences) in case law.

Chapter 4 will expand upon the analysis in chapter 3, and discuss the impact of the regime on criminal lawyers, and defendants who are subject to the regime. This will involve a survey of criminal lawyers in New Zealand, and will provide further insight into the practical application of the three-strikes regime and its effect on criminal defendants.

Next, chapter 5 will analyse the theoretical basis of the three-strikes regime. It will begin by establishing the theoretical grounds for punishment under which New Zealand's three-strikes

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[8] Minister Little may have been referring to decisions such as *R v Campbell* [2016] NZHC 2817; and *R v Fitzgerald* [2018] NZHC 1015 both of which resulted in sentences of 7 years imprisonment for relatively minor offending.
[9] New Zealand Electoral Commission "2020 General Election—Official Results And Statistics" (30 November 2020) <https://electionresults.govt.nz/electionresults_2020/statistics/index.html>.
[10] *R v Harrison; R v Turner* [2016] 3 NZLR 602.

regime is justified. It will then consider the validity of these grounds, and whether New Zealand's implementation and application of the three-strikes regime fits within these grounds.

The last chapter, chapter 6 will discuss the potential repeal of New Zealand's three-strikes regime. It will first analyse the arguments for and against repealing the regime. Then, it will consider how a potential repeal may be implemented, and the practical implications of such a repeal.

Chapter 2. Development of a Three-Strikes Regime in New Zealand

2.1 Introduction

The Sentencing and Parole Reform Bill was conceived and written in 2008 by then ACT Party MP David Garrett following a visit to California, one of the first states to introduce a three-strikes regime. He was accompanied on this visit by members of the Sensible Sentencing Trust.[11]

This chapter will first set out how the Bill was enacted, and briefly explain the Bill as it was enacted. Next, it will examine the changes made to the Bill as it moved through the legislative process, and discuss the effect of those changes. It will then examine Parliamentary debates on the Bill, and the arguments made in favour of and against the Bill. Finally, this chapter will examine the submissions made on the Bill by members of the public. Overall, the purpose of this chapter is to explain the background to the Bill. This will set the scene for Chapter 3 which discusses the application of the regime in case law.

2.2 Introduction and Initial Changes to the Bill

2.2.1 Overview of Legislative Process

The Bill had its First Reading in Parliament on 18 February 2009.[12] Following a call for submissions from 7 March 2009 to 24 April 2009,[13] an interim report was released by the Select Committee on 17 February 2010, containing several proposed amendments to give effect to some of the changes suggested in the first round of submissions.[14] At the same time, the lead advising agency was changed from the Ministry of Justice to the New Zealand Police, with the Department of Corrections assisting.[15]

There was then a second call for submissions ending 5 March 2010.[16] The final Select Committee report was presented on 26 March 2010,[17] together with a Bar-2 version of the Bill containing the same proposed amendments.[18] The Bill was then read a second time on 4 May 2010, where the amendments proposed by the Select Committee were agreed to by a party vote.[19]

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[11] The Sensible Sentencing Trust is a political lobby group that claims to advocate on behalf of victims of violent crime. Its goals include increasing sentencing levels and abolishing parole and cumulative sentencing.
[12] (18 February 2009) 652 NZPD 1420.
[13] New Zealand House of Representatives "Have Your Say: Sentencing and Parole Reform Bill" *The Press* (New Zealand, 7 March 2009) J5.
[14] Law and Order Committee *Interim report on the Sentencing and Parole Reform Bill (17-1) (17 February 2010); See also Chapter 2.4 below.*
[15] Cabinet Minute of Decision "Changes to the Sentencing and Parole Reform Bill" (17 December 2009) CAB Min (09) 45/11 at 3.
[16] Law and Order Committee, above n 1, at 11.
[17] Law and Order Committee, above n 1.
[18] Sentencing and Parole Reform Act 2010, Legislative History; See also Chapter 2.2.2 below.
[19] (4 May 2010) 662 NZPD 10673.

The Bill was then debated by a Committee of the whole House on 18 May 2010,[20] resulting in a Bar-3 version of the Bill containing several minor amendments, but no substantive changes.[21]

Finally, the Bar-3 version of the Bill was read a third time on 25 May 2010 and enacted as the Sentencing and Parole Reform Act 2010.[22] The Act received the Royal Assent on 31 May 2010 and commenced the following day.[23]

2.2.2 The Bill as Introduced

Under the Bill as it was introduced, the three-strikes regime was triggered by 'qualifying sentences'. Offenders who committed any of the 37 listed 'serious violent offences',[24] *and* received a sentence of 5 years or more imprisonment, would be considered to have received a 'qualifying sentence', and would receive a 'strike'.[25] An offender on his first strike would be sentenced normally, and would receive a First Warning stating the consequences of receiving further 'qualifying sentences'.

An offender who commits a non-murder offence on his second strike would be sentenced normally, but would have to serve the sentence without parole. In addition, he would receive a Final Warning stating the consequences of receiving further 'qualifying sentences'. [26]

An offender who commits a non-murder offence on his third strike must be sentenced to life imprisonment, and must serve a Minimum Period of Imprisonment of 25 years unless that would be manifestly unjust.[27]

There was a slightly different regime for murder offences. An offender who commits murder on his second or third strike must be sentenced to life imprisonment, and must serve that sentence without parole unless that would be manifestly unjust. If life imprisonment without parole is found to be manifestly unjust, the court must impose a Minimum Period of Imprisonment of 25 years.[28]

The relevant sections as introduced are quoted below:

> **86B First warning on receiving first qualifying sentence for serious violent offence**
>
> (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

[20] (18 May 2010) 663 NZPD 10901.
[21] Sentencing and Parole Reform Bill 2009 (17–3).
[22] (25 May 2010) 663 NZPD 11226 at 11247.
[23] Sentencing and Parole Reform Act, s 2.
[24] See Appendix A.
[25] Sentencing and Parole Reform Bill (17–1), s 86A.
[26] Sentencing and Parole Reform Bill (17–1), s 86C.
[27] Sentencing and Parole Reform Bill (17–1), s 86D.
[28] Sentencing and Parole Reform Bill (17–1), s 86E.

(b) was 18 years of age or over.

(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; and

(b) record that a sentence to which this section applies has been imposed on the offender and that the offender has been warned in accordance with paragraph (a).

(3) On the entry of a record under subsection (2)(b), the offender has a record of a first warning.

86C Final warning on receiving second qualifying sentence for serious violent offence

(1) This section applies to a qualifying sentence, other than a sentence of imprisonment for life for murder, for a serious violent offence imposed on an offender who, at the time of committing that offence, had a record of a first warning.

(2) If the sentence imposed on the offender is a determinate sentence of imprisonment, the court must order that the offender serve the sentence without parole.

(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; and

(b) record that a sentence to which this section applies has been imposed on the offender and that the offender has been warned in accordance with paragraph (a).

(4) On the entry of a record under subsection (3)(b), the offender has a record of a final warning.

86D Imprisonment for life on third or subsequent qualifying sentence

(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; 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.

(4) If the court imposes a minimum period of imprisonment that is less than 25 years, the court must give written reasons for doing so.

(5) If the court imposes a sentence of life imprisonment for an offence under this section, it must record, with reasons, the qualifying sentence the court would, but for this section , have imposed for that offence.

86E Offenders with record of warning or final warning who are sentenced to imprisonment for life for murder

(1) This section applies to a sentence of imprisonment for life for murder imposed on an offender who, at the time of committing that murder, had a record of a warning or a record of a final warning.

(2) If this section applies to a sentence, the court must order that the offender serve the sentence of imprisonment for life without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so.

(3) If the court does not make an order under subsection (2), the court must give written reasons for not doing so.

(4) If the court does not make an order under subsection (2), the court must,—

(a) if the offender did not, at the time of the commission of the murder, have a record of a final warning, order that the offender serve a minimum period of imprisonment in accordance with section 103 and, if applicable, section 104; and

(b) in any other case, impose a minimum period of imprisonment of not less than 25 years unless the court is satisfied that it would be manifestly unjust to do so.

(5) If, in any case to which subsection (4)(b) applies, the court imposes a minimum period of imprisonment of less than 25 years, the court must give written reasons for doing so.

(6) If the court makes an order under subsection (4)(a) and the offender does not, at the time of sentencing, have a record of a final warning, the court must—

(a) warn the offender of the consequences of receiving a further qualifying sentence for a further serious violent offence; and

(b) record the sentence that has been imposed on the offender and that the offender has been warned in accordance with paragraph (a).

(7) On the entry of a record under subsection (6)(b), the offender has a record of a final warning.

2.2.3 Changes from Bar-1 to Bar-2

There were a significant number of changes from the Bar-1 to the Bar-2 version of the Bill following the Select Committee process, including many changes in wording for the purpose of clarification. This chapter will focus on the substantive changes.

2.2.3.1 Removal of five-year requirement

Section 86A originally defined a 'qualifying sentence' as "a determinate sentence of imprisonment of 5 years or more or an indeterminate sentence of imprisonment".[29] It was amended to remove this definition.[30] Sections 86B to 86FA were also amended to remove references to a 'qualifying sentence'. This simply left the definition as referring to the specified offences, and had the effect of making sentences under five years' imprisonment count as strike offences, and therefore trigger the three-strikes regime, where they previously did not. With the removal of the five-year threshold, police discretion as to the charges laid would become critical. Therefore, all stage-3 charges would be referred to the Crown solicitor for peer review.[31]

This amendment was made in response to the 70 submitters who suggested that the five-year requirement be removed. Parliament intended for this amendment to provide more "certainty for offenders and victims about the consequences of offending",[32] and to increase the deterrent or incapacitory impact of the Bill as "the wide scope of this option means that more people will be subject to the regime".[33]

2.2.3.2 Removal of qualifying offences

Section 86A was also amended to remove the following offences from the list of "serious violent offence[s]" that would count as strike offences:

- Section 130 Crimes Act (Incest) (max penalty = 10 years imprisonment);
- Section 199 Crimes Act (Acid throwing) (max penalty = 14 years imprisonment).

This may have been in response to submissions that argued that incest may be consensual, and where it was not, it could also be charged as sexual assault which was a qualifying offence.[34] Similarly, some submissions argued that acid throwing was a rare offence that did not necessarily cause injury. If injury was caused, it could also be charged as wounding with intent to cause grievous bodily harm, which was a qualifying offence.[35]

2.2.3.3 Addition of qualifying offences

Section 86A was amended to add the following offences to the list of "serious violent offence[s]" that would count as strike offences:[36]

- Section 144A Crimes Act (sexual conduct with children and young people outside New Zealand);

[29] Sentencing and Parole Reform Bill (17–1), s 86A.
[30] Sentencing and Parole Reform Bill (17–2), s 86A.
[31] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10678.
[32] Cabinet Paper "Changes to the Sentencing and Parole Reform Bill" (16 December 2009) CAB 100/2008/1 at 8.
[33] At 6.
[34] Ron Peek "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009".
[35] Peek, above n 34; Sensible Sentencing Trust (Napier) "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009 (17 April 2009)" at 5.
[36] See also the new list of offences in Appendix B.

- Section 174 Crimes Act (counselling or attempting to procure murder);
- Section 175 Crimes Act (conspiracy to murder);
- Section 200(1) Crimes Act (poisoning with intent to cause grievous bodily harm);
- Section 201 Crimes Act (infecting with disease).

Although no explicit rationale was given for these changes, a Cabinet Paper stated that "[a]s a general rule, the list comprises of all major violent and sexual offences with a maximum penalty of seven years imprisonment or more."[37]

2.2.3.4 Requiring stage-3 offences be heard in High Court

Section 86D(1) was amended to require that stage-3 non-murder offences be heard in the High Court. There was no explicit rule on this in the Bar-1 version of the Bill, which meant that qualifying offences that were category 3 offences[38] could be heard in District Court even at stage-3.

2.2.3.5 Changes to consequences for stage-3 non-murder convictions

Section 86D(2) and (3) was amended to change the consequence for a stage-3 non-murder conviction from life imprisonment with a 25 year MPI (unless manifestly unjust) in the Bar-1 version of the Bill, to the maximum sentence of imprisonment for the offence served without parole (unless manifestly unjust) in the Bar-2 version of the Bill. This may have been intended to address concerns that requiring life imprisonment for offences that otherwise carry maximum sentences as low as seven years may be contrary to s 9 of the New Zealand Bill of Rights Act (NZBORA) 1990.

Section 86D(4) was amended to provide that a stage-3 manslaughter sentence would incur a minimum 20 year MPI, unless that would be manifestly unjust, in which case the court was required to impose a MPI of at least 10 years. Under the Bar-1 version of the Bill, the same offence would have incurred a mandatory sentence of life imprisonment, and a MPI of 25 years unless that would be manifestly unjust. This amendment was intended to account for the fact that under the new s 86D(3), a stage-3 manslaughter would incur a mandatory sentence of life imprisonment without parole unless that would be manifestly unjust, and to recognise the fact that "[m]anslaughter covers a wide range of conduct… [and] [l]ife imprisonment is seldom, if ever, imposed for manslaughter".[39]

Section 86D(6) was added to provide that where an offender was sentenced under s 86D(2) and (3) to serve the maximum sentence of imprisonment for the offence without parole, any other sentence of imprisonment imposed at the same time must be served concurrently. This was

[37] Cabinet Paper, above n 32, at 1.
[38] Crimes Act 1961, s 172 (Murder); Section 173 (Attempted murder); Section 174 (Attempting to procure murder); Section 175 (Conspiracy to murder); Section 177 (Manslaughter).
[39] Cabinet Domestic Policy Committee "Sentencing and Parole Reform Bill: Police Charging Practices and Additional Legal and Policy Issues" (22 February 2010) DOM (10)3 at [39].

intended to account for the fact that "[i]f the court was required to impose cumulative sentences for each qualifying offence, this would result in extremely long sentences in some cases."[40]

2.2.3.6 Allow for preventive detention for stage-3 non-murder

Section 86D(7) was added to allow courts to impose a sentence of preventive detention to an offender sentenced under ss 86D(2) and (3) to serve the maximum sentence of imprisonment for the offence without parole, and to clarify that the MPI for said preventive detention could not be less than the term of imprisonment under the regime (i.e. the maximum sentence for the offence), unless the term under the regime would be manifestly unjust. This change was intended to "align preventive detention with the general stage three policy".[41]

2.2.3.7 Changes to consequences for stage-2 and -3 murders

Section 86E(4) was amended to change the consequences if a court found that life imprisonment without parole for a stage-2 or -3 murder would be manifestly unjust. This had the effect of increasing the MPI that a court had to impose from the MPI under ss 103-104 (a minimum of 10 years and 17 years respectively) in the Bar-1 version of the Bill, to a minimum of 20 years for a stage-3 murder (unless manifestly unjust), and the MPI under s 103 for a stage-2 murder, or if manifest injustice was found for the 20 year MPI above in the Bar-2 version of the Bill.

2.2.3.8 Clarify effect of appeals on strikes

Section 86F was amended to make it compatible with the removal of the five-year requirement in s 86A.

Sections 86FA-86G were added to clarify the effect of appeals on strike warnings and the associated strike sentences.

2.2.4 Changes from Bar-2 to Bar-3 (Bill as enacted)

There were no substantive changes from the Bar-2 to Bar-3 versions of the Bill, following the debate in the Committee of the House. Some minor changes resulted from the committee of the whole House debate.[42] The bar-3 version of the Bill passed its third reading on 25 May 2010.

2.3 Debates in Parliament

2.3.1 Introduction

Having discussed the process leading up to the passing of the Bill, this thesis will now examine the arguments raised both for and against the Bill. This paper will begin by examining the arguments made by Members of Parliament. This will give us insight into Parliament's intent when passing the Bill.

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[40] At [43].
[41] At [37].
[42] "Sentencing and Parole Reform Bill – In Committee", above n 20.

The Bill was supported by members of the National and ACT Parties, and opposed by members of the Labour, Green, Maori, Progressive, and United Future Parties.

2.3.2 Arguments in favour of the three-strikes regime

This section will describe the arguments in favour of the three-strikes regime in each of the three readings. It is interesting to note that some arguments are raised in multiple stages of the debate, while others are raised only once.

2.3.2.1 First Reading

2.3.2.1.1 Public confidence in the Criminal Justice System[43]

Simon Power MP (National) and Dr Richard Worth MP (National) both noted that the Bill was intended to provide certainty to the public about when or whether offenders would be released on parole, and to restore the public's faith in sentencing.[44] Dr Worth further argued that public confidence in the Criminal Justice System had been damaged by reports of serious offending by people on parole, and of violent offenders being sentenced to home detention.[45]

2.3.2.1.2 Protect victims from re-victimisation[46]

Mr Power noted that the Bill was also intended to spare victims and their families from repeatedly having to attend parole hearings.[47]

2.3.2.1.3 Public safety[48]

The primary architect of the Bill as it was first introduced, David Garrett MP (ACT), said that at the time of introduction of the Bill, there were "77 murderers in jail who committed a murder at a time when they had three or more violent offences under their belt", and that had the Bill been in force in the past, there would have been 77 fewer murder victims.[49] Dr Worth similarly suggested that the rate of violent crime had risen by 46.6 per cent from 2000 to 2009, and that the Bill would respond to that increase by increasing the deterrent effect of prison sentences.[50]

On a similar note, Sandra Goudie MP (National), who would later become Chairperson of the Select Committee on the Bill, and Chester Borrows MP (National) both stated that the Bill would ensure the safety of law-abiding New Zealanders.[51] Ms Goudie added that members who opposed the Bill condoned criminal offending.[52]

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[43] See also 2.3.2.4.7.
[44] "Sentencing and Parole Reform Bill – First Reading", above n 12, at 1421.
[45] At 1424.
[46] See also 2.3.2.2.2 and 2.3.2.3.3.
[47] "Sentencing and Parole Reform Bill – First Reading", above n 12, at 1421.
[48] See also 2.3.2.2.3, 2.3.2.3.5, and 2.3.2.4.4.
[49] "Sentencing and Parole Reform Bill – First Reading", above n 12, at 1428.
[50] At 1425.
[51] At 1428; At 1435.
[52] "Sentencing and Parole Reform Bill – First Reading", above n 12, at 1427.

2.3.2.1.4 Supported by evidence[53]

Mr Garrett further noted that the Ministry of Justice Regulatory Impact Statement had found that a similar regime in California had a "statistically significant deterrent effect".[54] He also argued that a similar regime in Singapore had been effective.[55]

2.3.2.1.5 Address social and economic inequality[56]

Mr Garrett argued that although the regime would disproportionately affect Maori, Maori people were also more likely to be the victims of crime.[57]

2.3.2.1.6 Other comments on purpose of the Bill

Mr Garrett noted that the Bill was intended to remove the discretion of the sentencing judge.[58] Chester Borrows MP (National) considered that although the rehabilitation of prisoners was important, that was not the purpose of the Bill, and that other legislation would be introduced in the future to provide for rehabilitation.[59]

2.3.2.1.7 Summary

The key themes in arguments raised in favour of the proposed Bill in the First Reading were that the Bill would increase public confidence in the Criminal Justice System and that it would improve public safety.

2.3.2.2 Second Reading

2.3.2.2.1 Intended to target repeat violent offenders

Judith Collins MP (National), who was at that time the Minister of Corrections, considered that the Bill's main purpose was:[60]

> to deny parole to repeat serious violent offenders and to offenders who are guilty of committing the worst murders, and to impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious and violent offences.

Ms Collins and Rodney Hide MP (ACT) both considered that the Bill was intended to result in disproportionate sentences for repeat violent offenders.[61]

2.3.2.2.2 Protect victims from re-victimisation[62]

Ms Collins noted that the Bill would protect the victims of repeat offenders from the stress of attending regular parole hearings.[63]

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[53] See also 2.3.2.2.5 and 2.3.2.3.1.
[54] "Sentencing and Parole Reform Bill – First Reading", above n 12, at 1429.
[55] At 1430.
[56] See also 2.3.2.2.6 and 2.3.2.3.6.
[57] "Sentencing and Parole Reform Bill – First Reading", above n 12, at 1429.
[58] At 1438.
[59] At 1435.
[60] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10673.
[61] At 10673; At 10683.
[62] See also 2.3.2.1.2 and 2.3.2.3.3.
[63] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10673.

2.3.2.2.3 Public safety[64]

Ms Collins also referred to public submissions which reflected concerns about violent crime and public safety and argued that the Bill would improve public safety.[65]

Jonathan Young MP (National) considered that crime is often an endemic, generational issue that would take time to address, but that the Bill was intended to protect the public, not to address the causes of offending.[66]

2.3.2.2.4 Supported by evidence[67]

Mr Hide argued that there was evidence showing that the proposed regime would deter reoffending.[68]

2.3.2.2.5 Address economic and social inequality[69]

Mr Hide considered that the Bill would help address economic and social disadvantage by reducing violent offending, which disproportionately affects the poorest communities.[70]

2.3.2.2.6 Deterrent effect[71]

Ms Goudie and Mr Hide argued that the Bill would have a deterrent effect by sending a message that violent offending would no longer be tolerated.[72]

2.3.2.2.7 Tough on crime[73]

Ms Collins argued that the Bill represented the Government toughening up on criminals and putting the "victim's and the wider community's interests ahead of the interests of our worst serious violent offenders."[74]

Ms Goudie suggested that members who opposed the Bill were soft on crime, and that the consequence of committing a crime was that the offenders give up their rights. Ms Goudie further considered that the Bill represented the National Party "taking the tough steps needed in order to tackle violent crime and make people feel safer in their homes and on the streets."[75]

2.3.2.2.8 Summary

The key themes in arguments raised in favour of the proposed Bill in the Second Reading were that the Bill would improve public safety (which was also a key theme in the first reading), that

[64] See also 2.3.2.1.3, 2.3.2.3.5 and 2.3.2.4.4.
[65] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10674.
[66] At 10684.
[67] See also 2.3.2.3.1 and 2.3.2.1.4.
[68] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10684.
[69] See also 2.3.2.1.5 and 2.3.2.3.6.
[70] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10683.
[71] See also 2.3.2.3.4 and 2.3.2.4.5.
[72] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10678, 10684.
[73] See also 2.3.2.4.8.
[74] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10675.
[75] At 10678.

it was intended to target repeat offenders, and that it would demonstrate that the government was tough on crime.

2.3.2.3 In Committee of whole House

2.3.2.3.1 Supported by evidence[76]

David Garrett MP (ACT) argued that academics such as Professor Warren Brookbanks had conceded that similar regimes had been effective in the United States.[77]

2.3.2.3.2 Rehabilitation

Mr Garrett argued that some offenders were beyond rehabilitation. He further argued that the Bill would aid in rehabilitating other repeat offenders who were not beyond rehabilitation because it would provide certainty of sentence length.[78]

2.3.2.3.3 Protect victims from re-victimisation[79]

Dr Cam Calder MP (National) repeated previous arguments that the Bill would protect victims and their families from the stress of attending regular parole hearings.[80]

2.3.2.3.4 Deterrent effect[81]

Judith Collins MP (National), Rodney Hide MP (ACT) and Mr Garrett all considered that the Bill would reduce reoffending by sending a message to offenders that repeat offending would not be tolerated,[82] noting that a similar regime in California had shown a deterrent effect.[83]

2.3.2.3.5 Public safety[84]

Mr Garrett considered that the Bill was primarily about keeping the community safe by incapacitating repeat violent offenders, and that rehabilitation was not a priority.[85] He further argued that "[s]ince the election four more people have died at the hands of persons who, had this law been in place at the time they committed their crimes, would have been in jail."[86]

2.3.2.3.6 Address economic and social inequality[87]

Mr Garrett repeated previous arguments by himself and Mr Hide that the Bill was supported by poor communities because they were the ones most affected by crime.[88]

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[76] See also 2.3.2.1.4 and 2.3.2.2.5.
[77] "Sentencing and Parole Reform Bill – In Committee", above n 20, at 10905.
[78] At 10915.
[79] See also 2.3.2.1.2 and 2.3.2.2.2.
[80] "Sentencing and Parole Reform Bill – In Committee", above n 20, at 10908.
[81] See also 2.3.2.4.5 and 2.3.2.2.7.
[82] "Sentencing and Parole Reform Bill – In Committee", above n 20, at 10936.
[83] At 10906.
[84] See also 2.3.2.1.3, 2.3.2.2.3, 2.3.2.3.5 and 2.3.2.4.4.
[85] "Sentencing and Parole Reform Bill – In Committee", above n 20, at 10916.
[86] At 10905; Note: At 10905 Note: The 2008 New Zealand General Elections were held on 8 November 2008. This reading occurred on 18 May 2010. Approximately 15 months had passed in this time.
[87] See also 2.3.2.1.5 and 2.3.2.2.6.
[88] "Sentencing and Parole Reform Bill – In Committee", above n 20, at 10906.

2.3.2.3.7 Intended to target repeat offenders[89]

Mr Garrett stated that the Bill was intended to result in disproportionate sentences for repeat offenders.[90]

2.3.2.3.8 Regime would not result in unjust outcomes[91]

Mr Garrett argued that the Bill was designed to operate differently from the regime in California, and that the unjust outcomes seen under the Californian regime would not occur here.[92]

2.3.2.3.9 Summary

The key themes in arguments raised in favour of the proposed Bill in the Committee of whole House were that the Bill would improve public safety by deterring repeat offenders (also a key theme in the first and second readings), and that it would not result in unjust outcomes.

2.3.2.4 Third Reading

2.3.2.4.1 Intended to target repeat offenders[93]

Judith Collins MP (National) reiterated that the regime was intended to result in disproportionate sentencing of repeat violent offenders.[94]

2.3.2.4.2 Regime would not result in unjust outcomes[95]

Ms Collins said that the Bill would not result in unjust outcomes because stage-3 charges would be reviewed by the Crown solicitor to ensure that the appropriate charges were laid.[96]

2.3.2.4.3 Tough on crime[97]

Sandra Goudie MP (National) stated that the Bill would get tough on crime and keep the public safe, and suggested that members who opposed the Bill were soft on crime.[98] Jonathan Young MP (National) referred to submissions from the public, and argued that they overwhelmingly showed that New Zealanders wanted sentencing to be "tougher for the worst repeat violent offenders."[99]

2.3.2.4.4 Public safety[100]

Ms Collins, Ms Goudie and David Garrett MP (ACT) considered that the Bill was intended to protect victims, and that it would reduce crime by incapacitation and deterrence.[101]

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[89] See also 2.3.2.4.1.
[90] "Sentencing and Parole Reform Bill – In Committee", above n 20, at 10940.
[91] See also 2.3.2.4.2.
[92] "Sentencing and Parole Reform Bill – In Committee", above n 20, at 10906.
[93] See also 2.3.2.3.7.
[94] "Sentencing and Parole Reform Bill – Third Reading", above n 22, at 11228.
[95] See also 2.3.2.3.8.
[96] "Sentencing and Parole Reform Bill – Third Reading", above n 22, at 11228.
[97] See also 2.3.2.2.8.
[98] "Sentencing and Parole Reform Bill – Third Reading", above n 22, at 11231.
[99] At 11239.
[100] See also 2.3.2.1.3, 2.3.2.2.3 and 2.3.2.3.5.
[101] "Sentencing and Parole Reform Bill – Third Reading", above n 22, at 11237.

2.3.2.4.5 Deterrent effect[102]

Mr Garrett further argued that the Bill would have a deterrent effect because criminals would weigh up the cause and effect of their offending.[103]

2.3.2.4.6 Public support

Johnathan Young MP (National) cited a 1999 referendum which found that 92% of voters supported longer prison sentences and stated that the Bill had widespread public support.[104]

2.3.2.4.7 Public confidence in Criminal Justice System[105]

Mr Young further stated that the Bill was not intended to rehabilitate offenders, but to send "a signal to the people of New Zealand that this Government, in association with the ACT Party, is serious in its concerns about violent offending."[106]

2.3.2.4.8 Summary

The key themes in arguments raised in favour of the proposed Bill in the Third Reading were that the Bill reflected the public's desire for laws to be tougher on crime and that it would therefore improve public confidence in the Criminal Justice System, and public safety, which has been present at every stage.

2.3.2.5 Conclusion

In conclusion, the key themes in arguments raised in favour of the proposed Bill throughout the readings were that the Bill would improve public safety, protect victims from re-victimisation, and increase public confidence in the criminal justice system. Other themes appeared in latter readings, such as that the Bill reflected the public's desire for laws to be tougher on crime, and that the Bill was supported by evidence and would have a deterrent effect on offenders. Some other themes also arose in response to critiques of the regime, with proponents of the regime saying that it was intended to target repeat offenders and was designed in a manner that would not result in unjust outcomes.

2.3.3 Arguments against the three-strikes regime

This section will describe the arguments against the three-strikes regime in each of the three readings. It is interesting to note that some arguments are raised in multiple stages of the debate, while others are raised only once.

2.3.3.1 First Reading

2.3.3.1.1 Oversold to the public

Clayton Cosgrove MP (Labour) and Jim Anderton MP (Progressive) both argued that proponents of the Bill had oversold its effectiveness by claiming that it would have an immediate impact. They further argued that because the Bill had no retrospective effect, it

[102] See also 2.3.2.2.7 and 2.3.2.3.4.
[103] "Sentencing and Parole Reform Bill – Third Reading", above n 22, at 11237.
[104] At 11239.
[105] See also 2.3.2.1.1.
[106] "Sentencing and Parole Reform Bill – Third Reading", above n 22, at 11239.

would not come into effect for 15 to 20 years because of the time required to accumulate strikes. This is premised on the assumption that offenders would not offend in prison. However this assumption has not always held true. Mr Cosgrove and Mr Anderton also argued that public confidence in the justice system would be damaged when it inevitably did not live up to those earlier promises.[107]

2.3.3.1.2 Driven by popular appeal

Mr Anderton further argued that the Bill was a cynical bid for popular appeal.[108] Jacinda Ardern MP (Labour) similarly argued that the way to restore public confidence in the justice system was to end the political bidding war around law and order, and focus instead on addressing the root causes of offending.[109]

2.3.3.1.3 International comparisons

Ms Ardern and Tariana Turia MP (Maori) both argued that similar regimes in the USA have not been successful. Ms Ardern argued that eight of the 22 states that had implemented similar regimes were now trying to remove them,[110] and Ms Turia noted that in California in particular, a similar regime had resulted in an unsustainable increase in the number of prison inmates, eventually resulting in the release of 57,000 inmates one week ago.[111] Similarly, Mr Anderton argued that similar regimes in other countries had resulted in "huge anomalies and greater injustices."[112]

2.3.3.1.4 Effectiveness / Alternatives to incarceration

Mr Anderton, Ms Turia, Ms Ardern, and Metiria Turei MP (Green) argued that there was little evidence that the Bill would have a deterrent effect,[113] and that the Bill would not reduce violent crime because it did not address the root causes of crime, such as substance abuse and illiteracy.[114] Ms Turia further argued that research indicated that the Bill would result in "increased homicide rates, significantly larger prison population, disproportionate effect on non-violent offenders, disproportionate effect on marginalised populations, and significant costs and negative impacts on offenders' families",[115] and that alternatives to incarceration should be considered.[116] Ms Ardern similarly referred to the finding in the Regulatory Impact Statement (RIS) prepared by the Ministry of Justice[117] that "it is not possible to conclude with

[107] "Sentencing and Parole Reform Bill – First Reading", above n 12, at 1424.
[108] At 1425.
[109] At 1440.
[110] At 1439.
[111] At 1430.
[112] At 1427.
[113] At 1425; At 1431; At 1433; At 1439.
[114] "Sentencing and Parole Reform Bill – First Reading", above n 12, at 1427.
[115] At 1431.
[116] At 1432.
[117] Ministry of Justice *Sentencing and Parole Reform Bill: Explanatory Note (17—1)* 18 February 2009) <http://nzlii.org/nz/legis/bill/saprb2009277.pdf>.

any certainty to what extent any of the options will improve public safety", and argued that the Bill was therefore a solely punitive measure.[118]

2.3.3.1.5 Injustice

Ms Turei and Ms Ardern argued that the regime would result in injustice. Ms Turei noted that the RIS found that the Bill would result in disproportionate outcomes that would reduce public confidence in the justice system. Ms Ardern similarly argued that the Bill would remove judicial discretion, which would result in unjust outcomes such as an offender who commits three burglaries being sentenced to more than 60 years in prison.[119]

2.3.3.1.6 Disproportionate impact on Maori

Ms Turia and Ms Turei both noted the finding in the RIS that the Bill would disproportionately impact Maori. Ms Turei further argued that systemic racism in the criminal justice system leads to Maori being stopped by Police more frequently, and being sentenced more harshly.[120]

2.3.3.1.7 Unintended consequences

Ms Turia and Ms Turei both argued that the Bill could lead to unintended consequences. Ms Turia argued that it could result in the under-reporting of family violence, and an unsustainable increase in the prison population,[121] and Ms Turei argued that it could lead to a perverse incentive for offenders to commit more severe crimes in order to avoid detection.[122]

2.3.3.1.8 Cost

Ms Turei and Shane Jones MP (Labour) both argued that the Bill would lead to substantial financial costs and that it would not make the public safer.[123] Ms Turei further argued that these costs would take away funding which could be used to fund rehabilitation and education programmes in prison, which would more effectively reduce reoffending.[124]

2.3.3.1.9 Imprisonment rates

Ms Ardern argued that although crime rates in New Zealand were dropping, sentencing levels were higher, leading to New Zealand having one of the highest imprisonment rates in the world.[125]

2.3.3.1.10 Summary

The key themes in arguments raised against the proposed Bill in the First Reading were that the Bill would result in unjust outcomes, that it was oversold to the public and would therefore decrease public confidence in the Criminal Justice System, and that it would not effectively reduce reoffending.

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[118] "Sentencing and Parole Reform Bill – First Reading", above n 12, at 1440.
[119] At 1439.
[120] At 1439.
[121] At 1432.
[122] At 1433.
[123] At 1437.
[124] At 1434.
[125] At 1440.

2.3.3.2 Second Reading

2.3.3.2.1 Cost

Lianne Dalziel MP (Labour) cited a 16 December 2009 Cabinet Paper from the Minister of Police, which found that the deterrent effect of the Bill was uncertain, and that the Bill would:[126]

> add substantial direct costs to the justice system without creating any significantly improved outcomes in terms of reducing the drivers of crimes, improving social outcomes or reducing reoffending and victimisation

2.3.3.2.2 Effectiveness / Alternatives to incarceration

David Clendon MP (Green), Hone Harawira MP (Maori), and Lynne Pillay MP (Labour), and Ms Dalziel argued that the Bill would not effectively reduce reoffending, and that the focus should instead be on alternatives to incarceration which would be more effective.[127] Mr Clendon cited research showing that a combination of shorter sentences and family-oriented prison policies was a major factor in breaking the intergenerational cycle of crime.[128] Similarly, Mr Harawira cited a Cabinet paper entitled "Effective Interventions", which found that prison was "not the most effective or efficient approach to reducing crime."[129] Additionally, Ms Pillay argued that the Bill would remove incentives for good behaviour and reform in prison.[130]

2.3.3.2.3 New Zealand Bill of Rights Act

Hone Harawira MP (Maori), Parekura Horomia MP (Labour) and Ms Dalziel noted that the Attorney-General's report under s 7 of the New Zealand Bill of Rights Act 1990 (NZBORA) had found that the Bill may be inconsistent with s 9 of the NZBORA, which provides that "[e]veryone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment."[131]

2.3.3.2.4 Disproportionate impact on Maori

Mr Horomia and Ms Dalziel also repeated previous arguments that the Bill would disproportionately impact Maori because Maori were disproportionately represented in the criminal justice system.[132]

2.3.3.2.5 Oversold to the public

Mr Clendon also repeated previous arguments that the effect of the Bill had been oversold, and that public confidence in the criminal justice system would be damaged when it failed to live up to those promises.[133]

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[126] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10675.
[127] At 10676.
[128] At 10682.
[129] At 10687.
[130] At 10688.
[131] New Zealand Bill of Rights Act 1990, s 9.
[132] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10680; At 10677.
[133] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10681.

2.3.3.2.6 Impact on victims

Chris Hipkins MP (Labour), Mr Horomia, and Ms Pillay argued that the Bill would not help victims, but would rather prolong their hurt.[134] Ms Pillay and Mr Hipkins further argued that the Bill would remove any incentive for accused persons to plead guilty, which would lead to victims being re-victimised in the trial.[135]

2.3.3.2.7 Public safety

Mr Clendon argued that the Bill took a punitive and reactive approach, and that it would not make the public safer. He further argued that many offenders imprisoned under the Bill would eventually have to be released, and that these offenders would be "so alienated and brutalised that they will be almost impossible to reintegrate."[136]

2.3.3.2.8 Judicial discretion

Mr Hipkins argued that the Bill would give the Police far more discretion than the judiciary, and that this was inconsistent with an open transparent and fair judicial system.[137]

2.3.3.2.9 Summary

The key themes in arguments raised against the proposed Bill in the Second Reading were that it would incur significant costs that could be better applied to more effective interventions, that it was contrary to the New Zealand Bill of Rights Act, and that it would disproportionately impact Maori.

2.3.3.3 In Committee of whole House

2.3.3.3.1 Injustice

Carmel Sepuloni MP (Labour) argued that the Bill could lead to unjust outcomes because some of the qualifying offences, such as manslaughter, encompassed a wide range of offending with varying levels of severity.[138]

2.3.3.3.2 Effectiveness

Chris Hipkins MP (Labour) and Keith Locke MP (Green) argued that there should be more focus on preventing crime.[139] Mr Locke cited the success of the Norwegian prison system, and argued that the Bill would not reform repeat offenders, and would only increase the rate of reoffending. Instead, Mr Locke argued that there should be more focus on rehabilitation in prisons.[140]

2.3.3.3.3 Unintended consequences

Lianne Dalziel MP (Labour) and Mr Hipkins both argued that the Bill would place prison guards in more danger because it would lead to an increased prison population, and prisoners

[134] At 10680.
[135] At 10688; At 10691.
[136] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10681.
[137] At 10692.
[138] "Sentencing and Parole Reform Bill – In Committee", above n 20, at 10903.
[139] At 10905.
[140] At 10909.

under the regime would have no incentive to behave well.[141] Ms Dalziel further referred to a similar regime in California, which resulted in an exponential increase in violence against prison guards.[142]

2.3.3.3.4 Driven by popular appeal

Clayton Cosgrove MP (Labour) repeated previous arguments that the Bill was more about political posturing and tugging at the heartstrings of victims, than about having its promised effect of reducing violent crime.[143]

2.3.3.3.5 Not supported by evidence

Ms Dalziel referred to a similar regime in California, and argued that although there was a decrease in the crime rate after the regime was introduced, the crime rate had been decreasing before the regime came into effect.[144]

2.3.3.3.6 Imprisonment rates

David Clendon MP (Green) argued that the prison system was already overcrowded, resulting in "double bunking in jails, and the making of containers into cells", and that this Bill would further increase the prison population.[145]

2.3.3.3.7 Summary

The key themes in arguments raised against the proposed Bill in the Committee of whole House were that similar regimes had not been successful overseas and that it was not supported by evidence. It was further argued that the regime could in fact lead to more violent offending due to unintended consequences.

2.3.3.4 Third Reading

2.3.3.4.1 Not supported by evidence

Grant Robertson MP (Labour) and David Clendon MP (Green) both cited submissions from academics who considered that the Bill was unlikely to improve public safety. Mr Robertson cited submissions from the New Zealand prisoners Aid and Rehabilitation Society and criminologist John Pratt, who both considered that the Bill would not improve public safety.[146] Similarly, Mr Clendon cited submissions from Professor Warren Brookbanks and Dr Richard Ekins, who considered that the Bill was "unlikely to defer [sic] would-be offenders in general, or the offender with one or two strikes in particular."[147]

[141] At 10905.
[142] At 10923.
[143] At 10907.
[144] At 10923.
[145] At 10941.
[146] "Sentencing and Parole Reform Bill – Third Reading", above n 22, at 11230.
[147] At 11232.

2.3.3.4.2 Judicial discretion

Mr Robertson cited a submission from the Police Association, which said that the bill would remove judicial discretion, which "provides a 'safety valve' for the myriad of possible circumstances surrounding any given case and is preferable to mandatory sentencing".[148]

2.3.3.4.3 Injustice

Mr Clendon similarly cited Professor Warren Brookbanks and Dr Richard Ekins, who considered that the Bill would result in unjust outcomes.[149]

2.3.3.4.4 Effectiveness / Alternatives to incarceration

Hone Harawira MP (Maori) and Carmen Sepuloni MP (Labour) both argued that the Bill would not effectively improve public safety. Mr Harawira further argued that the Bill would create frustration, anger, and violence within the prison population, and that the children of offenders who have been jailed for life would grow up with a hatred for society, which would perpetuate the cycle of offending.[150] Similarly, Ms Sepuloni argued that the Bill was motivated more by hatred for the offender, than by compassion for the victim[151] and that more money should be spent on education, and less on prisons.[152]

2.3.3.4.5 Public safety

In response to arguments from proponents of the Bill that crime statistics had risen and that the Bill was required to keep the public safe, Chris Hipkins MP (Labour) argued that the recent (at the time) rise in crime statistics could be partially attributed to an increase in reporting of crimes that previously went unreported, such as domestic violence.[153]

2.3.3.4.6 Listed offences

Ruth Dyson MP (Labour) argued that Ministry of Health officials were not consulted about the Bill, and that their advice should have been sought about including as a qualifying offence s 201 of the Crimes Act, which makes it an offence to wilfully infect another person with a disease. This, Ms Dyson argued, would stigmatise risk-taking behaviour and drive it underground.[154]

2.3.3.4.7 Summary

The key themes in arguments raised against the proposed Bill in the Third Reading were that the proposed regime was not supported by evidence and that it would not effectively reduce violent reoffending or improve public safety.

[148] At 11230.
[149] At 11232.
[150] At 11238.
[151] At 11240.
[152] At 11241.
[153] At 11244.
[154] At 11235.

2.3.3.5 Conclusion

In conclusion, the key themes raised in arguments against the proposed Bill were that the Bill would not effectively reduce violent reoffending or improve public safety, and that it was motivated by public appeal. Opponents of the proposed Bill also argued that the regime was oversold to the public, and would in fact harm public confidence in the criminal justice system as it would inevitably fail to live up to its promises. Finally, opponents of the Bill also argued that the regime would lead to unjust outcomes and that it would incur substantial costs which could be better directed to more effective interventions.

2.3.4 Conclusion

The key themes in arguments raised in favour of the proposed Bill were that the Bill would make the public safer and improve public confidence in the Criminal Justice System by targeting repeat violent offenders. Proponents also argued that the Bill would not result in unjust outcomes, and that it would address social and economic inequality.

The key themes in arguments raised against the proposed Bill were that the Bill would not effectively reduce violent reoffending or improve public safety, and that it was motivated by public appeal. Opponents of the proposed Bill also argued that the regime would lead to unjust outcomes and that it would incur substantial costs which could be better directed to more effective interventions.

The Sentencing and Parole Reform Act was passed after the third reading on 25 May 2010, with a final vote of 63 Ayes and 58 Noes. The vote was along party lines, with members of the National and ACT Parties voting in favour of the Bill, and members of the Labour, Green, Maori, and United Future Parties voting against the Bill.[155]

2.4 Submissions to Parliament

2.4.1 Introduction

The previous section considered arguments for and against the three-strikes regime during the Parliamentary debates. Next, this thesis will move on to the arguments made by members of the public in submissions to Parliament. This will give us insight into the level of public support for the Bill, and how the Bill in its final form was shaped by public opinion.

On 7 March 2009, a call for submissions was published. It asked for comments on the Sentencing and Parole Reform Bill, which was described as a Bill to:[156]

> create a three stage regime of increasing consequences for the worst repeat violent offenders, specifically targeting offenders who show contempt for the court system

[155] At 11247.
[156] New Zealand House of Representatives, above n 13.

> and the safety of others by continuing to offend despite long prison sentences and judicial warnings.

The first round of submissions closed on 24 April 2009. Significant changes were then made to the Bill,[157] and there was a second call for submissions following the release of an interim report on 17 February 2010. The closing date for this second round of submissions was 5 March 2010, and this was only open to "those who have previously submitted on the aspects of the bill affected by the proposed changes."[158]

2.4.2 Methodology

Following the close of submissions, these were published on the Parliament website.[159] There were a total of 1111 submissions — 1075 from the first round,[160] and 36 from the second round.[161]

A summary of each round of submissions was created by the Law and Order Committee.[162] In this paper, this research, together with selected individual submissions, was analysed to identify public opinion on the existing sentencing and parole regime, specifically identifying reasons for supporting or opposing the amendments proposed in the Sentencing and Parole Reform Bill, and any further suggested amendments.

2.4.3 Overview of results

2.4.3.1 First round

Of the 1065 submissions from the first round of submissions, there were 32 submissions opposing the proposed Bill, 723 submissions supporting the proposed Bill, and 306 submissions supporting the proposed bill but suggesting changes.[163]

2.4.3.2 Second round

Of the 34 submissions from the second round of submissions, there were 13 submissions opposing the bar-2 version of the proposed Bill and 21 submissions supporting the bar-2 version of the proposed Bill with changes.[164]

2.4.3.3 Total

In total, of the 1065 submitters, 32 opposed the proposed Bill, 4 were unclear, 723 supported the proposed Bill, and 307 supported the proposed Bill with amendments.

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[157] More discussion above at "2.2.3 Changes from Bar 1 to Bar 2".
[158] Law and Order Committee, above n 1, at 3.
[159] "Sentencing and Parole Reform Bill—New Zealand Parliament" <https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL9040_1/tab/submissionsandadvice>.
[160] Law and Order Committee, above n 14, at 2.
[161] Law and Order Committee *Sentencing and Parole Reform Bill − Summary of submissions on proposed amendments to Sentencing and Parole Reform Bill* (March 2010) at 2.
[162] Law and Order Committee *Sentencing and Parole Reform Bill − summary of submissions* (6 May 2009); Law and Order Committee, above n 161.
[163] Law and Order Committee *Sentencing and Parole Reform Bill − summary of submissions: themes* (6 May 2009).
[164] Law and Order Committee, above n 161.

2.4.4 Reasons for opposing

32 submitters opposed the proposal. Thirteen of these submitters also made another submission on the bar-2 version of the Bill. The reasons given can be separated into the following themes.

2.4.4.1 Regime not supported by evidence and/or will have no deterrent effect

This was the most popular reason, with 20 submitters listing this. Four of these submitters also considered that three-strikes laws have been shown to be unsuccessful internationally. Three of these submitters considered that the Bill would not reduce violent offending. Most of these submitters cited various studies on the three-strikes regimes in the United States, which found that they did not reduce violent crime,[165] and noted that many US States had begun to reverse "get tough" policies such as three-strikes laws. Some also noted that the proposed regime was premised on Rational Choice Theories of crime, and that research has shown that this theory does not hold true for violent and sexual crime.[166] Other submitters considered that offenders may not understand the implications of the strikes.[167] The Legislation Advisory Committee further noted that there was little evidence to suggest that offenders specialise in serious violence, and that therefore the proposed regime would not reliably predict future offending.[168]

2.4.4.2 Breach of NZBORA and/or international conventions

This was the next most popular reason, with 13 submitters in total listing this reason — 12 submissions in the first round of submissions and five submissions (one of which was new)[169] in the second round. Submitters who listed this reason cited the Attorney-General's report on the Bill under s 7 NZBORA,[170] which considered that the proposed Bill would be a breach of s 9 NZBORA (Right not to be subjected to torture or cruel treatment). Submitters also considered that the proposed Bill would be a breach of Articles 7 (prohibiting torture or to cruel, inhuman or degrading treatment or punishment) and 9(1) (right to liberty and security of person) of the International Covenant on Civil and Political Rights (ICCPR). Many also noted that life imprisonment without parole may be a breach of Article 10(3) ICCPR, which provides that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation", as it removes the possibility for rehabilitation or reform. There were also concerns about the additional pressure that the regime would impose

[165] See e.g. New Zealand Law Society "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009 (23 April 2009)" at [31].
[166] See e.g. Rethinking Crime and Punishment "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009 (15 March 2010)" at [12].
[167] Valerie Morse "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009 (7 April 2009)" at 2.
[168] Legislation Advisory Committee "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at [6].
[169] The "new" submissions came from people who had submitted in the first round, but had not raised this issue in particular in that first submission.
[170] Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the entencing and Parole Reform Bill* (2009) <https://www.justice.govt.nz/assets/Documents/Publications/BORA-Sentencing-and-Parole-Reform-Bill.pdf>.

on the Corrections budget, which may cause standards in New Zealand prisons to fall below the UN Standard Minimum Rules for the Treatment of Prisoners.[171]

2.4.4.3 Removes judicial discretion

This was the next most popular reason, with 13 submitters in total listing this — 8 submitters in the first round of submissions, and 5 submitters (all of which were new) in the second round of submissions. Most of these submitters considered that judicial discretion was an essential 'safety valve' to account for the myriad of possible circumstances in each case, and that the removal of judicial discretion could result in anomalous and unjust outcomes.[172] Some of the submissions on the bar-1 version of the Bill noted that judges would retain some discretion with the 5 year requirement. This was removed in the bar-2 version of the Bill.

2.4.4.4 Focus instead on addressing causes of crime

This was the next most popular reason, with 10 submitters listing this in the first round of submissions. These submitters shared the stated desire of the proponents of the Bill to improve public safety, but considered that the proposed Bill represented an "ambulance at the bottom of the cliff" approach,[173] and that public safety would be more effectively improved by seeking to address the causes of criminal behaviour. Furthermore, some submitters considered that the Bill would result in increased costs, which would deprive other sectors of resources that would address the causes of crime.[174] Many of these submissions also considered that there should be more focus instead on the rehabilitation and reform of prisoners.

2.4.4.5 Others

Nine submitters (eight from the first round, one new submitter from the second round) considered that the Bill would have a disproportionate impact on Maori. Eight submitters considered that the Bill would provide an incentive for offenders to murder their victims in order to avoid apprehension.

The following reasons were listed by five submitters each:

- The Bill would be costly;
- The use of preventive detention could be expanded as an alternative to the proposed three-strikes regime;
- The Bill would lead to disproportionate sentencing.

The following reasons were listed by four submitters each:

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[171] Human Rights Commission "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at [4.19].

[172] See e.g. New Zealand Police Association "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at [5].

[173] Dunedin Community Law Center "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 1.

[174] Religious Society of Friends "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009 (20 April 2009)" at [10].

- The Bill would remove motivation for prisoners subject to the regime to reform;
- The Bill would make prisons more dangerous as it would remove incentives for good behaviour;
- The listed offences in the Bill were too broad, which would increase the chances of injustice;
- The public perception of crime did not reflect reality — one submitter noted that crime statistics had dropped while the reporting of "tragedy stories" had increased.

The following reasons were listed by three submitters each:

- Concerns with parole should be dealt with by examining the implementation of the parole system, rather than by abolishing it for certain offenders;
- Public confidence in the justice system could be improved by different means;
- There was no reliable evidence of public support for the Bill;
- The Bill would lead to public distrust of the sentencing process;
- The Bill may cause juries to be reluctant to convict if they knew a defendant was on his third strike;
- The Bill would lead to arbitrary sentencing;
- The Bill would contribute to New Zealand's already rising prison population.

The following reasons were listed by two submitters each:

- Prisons made offenders worse;
- The Bill could make victims, particularly of domestic violence, less likely to report offending;
- There was an over-representation of prisoners with psychiatric/social issues;
- The Bill would result in an increased number of elderly prisoners who remained incarcerated despite having aged out of the risk bracket;
- Parole provided a structure for a prisoner's transition back into society;

There were 89 suggestions listed by one submitter. These will not be listed here, but can be found in Appendix C.

2.4.5 Reasons for supporting

1065 submitters supported the proposal. The reasons given can be separated into the following themes.

2.4.5.1 Victim's Rights

This was the most popular reason, with 673 submitters listing this. Many submitters who listed this as a reason expressed dissatisfaction with the existing sentencing and parole regime and felt that New Zealand had become less safe. Some of these submitters also expressed the view that there was too much emphasis on the rights of offenders, and not enough on the rights of victims.

2.4.5.2 Life should mean life

This was the next most popular reason, with 383 submitters listing this. Submitters who listed this as a reason expressed the view that parole should not be available for sentences of life imprisonment. Many submitters who listed this as a reason also expressed the view that parole was granted too easily to dangerous criminals, and that public safety had suffered as a result.

2.4.5.3 Supports a three-strike system

This was the next most popular reason, with 336 submitters listing this. Submitters who listed this as a reason expressed support for a three-strike system, as opposed to a different number of strikes. Some of these submitters expressed a preference for a lower number of strikes, but would still support a three-strike system. There was significant overlap between submitters who listed this reason and those who listed 'life should mean life' (82.7%). There was also a 56% overlap between submitters who listed this reason and those who listed 'victim's rights'. Many submitters who listed this reason expressed the view that offenders who have not reformed after two stints in prison were unlikely to ever reform and should therefore not be given any more chances.

2.4.5.4 Supports abolishing parole for repeat offenders

This was the next most popular reason, with 140 submitters listing this. There is some overlap between submitters who listed this reason, and those who listed 'life should mean life' (72%) and 'supports a three-strike system' (64%). Many of the submitters who listed this reason also expressed concern with the numerous reports of reoffending by parolees.

2.4.5.5 Parole granted too easily

This was the next most popular reason, with 101 submitters listing this. It is interesting to note that there is almost no overlap between submitters who listed this reason, and those who listed 'supports abolishing parole for repeat offenders' (2 submitters). Many of the submitters who listed this reason expressed the view that parole seemed to be granted as a right, that parole conditions were not enforced well enough, and also expressed concern with the numerous reports of reoffending by parolees.

2.4.5.6 Current Sentencing laws are too lenient

This was the next most popular reason, with 99 submitters listing this. There was significant overlap between submitters who listed this reason, and those who listed 'victim's rights' (87.9%). Many of the submitters who listed this reason expressed the view that judges were too lenient, leading to a rise in violent offending. On a similar note, many submitters also suggested removing the five-year requirement in the bar-1 version of the Bill, due to concerns that judges would impose sentences just under five years to avoid the effect of the three-strikes regime.

2.4.5.7 Public safety

This was the next most popular reason, with 21 submitters listing this. Many submitters who listed this reason expressed the view that there had been an increase in violent crime, causing

New Zealand to become less safe. Some expressed the view that murder had become an almost daily occurrence in New Zealand.[175] They believed that the three-strikes regime would improve public safety either by deterrence or incapacitation.

2.4.5.8 Others

Nine submitters did not give a reason for supporting the regime. Seven submitters considered that the regime would prevent victims from being re-victimised at parole hearings.

The following reasons were listed by six submitters each:

- Bail was granted too easily;
- New Zealand's international image had deteriorated due to a perceived rise in violent crime.

The following reasons were listed by five submitters each:

- Legal aid was granted too easily and/or to too many defendants;
- The regime would reduce reoffending via a deterrent effect.

The following reasons were listed by four submitters each:

- The regime would promote personal responsibility in offenders subject to the regime;
- Although the regime would result in increased costs of imprisonment, these costs would be less than the cost of investigating and prosecuting the reoffending that would be prevented by the regime;
- There was too much emphasis on the rights of criminals, and not enough on the rights of victims;
- Prisons work better for reform than non-custodial sentences.

The following reasons were listed by three submitters each:

- Concerns about crime in New Zealand;
- The regime would promote "truth in sentencing";
- Parole conditions were too lenient;
- Parole for certain offences should be abolished;
- The regime would improve public confidence in the justice system.

The following reasons were listed by two submitters each:

- It was wrong for the government to condone repeat attacks on citizens;
- Prisons were too comfortable;
- Trying to help offenders who did not want to reform was a waste of time;
- The regime would result in less judicial discretion;

[175] James Cottle "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009".

- The ability of prisons to accommodate prisons was not relevant;
- The regime would protect poor and/or minority communities, who were more likely to be the victims of violent crime;
- The right of citizens to live in peace should be paramount.

Another two submissions, both from the same person (one as a representative of the Sensible Sentencing Trust Christchurch, and one in his personal capacity), considered that BORA concerns were "rubbish" and that the prohibition against "cruel and degrading" punishment in s 9 NZBORA referred only to torture.[176]

There were 28 suggestions listed by one submitter. These will not be listed here, but can be found in Appendix D.

2.4.6 Amendments proposed

Three hundred and six submitters supported the proposal with amendments. Twenty one of those submitters also made another submission on the bar-2 version of the Bill.[177] The amendments proposed can be separated into the following themes.

2.4.6.1 Include drug offences

One hundred and ninety two submitters thought that drug offences should be included in the list of strike offences — 188 in the first round of submissions, and four new submitters in the second round of submissions. Submitters who suggested this thought that the manufacture and/or supply of illegal drugs should be a strike offence. Many submitters were particularly focused on the manufacture and supply of 'P', or methamphetamine. The primary reason given was that the manufacture and/or supply of drugs creates a large number of victims who would then go on to commit serious offences to fund their addiction.[178]

2.4.6.2 Retroactive effect

One hundred and fifty nine submitters thought that the Bill should have retroactive effect — 157 in the first round of submissions, and two new submitters in the second round of submissions. Submitters who suggested this thought that a history of qualifying offense before the enactment of the Bill should be considered a 'strike' for the purposes of the three-strike regime. The primary reason given for this was that without retroactive effect, the regime would take too long to come into effect.[179]

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[176] Sensible Sentencing Trust (Christchurch) "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 1; Harry Young "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 1.

[177] Law and Order Committee, above n 161.

[178] See e.g. Sensible Sentencing Trust (Napier) "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009 (2 March 2010)" at 1.

[179] See e.g. Sensible Sentencing Trust (National Office) "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 3.

2.4.6.3 Remove five-year requirement

Seventy submitters thought that the five-year requirement should be removed. This was also one of the few suggestions that were implemented in the bar-2 and the final version of the Bill. Submitters who suggested this thought that the requirement in the bar-1 version of the Bill that an offender had to be sentenced to more than five years imprisonment for the offence to count as a strike offence should be removed. The primary reason given was that judges would try to avoid the effect of the three-strikes regime by imposing sentences below that threshold.[180]

2.4.6.4 Abolish parole

Sixty six submitters thought that parole should be abolished. Submitters who suggested this thought that parole should be abolished for all offenders. The primary reason given was that prisoners manipulate and trick the parole board into granting them parole.[181] Another reason given was that this would promote "truth in sentencing".[182] Some submitters caveated this suggestion by saying that parole should not be abolished for first-time offenders.[183]

2.4.6.5 More qualifying offences

Sixty three submitters thought that there should be more qualifying offences — 55 in the first round of submissions, and eight new submitters in the second round of submissions. Many of the new submissions in the second round were prompted by the removal of acid throwing and incest from the list of qualifying offense in the bar-2 version of the bill. Many submitters who suggested this thought that all violent crime,[184] or all offences with a maximum sentence above 3–5 years,[185] should count as a qualifying offence. Several also suggested that burglary,[186] vehicular manslaughter,[187] and offences against Police officers[188] should be included.

2.4.6.6 Consecutive sentences

Forty seven submitters thought that offenders sentenced under the regime should serve their sentences consecutively — 46 in the first round of submissions, and one new submitter in the second round of submissions. Submitters who suggested this thought that, contrary to s 86D(6), offenders who are sentenced for other offences in addition to a stage-3 offence should not serve

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[180] See e.g. Peek, above n 34, at 2; Sensible Sentencing Trust (Christchurch), above n 176, at 1.
[181] Jenny Peterson "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 1.
[182] See e.g. Rod Lewis "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 2.
[183] See e.g. Red Raincoat NZ Trust "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 4.
[184] See e.g. Josephine Dando "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 3.
[185] See e.g. Stephen Brewster "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 1.
[186] See e.g. Rita Croskery "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 2.
[187] See e.g. Judy Ashton "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 3.
[188] See e.g. Sensible Sentencing Trust (Napier), above n 178, at 2.

those sentences concurrently. Many of these submitters also suggested abolishing concurrent sentencing for all offenders.[189]

2.4.6.7 Forced labour for prisoners

Forty two submitters thought that prisoners should be forced to work during their incarceration. The primary reason given was that this would offset the increased costs of incarceration caused by the three-strikes regime.[190] Some submitters suggested that all prisoners, not just those imprisoned under the three-strikes regime, should be forced to work to offset the costs of their incarceration.[191]

2.4.6.8 Harsher prison conditions

Forty submitters suggested that prison conditions should be made harsher. The primary reason given was that this would make imprisonment a stronger deterrent to offenders.[192]

2.4.6.9 Death penalty

Twenty nine submitters suggested that New Zealand should bring back capital punishment. Some reasons given included that: this would offset the increase in prison population;[193] that this would have a strong deterrent effect;[194] and that some offenders have proven themselves incapable of rehabilitation.[195]

2.4.6.10 Should also apply to young offenders

Twenty seven submitters thought that the regime should also apply to young offenders. Submitters who suggested this suggested a variety of ages from which the regime should apply, ranging from 14[196] to 16 years.[197]

2.4.6.11 Past convictions should be admissible

Seventeen submitters suggested that a repeat offender's past convictions should be admissible in court. It was not clear whether this suggestion was to apply to the trial stage or the sentencing stage. Reasons given included that this would "enable juries to know the true nature of the

[189] See e.g. Sensible Sentencing Trust (National Office), above n 179, at 4.
[190] See e.g. Edmund Boros-Gyevi "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 1.
[191] See e.g. Eddie Wong "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 2.
[192] See e.g. Michelle Hodges "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 1.
[193] See e.g. Peek, above n 34, at 2.
[194] See e.g. Peter Brennan and Marion Brennan "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 1.
[195] See e.g. GE Turner "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 2.
[196] See e.g. Rod Thompson "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 2.
[197] See e.g. Rae Sidwell "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 2.

accused."[198] Some submitters also suggested that previous violent history should be available to the parole board.[199]

2.4.6.12 Only more serious offences to qualify for third strike

Fourteen submitters suggested that there should be a smaller list of the most serious offences that would count as a third strike offence. Some submitters suggested that this list should be comprised of the offences listed as ss 86A(18) – 86A(29).[200]

2.4.6.13 Fewer than three strikes

Thirteen submitters thought that there should be fewer than three strikes. Submitters who suggested this thought that three strikes would give offenders too many chances to offend, and that the maximum penalty should apply after either one[201] or two strikes.[202]

2.4.6.14 Fewer qualifying offences

Thirteen submitters thought that there should be fewer qualifying offences — 12 in the first round of submissions, and one new submitter in the second round of submissions. Submitters who suggested this thought that some of the listed offences should be removed, including attempted sexual offences,[203] offences where violence was merely threatened,[204] offences within the family,[205] acid throwing and incest,[206] and sexual offences.[207] This was another suggestion that was implemented in the bar-2 and final versions of the Bill, with incest and acid throwing being removed from the listed offences.

2.4.6.15 Life imprisonment for repeat serious offenders

Eleven submitters suggested that all repeat serious offenders should be sentenced to life imprisonment. A common reason given was that this would act as a deterrent to offenders.[208]

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[198] See e.g. Gerald Freeman and Sonia Freeman "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009".

[199] See e.g. Brian Thomson and Beverley Thomson "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 1.

[200] See e.g. Keith McConnell "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at [5b].

[201] See e.g. Celia Ashll and Tony Ashll "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 1.

[202] See e.g. M Dixon "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009".

[203] See e.g. Grant McNeil "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 1.

[204] See e.g. Rex Beer "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 2.

[205] Michael Crozier "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009 (9 April 2009)".

[206] See e.g. Peek, above n 34, at 3.

[207] See e.g. Stuart Clarke "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 2.

[208] See e.g. Gerry Tao "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009" at 2.

2.4.6.16 Deport non-New Zealander offenders

Ten submitters thought that non-New Zealander offenders should be deported. Some submitters suggested that non-New Zealanders accused (not convicted) of serious crimes should be deported.[209] Others suggested that offenders' families should also be deported.[210]

2.4.6.17 Others

Nine submitters suggested that there should be financial compensation for victims.

The following suggestions were listed by eight submitters each:

- Repeat violent offenders should forfeit their rights under the BORA;
- The parole system needed to be reformed;
- Bail should be abolished, either for violent offences or for all offences.

The following suggestions were listed by seven submitters each:

- The manifest injustice exception should be removed;
- Parole should only be available after a longer period of imprisonment.

The following suggestions were listed by six submitters each:

- Education and/or training programs should be available for young offenders;
- Concerns about criminal liability for self-defence, and/or suggested that there should be no prosecution for self-defence.

The following suggestions were listed by five submitters each:

- Punishment and/or deterrence should be considered by the Parole Board;
- Compulsory DNA testing for offenders.

The following suggestions were listed by four submitters each:

- Caning with a rattan cane should be available as a sentence;
- New Zealand's law should be more like Singapore;
- The manifest injustice exception should be applicable in more circumstances.

The following suggestions were listed by three submitters each:

- Parents of young offenders should stand trial alongside the offenders;
- Offenders should be sentenced to life without parole for all third strikes;
- Deterrence should be the main goal of the regime;
- All third strike offenders should be sentenced to life imprisonment;

[209] See e.g. FA Kelner and ER Kelner "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009".

[210] See e.g. WJ McLeod "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009".

- The purpose of the Bill should be amended to apply to all repeat offenders, not just those "guilty of the worst murders".

The following suggestions were listed by two submitters each:

- Handcuffs should be used in court;
- Boot camps;
- Compulsory RJ meetings if victims want;
- 25 years as a life sentence is sufficient;;
- Breach of parole provisions should result in return to prison;
- Use offenders to clear landmines;
- Abolish non-custodial sentences;
- Guilty until proven innocent;
- Parents to be held accountable for young offenders;
- Reduced sentences should not be allowed;
- Legal aid eligibility for self-defence cases;
- Accumulated sentence for offender where parties to the offence are not convicted;
- Abolish insanity plea;
- Five-year MPI for violent offenders;
- No ACC for injured offenders;
- Favours double bunking in prison;
- Confiscate proceeds from drug offending;
- Introduce degrees of murder;
- Clarify "manifest injustice";
- Mentoring/training for poor parents and children;
- Believes prisoners should not have time off for good behaviour;
- No Maori only prisons;
- 25-year MPI rather than 20;
- Keep five-year requirement.

There were 89 suggestions listed by one submitter. These will not be listed here, but can be found in Appendix E.

2.4.6.18 Opposed but made suggestions

In the second round of submissions, three submitters were opposed to the proposed Bill, but suggested amendments be made to the Bill should it be passed. All three of these submitters suggested that the manifest injustice exception should be applicable in more circumstances. Two submitters suggested that the five-year requirement which had been removed in the bar-2 version of the Bill[211] should be reintroduced.[212]

The following suggestions were listed by one submitter each:

[211] See "2.2 Changes to the Bill" above.

[212] Graeme Edgeler "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009 (15 March 2010)" at [4]–[5]; New Zealand Law Society "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009 (8 March 2010)" at 1.

- Fewer qualifying offences;[213]
- Add acid throwing to the list of offences;[214]
- No automatic Life Without Parole for second strike murder;[215]
- Only offending pursued in the indictable jurisdiction should fall within the three-strikes regime;[216]
- 14-year MPI instead of Life Without Parole for third strike manslaughter.[217]

2.5 Summary

Most submitters supported the Bill, with some suggesting changes. The three most popular changes suggested were that the regime should include drug offences, that it should have retroactive effect, and that the five-year requirement contained in the Bar-1 version of the Bill should be removed. This third suggestion was subsequently put into effect by Parliament. Only 32 of the 1065 submitters were opposed to the Bill, with the most popular reason for opposing being that the Bill was not supported by evidence, and would not effectively deter repeat violent offending.

2.6 Conclusion

2.6.1 Debates

The key arguments in favour of the proposed Bill were that it would increase public confidence in the Criminal Justice System, protect victims from re-victimisation, deter repeat offenders, improve public safety, and demonstrate that the government was tough on crime.

The key concerns raised about the Bill were that it was oversold to the public, that it was driven by popular appeal rather than evidence, that similar regimes in other countries did not work, that the cost of the regime should be applied instead to rehabilitation programmes, that it would lead to injustice, and that it would disproportionately impact Maori.

2.6.2 Submissions

The key themes in submissions in favour of the proposed Bill were that the Bill would advance victim's rights, that New Zealand was too soft on crime, and that the New Zealand public had become less safe as a result.

The key themes in submissions opposing the proposed Bill were that the Bill would breach the NZBORA and/or international conventions, that it would result in injustice, that it was not supported by evidence and would not reduce reoffending, and that the cost of the regime should be applied instead to programmes addressing the causes of offending.

[213] New Zealand Law Society, above n 212, at 1.
[214] At 2.
[215] Edgeler, above n 212, at [11]–[12].
[216] At [6]–[10].
[217] At [16]–[17].

The key themes in submissions proposing amendments to the proposed Bill were that drug offences should be included, that the Bill should be applied retroactively, that the five-year requirement contained in the bar-1 version of the Bill should be removed, and that New Zealand should be tougher on crime.

There was overwhelming public support for the proposed Bill, with many submitters proposing even harsher measures. Most submitters thought New Zealand was too soft on crime, and that there was too much focus on the rights of offenders, to the detriment of victim's rights.

2.6.3 Did Parliament address concerns raised in submission?

Arguments in Parliament in favour of the Bill for the most part did recognise submissions from members of the public who supported the proposed Bill. For example, Parliament responded to public concern about public safety, victim's rights, confidence in the Criminal Justice System, and the general notion that New Zealand should be tougher on crime.

However, submissions from the public also reflected a concern with parole being granted too easily. This was not considered in Parliament as the proposed Bill only targeted repeat violent offenders and was not intended to be a wider reform of the parole system.

On a similar note, neither of the two most frequently suggested amendments (inclusion of drug offences and retroactive application) were implemented.

Arguments in Parliament against the Bill similarly reflected concerns raised by members of the public. For example, Members of Parliament who opposed the Bill raised concerns about the failure of similar regimes in other countries, the potential for unjust outcomes, and the potential for disproportionate impact on Maori.

A key concern raised in submissions from the public was that the proposed Bill could be a breach of international conventions. This concern was not raised in debates in Parliament. However, several Members of Parliament who opposed the Bill did raise concerns that the regime would be contrary to the NZBORA.

A key concern raised in Parliament was that the Bill was oversold to the public and would thus decrease public confidence in the Criminal Justice System. However, this did not feature prominently in submissions from the public, with only one submitter noting that the regime may decrease public confidence in the Criminal Justice System among Maori, and three submitters suggesting that the regime would add to public distrust of the sentencing process. Three other submitters also suggested that public confidence in the Criminal Justice System could be improved by other means.

In summary, some, but not all of the more frequently mentioned arguments in submissions were raised by one or more MPs in Parliament, either explicitly or implicitly. Therefore, it seems that the resulting Bill did take into account submissions from the public. However this seems to have been limited to submissions focusing on general criminal and sentencing law

principles, rather than specific amendments such as retroactive effect or the inclusion of drug offences.

2.6.4 Enactment of the Bill

The Bill passed its third reading on 25 May 2010 with a vote of 63 Ayes and 58 Noes and came into force on 1 June 2010.

The next section will consider how this law has been applied in the courts.

Chapter 3. The Three-Strikes Regime in the New Zealand Courts[218]

3.1 Introduction

The previous chapter discussed the background to the legislation and the issues that arose during the debates and in submissions. This chapter will discuss the law's application in the courts and issues that have arisen from this. It will first examine the consistency of the three-strikes regime with the New Zealand Bill of Rights Act. Next, it will discuss the application of the manifest injustice exception in *Harrison*,[219] and how this was applied in subsequent decisions. Finally, this chapter will examine the application of the manifest injustice exception to s 86C (stage-2 non-murder offences) in case law.

3.2 Harrison

The leading three-strikes case is *R v Harrison; R v Turner*. This involved appeals from the Crown on two second-strike murders which would have resulted in sentences of life without parole had the manifest injustice exception in s 86E not been satisfied.[220] The facts of this case are as follows.

The first offender, Mr Harrison, was convicted of murdering Alonsio Matalasi.[221] Mr Harrison and an associate, Mr Pakai, were members of the Rogues Chapter of the Mongrel Mob. They entered the property of Mr EE, a member of the Petone Chapter, and stole various items of property, including a cellphone.[222] Mr EE contacted them on the stolen phone, and demanded that they return with it. He arranged for them to be met by a number of armed gang associates.[223] Mr Harrison and Mr Pakai returned. Mr Pakai was armed with a modified rifle.[224] Mr Harrison was struck by one of the Petone group, and Mr Pakai "responded by firing six shots in the direction of the group as they fled the scene."[225] Mr Matalasi was amongst the group, and was shot by Mr Pakai. He died soon after.[226] Mr Harrison and Mr Pakai were both convicted, with the jury finding that Mr Pakai was acting on Mr Harrison's instructions or encouragement.[227]

The second offender, Mr Turner, was convicted of murdering Maqbool Hussain. Mr Turner and Mr Hussain were both homeless. On 22 March 2014, Mr Turner severely beat Mr Hussain for approximately an hour and a half,[228] subjecting him to "punches, kicks and stomps to the neck and head area".[229] Turner left dressed in a different top, returned shortly after to take

[218] A version of this chapter was published as Xu Wang "Understanding manifest injustice" [2020] NZLJ 259.
[219] *R v Harrison; R v Turner*, above n 10.
[220] At [3].
[221] At [13].
[222] At [7].
[223] At [8].
[224] At [9].
[225] At [10].
[226] At [12].
[227] At [14].
[228] At [24].
[229] At [25].

Hussain's pants, then left again.[230] Mr Turner was arrested on 1 April 2014. In a police interview, he claimed to have been motivated by "just complete hatred, adrenalin and greed".[231]

3.3 Sections 86D, 86E and the Manifest Injustice Exception

The manifest injustice exception is an exception that applies to sections 86D and 86E of the Sentencing Act. As discussed in Chapter 1 above, s 86D requires a court to sentence an offender who commits a third-strike other than murder to the maximum sentence of imprisonment for the offence, and to order that this sentence must be served without parole. The manifest injustice exception in s 86D allows a court to avoid making the non-parole order if such an order would be manifestly unjust.

Section 86E requires a court to sentence an offender who commits a second or third strike murder to a sentence of life imprisonment, and to order that this sentence must be served without parole. The manifest injustice exception in s 86E allows a court to avoid imposing this order of life imprisonment without parole if such an order would be manifestly unjust.

This exception has had a significant effect on the application of the three-strikes regime in case law, as will be discussed later in this chapter.

3.4 Compatibility with the New Zealand Bill of Rights Act 1990

The preliminary issue raised in *Harrison* was whether the three-strikes regime was consistent with the NZBORA. The Court first began by considering the purpose of the three-strikes law. Referring to the Regulatory Impact Statement prepared by the Ministry of Justice,[232] it considered that the purpose of the three-strikes regime was to "reduce violent crime, and thus improve public safety, through deterrence and incapacitation."[233] It also referred to reports from New Zealand Police and the Ministry of Justice, and the legislative history, and concluded that "Parliament's intention was to limit judicial discretion and any departure from the mandatory nature of the regime would be rare and only in "exceptional cases where life without parole would be unjustifiably harsh".[234] It was intended that the manifest injustice exception set a very high threshold[235] and was intended to apply only to very extraordinary cases, such as "an offender with intellectual or mental impairment, offending on the cusp of murder and manslaughter or where an offender has provided significant assistance to police."[236]

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[230] At [24].
[231] At [26].
[232] Ministry of Justice, above n 117 <http://nzlii.org/nz/legis/bill/saprb2009277.pdf>.
[233] *R v Harrison; R v Turner*, above n 10, at [76]; citing "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10673–10675; "Sentencing and Parole Reform Bill – Third Reading", above n 22, at 11236; See also New Zealand Police *Sentencing and Parole Reform Bill: Departmental Report* (12 March 2010) at [10]–[25].
[234] *R v Harrison; R v Turner*, above n 10, at [73]; citing "Sentencing and Parole Reform Bill – First Reading", above n 12, at 1421.
[235] *R v Harrison; R v Turner*, above n 10, at [74]; citing Ministry of Justice *Sentencing and Parole Reform Bill: Initial Briefing* (22 April 2009) at [47].
[236] *R v Harrison; R v Turner*, above n 10, at [73]; citing Cabinet Business Committee "No parole for worst repeat violent offenders and worst murder cases" (5 December 2008) at [16].

The Court then considered the NZBORA, and noted that the three-strikes regime may be inconsistent with s 9 NZBORA. It began its analysis by setting out the approach to be taken to interpreting legislation that may be inconsistent with the NZBORA:[237]

> Here the court must seek to resolve the tension that exists between Parliament's right to determine a sentence for a particular offence and the constitutional right of citizens to be free from disproportionately severe punishment. Where the two cannot be reconciled, the Court must give effect to the legislation but may say that it has done so under s 4 of the Bill of Rights Act.

The Supreme Court set out a test for breach of s 9 NZBORA in *Taunoa v Attorney-General*.[238] A summary of the decision in *Taunoa* can be found in *Vaihu v Attorney-General*:[239]

> The Judges of the Supreme Court expressed differing views on the test for determining whether conduct breaches s 9, and none of those views commanded majority support. Elias CJ and Blanchard J favoured the test from Canada – conduct which outrages standards of decency. However in the case of Blanchard J, this definition gave content only to "disproportionately severe" treatment. Elias CJ considered that no test could be drawn to determine whether conduct was inhuman. Blanchard J appeared to adopt a general criterion of outrageousness and unacceptability of conduct for determining whether there is a breach of s 9. Tipping and Henry JJ preferred an arguably stricter test – conduct which shocks the national conscience – again, only with respect to the definition of "disproportionately severe". McGrath J preferred a criterion of overall harshness. What is clear from the judgments, however, is that the threshold for establishing a breach of s 9 is a high one.

The Court considered that Parliament intended for the three-strikes regime to result in sentences that were higher, but not grossly disproportionate, to those previously imposed and that grossly disproportionate sentences would be contrary to s 9 NZBORA.[240] It also considered that "a whole-of-life sentence is not a grossly disproportionate response to the very worst murders".[241]

The qualifying offences under the three-strikes regime are extremely broad,[242] potentially encompassing "an infinite range of possible circumstances of offending".[243] Therefore, there was an elevated "risk of gross disproportionality",[244] and a potentially high risk that "s 86E will produce arbitrary or wholly disproportionate outcomes".[245]

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[237] *R v Harrison; R v Turner*, above n 10, at [78]; See also *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at 16.
[238] *Taunoa v Attorney-General* [2007] NZSC 70; *Taunoa v Attorney-General* [2008] 1 NZLR 429.
[239] *R v Harrison; R v Turner*, above n 10, at [82]; citing *Vaihu v Attorney-General* [2007] NZCA 574 at [36].
[240] *R v Harrison; R v Turner*, above n 10, at [83].
[241] At [84].
[242] At [87].
[243] At [88].
[244] At [87].
[245] At [88].

The Court also accepted submissions from counsel for Mr Harrison on the subject of "death by incarceration",[246] and found that "on average, an offender sentenced under the three-strikes regime may face an effective sentence between 35 and 42 years in prison".[247] This far exceeds the longest non-parole period ever imposed, which was 30 years,[248] and further demonstrated the "risk of gross disproportionality arising from the three-strikes regime."[249]

With the above findings in mind, the Court found that the manifest injustice exception "must be exercised by reference to the inherent risk of gross disproportionality arising from the application of s 86E"[250] in order to avoid breach of s 9 NZBORA, and that the exercise of the discretion was to be an intensely factual inquiry, "informed by the full range of sentencing objectives and principles."[251] The Court noted that the language of manifest injustice was also found in ss102 and 104 of the Sentencing Act[252] and that its approach to manifest injustice under the three-strikes regime differed from the approach under ss 102 and 104. It concluded, however, that only minimal guidance could be taken from ss 102 and 104[253] because the three-strikes regime encompassed a far wider range of offending,[254] and could result in far more extreme outcomes.[255]

In conclusion, the Court found that in order to interpret s 86E consistently with s 9 NZBORA, "the test for circumstances that are manifestly unjust must be of sufficient breadth to ensure that any sentence imposed under s 86E is not grossly disproportionate".[256]

3.5 R v Harrison: Manifest Injustice under s86E (Stage 2 or 3 murder)

In considering whether manifest injustice could be found in a specific case, the Court of Appeal in *Harrison* set out a three-step process:[257]

1. Begin by recognising "that the sentence for a stage-2 or stage-3 murder is presumed to be life imprisonment without parole"; and
2. Determine the appropriate sentence under the ordinary sentencing regime (i.e. but for s 86E); and

[246] At [92].
[247] At [93].
[248] At [93]; *R v Bell* CA80/03, 7 August 2003.
[249] *R v Harrison; R v Turner*, above n 10, at [93].
[250] At [94].
[251] At [96].
[252] Sentencing Act 2002, s 102 states that "[a]n offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust."; Section 104 states that "[t]he court must make an order under section 103 imposing a minimum period of imprisonment of at least 17 years in the following circumstances, unless it is satisfied that it would be manifestly unjust to do so".
[253] *R v Harrison; R v Turner*, above n 10, at [101].
[254] At [100].
[255] At [98].
[256] At [106].
[257] At [109]–[110].

3. Determine whether the 'manifest injustice' exception applies, where the manifest injustice standard is to be read as meaning 'grossly disproportionate' in the language of s 9 NZBORA.

In the second stage of the inquiry, the Court referred to its ordinary sentencing analysis under ss 102 and 104 and described 'the appropriate sentence' as "the sentence that would otherwise be appropriate for this particular offending and offender".[258]

In the third stage of the inquiry the Court noted that this analysis is to take into account both the circumstances of the offence and the offender.[259] This is to be an intensely factual inquiry.[260] This will include:

- Personal mitigating factors under s 9(2) Sentencing Act;
- The principles and purposes of sentencing as described in sections 7, 8 and 9 of the Sentencing Act (except where inconsistent with ss 86B to 86E);
- The offender's ability to understand the three-strikes warnings;
- The likelihood of re-offending;
- The consequences for the offender of a non-parole order;
- The stage of the index offence;
- The nature of the index offence;
- The nature of the offending in previous strike offences and the sentences imposed;
- The sentence that would have been imposed but for s 86E; and
- Relative sentencing in other three-strike cases.

Some of these factors will be discussed further below.

3.6 R v Campbell: Manifest Injustice Under s 86D (stage 3 offences other than murder)

Harrison was decided under s 86E, which applies to stage-2 and -3 murder cases. The same test for manifest injustice was applied to s 86D (stage-3 non-murder) cases in *R v Campbell*[261] (stage-3 indecent assault). In *Campbell*, the offender was convicted of indecent assault as a stage-3 offence after he grabbed the buttock of a female prison officer while serving a sentence of imprisonment. The Court cited *Harrison* and considered that it could only make a finding of manifest injustice if a non-parole order would result in a "grossly disproportionate outcome".[262] The Court also noted that it was required to consider the factors set out in *Harrison*.[263]

[258] At [149].
[259] At [104].
[260] At [108].
[261] *R v Campbell*, above n 8.
[262] At [16].
[263] At [16].

3.7 Davis v R: Clarification on the manifest injustice exception

A section 86E sentence (stage-3 murder) was recently the subject of an appeal. In *Davis v R*[264], The Court of Appeal considered and applied the *Harrison* test, and echoed the ruling in *Harrison* that the case for finding manifest injustice must be "clear and convincing", but that such cases "need not be rare or exceptional".[265] The Court also added that "[a]ll relevant aggravating and mitigating factors under ss 7–9 of the Sentencing Act must be considered, including those identified in *Harrison*".[266] The Court commented that:[267]

> Because it does not allow for the circumstances of either instant or prior offending, the three-strikes regime is capable of producing what might otherwise be disproportionately severe sentences.

For this reason, as was found in *Harrison*, there is 'significant scope' for a finding of manifest injustice in s 86E cases. The same test was applied to s 86E decisions in *Campbell*.[268] However, manifest injustice is less likely to be found in s 86D cases as the consequences are far less extreme.[269]

3.8 The Manifest Injustice Factors: Introduction

In *Harrison*, the Court of Appeal commented that the presence of exceptional circumstances was not necessary for manifest injustice to be found:[270]

> Where we part company with the Solicitor-General's submissions is the proposition that the test for manifestly unjust is likely to be reached only in exceptional circumstances. If that approach were to be applied, we consider it would often give rise to grossly disproportionate sentences.

This section will consider some of the factors that the Court of Appeal indicated that the inquiry into manifest injustice should take into account, and how these have been discussed in subsequent cases. It will also include some other factors considered by the courts.

3.8.1 Factors: General Sentencing

3.8.1.1 Section 8: Personal background of the offender

Under s8 Sentencing Act, one principle of sentencing is that the court:

> must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose.

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[264] *Davis v R* [2019] NZCA 40.
[265] At [30].
[266] At [33].
[267] At [46].
[268] *R v Campbell*, above n 8, at [16]; fn 8.
[269] See e.g. *R v Waitokia* [2018] NZHC 2146 at [24]; *R v Nuku* [2018] NZHC 2510; *R v Williams* [2019] NZHC 2630; *R v Winitana* [2019] NZHC 3229.
[270] *R v Harrison; R v Turner*, above n 10, at [106].

A poor upbringing, sometimes described as Rotten Social Background (RSB),[271] may be considered by a court. In *R v Puna*[272] (stage-2 murder), the Court noted that Mr Puna had been exposed to violence and bullying as a child, leaving him with problems with fighting and anger, especially when provoked. It further noted that Mr Puna's upbringing had resulted in developmental delays and that a long sentence of imprisonment would negatively affect his life.[273]

However, in many instances, the offender's poor upbringing was not considered a factor pointing toward manifest injustice. In *R v Tai*[274] (stage-2 murder), Mr Tai had been a victim of sustained physical abuse by his father from about the age of five. He was later placed in foster care, where he suffered further abuse.[275] The Court noted that Mr Tai's "background and circumstances … make him almost a paradigm of those who appear before this Court for serious crimes of violence".[276] However, despite noting Mr Tai's childhood abuse, the Court did not refer to it as being a factor pointing towards manifest injustice.

Similarly, in *R v Alexander*[277] (stage-2 murder), the Court did not find Mr Alexander's poor upbringing to be a factor in its finding of manifest injustice, despite noting that Mr Alexander had been "exposed to violence, crime and substance abuse from a young age".[278] Rather, the Court found that his upbringing, together with his pattern of substance abuse, had contributed to his propensity for violence, and noted that he exhibited "all the risk factors associated with re-offending".[279] In this instance, it seems the Court found manifest injustice because it was primarily convinced by Mr Alexander's insight into his offending and his frank self-awareness.[280] In *R v Wereta*[281] (stage-3 wounding with intent to cause GBH), the Court noted that Mr Wereta's background was "depressingly familiar, indeed sad",[282] but similarly did not find that to be a factor pointing towards manifest injustice. In *R v Winitana*[283] (stage-3 wounding with intent to injure), the Court considered similarly that Mr Winitana's circumstances were "distressingly familiar", partly explained his resort to gang life and violence, and warranted a 10 per cent discount to the 'but for' sentence. However, manifest injustice was not found due to the severity of the offending.

[271] Richard Delgado "Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation" (1985) 3 Law & Ineq 9.
[272] *R v Puna* [2018] NZHC 79.
[273] At [42].
[274] *R v Tai* [2018] NZHC 1602.
[275] At [16].
[276] At [16].
[277] *R v Alexander* [2018] NZHC 1584.
[278] At [48].
[279] At [64].
[280] At [103].
[281] *R v Wereta* [2019] NZHC 2734.
[282] At [22].
[283] *R v Winitana*, above n 269.

Thus, it seems that the Court will often discuss the offender's RSB where it is relevant, but it is often not considered a factor pointing towards manifest injustice. Instead, RSB can point towards a propensity for violence and/or reoffending.

3.8.1.2 Section 9 Mitigating Factor: Remorse

Under s9 Sentencing Act, one mitigating factor in sentencing is that the court must take into account "any remorse shown by the offender".

The offender's attitude towards the index offending (i.e. the offending for which they are being sentenced) is a factor in most three-strikes decisions. Many offenders express remorse for their offending both to the victims and to the Court. However, the Court will, as in the orthodox sentencing approach, assess the authenticity of the offender's remorse with regard to the available facts. The Court may decide that an expression of remorse is insufficient if not accompanied by tangible actions. For instance, in *R v Pomee*[284] (stage-3 aggravated robbery and kidnapping), the Court noted that Mr Pomee had acknowledged his wrongdoing and said that he needed to "accept responsibility for [his] actions".[285] However, the Court considered that his "expressions of remorse and insight do not add materially to [his] pleas, because nothing tangible yet arises".[286]

The Court is likely to rely on psychiatric and pre-sentence reports to determine the authenticity of the offender's remorse. For instance, in *R v Ratima*[287] (stage-3 robbery), although the Court accepted that Mr Ratima had been shaken and had started crying when he learned of the severity of his offence, it noted the conclusion in the psychiatric assessment that Mr Ratima's remorse appeared to be very limited in scope.[288] Similarly, in *R v Davis*[289] (stage-3 murder), the Court relied on the pre-sentence report and psychological assessment and found that Mr Davis had displayed no real or genuine remorse or empathy.[290]

Conversely, the Court is more likely to accept an expression of remorse when this is supported by the offender's conduct both immediately following the offending, and in subsequent interviews. For instance, in *Campbell*, the Court accepted Mr Campbell's remorse and desire to engage in restorative justice as expressed during the pre-sentence interview.[291] The Court considered that Mr Campbell's remorse was "genuine and that it is as much related to the effect of [his] behaviour on the victim, whom [he] liked, as it is on the consequences for [him]".[292] Similarly, in *R v Kingi*[293] (stage-2 murder), the Court noted that Mr Kingi had "expressed

[284] *R v Pomee* [2018] NZHC 2891.
[285] At [29].
[286] At [31].
[287] *R v Ratima* [2017] NZHC 252.
[288] At [24].
[289] *R v Davis* [2018] NZHC 1162.
[290] At [53].
[291] *R v Campbell*, above n 8, at [9, 10].
[292] At [10].
[293] *R v Kingi* [2016] NZHC 139.

remorse to each of the health assessors who interviewed [him]"[294] and accepted this expression of remorse, saying that "[t]here is nothing to suggest that the remorse [he has] expressed is not genuine".[295]

The Court may also take into account other considerations. For instance, in *Puna*, the Court considered that Mr Puna had demonstrated genuine regret and remorse due to:[296]

- his conduct in the police interview and swift acknowledgement of his actions;
- his conduct at trial;
- his display of shame and remorse, instead of bravado; and
- his expression of remorse to his family.

Staying on the topic of post-offending conduct, in *Tai*, Mr Tai seemed to regret his actions immediately after shooting the victim and had expressed remorse for his offending in a letter to the Court.[297] However, the Court considered that he had not demonstrated genuine remorse, as this was offset by his subsequent actions — threatening one of the witnesses; attempting to find the gun in order to conceal it; and leaving and remaining on the run before knowing whether the victim survived.[298]

Even if the Court finds that the offender has expressed genuine remorse, this may be discounted due to other factors. For instance, in *R v Rutherford*[299] (stage-3 indecent act on a child) the Court accepted the finding in the pre-sentence report that Mr Rutherford felt genuine regret for his offending and demonstrated insight into the impact of his offending on the victim.[300] However, the report also noted that he had not been able to control his impulses despite previously completed treatment, and therefore the Court found that a discount for remorse was not available,[301] and did not consider this to be a factor pointing towards manifest injustice.[302]

Therefore we can see that the offender's remorse can often point towards a finding of manifest injustice. However, the Courts are less likely to be satisfied by mere expressions of remorse that are not accompanied by conduct consistent with remorse.

3.8.1.3 Section 9 Mitigating Factor: Early guilty plea

Expressions of remorse aside, the Court may also consider the offender's guilty plea. An early guilty plea is given more weight than a late plea. Under s9 Sentencing Act, one mitigating factor in sentencing is "whether and when the offender pleaded guilty".

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[294] At [63].
[295] At [63].
[296] *R v Puna*, above n 272, at [43].
[297] *R v Tai*, above n 274, at [17].
[298] At [34].
[299] *R v Rutherford* [2019] NZHC 1628.
[300] At [17].
[301] At [17].
[302] At [25].

An early guilty plea contributed to a finding of manifest injustice in *Harrison, Campbell, Kingi, Davis* and *R v Waitokia*[303] (stage-3 wounding with intent to injure). In *Harrison*, the Court noted that "Mr Turner admitted his actions to police at the first opportunity and pleaded guilty at an early stage",[304] and considered that this, together with other factors, pointed towards a finding of manifest injustice.[305]

The impact on sentencing of an early guilty plea may be lessened if the Crown case is very strong.[306] In *Ratima*, the Court considered that although Mr Ratima had entered a guilty plea, he had done so in the face of a very strong Crown case and that therefore a discount of only 15 per cent to the 'but for' sentence would adequately reflect his guilty plea (instead of the 20-25% that might normally be expected).[307] A similar 15 per cent discount was given for a guilty plea in the face of a strong Crown case in *R v Nuku*[308] (stage-3 wounding with intent to injure).

The lack of a guilty plea is not necessarily disqualifying. In *Alexander*, the Court noted that although Mr Alexander did not plead guilty, he was justified in proceeding to trial as there were available verdicts of manslaughter or murder.[309]

Thus, an early guilty plea can contribute to a finding of manifest injustice. However, a guilty plea that was motivated by a strong Crown case may be discounted. In addition, a guilty plea will often result in a discount to the 'but for' sentence, which may widen the discrepancy between the 'but for' sentence and the consequences of a non-parole order, and thus contribute to a finding of manifest injustice (see also '3.8.2.3 Consequences of a non-parole order' below).

3.8.1.4 Section 9 Mitigating Factor: Diminished intellectual capacity or understanding

Under s9 Sentencing Act, one mitigating factor in sentencing is "that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding".

In *Harrison*, the Court of Appeal found that Mr Turner had a severe personality disorder and was being treated for schizophrenia. The Court further noted that mental health difficulties like those Mr Turner suffered from were "specifically considered as a justification for introducing the manifestly unjust exception into s 86E".[310]

In *R v Fitzgerald*[311] (stage-3 indecent assault), Mr Fitzgerald was described as having significant mental health issues and needing constant mental health care.[312] The Court considered that "[h]is mental health issues are linked to his impulsive offending of this type,

[303] *R v Waitokia*, above n 269.
[304] *R v Harrison; R v Turner*, above n 10, at [148].
[305] At [149].
[306] At [154].
[307] *R v Ratima*, above n 287, at [25].
[308] *R v Nuku*, above n 269, at [18].
[309] *R v Alexander*, above n 277, at [101].
[310] *R v Harrison; R v Turner*, above n 10, at [148].
[311] *R v Fitzgerald*, above n 8.
[312] At [26].

but not to an extent as to provide him with a defence".[313] Nonetheless, the Court noted Mr Fitzgerald's significant mental health issues as being a factor pointing towards a finding of manifest injustice.[314]

Therefore, it appears that the offender's diminished intellectual capacity or understanding will often lead to a finding of manifest injustice.

3.8.1.5 Section 9 Mitigating Factor: Age

Under s9 Sentencing Act, one mitigating factor in sentencing is "the age of the offender".

Aside from its implications on the consequences of a non-parole order (see also '3.8.2.3 Consequences of a non-parole order' below), age may also be considered as a separate mitigating factor. In *Campbell*, the Court considered that Mr Campbell was relatively young at the age of 25. This, together with his relatively meagre list of previous convictions, suggested that Mr Campbell had good prospects for rehabilitation, which led to a finding of manifest injustice.[315] Similarly, in *Ratima*[316] and *Pomee*,[317] the Court considered that the offenders' relative youth was in itself a factor pointing towards a finding of manifest injustice. This is consistent with the orthodox sentencing approach, as the age of the offender is listed as a mitigating factor in s 9(2)(a) Sentencing Act. In *Puna*, the Court noted that youth is relevant to sentencing because:[318]

a) there are age related neurological differences between young people and adults. Young people are not as mature and do not respond in the same way that a more mature adult will;

b) secondly, the effect … of imprisonment on young people, including the fact that long sentences can be crushing; and

c) thirdly, young people have the potential and greater capacity for rehabilitation with appropriate direction.

3.8.1.6 Other Factor: Prospects for rehabilitation

In *Harrison*, the Court of Appeal held that the manifest injustice assessment would take into account ss 7, 8 and 9 of the Sentencing Act.[319] Section 7(1)(h) Sentencing Act states that a court may consider the need to assist in an offender's rehabilitation and reintegration when sentencing an offender. However, the Court went on to say that as the three-strikes regime

[313] At [22].
[314] At [25].
[315] *R v Campbell*, above n 8, at [20].
[316] *R v Ratima*, above n 287, at [26].
[317] *R v Pomee*, above n 284, at [36].
[318] *R v Puna*, above n 272, at [41]; citing *Churchward v R* [2011] NZCA 531 at [77].
[319] *R v Harrison; R v Turner*, above n 10, at [105].

prevails over inconsistent provisions,[320] some principles, such as parity and rehabilitation, will be "inapplicable or of lesser relevance".[321]

Nevertheless the Courts have, in several decisions, cited an offender's prospects for rehabilitation as a factor pointing towards a finding of manifest injustice. For instance, in *Fitzgerald*, Mr Fitzgerald expressed a desire to stop offending. The Court also noted Mr Fitzgerald's developing insight into his offending and considered that "[i]t is appropriate to provide encouragement and incentive to maintain this insight",[322] and that "an order that the standard one-third parole rule apply will achieve that".[323]

The Court in *Campbell* expressed a similar sentiment. The Court accepted that Mr Campbell was genuinely remorseful and willing to engage in rehabilitation.[324] It went on to note that having no prospects for parole would not encourage Mr Campbell to engage in rehabilitative programmes while in prison[325] and concluded that manifest injustice was established.[326] This was cited in *R v Sanders*[327] (stage-3 wounding with intent to cause Grevious Bodily Harm), where the Court similarly recognised that "having no prospect of parole may dissuade [Mr Sanders] from engaging in rehabilitative steps to address [his] behaviour".[328]

The Court will also rely on reports on the offender. In *Alexander*, the Court relied particularly on the s 27 Cultural Report and considered that there was potential for rehabilitation with significant professional help and the fostering of Mr Alexander's cultural identity.[329] Similarly, in *Tai*, the Court noted that the psychiatric report found that Mr Tai was willing to participate in specialist rehabilitation programmes that would be available during his incarceration, and that there was potential for his eventual rehabilitation.[330] Similarly, in *Davis*, the Court noted that Mr Davis was diagnosed with Attention Deficit Hyperactive Disorder and Oppositional Defiant Disorder at a young age and was diagnosed with severe alcohol use disorder as an adult. The Court considered that Mr Davis' offending was influenced by alcohol and that this favoured "the imposition of a rehabilitative sentence".[331]

In *Kingi*, the psychiatric report found that Mr Kingi had a history of significant mental illness and had been diagnosed with schizoaffective disorder.[332] Counsel for Mr Kingi submitted, and the Court accepted, that Mr Kingi's offending was correlated with his mental illness.[333] The

[320] Sentencing Act 2002, s 86I.
[321] *R v Harrison; R v Turner*, above n 10, at [105].
[322] *R v Fitzgerald*, above n 8, at [26].
[323] At [26].
[324] *R v Campbell*, above n 8, at [20].
[325] At [20].
[326] At [21].
[327] *R v Sanders* [2019] NZHC 164.
[328] At [25].
[329] *R v Alexander*, above n 277, at [104].
[330] *R v Tai*, above n 274, at [19].
[331] *R v Davis*, above n 289, at [67].
[332] *R v Kingi*, above n 293, at [21].
[333] At [28], [57] and [58].

Court considered that therefore the risk of re-offending could be reduced if his mental illness was addressed.[334] Similarly, in *R v Herkt*[335] (stage-2 murder), the Court considered the psychiatric report and found that Mr Herkt's mental health issues did contribute to the index offending[336] and that there was room for optimism for Mr Herkt's rehabilitation if his mental health issues were treated.[337]

Reports may also assist the Court by shedding light on the cause of the offending. In *R v Eruera*[338] (stage-2 murder), the Court accepted the finding in the Cultural Report that Mr Eruera's offending could be explained by his exposure to gang culture, and a perceived need to protect his family.[339] The Court considered that there was hope for rehabilitation with the appropriate counselling.[340] In *Herkt*[341] and *Kingi*,[342] the Court, in light of the reports provided, considered that the offenders' mental health issues, while falling short of providing them with a defence, did contribute to their offending and that therefore there was room for optimism for their rehabilitation if their mental health issues were treated.

Successful engagement in rehabilitative programmes can be considered as a strong indicator of rehabilitative prospects. In *Puna*, the Court noted Mr Puna's successful engagement in a rehabilitative programme and his improvement in behaviour throughout.[343] It was aided by the psychiatric report which considered that Mr Puna would benefit from intervention and could do well with input.[344] The Court found that Mr Puna showed good prospects for rehabilitation,[345] and found that manifest injustice was established.[346] This was also a factor in *Herkt*, as the Court noted that Mr Herkt had "enrolled in and successfully completed a number of helpful rehabilitation programmes"[347] while in custody.

On a related note, the Court may also consider the rehabilitative opportunities available to the offender in the past. In *Ratima*, the Court noted that Mr Ratima had not had an opportunity to engage in rehabilitation in any meaningful way, as he had sought but was declined admission to a methamphetamine rehabilitation programme upon his previous release from prison.[348] The Court found that this was a factor pointing towards a finding of manifest injustice.[349]

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[334] At [64].
[335] *R v Herkt* [2016] NZLR 284.
[336] At [73].
[337] At [74].
[338] *R v Eruera* [2016] NZHC 532.
[339] At [23].
[340] At [121].
[341] *R v Herkt*, above n 335, at [74].
[342] *R v Kingi*, above n 293, at [66].
[343] *R v Puna*, above n 272, at [16].
[344] At [24].
[345] At [29]; [49].
[346] At [62].
[347] *R v Herkt*, above n 335, at [75].
[348] *R v Ratima*, above n 287, at [26].
[349] At [26].

In *Sanders*, the Court noted Mr Sanders' frustration at the lack of redemptive measures available to him in a maximum-security prison.[350] However, this did not convince the Court to make a finding of manifest injustice — the Court's decision seemed to turn instead on the issue of parity, particularly with previous three-strikes cases.[351]

The Court may also consider that a finding of manifest injustice may give the offender more incentive or support to reform, and thus keep the community safer. In *Rutherford*, the Court noted that imposing a 10-year MPI would "significantly delay the commencement of rehabilitation programmes, which may create adverse consequences for the community in the longer term."[352] In *Wereta*, the Court found that it was in the interests of public safety that Mr Wereta was motivated to reform, and that a shorter minimum period may give him that incentive.[353]

The length of the MPI imposed may also factor into the Court's consideration of the offender's prospects for rehabilitation. In *Tai*, the Court considered that a sentence of life without parole would be manifestly unjust. A 17-year MPI had already been imposed, and due to the fact that incidents of violent offending decreases with age, there was hope that Mr Tai could be rehabilitated during this MPI term.[354]

Finally, it is worth noting that an offender's expression of his desire to rehabilitate may not be sufficient. In *Waitokia*, the Court found that Mr Waitokia's stated desire to engage in rehabilitation was offset by his conduct while in custody, notably his recent involvement in a violent incident against a prison guard.[355]

To summarise, although it was held in *Harrison* that rehabilitation may be a factor of lesser relevance, Courts in subsequent cases have nonetheless found that the offender's potential for rehabilitation may point towards a finding of manifest injustice. This is especially so when there are clear indications of the offender's potential for rehabilitation, such as successful engagement in rehabilitative programmes while in custody, or the offending being linked to mental health issues that can be addressed.

3.8.1.7 Other Factor: Risk of reoffending

In *R v Heihei*[356] (stage-2 murder) the Court found that the spontaneous nature of the offending, together with Mr Heihei's criminal history, suggested that Mr Heihei was not "at risk in any way of acting in a similar way in the future."[357]

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[350] *R v Sanders*, above n 327, at [16].
[351] At [26]–[30].
[352] *R v Rutherford*, above n 299, at [25].
[353] *R v Wereta*, above n 281, at [40].
[354] *R v Tai*, above n 274, at [56].
[355] *R v Waitokia*, above n 269, at [17].
[356] *R v Heihei* [2018] NZHC 2243.
[357] At [17]; See also the below discussion on "Offending in previous strike offences" and "Nature of the index offending".

3.8.2 Factors: The Offender

3.8.2.1 Mental health

The offender's mental health issues may provide the Court with a more nuanced understanding of the reasons for the offending. In *Herkt*, the Court noted Mr Herkt's extended history of mental health issues. He had been diagnosed with schizophrenia and bipolar disorder and had been prescribed a "long acting intra-muscular anti-psychotic medication Risperidone Consta".[358] Mr Herkt had been under the influence of alcohol at the time of the offending, and the Court heard evidence that alcohol neutralises the effects of said medication, "unmasking … the underlying psychiatric symptoms and making [him] impulsive and prone to violence."[359] This led the Court to find that Mr Herkt's mental health issues, while falling short of providing him with a defence, did contribute to his offending, and that there was room for optimism for his rehabilitation if his mental health issues were addressed.[360]

3.8.2.2 Offending in previous strike offences

In *Harrison*, the Court held that the inquiry would take into account "the nature of the previous stage offences and the sentences imposed."[361] Applying the inquiry to Mr Harrison, the Court went on to note that considering his stage-1 conviction was for an indecent assault which was "at the lower end of that type of offending",[362] the fact that this could trigger a whole-of-life sentence was a wholly disproportionate response.[363]

Manifest injustice may be available even if the stage-1 offending is not as minor as it was in *Harrison*. In *R v Lothian*[364] (stage-2 murder), Mr Lothian was convicted of murder as a stage-2 offence.[365] His previous stage offence was wounding with intent to injure, resulting in a sentence of two years five months imprisonment.[366] The Court considered that this was not among the more serious violent offences within the regime, and found that this was a factor pointing towards manifest injustice.[367]

Thus, we can see that previous stage offences being relatively less serious can point towards a finding of manifest injustice. The Court may view the sentence imposed for the previous stage offences as an indication of their severity. For instance, in *Tai*, Mr Tai was convicted of murder as a stage-2 offence, with his previous stage offence being wounding with intent to injure.[368] He was sentenced to nine months' imprisonment for this stage-1 offence. The Court considered that this relatively low sentence reflected that it was "not the most serious offending of its

[358] *R v Herkt*, above n 335, at [64].
[359] At [66].
[360] At [74].
[361] *R v Harrison; R v Turner*, above n 10, at [104].
[362] At [128].
[363] At [129].
[364] *R v Lothian* [2019] NZHC 2938.
[365] At [20]; [41].
[366] At [31].
[367] At [39].
[368] *R v Tai*, above n 274, at [17].

kind",[369] and found that this was a factor pointing towards a finding of manifest injustice in relation to the stage-2 offence.[370] A similar analysis was undertaken in *Ratima*,[371] *Puna*,[372] *Davis*[373] and *Kingi*.[374]

Beyond acting as an indication of the severity of the offences, sentences imposed for previous stage offences may also be a standalone factor. In *Pomee*, Mr Pomee was convicted of aggravated robbery as a stage-3 offence,[375] with his previous stage offences being robbery[376] and aggravated robbery respectively.[377] He faced a sentence of 14 years' imprisonment without parole for the index offending.[378] The Court noted that he had received much shorter sentences in his earlier stage-1 and 2 offences and that this was one of three factors pointing towards a finding of manifest injustice.[379]

There has also been a notion of proportionality in some decisions. In *Fitzgerald*, Mr Fitzgerald appeared for sentence on a charge of indecent assault[380] as a stage-3 offence,[381] with his previous stage offences both being indecent assaults.[382] The Court considered that the previous offences were "relatively less serious",[383] and could be respectively described as "briefly grabbing the buttocks of a passing woman, and attempting to kiss a passing woman".[384] The Court went on to consider that the previous stage offences warranted sentences of 11 months imprisonment and four months' imprisonment respectively and that the index offence was less serious than the previous two.[385] Therefore, the Court considered that "[a]n order that Mr Fitzpatrick [sic] serve the whole of a seven year sentence in relation to [the index offence] would be manifestly unjust".[386]

Differences between the circumstances of previous stage offences and the index offending may also lead to a finding of manifest injustice. In *Heihei*, Mr Heihei was convicted of murder as a stage-2 offence,[387] with his previous stage offence being an indecent assault.[388] The Court also found it appropriate to consider a conviction for indecent assault in 2004, before the three-

[369] At [56].
[370] At [56].
[371] *R v Ratima*, above n 287, at [28].
[372] *R v Puna*, above n 272, at [59].
[373] *R v Davis*, above n 289, at [66].
[374] *R v Kingi*, above n 293, at [44].
[375] *R v Pomee*, above n 284, at [1].
[376] At [4].
[377] At [8].
[378] At [22].
[379] At [35].
[380] *R v Fitzgerald*, above n 8, at [1].
[381] At [3].
[382] At [3].
[383] At [24].
[384] At [24].
[385] At [25].
[386] At [25].
[387] *R v Heihei*, above n 356, at [14].
[388] At [22].

strikes regime came into force.[389] Mr Heihei was sentenced to three years imprisonment for the first offending,[390] and four months' home detention for the second.[391] The Court considered Heihei to be a "recidivist burglar who opportunistically offends against female victims when under the influence of alcohol",[392] and noted that nothing in his criminal history suggested that he would commit a murder, or that he would do so again.[393] Overall, the Court considered that Heihei's criminal history was not "supportive of a whole of life sentence".[394] A similar analysis was undertaken in *Campbell*,[395] *R v Hone*[396] (stage-2 murder), and *Eruera*.[397]

On the other hand, previous strike offences may also count against the offender. In *Sanders*, the Court considered that Mr Sanders' present offence was "an escalating continuation of [his] first- and second-strike conduct".[398] Similarly, in *Ratima*, Mr Ratima appeared for sentence on a charge of robbery,[399] with his previous stage offences both being robberies.[400] The Court considered that the index offending was very similar to that in his two previous stage offences and that the degree of violence used had "escalated over the course of the three offences".[401]

To summarise, it is a factor in the offender's favour if their previous strike offences are relatively minor or are significantly different in nature to the index offending. Conversely, if previous strike offences show an escalating pattern of conduct, that may count against a finding of manifest injustice.

3.8.2.3 Consequences of a non-parole order

As discussed above, the approach set out by the Court of Appeal in *Harrison* is to first determine the appropriate sentence under the orthodox sentencing approach (i.e. the sentence but for the three-strikes regime), before comparing that with the consequences of a non-parole order. Manifest injustice will be found if the consequences of a non-parole order are "grossly disproportionate, given the circumstances of the offending and the offender".[402]

Thus, the discrepancy between the 'but for' sentence and the consequences of a non-parole order seems to be the ultimate deciding factor. In s 86E (stage-2 or 3 murder) cases, Courts will estimate the term of imprisonment likely to be served under a non-parole order based on the offender's age and the average life expectancy of his or her demographic group. For instance, in *Harrison*, the Court noted that "life expectancy for a male is 79.5 years, albeit this varies by

[389] At [19].
[390] At [21].
[391] At [22].
[392] At [23].
[393] At [23].
[394] At [24].
[395] *R v Campbell*, above n 8, at [20].
[396] *R v Hone* [2018] NZHC 2605 at [34].
[397] *R v Eruera*, above n 338, at [128].
[398] *R v Sanders*, above n 327, at [20].
[399] *R v Ratima*, above n 287, at [2].
[400] At [4], [5].
[401] At [28].
[402] *R v Harrison; R v Turner*, above n 10, at [110].

ethnicity: a Maori male's life expectancy is 73 years while a "non-Māori" male's is 80 years".[403]

The Court then considered that Mr Harrison was aged 44 and was therefore likely to serve over 30 years in prison under a non-parole order.[404] Mr Turner, at 29 years of age, was likely to serve approximately 50 years.[405] In both instances, the Court found that the difference between the sentences the offenders were likely to serve, and the 'but for' sentences, raised "issues of significant disproportionality".[406]

It appears that this factor will outweigh all other considerations. For instance, in *Davis*, *Tai*, and *Lothian*, the offenders presented relatively few of the factors discussed above. Nonetheless, the Court considered that life imprisonment without parole would be manifestly unjust. They could all expect to serve over 50 years in prison under a non-parole order[407] and this was grossly disproportionate to the 'but for' sentence, which was found to be life imprisonment with a 14-year MPI in *Davis* and *Tai*,[408] and life imprisonment with a 20-year MPI in *Lothian*.[409]

However, this factor is less determinative in s 86D (stage-3 non-murder) cases, as the consequences of a non-parole order are far less severe — the maximum sentence served without parole, rather than life imprisonment without parole. In *Waitokia*, the Court found that:[410]

> While the Court of Appeal noted that youth would be a relevant factor, that comment was made in the context of the consequences a whole-of-life sentence would have on an offender. While your age is still relevant to my assessment, it is less of a concern in the context of a seven-year sentence than for a life sentence. In my view, while taking your age into account, this is not a factor that impacts in any significant way on your sentence.

This distinction is apparent in the fact that since the enactment of the regime in 2010, there have only been four cases in which manifest injustice has not been found — *Waitokia*, *Nuku*, *R v Williams*[411] (stage-3 attempted murder) and *Winitana*. All were s 86D (stage-3 non-murder) cases.

Thus, it seems that the consequences of a non-parole order will almost always be the determinative factor when the consequences are life imprisonment without parole. However,

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[403] At [93]; citing Statistics New Zealand *New Zealand period life tables: 2012–14* (8 May 2015).
[404] *R v Harrison; R v Turner*, above n 10, at [131].
[405] At [148].
[406] At [131].
[407] *R v Davis*, above n 289, at [69]; *R v Tai*, above n 274, at [54]; *R v Lothian*, above n 364, at [40].
[408] *R v Davis*, above n 289, at [54]; *R v Tai*, above n 274, at [37].
[409] *R v Lothian*, above n 364, at [34].
[410] *R v Waitokia*, above n 269, at [24].
[411] *R v Williams*, above n 269.

this is less important when the consequences are merely the maximum sentence for the offence without parole, rather than life imprisonment.

3.8.3 Factors: The Offence

3.8.3.1 Stage of index offence

In *Harrison*, it was held that the Court must take into account whether the index offence is a stage-2 or stage-3 murder, as this "may inform the nature and extent of the recidivism involved".[412] This has been applied in *Hone*,[413] *Tai*[414] and *Alexander*[415].

However, this is not a definitive factor. In *Davis*, Mr Davis was granted the manifest injustice exception despite the index offence being a stage-3 murder, because this was outweighed by other factors:[416]

- the index offence was not one of the worst murders;
- Mr Davis entered an early guilty plea;
- his previous strike offences resulted in relatively low sentences;
- he suffered from mental health difficulties;
- the index offence occurred while he was intoxicated;
- Mr Davis' prospects for rehabilitation; and
- the consequences of a whole-of-life sentence.

3.8.3.2 Nature of the index offending

In *Harrison*, the Court of Appeal held that Courts must take into account the circumstances of the offending.[417] This is usually done at step 2 of the *Harrison* test (calculating the 'but for' sentence). However, where the index offending is particularly minor, this may be considered another factor pointing towards manifest injustice. For instance, in *Fitzgerald*, the Court considered that the relatively minor nature of the offence, which it described as being "at the bottom end of the range",[418] pointed towards a finding of manifest injustice.[419] Similarly, in *Campbell*, the offending was described as "spontaneous and not malicious, and … at the lower end of the spectrum".[420] The Court went on to say that the nature of the offending pointed towards a finding of manifest injustice.[421] In *Rutherford*, the Court considered that the index

[412] *R v Harrison; R v Turner*, above n 10, at [108].
[413] *R v Hone*, above n 396, at [34].
[414] *R v Tai*, above n 274, at [56].
[415] *R v Alexander*, above n 277, at [101].
[416] *R v Davis*, above n 289, at [66]–[71].
[417] *R v Harrison; R v Turner*, above n 10, at [103].
[418] *R v Fitzgerald*, above n 8, at [21].
[419] At [27].
[420] *R v Campbell*, above n 8, at [17].
[421] At [21].

offending was "at the lower end of the range for indecent assault",[422] and found that this pointed towards a finding of manifest injustice.[423]

Even if the offending is not minor, the circumstances of the offending may still lead to a finding of manifest injustice. In *Heihei*, Mr Heihei stabbed the victim when an argument developed into a fight.[424] The Court considered that the offending occurred spontaneously and that the circumstances of the offending did not suggest that Mr Heihei was "at risk in any way of acting in a similar way in the future".[425] Similar circumstances were present in *Alexander*, although the level of culpability was higher because Mr Alexander returned to confront the victim with a knife.[426] Manifest injustice was found because the Court considered that the offending was at the "lower end of the culpability spectrum".[427] In *Eruera*, the Court considered that due to the presence of provocation leading to the offending, life imprisonment without parole was not necessary to protect the public[428] and that "a father provoked to violence by an attempted rape of his daughter [does not] engage to the same extent, the object of s 86 in terms of deterrence and denunciation".[429]

There have also been cases where no such mitigating factors were present, but manifest injustice was still found because the offending was not the worst of its kind.[430] In *Davis*, Mr Davis committed a "sustained and continuous assault" upon the victim, resulting in her death.[431] The Court considered that "in comparison with other murder cases, [this] was not one of the worst murders".[432] In *Kingi*, Mr Kingi struck the victim in the head while robbing him. The victim later died. The Court considered that this was not the worst type of murder. There was no significant premeditation, and the violence was significant but not extreme.[433] The evidence showed that Mr Kingi did not intend to kill the victim.[434]

As in the previous section, there has also been a notion of proportionality in some decisions. For instance, in *Tai*, the Court drew comparisons to *Davis* where manifest injustice was found because the offending was "not one of the worst murders",[435] and considered that the facts in *Davis* were "appreciably worse".[436] In *Herkt*, manifest injustice was found because the Court considered that overall, the offending was "a good deal less serious" than that in *Turner*,

[422] *R v Rutherford*, above n 299, at [21].
[423] At [26].
[424] *R v Heihei*, above n 356, at [5].
[425] At [17].
[426] *R v Alexander*, above n 277, at [23].
[427] At [101].
[428] *R v Eruera*, above n 338, at [120].
[429] At [128].
[430] See e.g. *R v Davis*, above n 289, at [66].
[431] At [8]–[9].
[432] At [66].
[433] *R v Kingi*, above n 293, at [46].
[434] At [47].
[435] *R v Davis*, above n 289, at [66].
[436] *R v Tai*, above n 274, at [56].

Harrison or *Kingi*[437] where manifest injustice had been found. In *Sanders*, the Court found that manifest injustice had to be found because the nature of the offending was very similar to that in *Nuku*.[438] However, because of how the offending was charged, Mr Nuku faced a sentence of,[439] and had been sentenced to, seven years' imprisonment without parole,[440] whereas Mr Sanders faced a sentence of 14 years' imprisonment without parole.[441] The Court found that the manifest injustice exception applied and imposed a sentence of 14 years' imprisonment with a seven-year MPI.[442]

The nature of the index offending will often affect the 'but for' sentence arrived at in step 2 of the *Harrison* test. However, it may be taken into account as a separate factor, for example when the index offence is particularly minor, or when it suggests that the offender is unlikely to reoffend in a similar manner.

3.8.3.3 Length of MPI imposed

In *Tai* and *Alexander*, both s 86E decisions, the Courts have found that life imprisonment without parole would be manifestly unjust but emphasised that the sentence to be imposed instead would be life imprisonment and that the offender would only be released on parole if the Parole Board was satisfied that there was no risk to the public.[443] In *Tai*, the Court noted:[444]

> The minimum period of imprisonment I intend to impose is within the context of what is a life sentence. At the expiration of that period, Mr Tai may apply for release on parole but that result is far from automatic. The Parole Board will only grant him parole if it is satisfied he does not pose a risk to the public. And, even if he is released, he is liable to be recalled to prison if he breaches his parole terms or reoffends. He is, therefore, subject to the sentence I impose today for the rest of his natural life.

A lengthy MPI may also be in itself a factor pointing towards a finding of manifest injustice. This was the case in *Hone*, where the Court considered the fact that Mr Hone faced a lengthy 20-year MPI to be a factor making it manifestly unjust to sentence him to life without parole.[445]

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[437] *R v Herkt*, above n 335, at [55].
[438] *R v Sanders*, above n 327, at [26].
[439] At [27].
[440] *R v Nuku*, above n 269, at [40].
[441] *R v Sanders*, above n 327, at [28].
[442] At [30].
[443] *R v Tai*, above n 274, at [57]; *R v Alexander*, above n 277, at [95], [109].
[444] *R v Tai*, above n 274, at [57].
[445] *R v Hone*, above n 396, at [34].

3.8.4 Factors: Other

3.8.4.1 Victim's views

In *Harrison*, the father of Mr Harrison's victim "had granted forgiveness and did not seek imprisonment or a whole-of-life sentence".[446] The Court held that this was a relevant consideration:[447]

> Given that one justification for the three-strikes legislation is that it ensures victims' families do not have to worry about parole hearings or the offender's release, it follows that the views of those affected may be a relevant consideration in the overall analysis.

In *Campbell*, the victim wished for Mr Campbell to be allowed the opportunity for parole, and for him to be offered assistance.[448]

The victim's views are especially relevant when the victim is related to the offender. In *Heihei*, Mr Heihei was convicted of the murder of his brother. An argument arose between them, which escalated into a fight, during which Mr Heihei picked up a large knife and killed his brother. Mr Heihei and his brother's parents expressed their support for Mr Heihei, as they "have lost one son and do not want to lose another completely".[449] The Court considered that "the views expressed by [his] victim are … not consistent with the imposition of a whole of life sentence".[450]

In both *Herkt* and *Kingi*, the victims expressed a desire for the offenders to serve significant terms of imprisonment but did not wish for them to be denied parole.[451] This was taken into account by the Courts in both decisions.

If the victim expresses a desire for the offender to be allowed the opportunity for parole, that will almost certainly be taken into account by the Courts. This is particularly so when the victim is related to the offender.

3.9 Effect of the Three-strikes Regime on the Conventional Sentencing Approach in s 86C

Under s 86C, an offender who is convicted of a second-strike offence other than murder is to be sentenced normally, but must serve that sentence without the possibility of parole. An issue that has arisen in the Courts is whether this sentencing should take into account the fact that the offender must serve the sentence without parole.[452]

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[446] *R v Harrison; R v Turner*, above n 10, at [132].
[447] At [132].
[448] *R v Campbell*, above n 8, at [12].
[449] *R v Heihei*, above n 356, at [28].
[450] At [28].
[451] *R v Herkt*, above n 335, at [80]; *R v Kingi*, above n 293, at [68].
[452] Sentencing Act 2002, s 86C(4).

3.9.1 Wereta and Muraahi: the initial approach

The issue first arose in *R v Wereta*[453] (stage-2 wounding with intent to cause GBH) and *R v Muraahi*.[454] In *Wereta*, it was held that imposing an uplift for the offender's previous convictions would amount to double counting because his ineligibility for parole under s 86C came as a result of said previous convictions.[455] In *Muraahi*, it was held that the Court could, having arrived at a final sentence, apply a further "enhanced totality deduction" to take into account the offender's ineligibility for parole.[456]

3.9.2 Palalagi v New Zealand Police: the approach reconsidered

The Court in *Palalagi v New Zealand Police* disagreed with both decisions. Mr Palalagi had been sentenced to three years and nine months imprisonment for two charges of burglary and three charges of indecent assault as a stage-2 offence.[457] Mr Palalagi appealed the sentence on the grounds that it was manifestly excessive.[458] Counsel for Mr Palalagi submitted, among other things, that inadequate consideration was made for the principle of totality. It was submitted, citing the decision in *Muraahi*, that the Court "should have taken into account the consequences of the three-strikes regime in recognition of the principle of totality".[459]

The Crown submitted, and the Court agreed, that parole eligibility was not to be taken into account in determining sentencing length.[460] Referring to Parliamentary history, the Court found that Parliament clearly intended to separate the sentencing exercise from the statutory consequences of the three-strikes legislation.[461] Unlike ss 86D and 86E, there was no room for judicial discretion under s 86C.[462]

3.9.3 Barnes v R: The Court of Appeal consideration

The issue arose again in the Court of Appeal decision *Barnes v R*.[463] Mr Barnes had been sentenced to two years seven months imprisonment[464] for aggravated robbery[465] as a stage-2 offence.[466]

Mr Barnes appealed on the grounds that his sentence should have been reduced because he was a stage-2 offender.[467] Counsel for Mr Barnes submitted that s 86C Sentencing Act does not offer any guidance as to the length of imprisonment imposed, and that s 86C does not prevail

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[453] *R v Wereta* [2014] NZHC 2555.
[454] *R v Muraahi* DC Manukau CRI-2014-092-4111, 19 November 2014; discussed in *Palalagi v New Zealand Police* [2015] NZHC 1832 at [25].
[455] *Palalagi v New Zealand Police*, above n 454, at [50]; citing *R v Wereta*, above n 453, at [12].
[456] *Palalagi v New Zealand Police*, above n 454, at [51]; citing *R v Muraahi*, above n 454, at [5].
[457] *Palalagi v New Zealand Police*, above n 454, at [1].
[458] At [2].
[459] At [25].
[460] At [37], [57].
[461] At [58]–[59].
[462] At [62].
[463] *Barnes v R* [2018] NZCA 42.
[464] At [8].
[465] At [4].
[466] At [5].
[467] At [30].

over any other provisions of the Act, including the purposes and principles of sentencing set out in ss 7, 8 and 9. In particular, s 8(h) provides that the Court must take into account:[468]

> … 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…

Counsel for Mr Barnes submitted that his ineligibility for parole was a particular circumstance relating to him that meant that the sentence was disproportionately severe.[469] The Court should instead have imposed a sentence of two years or lesser, as that would have allowed the Court to require Mr Barnes to participate in rehabilitation programmes for up to six months after the sentence expired.[470]

The Court considered that Parliament intended that "[a] stage-2 offence will have the consequence that the sentence imposed, arrived at in the normal way, will be served without parole",[471] and that therefore, s 86C was to apply after the sentence had been "evaluated in the normal way and imposed."[472]

However, the Court went on to consider that the absence of an explicit manifest injustice exception did not preclude the Court from considering manifest injustice when sentencing stage-2 offenders.[473] Section 86C engages the normal sentencing approach, which "necessarily involves the Court avoiding manifest injustice."[474] The Court discussed the decision in *Harrison*, where it was held that Parliament did not intend for s 86E to result in grossly disproportionate sentences, and concluded that Parliament similarly did not intend for s 86C to result in "disproportionately severe or manifestly unjust" sentences.[475] Furthermore, Parliament intended for all other relevant principles of sentencing to apply, including rehabilitative purposes[476] and the duty to impose the least restrictive outcome appropriate,[477] as well as other provisions that would increase a sentence.[478]

The Court referred to a number of decisions where parole eligibility was deemed to be relevant to sentencing,[479] and concluded that most sentencing under s 86C would take place without consideration of parole eligibility, but that a Court could take into account the offender's rehabilitation if it considered that rehabilitation "might be better achieved by earlier eligibility

[468] At [31]; citing Sentencing Act 2002, s 8(h).
[469] *Barnes v R*, above n 463, at [32].
[470] At [33]; See also Parole Act 2002, s 15(3)(b).
[471] *Barnes v R*, above n 463, at [42].
[472] At [50].
[473] At [53].
[474] At [53].
[475] At [56].
[476] Sentencing Act 2002, s 7(1)(h), 8(i).
[477] Sentencing Act, s 8(g).
[478] *Barnes v R*, above n 463, at [59].
[479] At [68]–[72]; citing *R v Accused (CA265/88)* [1989] 1 NZLR 643 at 656; *R v Hape* [1994] 1 NZLR 167.

for parole than would otherwise be the case."[480] Where appropriate, a Court could, as counsel for Mr Barnes sought,[481] impose "a sentence of imprisonment of two years or less, thereby enabling imposition of the standard and any relevant special conditions of release."[482] However, the Court emphasised that this approach could not be taken simply to avoid the effect of s 86C,[483] and that it was likely to apply only in exceptional cases.[484]

3.10 Conclusion

Three issues have emerged with the application of the three-strikes regime in the courts. The first is the consistency with the NZBORA. The Court of Appeal in *Harrison* concluded that that Parliament intended for the three-strikes regime to result in sentences that were higher, but not grossly disproportionate, to those previously imposed and that grossly disproportionate sentences would be contrary to s 9 NZBORA.[485] It also considered that the qualifying offences under the three-strikes regime are extremely broad,[486] potentially encompassing "an infinite range of possible circumstances of offending".[487] Therefore, there was an elevated "risk of gross disproportionality",[488] and a potentially high risk that "s 86E will produce arbitrary or wholly disproportionate outcomes".[489]

The second is the meaning of 'manifest injustice' as used in s86D and s86E, and how it is to be identified in cases. It was held in *Harrison* that in order to interpret s 86E consistently with s 9 NZBORA, manifest injustice must be found when the sentence under s 86E would be grossly disproportionate.[490]

The Courts are for the most part following the test laid out in *Harrison* in determining whether manifest injustice exists. However, they have also introduced new factors pointing towards manifest injustice, thus making the test broader than was originally conceived in *Harrison*. The manifest injustice test is far broader under the three-strikes regime than it is for ss 102 – 104. As the Court of Appeal noted in *Harrison*, this is necessary because the broad scope of the three-strikes regime, combined with the possibility of a whole-of-life sentence, means there is a greater risk of disproportionality — and thus breach of s 9 NZBORA — under the three-strikes regime.[491]

[480] *Barnes v R*, above n 463, at [77].
[481] At [33].
[482] At [77].
[483] At [78].
[484] At [79].
[485] *R v Harrison; R v Turner*, above n 10, at [83].
[486] At [87].
[487] At [88].
[488] At [87].
[489] At [88].
[490] At [106].
[491] At [98]–[101].

However, it is worth noting that while the Courts do generally apply the *Harrison* test, they do not always do so in the format set out in *Harrison*. That is, they will consider the factors discussed in *Harrison*, but may not always explicitly follow the steps in the *Harrison* approach.

The third issue is whether manifest injustice is able to be taken into account in s86C, despite the lack of specific inclusion of this language in the section. In *Barnes*, it was held that Courts were also required to consider manifest injustice in s 86C decisions despite the absence of an explicit manifest injustice exception.[492] However, the Court emphasised that this approach could not be taken simply to avoid the effect of s 86C,[493] and that it was likely to apply only in exceptional cases.[494]

The next section will consider the effect of the three-strikes regime on how defence lawyers prepare for criminal proceedings under the regime, and the impact on defendants as a result of being subject to the regime.

[492] *Barnes v R*, above n 463, at [56].
[493] At [78].
[494] At [79].

Chapter 4. The Three-Strikes Regime from the Perspective of Lawyers

4.1 Introduction

In order to gain insight into the effect of the three-strikes regime on preparation for criminal proceedings under the three-strikes regime, and the impact on defendants as a result of being subject to this, a survey of criminal lawyers was conducted. The survey was designed and analysed using online survey tool Qualtrics and the link to the survey was distributed with the assistance of local branches of the New Zealand Law Society.[495]

4.2 Methodology

Survey respondents were asked the following questions:

1. As a lawyer, do you prepare differently for three-strike cases?
2. How do you prepare differently for three-strike cases?
3. Do you advise your clients differently for three-strike cases?
4. How do you advise your clients differently for three-strike cases?
5. How does the fact that they are on a second or third strike seem to affect your clients?
6. Sections 86D (third strike non-murder) and 86E (second and third strike murder) contain a manifest injustice exception. What do you think the Court considers relevant in the manifest injustice assessment?
7. Minister of Justice Andrew Little has signalled his intention to repeal the three-strikes regime. What are your thoughts?
8. Do you agree with the following statement: New Zealand's three-strikes regime has helped reduce violent crime.
9. Do you have anything else to add?

4.3 Overview of results

Twenty seven lawyers responded to the survey. However, not all respondents completed the survey, and the number of responses dropped off as the survey progressed, with 23 responses to the first question and 15 responses to the last question. A majority of respondents reported preparing differently for three-strike cases (13 out of 23 respondents or 56.5%) and advised their clients differently for three-strike cases (13 out of 19 respondents or 68.4%). Finally, a majority (8 out of 15 respondents or 53.3%) of respondents strongly disagreed that the three-strikes regime has helped reduce violent crime.

4.4 How do lawyers prepare differently for three-strike cases

Thirteen out of 23 respondents considered that they did prepare differently for three-strike cases. Of the respondents who did prepare differently, two common themes emerged. First, most respondents noted that in a three-strike case, they would attempt to negotiate with the Crown

[495] This survey was approved by the University of Canterbury Human Ethics Committee, approval number HEC 2020/06.

to substitute the charge with a lesser (non-strike) charge. Secondly, respondents noted that if substitution of a non-strike charge was not possible, they would explore any mitigating factors available to the client. Respondents also noted that they would be more likely to take the matter to a defended hearing if substitution of a non-strike charge was not possible. One respondent considered that:

> There is a lot more riding on the outcome. One avenue that I explore is whether or not the charge could be reduced to a non-strike offence; for example, wounding with intent reduced to injuring with intent. The main area of difference is in the prospect of plea bargaining reducing the charge to a non-strike offence

4.5 How do lawyers advise their clients differently for three-strike cases

Thirteen out of 19 respondents considered that they did advise their clients differently for three-strike cases. Of the respondents who did advise their clients differently, most noted that they would explain the effect of the three-strikes regime, and the consequences of the strike offence on their client's current sentence and on any future convictions.

4.6 How does being on a second or third strike affect defendants

Twelve respondents answered this question. Most respondents noted that being on a second or third strike was unlikely to deter their clients from reoffending in the future as clients were either unaware of the significance of the three-strikes regime, or did not consider the consequences of the regime. One respondent considered that:

> To be honest I don't think they care much. In relation to what they are currently charged with they already know what they have done. And in relation to the possibility of further strikes in the future that is hard to assess. Either their behaviour is going to improve or it isn't, having that hanging over them probably doesn't enter their minds when they are in situations of further serious violence.

Similarly, another respondent stated that:

> Most offending is impulsive, much of it committed while under the influence of drugs, alcohol or both. Many clients are intellectually disabled. So the strike warning simply wears off and doesn't affect their behaviour or act as an effective deterrent. Obviously when they get charged, they are more likely to want to defend the charge, even if advised the defence has very slim prospects of success.

Furthermore, many respondents found that clients were more demanding and belligerent than usual, and less likely to take responsibility for the offending because second and third strike offenders are required under the regime to serve their sentences without parole (with a manifest injustice exception for third strike offenders, as discussed above in Chapter 3 of this thesis). This removal of the possibility of parole also removes any incentive to take responsibility for the offending, or to take steps towards reform.

4.7 What do lawyers think the Court considers relevant in the manifest injustice assessment

As discussed above in Chapter 3, sections 86D and 86E Sentencing Act are both subject to a 'manifest injustice' exception — that is, the Court may avoid making a non-parole order if it is satisfied that such an order would be manifestly unjust.

Most respondents felt that the Court is very reluctant to impose a sentence of life without parole and would consider a wide range of mitigating factors. Respondents felt that the Court would consider the following factors relevant:

- The difference between the sentence under the three-strikes regime and the sentence that would otherwise be imposed;
- The circumstances of the first and second strikes;
- Personal factors that may demonstrate some particular vulnerability in the defendant;
- Youthful offending on a first strike;
- Relatively low-level offending on a third strike;
- Willingness and opportunity for an offender to engage in rehabilitative treatment.

These results broadly echo the conclusions reached in Chapter 3 of this thesis, which suggests that the respondents have a good understanding of the factors which will be taken into account.

4.8 Lawyers' opinions on proposed repeal of the three-strikes regime

All 11 respondents who answered this question strongly supported the proposed repeal of the three-strikes regime. Three respondents considered that the three-strikes regime should be repealed because it does not achieve its stated goals of reducing violent reoffending. In particular, one of these respondents noted that:

> For someone on a second strike they often have extremely limited oversight after they are released. In my experience they are also less likely to receive treatment whilst in prison because they are not going to receive parole.

This echoes the decision in *R v Rutherford*, where the Court found that:[496]

> it seems to me to be of central importance that focused attempts at rehabilitation occur sooner rather than later in Mr Rutherford's case. Imposing a sentence of 10 years without eligibility for parole will significantly delay the commencement of rehabilitation programmes, which may create adverse consequences for the community in the longer term.

Three respondents considered that the three-strikes regime was motivated by political populism, and was a knee-jerk reaction to particularly bad crimes. One respondent in particular felt that

[496] *R v Rutherford*, above n 299, at [25].

"[t]hree strikes was an unprincipled act of political populism which creates injustice and does little, if anything, to protect the public."

Two respondents considered that the regime restricted the autonomy of the judiciary, and undermined the role of judicial discretion. These respondents felt that the Courts, with their system of appellate courts and checks and balances, were best placed to calculate the appropriate sentence taking into account the particular circumstances of the offender and the offending, rather than an inflexible administrative process.

Two respondents considered that the regime resulted in manipulation of charges by both Crown and Defence, and that this was a distortion to the justice system that was inherently wrong. One respondent noted that:

> [the regime] certainly results in a manipulation of charges by both Crown and Defence, often without proper reasoned basis, to achieve a result both sides can live with. For instance, I have represented two defendants on third strike offences where the max penalty is 14 years imprisonment. On the disclosed evidence, there has been an overwhelming Crown case against each defendant. But the Crown have been willing to reduce charges from 14 year charges to 7 year charges to reduce the impact of the three strike regime, which, but for the 3 strike regime, they would not have done.

One respondent felt that the three-strikes regime should be repealed because it was likely in contravention of the United Nations prohibition against cruel and inhuman treatment (Article 7 of the International Covenant on Civil and Political Rights). Another respondent felt that the regime should be repealed because it results in disproportionate outcomes.

Finally, one respondent considered that the three-strikes regime should be repealed because it was theoretically flawed, and did not address the causes of crime:

> Three strikes is flawed in its concept. The idea that violent crime is the product of rational actors is inherently flawed. Most such crime is spontaneous, often driven by impulsive acts by drug or alcohol addled young men who lack good role modelling and who suffer from addictions.

In summary, respondents felt that the three-strikes regime should be repealed because it did not reduce violent reoffending, was motivated by political populism, undermined the important role of judicial discretion, and resulted in manipulation of charges in the form of plea negotiation. The comments, both in this section and in section 4.4 above, about the prevalence of plea negotiation were particularly interesting because they provided insight that could not be found in case law.

4.9 Lawyers' opinions on the efficacy of the three-strikes regime

Respondents were asked whether they agreed with the following statement: New Zealand's three-strikes regime has helped reduce violent crime. Of the 15 respondents who answered this

question, eight respondents strongly disagreed with the statement, five respondents disagreed, one respondent somewhat disagreed, and one respondent was neutral.

4.10 Additional notable comments

Respondents were asked whether they had any additional comments. Several respondents echoed previous comments about the political nature of the three-strikes regime. One respondent in particular considered that:

> This is neoliberalism at its worst and a political "solution" designed to catch votes. Nothing objective can be said about it except "it's the law". It is unenlightened at best and at worst just another oppressive law that maintains the (shameful) statistics of incarcerated Maori and Polynesian people. It would have been repealed but NZ First vetoed it to appease its conservative backbone.[497] I'm looking forward to a Labour landslide so that Minister Little can consign this law to the dustbin of history.

Respondents also echoed previous comments about the ineffectiveness of the regime, and the disproportionate outcomes that resulted. One respondent in particular noted that:

> I have been a criminal lawyer for 27 years. I regularly look over my clients' criminal history list to see how much time they would have spent in jail unjustly had they lived their whole lives under 3-strikes. It is sometimes decades longer than a trained and experienced Judge has sentenced them to on just principles. We are going to have to build a lot more prisons, and a more uncaring and callous attitude in our hearts, unless we repeal this legislation.

Finally, one respondent considered that in addition to repealing the three-strikes provisions, there should also be re-consideration of those sentenced under the regime, and that an avenue for those sentenced under the regime to seek a resentencing would be appropriate.

4.11 Conclusion

The strength of this research is unfortunately limited due to the small number of respondents. However, the comments from the respondents were incredibly insightful and considered and are worth recording here.

There were three trends in the responses that are worth highlighting. Firstly, lawyers generally do prepare differently for three-strike cases, and do advise clients differently if they are charged with a strike offence. Lawyers also seem to have a good understanding of how the courts approach three-strike cases.

Secondly, defendants do not seem to be deterred by the regime, likely because most serious violent offences such as the ones captured by the regime are often impulsive, and often committed under the influence of drugs, alcohol, or both. In fact, defendants may be less likely

[497] See, for example, Laura Walters and Jo Moir "Government's three strikes repeal killed by NZ First" (11 June 2018) Stuff <https://www.stuff.co.nz/national/politics/104608068/governments-three-strikes-repeal-killed-by-nz-first>; discussed further at chapter 6.1 below.

to engage in rehabilitative and reformative programs due to the removal of the possibility of parole.

Finally, respondents overwhelmingly disagreed with the three-strikes regime, and supported a repeal of the regime. One respondent went further and suggested that if the regime were to be repealed, offenders sentenced under the regime should also be allowed to seek a resentencing. Several reasons were given for disagreeing with the regime. Firstly, respondents felt that the regime did not reduce violent reoffending because their clients who were subject to the regime were unlikely to be deterred from future offending. Secondly, respondents felt that the regime removed judicial discretion from the sentencing process, resulting in an administrative procedure that did not take into account the particular circumstances in each instance. Thirdly, respondents felt that the regime resulted in a distortion of the justice system in the form of increased plea negotiation. Respondents also considered that the regime resulted in disproportionate outcomes, and contributed to the overincarceration of Maori and Polynesian people.

This chapter has suggested that the three-strikes regime is problematic, or even ineffectual, in practice. The next section will consider whether the regime is justifiable from a theoretical basis.

Chapter 5. The Theoretical Justifications for a Three-Strikes Regime

5.1 Introduction

The previous chapter considered the practical operation of the three-strikes regime and found that it has issues in implementation. This chapter considers whether there is a theoretical basis for the regime.

5.2 Application of punishment theory to three-strikes

Of the four key theoretical grounds for punishment — retribution, deterrence, incapacitation and rehabilitation, three-strikes regimes are premised on deterrence and incapacitation, and reject retribution and rehabilitation. The primary justification for three-strikes regimes is incapacitation — a criminal who is incarcerated cannot offend against the general public. This is reflected in New Zealand's implementation of the three-strikes regime — as discussed in the Chapter 2.3.2, proponents of the Bill considered that the primary objective of the Bill was to keep the community safe by incapacitating repeat violent offenders.[498] More specifically, three-strikes regimes are premised on the theory of specific incapacitation. Specific incapacitation is a subset of incapacitation theory which posits that if a small number of offenders are responsible for a disproportionate share of violent offences, and if it is possible to reliably select this group of offenders, society can achieve "maximum crime protection per prisoner"[499] by targeting this group of offenders with enhanced sentencing measures.[500]

The secondary justification for three-strikes regimes is deterrence.[501] Three-strikes regimes rely both on specific deterrence and general deterrence. The theory of specific deterrence posits that "a repeat offender who would be subject to longer prisoner terms based on his prior convictions might be deterred from committing new offenses."[502] General deterrence theory extends this by positing that the longer sentences will not only deter the specific offender, but will also "serve as an example and deter other criminals from committing new offenses".[503]

Three-strikes regimes reject both rehabilitation and retribution theory. Rehabilitation theory posits that an offender's character can be improved such that he will not offend again. Three-strikes regimes, however, assume that certain offenders are "beyond rehabilitation and have a high propensity for recidivism",[504] and therefore must be incarcerated either indefinitely or for very long periods of time for the protection of the public.[505]

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[498] "Sentencing and Parole Reform Bill – In Committee", above n 20 at 10916.
[499] Erik G Luna "Foreword: Three Strikes in a Nutshell" (1998) 20 T Jefferson L Rev 1 at 8.
[500] Steve Van Dine, John P Conrad and Simon Dinitz "Incapacitation of the Chronic Thug" (1979) 70 J Crim L & Criminology 125 at 125; Luna, above n 499, at 7–8.
[501] See e.g. "Sentencing and Parole Reform Bill – First Reading", above n 12, at 1425 per Dr Richard Worth; "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10684 per Rodney Hide.
[502] Luna, above n 499, at 8; citing Robert Heglin "A Flurry of Recidivist Legislation Means: 'Three Strikes and You're Out'" (1994) 20 J.Legis. 213 at 218.
[503] Luna, above n 499, at 8; citing Michael Vitiello "'Three Strikes' and the Romero Case: The Supreme Court Restores Democracy" (1997) 30 Loy.L.A.L.Rev. 1643 at 1679.
[504] Nina Schuyler "Throwing Away the Key" (1994) 14 Caif.Law. 45 at 45.
[505] Luna, above n 499, at 7.

Three-strikes regimes also reject retribution theory because retribution theory posits that offenders who commit crimes deserve to be punished for their crimes. Retribution theory requires that the offender be punished in proportion to his culpability for the charged crime. Three-strikes regimes, however, are explicitly intended to punish offenders disproportionately to their culpability for the charged crime. In New Zealand, proponents of the Bill have stated that the regime was intended to result in disproportionate sentences for repeat violent offenders.[506] As a result of this disproportionate sentencing, offenders sentenced under three-strikes regimes "receive more than their "just desserts" for the criminal act — more than what they would be morally culpable for if the present crime was considered in isolation".[507]

In summary, three-strikes regimes rely on incapacitation and deterrence, and reject rehabilitation and retribution. This chapter will now discuss, with reference to criminological and sociological research on incapacitation and deterrence, whether New Zealand's three-strikes regime as enacted can achieve its stated aims of incapacitation and deterrence.

5.3 Incapacitation

This section will consider the application of incapacitation theory to the three-strikes regime, through a consideration of relevant studies, reports and academic arguments.

5.3.1 Arguments that incapacitation theory provides justification for a three-strikes regime

Proponents of three-strikes laws rely predominantly on incapacitation as the justification for the law because incapacitation achieves its goals by definition — an incarcerated offender cannot offend against the general population. Three-strikes laws promise to reduce serious violent offending by imposing disproportionately long sentences on offenders who are predicted to commit serious violent offences in the future. This is an application of Selective Incapacitation theory. For this to be effective, the regime has to be able to accurately predict the propensity of an offender to commit serious violent offences in the future. Therefore, a key factor in the success of selective incapacitation is the selection criteria used. Three-strikes regimes generally select targets by assuming that offenders who have committed two serious violent offences are more likely to commit other serious violent offences in the future. Proponents of three-strikes regimes point to studies like a 1995 study which estimated that California's three-strikes law would reduce serious felonies by between 22 and 34 percent due to the incapacitation effect,[508] and the fact that violent crime in California dropped following the introduction of their three-strikes laws in 1994.[509]

This notion is also supported by studies such as a 1987 study by Peterson which showed that career criminals accounted for only 25% of the sample (of 657 male prisoners), but had

[506] "Sentencing and Parole Reform Bill – Second Reading", above n 19, at 10673 per Judith Collins MP; At 10683 per Rodney Hide MP.
[507] Luna, above n 499, at 9; citing Heglin, above n 502, at 225–226.
[508] Luna, above n 499, at 17.
[509] At 19.

"committed a large proportion of the total number of self-reported offenses."[510] This finding is consistent with the findings of a 1978 study by Williams,[511] and a 1982 study by Shannon found that this held true for juvenile offenders.[512] More recently, a 2000 study by Piquero concluded that "a small percentage of [the survey sample] was responsible for the majority of police contacts", and that chronic offenders (those with five or more police contacts), were also serious offenders, and were more likely to be violent offenders.[513]

5.3.2 Arguments that incapacitation theory does not provide justification for a three-strikes regime

While it has been shown above that some studies do suggest an incapacitative benefit to a three-strikes regime, other studies reach a different conclusion. One study by Van Dine, Conrad and Dinitz suggests that selective incapacitation is not effective because "it is clearly impossible to define the chronic offender in such a way that a practical basis for crime reduction can be structured",[514] and that even under the most extreme option, which applied a five year mandatory minimum sentence following a single conviction for a violent felony, only 3.7% of the 2892 violent offences would have been prevented.[515] Piquero and Blumstein's literature review of studies into selective incapacitation found that no research has been able to find a group of offenders with a consistently high rate of offending.[516]

Furthermore, to the extent that selective incapacitation may sometimes be effective, other studies suggest that previous offences are not an accurate selection criteria. These studies suggest that "most violent crime is committed by individuals who lack the indicia of recidivism",[517] and that future violent behaviour cannot be predicted based on an offender's criminal record.[518] Studies on selective incapacitation suggest that:[519]

> Prior criminal contact with the criminal justice system is an important predictor of future contact. This was found to be true in all the studies. However, prior convictions do not seem to be very good predictors by themselves. This is caused, in part, by the interaction of age with criminality. By the time a person is old enough to have several prior convictions, he is old enough to have reduced his propensity toward crime.

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[510] Scott H Decker and Barbara Salert "Predicting the Career Criminal: An Empirical Test of the Greenwood Scale Criminology" (1986) 77 J Crim L & Criminology 215 at 217.
[511] At 217.
[512] At 217.
[513] Alex R Piquero "Assessing the relationships between gender, chronicity, seriousness, and offense skewness in criminal offending" (2000) 28 Journal of Criminal Justice 103 at 111.
[514] Van Dine, Conrad and Dinitz, above n 500, at 135.
[515] At 135.
[516] Alex R Piquero and Alfred Blumstein "Does Incapacitation Reduce Crime?" (2007) 23 J.Quantitative Criminology 267 at 276.
[517] Luna, above n 499, at 22.
[518] At 22; citing Nkechi Taifa "'Three-Strikes-and-You 're-Out': Mandatory Life Imprisonment for Third Time Felons" (1995) 20 U.Dayton L.Rev. 717 at 723.
[519] Kristen M Williams "Selection Criteria for Career Criminal Programs Criminology: Symposium on the Career Criminal Program" (1980) 71 J Crim L & Criminology 89 at 92.

Furthermore, the same report concluded that "property crimes seem to be better predictors of future criminality than violent crimes with no property motivation".[520] This observation has been supported by other studies — a 2007 study by Bhati examining sentencing practices in 13 US states found that "[a]cross all 13 states, the average number of crimes against persons averted annually was 1.93 … [whereas] [t]he average property related crimes averted annually across these states was 8.47."[521] This study further found that for property offences, "for most individuals, a 1% increases in prison term will yield a less than a percent increase in the number of crimes averted"[522] and that therefore, for property offences, "reducing the incarceration terms of a large number of inmates may result in little or no reductions in the number of crimes averted by incapacitation."[523]

A New Zealand-based study by Brown examined amendments to New Zealand's Criminal Justice Act 1985 which created a distinction between 'ordinary' offenders and 'serious' offenders.[524] The following offences were classified as "serious violent offences":[525]

- section 128 (sexual violation);
- section 171 (manslaughter);
- section 173 (attempt to murder);
- section 188(1) (wounding with intent to cause grievous bodily harm);
- section 188(2) (wounding with intent to injure);
- section 189(1) (injuring with intent to cause grievous bodily harm);
- section 189(2) (injuring with intent to injure);
- section 198A (using a firearm against law enforcement officer, etc);
- section 198B (commission of crime with firearm);
- section 234 (robbery);
- section 235 (aggravated robbery).

Although the study is somewhat dated, it is nonetheless relevant because the 1985 Act, like the current New Zealand three-strikes regime, attempted to predict the future dangerousness of an offender using a present offence (or set of offences). This was based on the assumption that there was "a higher than average reoffending rate among those individuals whose present offence lay within a specific group of violent offences".[526] The study found that predicting future dangerousness in this manner was problematic for two reasons. First, the New Zealand data confirmed previous studies[527] showing that offenders engage in a range of illegal

[520] At 93.
[521] Avinash Singh Bhati "Estimating the Number of Crimes Averted by Incapacitation: An Information Theoretic Approach" (2007) 23 J.Quantitative Criminology 355 at 372.
[522] At 372.
[523] At 372.
[524] Mark Brown "Serious Offending and the Management of Public Risk in New Zealand" (1996) 36 Brit.J.Criminol. 18 at 20.
[525] Criminal Justice Act 1985, s 2.
[526] Brown, above n 524, at 24.
[527] e.g. DP Farrington "Childhood Aggression and Adult Violence: Early Precursors and Later Life Outcomes" in DJ Pepler and KH Rubin (eds) *The Development and Treatment of Childhood Aggression* (Erlbaum, Hillsdale (NJ), 1991) 5; MW Klein "Offence Specialization and Versatility Among Juveniles" (1984) 24 Brit.J.Criminol

behaviour. Brown noted that "[l]ess than half of all offenders receiving a further conviction during the follow-up period were reconvicted for offences within even the same broad offence category (e.g., violent, sexual, property) as that for which they were imprisoned."[528] Secondly, a three-strikes regime "fails to take into account the principle of regression — the observation that extreme events are by definition infrequent and thus likely to be followed by less extreme (or in the present case, less serious) events."[529] Overall, this attempt to predict serious violent offending is inadequate because:[530]

> directing strategies for incapacitation or control at current violent offenders alone will, perhaps substantially, under identify the at-risk group. Conversely, this approach will also incorrectly identify a substantial number of offenders (false positives) whose offending is largely 'ordinary'.

The study went on to conclude that "offence-based classification systems are difficult to sustain on either logical or empirical grounds."[531]

This conclusion is supported by another New Zealand-based study by Brown, which found that the vast majority of serious offences committed by the sample group were committed by offenders who were imprisoned for a non-serious offence.[532]

Another study by Blokland and Niewbeerta found that a policy of selective incarceration in the Netherlands led to a small projected decrease in the number of violent offences.[533] It further found that "[s]electively incapacitating presumed frequent offenders on the basis of the number of offenses they have committed in the … preceding 5 years … leads to a substantial decline in crime",[534] but that this was offset by the significant increase in the prison population — up to 45 times the baseline population. For this to be justified, "the average conviction prevented by the selective incapacitation of frequent offenders would have to generate four to eight times as much in benefits than it would cost detaining an offender for 1 year."[535] In reality, "the benefits from preventing an average conviction are only approximately twice as high as the costs of 1 year of prison."[536] Blokland went on to conclude that "risk estimation merely on the basis of criminal past generates high wastage of prison capacity."[537] Furthermore, the study

185; ME Wolfgang, RM Figlio and T Sellin *Delinquency in a Birth Cohort* (University of Chicago Press, Chicago, 1972).
[528] Brown, above n 524, at 24.
[529] At 24.
[530] At 25.
[531] At 27.
[532] Mirko Bagaric "Strategic (and Popular) Sentencing" (2006) 2 IJPS 121 at 130; citing Mark Brown "Serious Violence and Dilemmas of Sentencing: A Comparison of Three Incapacitation Policies" [1998] Crim.L.R. 710 at 710.
[533] Arjan AJ Blokland and Paul Nieuwbeerta "Selectively Incapacitating Frequent Offenders: Costs and Benefits of Various Penal Scenarios" (2007) 23 J.Quantitative Criminology 327 at 337.
[534] At 348.
[535] At 349.
[536] At 349.
[537] At 349.

noted that if incarceration has an effect on an offender's likelihood of future offending, this may cancel out any positive effects of selective incarceration.[538]

Finally, studies have found that the average career length for offenders is 9.2 years for violent offences, and 13.6 years for property offences.[539] In comparison, a third-strike conviction under New Zealand's three-strikes regime will result in imprisonment without parole (unless manifest injustice is found) for between seven years to life, depending on the offence. This suggests that for its stated goal of reducing serious violent offending, New Zealand's three-strikes regime is likely imprisoning offenders for too long.

5.3.3 Ethical implications of a three-strikes regime

Another aspect of the incapacitation argument is the ethical question. This was examined in great detail in the Floud Report. Floud considered that preventive detention of dangerous offenders could be justified by the principle of just redistribution of risk. Under this conception, preventive detention is justly imposed if it justly redistributes risk between potential victims and potential aggressors.[540] The risk is therefore justly redistributed if:[541]

i. the risk presented by the offender must be one of grave harm;
ii. the offender is at fault;
iii. there is no less restrictive way of dealing with the offender consistent with maintaining the necessary degree of public protection; and
iv. the offender has caused or risked grave harm, and has committed at least one offence of a similar kind on a separate occasion from the instant offence.

The Floud Report went on to examine the practical feasibility of identifying dangerous offenders, and noted that:[542]

> The nature of predictive judgments, the limited scope for precision and confidence in such judgments, the widely varying characteristics of the relatively few offenders likely to meet the qualifying conditions we propose for a protective sentence, call for the exercise of a broad discretion rather than the application of statutory tests.

Floud further noted that predictive judgments have "on average no more than an even chance, at best, of being right".[543] However, the Report went on to argue that certain offences were so harmful that even a low risk of reoffending was unacceptable, and that preventive detention could be justified if sufficient procedural safeguards were put in place.[544] It is worth noting that this is an argument in favour of a preventive detention regime with broad judicial discretion,

[538] At 349.
[539] Piquero and Blumstein, above n 516, at 276; John H Laub and Robert J Sampson *Shared Beginnings, Divergent Lives* (Harvard University Press, Cambridge (MA), 2003) at 90.
[540] Jean Floud "Dangerousness and Criminal Justice" (1982) 22 Brit.J.Criminol 213 at 218–219.
[541] AE Bottoms and Roger Brownsword "The Dangerousness Debate After The Floud Report" (1982) 22 Brit.J.Criminol 229 JSTOR at 233.
[542] Floud, above n 540, at 223–224.
[543] At 224.
[544] At 224.

such as the regime in ss103-104 Sentencing Act. It does not, however, justify our three-strikes regime, which is a strict statutory test. In fact, Floud warns against an application of such tests because the limited precision of predictive judgments calls for "the exercise of a broad discretion rather than the application of statutory tests."[545]

5.3.4 Conclusion

In summary, incapacitation will by definition reduce reoffending because an incarcerated offender cannot offend against the general public. However, it would not be just or practicable to incapacitate every offender by incarcerating them for extensive periods of time. Therefore, the goal of the incapacitation principle is to accurately predict offenders who are likely to commit serious violent offences in the future, so as to specifically incapacitate them. Some research has shown that a small percentage of career offenders are responsible for the majority of the offending. This indicates that selectively incapacitating these career offenders would effectively reduce offending. However, other research has shown that an offender's criminal history may not be an accurate predictor of his propensity to reoffend. This is particularly true when attempting to predict violent offending. Furthermore, other research suggests that offence-based classification systems like that implemented by New Zealand's three-strikes regime fail to accurately predict future reoffending. New Zealand's three-strikes regime is also likely to result in periods of imprisonment that are longer than the average career length of an offender, which suggests that the regime is likely imprisoning these offenders for too long. Finally, a strict statutory test like that implemented by the New Zealand regime may also be ethically unjustifiable, as it removes the judicial exercise of discretion.

5.4 Deterrence

5.4.1 Introduction

This section will consider the application of deterrence theory to a three-strikes regime.

5.4.2 The theory of deterrence

Deterrence theory posits that punitive consequences for offending will deter future offending either by the particular offender being sentenced (Specific Deterrence), or by the general public (General Deterrence). This is premised on the notion that offenders act as "*homo economicus*" — the economic person with perfect knowledge making unfailingly rational choices.[546] Under this assumption, offenders undergo a rational cost-benefit analysis before committing an offence, and as such, would be deterred from offending by their fear of punitive consequences.[547] The hypothetical rational offender would undertake the following analysis, where C is the certainty of being punished for the offending, S is the severity of the punishment,

[545] At 223–224.
[546] David Crump "Deterrence" (2018) 49 St Mary's LJ 317 at 326.
[547] At 320.

D is the delay between offending and punishment, and R is the reward gained from the offending:[548]

$$\frac{C \times S}{D} > R$$

In other words, if the value of R is less than the value of the equation on the left, it will not be in the rational offender's best interests to commit the offence.

5.4.3 Studies on the effectiveness of deterrence

Research to test deterrence theory has been difficult to accomplish because deterrence refers to nonevents (an offender's failure to commit an offence), and is therefore not directly observable. "[F]ailure to act is meaningful information about deterrence only if we clearly expect that the action should have occurred but did not".[549] Furthermore, where an offender does offend, this is nonetheless not a helpful observation because "[t]o infer a failure of deterrence, we must know that they were aware of and considered the punitive consequences of their acts before deciding to act anyway … otherwise, it is not a failure of deterrence but rather a thoughtless behaviour oblivious to its possible outcomes".[550]

The research that has been carried out on the effectiveness of deterrence has produced mixed results. Anecdotal studies based on interviews of repeat offenders found that "most of the offenders studied did not really think about the likely legal consequences of their actions", and "had unrealistic perceptions about the likelihood of being caught and irrational expectations about what would happen to them if they did get caught"[551]. This result may be explained by the fact that "certainty of punishment mostly deters those with a high predisposition (or low "risk-sensitivity") from offending because those with a low predisposition ("high risk-sensitivity") are not likely to engage in crime at all".[552] This is supported by other research which shows that people vary in deterrability (their responsiveness to sanction threats), and that a certain segment of people are "incorrigible offenders", who are "impervious to dissuasion" — "[i]ncreases in the perceived certainty and/or severity of sanction threats mean little to them because of their unresponsiveness to threatened punishment."[553] In addition, other research shows that many offenders who were incarcerated for the first time reached the conclusion that incarceration could be endured relatively easily, and therefore was no great threat.[554] Some offenders did desist from crime for a short time after their first incarceration, and attributed this

[548] At 324.
[549] J Mitchell Miller, Christopher J Schreck and Richard Tewksbury *Criminological Theory* (3rd ed, Prentice Hall, Boston, 2011), at 25.
[550] At 26.
[551] At 26.
[552] Kelli D Tomlinson "An Examination of Deterrence Theory: Where Do We Stand" (2016) 80 Fed. Probation 33 at 36.
[553] Bruce A Jacobs "Deterrence and Deterrability" (2010) 48 Criminology 417 at 420.
[554] Kenneth D Tunnell "Choosing Crime: Close Your Eyes and Take Your Chances Crime and Deviance" (1990) 7 Just Q 673 at 684.

to knowledge of the legal punishment, and extralegal factors in their lives.[555] Offenders who did not desist either engaged in more planning before committing a crime, or "simply chose not to think about the legal consequences of their actions."[556] Other researchers have commented that for some individuals, being arrested and incarcerated was viewed as a way of life, and therefore had little or no deterrent effect.[557]

An increased police presence in an area has been shown to deter some amount of crime, as offenders rationally readjust their perception of risk, but research suggests that offenders may simply commit crimes elsewhere until "the heat is off",[558] or change the manner in which they offend to reduce the risk.[559] One study concluded that:[560]

> The implementation of harsher penalties may be adequate to deter those populations who either do not commit crime or do so infrequently, but it appears to be dubious when applied to frequent offenders. They view themselves as immune from criminal sanction, and hence are undeterred. They tend to believe that they simply will not be apprehended for their criminal actions; if they are caught, they will be imprisoned for a very short amount of time. Those who actually consider the possibilities of brief imprisonment view prison as a nonthreatening environment.

Studies correlating imprisonment rates and sentencing policy across states in the United States found results consistent with deterrence. However, this methodology produces inconclusive results because it does not directly assess the effects of deterrence.[561] Studies that tracked crime levels before and after a change in punishment or enforcement policy similarly produced mixed results, with some studies showing a "definite deterence-like effect", and others showing an opposite effect.[562] In relation to the effect of California's three-strikes law, proponents argued that the three-strikes law accounted for a sharp decline in crime in California, and that indeed this decline significantly exceeded the that in the rest of the United States.[563] However, opponents of the law argue that New York (which did not have a three-strikes law during that time) showed the sharpest decline in crime in the same time period, not California.[564] Furthermore, more recent studies found that "within California, counties that aggressively enforce the law "had no greater declines in crime than did counties that used it far more

[555] At 685.
[556] At 686.
[557] Tomlinson, above n 552, at 34.
[558] Raymond Paternoster "How Much Do We Really Know about Criminal Deterrence Centennial Symposium: A Century of Criminal Justice - Crimes and Punishments" (2010) 100 J Crim L & Criminology 765 at 819.
[559] Jacobs, above n 553, at 422.
[560] Tunnell, above n 554, at 687–688.
[561] Miller, Schreck and Tewksbury, above n 549, at 27.
[562] At 27.
[563] Michael Vitiello "Three Strikes Laws: A Real or Imagined Deterrent to Crime?" (2002) 29 HR 3 at 3; citing Bill Jones "Why the Three Strikes Law Is Working in California Symposium: New Legal Scholarship of Sentencing" (1999–2000) 11 Stan L & Pol'y Rev 23.
[564] Vitiello, above n 563, at 3.

sparingly.""[565] Thus, any decline in crime during that time period may be more correctly attributed to other criminological factors such as a decrease in alcohol consumption and unemployment,[566] rather than to the adoption of the three-strikes regime. This is supported by another study which found that "prior to "three strikes," crime rates were declining already and, after "three strikes" they continued to decline at about the same rate, suggesting that whatever effect "three strikes" had, it was small at best."[567]

To the extent that deterrence may be effective, research indicates that it is affected more by the certainty (certainty that offending will result in punishment) and celerity (swift punishment following the offending) of the punishment, and less by the severity of the punishment.[568] The criminal justice system is not suited to delivering effective deterrents because it fails to deliver certainty and celerity — sentences are generally uncertain, and are only imposed long after the commission of the offence. On the other hand, "the pleasures of crime are immediate and so carry greater weight than the delayed costs of crime in the would-be offender's calculus."[569]

Furthermore, other research indicates that to the extent that deterrence may be effective, it is more effective at preventing property offences, and less effective at preventing violent offences. This is because in instrumental crimes such as property offences, offenders may be more likely to weigh benefits and costs consciously, whereas in violent offences, offenders are less likely to make a rational decision to offend based on a cost-benefit analysis.[570] "[T]he failure of the rational choice model may be the basis of many of the most serious crimes — from murder based upon anger, to terrifying thrill killings."[571]

5.4.4 Conclusion

In summary, deterrence affects different people differently due to different levels of risk-sensitivity. In addition, deterrence is particularly ill-suited to reducing re-offending by chronic offenders for two reasons. Firstly, people with high levels of risk-sensitivity are unlikely to offend in the first place. Repeat offenders on the other hand either do not believe that they will be apprehended, or believe that if they are caught, they will be imprisoned for a very short amount of time.[572] Policies that increase deterrence may cause repeat offenders to adjust their behaviour, but this will likely be done by changing the manner or location of their offending in order to reduce the risk.[573] Secondly, many offenders discover when they are first incarcerated

[565] At 4; citing "Crime States Capture Both Arguments" *Contra Costa Times* (California, US, 27 February 2000) A1.
[566] Warren Brookbanks "Three Strikes – Five Years On" (Inaugural Greg King Memorial Lecture, Victoria University of Wellington Faculty of Law, Wellington, 30 September 2015) at 8.
[567] Vitiello, above n 563, at 4.
[568] Richard D Clark "Celerity and Specific Deterrence: A Look at the Evidence" (1988) 30 Can.J.Criminology 109 at 109–110.
[569] Paternoster, above n 558, at 777.
[570] Daniel S Nagin and Raymond Paternoster "The Preventive Effects of the Perceived Risk of Arrest: Testing an Expanded Conception of Deterrence" (1991–1992) 29 Criminology 561 at 566.
[571] Crump, above n 546, at 331.
[572] Tunnell, above n 554, at 688; Jacobs, above n 553, at 420.
[573] Jacobs, above n 553, at 422.

that incarceration can be endured relatively easily, and is therefore no great threat.[574] This is compounded by the fact that for some people, arrest and incarceration is viewed simply as a way of life.

5.5 The impact of the manifest injustice exception

The above discussion has considered what could be described as a 'pure' three-strikes regime- one that contains no exceptions. New Zealand has implemented a slightly modified regime. In short, offenders who commit three "serious violent offences" are subject to long terms of imprisonment without parole. A manifest injustice exception was introduced as a safeguard, allowing courts to avoid imposing a non-parole order if such an order would be manifestly unjust. As discussed in chapter 3 above, this exception has been applied in almost every case. This has had the effect of further watering down the incapacitative and deterrent effects of NZ's three-strikes regime. The existence and frequent application of the manifest injustice exception further reduces certainty of punishment. As discussed above,[575] certainty is a key factor in deterrence, and any reduction in certainty will drastically reduce the deterrent effect of the three-strikes regime. The application of the manifest injustice exception also means that fewer potential reoffenders are imprisoned, which by definition reduces the incapacitative effect of the regime. The potential effectiveness of a three-strikes regime as discussed in studies above must therefore be qualified, and will likely be reduced, in a New Zealand context, due to the manifest injustice exception.

5.6 Conclusion

To summarise, New Zealand's three-strikes regime seeks to reduce reoffending by means of incapacitation and deterrence. Although incapacitation by definition prevents an offender from reoffending against the general public, the three-strikes regime is a strict statutory test based on offence categories, and as such is poor predictor of future offending. Furthermore, the three-strikes regime will often result in sentences of incarceration that exceed the career length of the offender — that is, the regime will incarcerate offenders even when they no longer pose a risk to society.

The second mechanism by which the three-strikes regime seeks to reduce reoffending is deterrence. However, this is unlikely to be effective. Deterrence is particularly ill-suited to reducing re-offending by chronic offenders because people with high levels of risk-sensitivity are unlikely to offend in the first place. Repeat offenders on the other hand either do not believe that they will be apprehended, or believe that if they are caught, they will be imprisoned for a very short amount of time. Repeat offenders may also become institutionalised, and find that incarceration is either easily endured, or in fact preferable to life outside prison. Finally, the manifest injustice exception in the three-strikes regime further reduces the certainty of punishment, which further reduces the deterrent effect of the three-strikes regime.

[574] Tunnell, above n 554, at 684.
[575] In chapter 5.3.

This discussion of a three-strikes regime from a theoretical perspective therefore raises doubt as to its overall likelihood of effectiveness in New Zealand. This is a conclusion that appears to be supported by the discussion in the previous chapter of the practical operation of the three-strikes law in New Zealand.

Chapter 6. The future of the three-strikes regime in New Zealand

6.1 Indications of plans to repeal

In May 2018, the Hon Andrew Little, who was at the time the Minister of Justice, announced plans to repeal the three-strikes regime[576] because it "had not reduced crime rates and failed to act as an effective deterrent", and had not made a difference in the eight years since its enactment.[577] However, this attempt at repeal was unsuccessful as Mr Little was forced to withdraw his proposal due to a lack of political support from their coalition partners in the New Zealand First Party.[578]

Although Mr Little signalled his intention to re-introduce the issue of repealing the three-strikes regime as part of the bulk of the criminal justice reforms taking place in 2019, this did not ultimately happen.

In October 2020, following the 2020 New Zealand General Election, the Labour Party once again vowed to repeal the three-strikes regime, with caretaker Minister of Justice Andrew Little[579] saying that:[580]

> Labour has committed to repeal the three strikes law which is leading to absurd results and instead focus on building a criminal justice system that ensures less crime, less offending and fewer victims of crime who are better supported.[581]

This attempt at repeal may be more successful than the 2018 attempt as the Labour Party's commanding win in the 2020 General Election allowed it to govern without a coalition partner.[582] Thus far, as of February 2021, the new Minister of Justice, Kris Faafoi, has not commented publicly on this.

6.2 Should it be repealed?

6.2.1 Arguments for repeal

The analysis of three-strikes case law carried out in the chapter 3 above shows that the Courts have indicated a lack of comfort with the three-strikes regime, as is demonstrated through the frequent application of the manifest injustice exception. As examples, in *R v Harrison*, [583] the Court found that the broad scope of the regime resulted in an elevated "risk of gross disproportionality",[584] and a potentially high risk of "arbitrary or wholly disproportionate

[576] O'Brien, above n 3.
[577] Northcott, above n 4.
[578] Little, above n 5.
[579] Following the 2020 New Zealand General Election, the current Minister of Justice is the Honourable Kris Faafoi: "Ministers | Beehive.govt.nz", above n 6.
[580] Gay, above n 7.
[581] Minister Little may have been referring to decisions such as *R v Campbell*, above n 8; and *R v Fitzgerald*, above n 8 both of which resulted in sentences of 7 years imprisonment for relatively minor offending.
[582] New Zealand Electoral Commission, above n 9.
[583] *R v Harrison; R v Turner*, above n 10.
[584] At [87].

outcomes",[585] and in *R v Campbell*, where Mr Campbell was sentenced to 7 years' imprisonment for grabbing the buttocks of a Corrections Officer, the Court stated that:[586]

> It may seem very surprising that this consequence could be required by law for an offence of this kind, but that is the law and I have no option but to enforce it.

The regime is similarly criticised by lawyers. As discussed above in chapter 3, prosecution lawyers will often agree with the defence counsel that the manifest injustice exception should be applied.[587] This is further illustrated by the findings in chapter 4 above, where several defence lawyers responded to the author's survey by commenting that when acting for a client on their second or third strike, they would often seek to plea bargain to reduce the charge to a non-strike offence. Some defence lawyers also noted that their clients either did not understand the impact of the regime, or would not be deterred from future offending by the regime because most of the offending captured by the regime is impulsive and carried out under the influence of drugs, alcohol or both. Crown lawyers may also be more willing to reduce charges to a non-strike offence when the defendant is on his second on third strike. As one survey respondent noted:

> [the regime] certainly results in a manipulation of charges by both Crown and Defence, often without proper reasoned basis, to achieve a result both sides can live with. For instance, I have represented two defendants on third strike offences where the max penalty is 14 years imprisonment. On the disclosed evidence, there has been an overwhelming Crown case against each defendant. But the Crown have been willing to reduce charges from 14 year charges to 7 year charges to reduce the impact of the three strike regime, which, but for the 3 strike regime, they would not have done.

The three-strikes regime is also theoretically unsound. As discussed in the chapter 5 above, a strict statutory test such as the one imposed in New Zealand's three-strikes regime is a poor predictor of future offending and often results in sentences of incarceration that exceed the career length of the offender, and therefore is an inefficient way to reduce reoffending by incapacitation. Furthermore, the three-strikes regime is also unlikely to reduce reoffending by deterrence because deterrence is particularly ill-suited to reducing re-offending by chronic offenders.

Furthermore, the three-strikes regime will incur significant additional costs. A Regulatory Impact Statement by the New Zealand Police estimated that the regime would cause an increase in prison population, and therefore an increase in capital and operating costs as additional prison beds would be required. The Regulatory Impact Statement went on to say that 50 years after implementation, the regime would result in 700 additional prison beds being required,

[585] At [88].
[586] *R v Campbell*, above n 8, at [13].
[587] See e.g. *R v Campbell*, above n 8; *R v Fitzgerald*, above n 8; *R v Alexander*, above n 277.

incurring an additional $280 million in one-time capital costs and $63.8 million per year in ongoing operating costs.[588]

The effect of this increase in prison population is exacerbated by the fact that many of New Zealand's prisons are overcrowded and unfit for purpose. For instance, an inspection of the Auckland South Corrections Facility by Chief Ombudsman Peter Boshier found that prisoners were frequently locked in their cells for extended amounts of time as a way of managing staff shortages or rostering issues.[589] Similarly, an inspection of the Waikeria Prison by the Chief Ombudsman found that prisoners in the High Security Complex (HSC) were "double-bunked in cells originally designed for one, and living conditions were poor", and that the "HSC environment is not fit for purpose and is impacting adversely on the treatment of [prisoners]".[590] Another inspection of the Paremoremo prison in Auckland by the Chief Ombudsman found that "staff shortages were having a significant impact on many aspects of custodial operation",[591] and that this negatively affected the prisoners "ability to attend medical, case management and reintegration appointments",[592] and could compromise prisoner and staff safety.[593]Finally, New Zealand's three-strikes regime does not appear to have achieved its stated goal of reducing violent offending. An Evidence Brief by the Ministry of Justice concluded that the evidence on the effectiveness of our three-strikes regime was inconclusive, and that there was conflicting evidence that the regime could reduce crime.[594] Similarly, research by the Ministry of Justice published in August 2018 found that there had been a 5 per cent increase in three-strikes convictions since the introduction of the regime in 2010, and that there was "no clear indication that the three strikes legislation is reducing serious offending behaviour."[595]

6.2.2 Arguments against repeal

Proponents of the regime may argue that the regime should not be repealed because it has not been given enough time to determine its efficacy. A Regulatory Impact Statement by the New Zealand Police found that the three-strikes regime would begin to increase the prison population 5 years after implementation, with the effect increasing linearly from five to 50

[588] New Zealand Police *Regulatory Impact Statement: Sentencing and Parole Reform Bill* (16 December 2009) at 7.
[589] Peter Boshier *Ombudsman's Report on an announced inspection of Auckland South Corrections Facility under the Crimes of Torture Act 1989* (February 2019) at 8.
[590] Peter Boshier *Ombudsman's Final report on an unannounced inspection of Waikeria Prison under the Crimes of Torture Act 1989* (August 2020) at 2.
[591] Peter Boshier *Ombudsman's Final report on an unannounced inspection of Auckland Prison under the Crimes of Torture Act 1989* (December 2020) at 2.
[592] At 2.
[593] At 2.
[594] Tadhg Daly and Matthew McClennan *Three Strikes Law: Evidence Brief* (Ministry of Justice, Evidence Brief 2018).
[595] Ministry of Justice *Factsheet: Three Strikes Offending* (Ministry of Justice, Evidence Brief, August 2018).

years after implementation.[596] Due to the incapacitative effect of incarceration, this would be expected to reduce serious violent offending by a proportionate amount.

From a victim's perspective, it should be noted that the regime also serves to protect victims from re-victimisation as it spares victims and their families from having to repeatedly attend parole hearings. It is worth noting however that this outcome could also be achieved through a reform of the parole system, rather than through sentencing legislation.

The regime may also reflect public opinion. When the regime was first introduced in the Sentencing and Parole Reform Bill 2009, public submissions in support of the regime far outnumbered submissions opposing the regime. This is discussed in further detail in Chapter 2 of this thesis. On a similar note, some proponents of the regime may also argue that aside from its effect on serious violent offending, the regime was intended to increase public confidence in the Criminal Justice System.

6.3 What does repeal look like?

Given that the Labour Government has given a clear indication of its intention to repeal the three-strikes law, it is worthwhile considering how a repeal should be implemented. While those convicted of serious violent or sexual offending would no longer accrue strikes following the repeal of the regime, there may be an issue in relation to those who have already been sentenced under the regime. Could they be eligible to seek resentencing, as suggested by some lawyers in the practical chapter?[597] This would be particularly relevant for second strike offenders who are by definition ineligible for parole and third strike offenders who are serving the maximum sentence.

Any resentencing requires consideration of retrospectivity. There is a general presumption that legislation should not be construed to have retrospective effect.[598] However, Parliament can provide for retrospective effect if it wishes to do so.[599] There are two groups of defendants who stand to benefit from a repeal of the three-strikes regime. Firstly, defendants who have been convicted of a strike offence, but who are sentenced after a repeal of the regime, would likely be subject to the non-strike penalty. This is because Section 6(1) of the Sentencing Act 2002 states that:

> An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.

However, this same section would be of no assistance to the second group of defendants — those who have already been sentenced under the regime. For this second (likely larger) group

[596] New Zealand Police, above n 588, at 7; See table at Table A.
[597] See discussion in chapter 4 above.
[598] Interpretation Act 1999, s 7; Crimes Act 1961, s 10A; Sentencing Act 2002, s 6.
[599] Interpretation Act, s 8.

of defendants, any relief would likely have to come in the form of a specific provision in the repeal allowing defendants sentenced under the regime to seek resentencing.

The prohibition against retroactive application in s 26 of the New Zealand Bill of Rights Act 1990 (NZBORA) and s 10 of the Crimes Act applies only to liability for offences, so a retroactive repeal of a sentencing law allowing defendants who have been sentenced under the regime to seek resentencing would arguably not be contrary to the NZBORA.

As New Zealand's three-strikes regime was inspired by a similar regime in California, it may be appropriate to look to California's reform of their three-strikes regime as a guide for any NZ reform. Under California's three-strikes regime as it was originally enacted, an offender who had two previous convictions for qualifying offences had to be sentenced to life imprisonment for their third conviction, even if this third conviction was a non-violent offence. This led to unjust outcomes in which defendants were sentenced to life imprisonment for relatively minor non-violent offending. In 2012, this regime was reformed to impose less severe sentences for non-violent and non-serious third strike offenders.[600] Under this reform, non-violent third strike offenders would be sentenced to double the ordinary term of imprisonment, rather than to life imprisonment. The amendment also applied retroactively, allowing for defendants who were sentenced to life-imprisonment for a non-violent offence under the old regime to seek to be resentenced. More recently, in December 2020, Los Angeles County District Attorney George Gascón announced that prosecutors in the district of Los Angeles would no longer seek to apply "prior-strike enhancements" in sentencing, and would no longer seek sentences of life without parole. Furthermore, any defendants sentenced on the amended provisions within 120 days of the announcement would be eligible for resentencing.[601]

It is interesting to note that resentencing in a New Zealand context, resentencing might not be as complicated or as time consuming as in California. Because of the test laid out in *Harrison*, Courts have generally set out a "but for" sentence for every second and third strike murder and third strike non-murder defendant as part of the manifest injustice decision. This is the sentence that would have been imposed in the absence of the three-strikes regime. If our three-strikes regime was repealed with retroactive effect, sentences affected by three-strikes provisions could simply be rolled back to their "but-for" sentences. This would also mean that defendants for whom the sentence under the regime was found to be manifestly unjust would not be eligible for resentencing, as they would already have been sentenced to the but-for sentence. Similarly, second strike defendants (who under the regime were required to serve their sentence without parole) could simply have the restriction on parole eligibility removed. This may prevent some of the administrative issues seen in some counties in California following the reform in 2012, such as a large backlog of cases pending resentencing.[602]

[600] California Proposition 36, *Changes in the "Three Strikes" Law* (2012).
[601] George Gascón *Sentencing Enhancements/Allegations* (2020) Special Directive 20-08.
[602] Stanford Law School Three Strikes Project and NAACP Legal Defense and Education Fund *Progress Report: Three Strikes Reform (Proposition 36)* (2013).

To date, there have been 402 second strike[603] and 19 third strike defendants sentenced under the three-strikes regime since its enactment. However, of the 402 second-strike defendants, 12 defendants were sentenced for murder as a second-strike offence. In all 12 of these cases, defendants were not ordered to serve the sentence of life imprisonment without parole due to the manifest injustice exception that applies to the sentencing of second and third strike murders under the regime. In addition, due to the manifest injustice exception that applies to third strike sentencing, 12 of the 19 third-strike defendants were not ordered to serve their full sentence of imprisonment without the possibility of parole. Another two of those third-strike defendants were sentenced for murder as their third-strike offence, and in both cases, the defendants were similarly not ordered to serve the sentence of life imprisonment without parole.[604] Therefore, without accounting for defendants who have already completed their sentence under the regime and been released, there may potentially be 390 second-strike defendants and five third-strike defendants who are eligible for resentencing following a repeal of New Zealand's three-strike regime.

6.4 Conclusion

The Labour government attempted to repeal the three-strikes regime in May 2018, but was unsuccessful due to lack of political support from its coalition partners, the New Zealand First Party. Following a commanding win in the 2020 General Elections, the Labour government is now able to govern without a coalition partner, and has once again indicated that it intends to repeal the three-strikes regime.

The analysis carried out in the Case Law, Theory, and Practical chapters 3, 4 and 5 of this thesis indicates that the three-strikes regime is disliked by judges, prosecutors, and defence lawyers. The regime is also theoretically unsound, and the limited quantitative evidence available thus far suggests that as predicted by the theory, it does not appear to have effectively reduced violent offending. Although proponents of the regime may claim that the regime achieves other goals such as protecting victims from repeated parole hearings and improving public confidence in the Criminal Justice System, these goals can and should be achieved by other, more targeted means such as a reform of the parole system, rather than by the unwieldy lever of increased sentencing. The regime should be repealed, and in addition, defendants who would be affected by the repeal (see discussion above) should have an opportunity to seek resentencing. To quote Los Angeles County District Attorney George Gascón, "[t]he pursuit of justice is timeless, therefore this policy will correct historic wrongs".[605] It therefore follows that defendants who have been subject to unjust outcomes as a result of this regime should be able to seek redress in the form of a resentencing.

[603] Ministry of Justice *"Three strikes" offences* (Ministry of Justice, June 2020).
[604] A more detailed breakdown of these cases is available on Table B.
[605] Gascón, above n 601.

Chapter 7. Conclusion

7.1 Summary

Similarly to the Californian three-strikes regime, New Zealand's three-strikes regime was enacted amid public outcry about crime and the perceived leniency of the criminal justice system. Proponents of the regime claimed that it would increase public safety by reducing serious and violent offending, through the means of incapacitation and deterrence. Proponents also claimed that the New Zealand regime was better designed than the Californian regime, and therefore would not result in the unjust outcomes seen under the Californian regime. However, these promises do not appear to have been fulfilled.

This thesis began in chapter 2 by setting out the background and history of New Zealand's three-strikes law, by examining the evolution of the Sentencing and Parole Reform Bill as it moved through the legislative process. It then examined the arguments made for and against the Bill in Parliamentary debates, and then analysed public sentiment about the Bill by examining the submissions made on the Bill by members of the public.

Chapter 3 of this thesis went on to analyse the application of the regime as found in case law. It first examined the consistency of the three-strikes regime with the New Zealand Bill of Rights Act 1990. Next, it discussed the application of the manifest injustice exception in the leading case of *R v Harrison; R v Turner*, and how this was applied in subsequent decisions. Finally, this chapter examined the application of the manifest injustice exception to s 86C (stage-2 non-murder offences) in case law.

Expanding from the analysis in chapter 3, chapter 4 of this thesis discussed the impact of the regime on criminal lawyers, and defendants who are subject to the regime. This involved a survey of criminal lawyers in New Zealand, and provided further insight into the practical application of the three-strikes regime and its effect on criminal defendants.

Next, chapter 5 of this thesis analysed the theoretical basis of the three-strikes regime. It began by establishing the theoretical grounds for punishment under which New Zealand's three-strikes regime is justified. It then considered the validity of these grounds, and whether New Zealand's implementation and application of the three-strikes regime fits within these grounds.

Finally, chapter 6 of this thesis discussed the potential repeal of New Zealand's three-strikes regime. It first analysed the arguments for and against repealing the regime, before going on to consider how a potential repeal may be implemented, and the practical implications of such a repeal.

7.2 Significance

This thesis contributes to the debate by performing an in-depth analysis of the design and development of the New Zealand law, and its application in case law. In the course of this analysis, this thesis has found that the New Zealand regime has resulted in several potentially unjust outcomes, and that as a result, judges are often uncomfortable with the effects of the

regime, and have frequently sought to avoid applying the regime to its full extent by means of liberal application of the manifest injustice exception.

Furthermore, this thesis also sheds light on the practical effects of the regime on pre-trial negotiations and preparations by defence lawyers, and the practical effects of the regime on defendants. In the course of this research, this thesis has found that defence lawyers (and possibly also prosecution lawyers) are often similarly uncomfortable with the effects of the regime due to the removal of judicial discretion and the resulting potential to result in unjust outcomes, and as a result were often more willing to engage in plea negotiation. This thesis has also found in its analysis of the case law that prosecution lawyers have in many cases conceded that application of the full extent of the regime would result in unjust outcomes. The regime has also resulted in defendants being less likely to plead guilty to strike offences, and being less willing to engage in rehabilitative programs due to the removal of the possibility of parole.

This thesis has also found that the New Zealand regime is theoretically unsound. The regime fails as an incapacitative measure because it operates as a strict statutory test based on offence categories, and such tests are a poor predictor of future offending. Furthermore, the regime will result in offenders being imprisoned even when they no longer pose a risk to society. The regime also fails as a deterrent measure because deterrence is particularly ill-suited to reducing re-offending by chronic offenders because people with high levels of risk-sensitivity are unlikely to offend in the first place. Repeat offenders on the other hand are less likely to respond to deterrence because they either do not believe that they will be apprehended, or believe that if they are caught, they will be imprisoned for a very short amount of time. This is reflected in the experience of defence lawyers who commented that defendants do not seem to be deterred by the regime, likely because most serious violent offences such as the ones captured by the regime are often impulsive, and often committed under the influence of drugs, alcohol, or both. In fact, defence lawyers have noted that defendants who fall under the regime may be less likely to engage in rehabilitative and reformative programs due to the removal of the possibility of parole.

Finally, this thesis argues that New Zealand's three-strikes regime should be repealed because of the flaws discussed above. Furthermore, drawing from the repeal of California's three-strikes regime, this thesis argues that such a repeal should extend to allowing for defendants sentenced under the regime to seek a resentencing, and briefly discusses what a resentencing process might look like in the context of the New Zealand regime.

7.3 Future directions for research

One future direction for research is connected to the limitation of the present thesis. As acknowledged in the introduction, there has been little empirical data on the efficacy of New Zealand's three-strikes regime, and so more empirical research on this front would contribute greatly to the literature. This might involve semi-structured interviews with both defence and prosecution lawyers, in order to follow up on some of the comments made in the online survey.

However, this research would need to isolate the influence of a large variety of other variables, such as changes in socioeconomic conditions and other policies introduced during the same time period.

Another future direction for research is the practical implications of a repeal of the New Zealand regime. For example, this thesis has argued that any repeal should also extend to allowing for defendants sentenced under the regime to seek a resentencing. However, one question that has not been addressed is whether it would be possible, or even desirable, for the Courts to create a right of resentencing through case law if resentencing is not provided for by the legislation of the repeal. Further research in this area will depend on if, and how, repeal is considered by the new Minister of Justice.

7.4 Final words

I hope that this thesis has set out the case for repealing New Zealand's three-strikes sentencing regime. The regime removes the exercise of judicial discretion from the sentencing process, and in doing so turns sentencing into a mechanical box-ticking exercise, rather than an application of the law to individual circumstances. It is theoretically unsound, has not achieved its stated goals, and has resulted in potentially unjust outcomes. To quote a lawyer who responded to the survey in chapter 4.10 of this thesis, "[w]e are going to have to build a lot more prisons, and a more uncaring and callous attitude in our hearts, unless we repeal this legislation."

Appendix A: List of Strike Offences in Bar-1 Bill

1. Section 128B Crimes Act (sexual violation) (max 20 years imprisonment)
2. Section 129 Crimes Act (attempted sexual violation and assault with intent to commit sexual violation) (max 10 years imprisonment)
3. Section 129A(1) Crimes Act (sexual connection with consent induced by threat) (max 14 years imprisonment)
4. Section 130 Crimes Act (incest) (max 10 years imprisonment)
5. Section 131(1) Crimes Act (sexual connection with dependent family member under 18 years) (max 7 years imprisonment)
6. Section 131(2) Crimes Act (attempted sexual connection with dependent family member under 18 years) (max 7 years imprisonment)
7. Section 132(1) Crimes Act (sexual connection with child) (max 14 years imprisonment)
8. Section 132(2) Crimes Act (attempted sexual connection with child) (max 14 years imprisonment)
9. Section 132(3) Crimes Act (indecent act on child) (max 10 years imprisonment)
10. Section 134(1) Crimes Act (sexual connection with young person) (max 10 years imprisonment)
11. Section 134(2) Crimes Act (attempted sexual connection with young person) (max 10 years imprisonment)
12. Section 134(3) Crimes Act (indecent act on young person) (max 7 years imprisonment)
13. Section 135 Crimes Act (indecent assault) (max 7 years imprisonment)
14. Section 138(1) Crimes Act (exploitative sexual connection with person with significant impairment) (max 10 years imprisonment)
15. Section 138(2) Crimes Act (attempted exploitative sexual connection with person with significant impairment) (max 10 years imprisonment)
16. Section 142A Crimes Act (compelling indecent act with animal) (max 14 years imprisonment)
17. Section 172 Crimes Act (murder) (max life imprisonment)
18. Section 173 Crimes Act (attempted murder) (max 14 years imprisonment)
19. Section 177 Crimes Act (manslaughter) (max life imprisonment)
20. Section 188(1) Crimes Act (wounding with intent to cause grievous bodily harm) (max 14 years imprisonment)
21. Section 188(2) Crimes Act (wounding with intent to injure) (max 7 years imprisonment)
22. Section 189(1) Crimes Act (injuring with intent to cause grievous bodily harm) (max 10 years imprisonment)
23. Section 191(1) Crimes Act (aggravated wounding) (max 14 years imprisonment)

24. Section 191(2) Crimes Act (aggravated injury) (max 7 years imprisonment)
25. Section 198(1) Crimes Act (discharging firearm or doing dangerous act with intent to do grievous bodily harm) (max 14 years imprisonment)
26. Section 198(2) Crimes Act (discharging firearm or doing dangerous act with intent to injure) (max 7 years imprisonment)
27. Section 198A(1) Crimes Act (using firearm against law enforcement officer, etc) (max 14 years imprisonment)
28. Section 198A(2) Crimes Act (using firearm with intent to resist arrest or detention) (max 10 years imprisonment)
29. Section 198B Crimes Act (commission of crime with firearm) (max 10 years imprisonment)
30. Section 199 Crimes Act (acid throwing) (max 14 years imprisonment)
31. Section 208 Crimes Act (abduction for purposes of marriage or sexual connection) (max 14 years imprisonment)
32. Section 209 Crimes Act (kidnapping) (max 14 years imprisonment)
33. Section 232(1) Crimes Act (aggravated burglary) (max 14 years imprisonment)
34. Section 234 Crimes Act (robbery) (max 10 years imprisonment)
35. Section 235 Crimes Act (aggravated robbery) (max 14 years imprisonment)
36. Section 236(1) Crimes Act (causing grievous bodily harm with intent to rob or assault with intent to rob in specified circumstances) (max 14 years imprisonment)
37. Section 236(2) Crimes Act (assault with intent to rob) (max 7 years imprisonment)

Appendix B: List of Strike Offences in Bar-2 Bill

1. Section 128B Crimes Act (sexual violation) (max 20 years imprisonment)
2. Section 129 Crimes Act (attempted sexual violation and assault with intent to commit sexual violation) (max 10 years imprisonment)
3. Section 129A(1) Crimes Act (sexual connection with consent induced by threat) (max 14 years imprisonment)
4. Section 131(1) Crimes Act (sexual connection with dependent family member under 18 years) (max 7 years imprisonment)
5. Section 131(2) Crimes Act (attempted sexual connection with dependent family member under 18 years) (max 7 years imprisonment)
6. Section 132(1) Crimes Act (sexual connection with child) (max 14 years imprisonment)
7. Section 132(2) Crimes Act (attempted sexual connection with child) (max 14 years imprisonment)
8. Section 132(3) Crimes Act (indecent act on child) (max 10 years imprisonment)
9. Section 134(1) Crimes Act (sexual connection with young person) (max 10 years imprisonment)
10. Section 134(2) Crimes Act (attempted sexual connection with young person) (max 10 years imprisonment)
11. Section 134(3) Crimes Act (indecent act on young person) (max 7 years imprisonment)
12. Section 135 Crimes Act (indecent assault) (max 7 years imprisonment)
13. Section 138(1) Crimes Act (exploitative sexual connection with person with significant impairment) (max 10 years imprisonment)
14. Section 138(2) Crimes Act (attempted exploitative sexual connection with person with significant impairment) (max 10 years imprisonment)
15. Section 142A Crimes Act (compelling indecent act with animal) (max 14 years imprisonment)
16. Section 144A Crimes Act (sexual conduct with children and young people outside New Zealand) (max 7–14 years imprisonment)
17. Section 172 Crimes Act (murder) (max life imprisonment)
18. Section 173 Crimes Act (attempted murder) (max 14 years imprisonment)
19. Section 174 Crimes Act (counselling or attempting to procure murder) (max 10 years imprisonment)
20. Section 175 Crimes Act (conspiracy to murder) (max 10 years imprisonment)
21. Section 177 Crimes Act (manslaughter) (max life imprisonment)
22. Section 188(1) Crimes Act (wounding with intent to cause grievous bodily harm) (max 14 years imprisonment)

23. Section 188(2) Crimes Act (wounding with intent to injure) (max 7 years imprisonment)
24. Section 189(1) Crimes Act (injuring with intent to cause grievous bodily harm) (max 10 years imprisonment)
25. Section 191(1) Crimes Act (aggravated wounding) (max 14 years imprisonment)
26. Section 191(2) Crimes Act (aggravated injury) (max 7 years imprisonment)
27. Section 198(1) Crimes Act (discharging firearm or doing dangerous act with intent to do grievous bodily harm) (max 14 years imprisonment)
28. Section 198(2) Crimes Act (discharging firearm or doing dangerous act with intent to injure) (max 7 years imprisonment)
29. Section 198A(1) Crimes Act (using firearm against law enforcement officer, etc) (max 14 years imprisonment)
30. Section 198A(2) Crimes Act (using firearm with intent to resist arrest or detention) (max 10 years imprisonment)
31. Section 198B Crimes Act (commission of crime with firearm) (max 10 years imprisonment)
32. Section 200(1) Crimes Act (poisoning with intent to cause grievous bodily harm) (max 14 years imprisonment)
33. Section 201 Crimes Act (infecting with disease) (max 14 years imprisonment)
34. Section 208 Crimes Act (abduction for purposes of marriage or sexual connection) (max 14 years imprisonment)
35. Section 209 Crimes Act (kidnapping) (max 14 years imprisonment)
36. Section 232(1) Crimes Act (aggravated burglary) (max 14 years imprisonment)
37. Section 234 Crimes Act (robbery) (max 10 years imprisonment)
38. Section 235 Crimes Act (aggravated robbery) (max 14 years imprisonment)
39. Section 236(1) Crimes Act (causing grievous bodily harm with intent to rob or assault with intent to rob in specified circumstances) (max 14 years imprisonment)
40. Section 236(2) Crimes Act (assault with intent to rob) (max 7 years imprisonment)

Appendix C: Issues raised in submissions against the Bill

1. Contravenes natural justice
2. Does not support mandatory life without parole
3. Increased legal aid costs because strike offences will require senior practitioners
4. Will cause chaos in penal system
5. Stronger emphasis on restorative justice
6. Punitive culture unhealthy for society
7. Will compound society's lack of concern for elderly
8. Section 86D raises double jeopardy issue
9. Will put judges in difficult position
10. Recommend putting in place Ombudsman's 2007 recommendations
11. Incarceration shouldn't be a cure-all
12. Sensible Sentencing Trust does not understand crime and its causes
13. Bi-cultural, value-based model in schools
14. More recognition and resources for NGOs involved in early intervention, Restorative Justice, etc.
15. Effect on youth — longer in prison without rehab
16. Recent increase in statistics is due to increased reporting of domestic violence
17. NZ Law is based on inclusion and redemption
18. Breaches separation of powers
19. Will put increased demands on forensic mental health services that cannot be met
20. Evidence shows modest reduction in crime rates accompanying significant increases in sentencing
21. Danger of Police ratcheting up charges to meet strike threshold
22. Incapacitation to reduce crime is unrealistic due to cost
23. Alternative: parole eligibility at a later point
24. Manifest injustice is a high threshold
25. Explanatory Note is missing key information
26. If offenders are detained for long periods, there must be a commitment to rehabilitation
27. Regime is inconsistent with parole framework
28. Lists of offences in legislation are problematic due to inconsistencies
29. Does not support retroactive effect
30. Does not support inclusion of more offences
31. May decrease confidence in Criminal Justice System among Maori
32. Prisoners should be treated with dignity and respect
33. Prisons will have to be improved to meet UN standards
34. Contrary to Te Ao Maori principles

Appendix D: Issues raised in submissions in favour of the Bill

1. Concerns about immigrants;
2. It was society's right to punish offenders;
3. the regime would allow judges to apply sentences that better reflect the seriousness of the crime and impose harsher sentences;
4. The regime would reduce reoffending by incapacitating offenders;
5. Concern about the younger age at which offending begins;
6. Major crime was being fuelled by imported media;
7. The criminal process was unnecessarily convoluted, with too many appeals;
8. Criminals were not deterred by prison sentences, and should therefore be excluded from the community;
9. The financial costs of the regime should not be a consideration;
10. The regime would stop the cycle where prison time was seen as a badge of honour;
11. Other areas of government need to address the over-representation of Maori and Pasifika peoples in prison;
12. NZ has a low imprisonment rate;
13. Crime is underreported in Police statistics;
14. The regime would affect 0.3% of the current prison population;
15. There was evidence that "getting tough on crime" worked;
16. The BORA fails law-abiding people;
17. Life sentences are a good idea;
18. Habitual offenders commit a majority of offences;
19. The regime would eliminate sentencing disparities;
20. The crime rate fell in USA after implementation of their three-strikes regimes;
21. Current rehabilitation programmes do not work;
22. Youth need to be educated;
23. There was international research showing that three-strike systems do not criminalise ethnic minorities;
24. There was no comparison between the regime proposed in the Bill, and the USA system (fortunately not from the same person who supported the regime because the USA system works);
25. The regime would not result in cruel and unusual penalties;
26. Preventive detention was not a satisfactory alternative because victims would still be re-victimised at parole hearings;
27. The regime should not focus on reform;
28. There was inadequate police presence in rural communities.

Appendix E: Amendments suggested by one submitter

1. More than three strikes
2. Send young offenders into the Army
3. Ignorance of the list of strike offences should not be a defence
4. Compulsory rehab programs
5. More consideration for rehab programs
6. More support systems for victims
7. All criminals should be sterilised
8. Eugenics should be considered
9. Gang members should not be eligible for parole
10. NZ version should avoid problems of US version
11. Life sentences for drug offences
12. Where appropriate, three-strike system should be applied to first time offenders
13. Believes home invasion and theft are organised crime
14. Combine with accessible addiction treatment
15. Offenders sentenced to 25 years released once they reach 55 years of age and 15 years have been served
16. New, separate prison wings for drink/drugged drivers
17. Failure to notify victims should invalidate parole hearings
18. Sentences doubled if positive drug test
19. Parole violations should be actioned immediately
20. Prisoners should be assessed on education levels
21. Ban gangs
22. Remove troubled children from their environment
23. Wants imprisonment for child pornography
24. Offenders who offend against children should have any future children taken from them
25. No compensation for prisoners
26. Increased anti-drug efforts
27. Focus resources on helping offenders on first appearance
28. Life sentences for violent offenders
29. Significant sentences for convicted directors and CEOs
30. Harsher sentences for home invasion
31. Investigate offenders re Maori land ownership
32. Public safety should be paramount in all legislation
33. More prison funding
34. No appeals for repeat offenders
35. Some non-violent offenders offered home detention to mitigate expanding prison population

36. Wants Maori leaders to condemn crime
37. Reintroduce corporal punishment in schools
38. Legal aid for victims
39. Judges held responsible for repeat offenders
40. 17-year minimum sentence for all murders
41. 25-year minimum sentence for certain murders
42. Legal aid only for first time offenders
43. Licence cancellation/suspension for car thieves/car chases
44. No defence lawyers allowed — self rep only
45. 3 strike system for all offenders
46. Wants more emphasis on first serious crime
47. Police should spend less time on motorists
48. Harsher sentences for deterrence
49. Build more prisons
50. Better education from birth
51. 25-year MPI for serious offences
52. Young offenders should be closely looked at
53. Allow victim's family to be merciful
54. It's racist, sexist and ageist to notice disproportionate impact on Maori
55. Look at Canadian system
56. Cases being brought to court quicker
57. Get rid of drugs
58. ROC/ROI results should be available to the courts
59. No legal aid for violent offenders
60. Concessions for early guilty plea
61. Any offence resulting in permanent disability or loss of life should always result in prison
62. Chemical castration for serial rapists
63. More police presence
64. Violent offending resulting in permanent disability should attract 2 strikes
65. Separate facilities for young offenders
66. Educate prisoners
67. Morale/humanity education in prisons
68. Prisoners should not be allowed to father children
69. No sentences less than 75% of the max
70. Raise drinking age to 20
71. More speed cameras
72. Whipping criminals instead of imprisonment
73. Bail and parole should not be abolished for violent criminals
74. Community Safety Act to protect public

75. Also address causes of crime
76. Jury to give strike warnings instead of judges
77. More punitive sentences
78. BORA concerns can be dealt with by adding a presumption that third strike offenders pose a significant risk
79. Confiscation of profits from drug dealing
80. Random visits by police
81. Police should have more powers
82. Fewer qualifying offences
83. Only prosecute more serious crimes
84. No automatic LWOP for second strike murder
85. Increase max sentences
86. Life sentences for life
87. Mandatory imprisonment for strike 2
88. Proceedings in indictable jurisdiction
89. 14-year MPI instead of LWOP for third strike manslaughter

Table A: Initial Estimate of Costs Incurred by the Regime

Years after Implementation	Estimated number of additional beds	Capital Costs (total $m)	Operating Costs per year ($m)
5	44	17.6	4.0
10	117	46.8	10.6
15	190	76.0	17.3
20	263	105.2	23.9
25	335	134.0	30.5
30	408	163.2	37.1
35	481	192.4	43.8
40	554	221.6	50.4
45	627	250.8	57.1
50	700	280.0	63.7

Table B: Spreadsheet of Section 86D and 86E Cases

s86D (Stage 3 offences other than murder)

Case Name	Offender Name	Court	Location	Judge	Counsel	Date Decided	Strike	Sentence under s86D
R v Campbell [2016] NZHC 2817	Raven Casey Campbell	High Court	Hamilton	Kit Toogood	Thomas Sutcliffe	24/11/2016	3	7 years imprisonment without parole
R v Ratima [2017] NZHC 252	Kingi Ratima	High Court	Hamilton	Gordon	A-M Beveridge	23/02/2017	3	10 years imprisonment without parole
R v Fitzgerald [2018] NZHC 1015	Daniel Clinton Fitzgerald	High Court	Wellington	Simon France	Kevin Preston & A C R M Jeffares	10/05/2018	3	7 years imprisonment without parole
R v Waitokia [2018] NZHC 2146	Hayze Neihana Waitokia	High Court	Whanganui	David Collins	Roger B Crowley	21/08/2018	3	7 years imprisonment without parole
R v Nuku [2018] NZHC 2510	Stead Nuku	High Court	Auckland	Matthew Downs	AS Bloem	26/09/2018	3	7 years imprisonment without parole
R v Pomee [2018] NZHC 2891	George Christopher Pomee	High Court	Auckland	Matthew Downs	LB Cordwell	09/11/2018	3	14 years imprisonment without parole
R v Sanders [2019] NZHC 164	Bailey Desmond Sanders	High Court	Auckland	Pheroze Jagose	G A Harvey and K-A Stoikoff	15/02/2019	3	14 years imprisonment without parole
R v Rutherford [2019] NZHC 1628	Grahame John Rutherford	High Court	Wellington	Francis Cooke	L A Scott	12/07/2019	3	10 years imprisonment without parole
R v Williams [2019] NZHC 2832	Stephen Williams	High Court	Wellington	Peter Churchman	B Crowley	1/11/2019	3	14 years imprisonment without parole
R v Wereta [2019] NZHC 2734	Damian Karl Wereta	High Court	Auckland	Matthew Downs	Ron M Mansfield	25/10/2019	3	14 years imprisonment without parole
R v Winitana [2019] NZHC 3229	Leo Winitana	High Court	Wellington	Francis Cooke	M J Phelps	9/12/2019	3	7 years imprisonment without parole
R v Mitai-Ngatai [2020] NZHC 410	Tauhu David Mitai-Ngatai	High Court	Tauranga	Pheroze Jagose	B J Hesketh	5/12/2020	3	7 years imprisonment without parole
R v Edmonds [2020] NZHC 557	Peter Edmonds	High Court	Christchurch	Cameron Mander	DJH Stringer	18/03/2020	3	7 years imprisonment without parole
R v Nuku [2020] NZHC 506	Stead Nuku	High Court	Auckland	Sarah Katz	E Priest & P Wilks	13/03/2020	4	14 years imprisonment without parole
R v Love [2020] NZHC 1215	Jamie Natata Love	High Court	Christchurch	Cameron Mander	S J Hembrow	3/06/2020	3	10 years imprisonment without parole
R v Sheers [2020] NZHC 1596	Conrad John Sheers	High Court	Auckland	Mark Woolford	Maria Pecotic	7/07/2020	3	14 years imprisonment without parole
R v Allen [2020] NZHC 1796	Wiremu Tamahana Allen	High Court	Wellington	Clark	C J Nicholls	23/07/2020	3	7 years imprisonment without parole

Case Name	First Strike Offence	First Strike Sentence	Date of First Strike Offending	Date of Conviction for First Strike Offence	Estimated End of Sentence for First Strike Offence	Second Strike Offence	Second Strike Sentence	Date of Second Strike Offending	Date of Conviction for Second Strike Offence	Estimated End of Sentence for Second Strike Offence
R v Campbell [2016] NZHC 2817	Robbery (10 years)	14 months intensive supervision, 4 months community detention	September 2012	March 2013	May 2014 release; 4 months community detention	Aggravated robbery (14 years)	3 years 4 months imprisonment	August 2013	7 April 2014	
R v Ratima [2017] NZHC 252	Robbery (10 years)	1 year imprisonment	14 May 2014	4 August 2014	August 2015	Robbery (10 years)	1 year 4 months imprisonment without parole	25 November 2014	10 June 2015	April 2016 (dates don't match up? Backdate for time se
R v Fitzgerald [2018] NZHC 1015	Indecent assault (7 years)	11 months imprisonment	1 October 2012 ((https://global	convicted 26 October 2012 and remanded i	2013	Indecent assault (7 years)	4 months imprisonment	2015		
R v Waitokia [2018] NZHC 2146	Wounding with intent to injure (7 years)	5 months home detention		Sentenced in 2012	2012	Sexual violation by unlawful sexual connection (20 years)	3 years imprisonment		Sentenced in 2014	
R v Nuku [2018] NZHC 2510	Wounding with intent to cause grievous bodily harm (14 years)	5 years 9 months imprisonment	14 July 2015	22 December 2015 ((https://global-factiva-	2021	Wounding with intent to cause grievous bodily harm (14 years)	3 years 10 months imprisonment (cumulative)	19 October 2016	Sentenced 3 November 2017	2024
R v Pomee [2018] NZHC 2891	Robbery (10 years)	1 year 11 months imprisonment	11 & 14 November 2013		2016	Aggravated robbery (14 years)	1 year 4 months imprisonment	23 April 2015		
R v Sanders [2019] NZHC 164	Wounding with intent to injure (7 years)	2 years 8 months imprisonment	2014			Injuring with intent to cause grevious bodily harm (10 years)	5 years imprisonment (cumulative)	2016 (while in prison)		2024, parole in 2021
R v Rutherford [2019] NZHC 1628	Indecent act on a child under 12 (10 years)	2 years community detention		2015	2017	Indecent assault on a female under 12 (10 years)	8 months imprisonment		2016	
R v Williams [2019] NZHC 2832	Attempted murder (14 years)	5 years 8 months imprisonment	8 August 2014	Sentenced 26 November 2014	serving life imprisonment; eligible for parole 2019	Attempted murder (14 years)	Preventive detention; 10 year MPI	11 December 2016	sentenced 14 March 2017	serving life imprisonment and preventive detention; e
R v Wereta [2019] NZHC 2734	Aggravated robbery (14 years); Causing grievous bodily harm with	10 years 6 months imprisonment		Sentenced 1 February 2013	2023	Wounding with intent to cause grievous bodily harm (14 years)	7 years 9 months	15 September 2013	Sentenced 17 September 2015	2021
R v Winitana [2019] NZHC 3229	Aggravated robbery (14 years)	3 years imprisonment		2011	2014	Aggravated robbery (14 years)	6 years	2016	Sentenced May 2016	2021
R v Mitai-Ngatai [2020] NZHC 410						Indecent assault (7 years)	13.5 months imprisonment without parole		2017	2018
R v Edmonds [2020] NZHC 557	Wounding with intent to injure (7 years)	9 months home detention	9 November 2014			Robbery (10 years)	9 months imprisonment	10 June 2016		
R v Nuku [2020] NZHC 506	Wounding with intent to cause grievous bodily harm (14 years)	5 years 9 months imprisonment	14 July 2015	22 December 2015 ((https://global-factiva-	2021	Wounding with intent to cause grievous bodily harm (14 years)	3 years 10 months imprisonment (cumulative)	19 October 2016	Sentenced 3 November 2017	2024
R v Love [2020] NZHC 1215	Robbery (10 years)	2 years 4 months imprisonment		February 2013	2015	Robbery (10 years)	Compulsory treatment order	7 February 2019	22 July 2019	
R v Sheers [2020] NZHC 1596	Aggravated robbery (14 years)		2015	11 September 2015		Aggravated robbery (14 years)		2015	15 July 2016	
R v Allen [2020] NZHC 1796										

Case Name	Third Strike Offence	Third Strike Sentence	Date of Third Strike Offending	Sentence but for s86D (*Harrison* step 2)	Fourth Strike Offence	Fourth Strike Sentence	Date of Fourth Strike Offending	Fourth Strike Sentence but for s86D (*Harrison* step 2)	Personal circumstances	Manifest injustice found	Crown agrees with manifest injustice
R v Campbell [2016] NZHC 2817	Indecent assault (7 years)	7 years imprisonment; normal parole rules apply	17 May 2016	12 months imprisonment					Relatively young, no previous sexual offending, genuin	Yes	Yes
R v Ratima [2017] NZHC 252	Robbery (10 years)	10 years imprisonment with 5 year MPI	15 May 2016 (3 weeks after release)	3 years 11 months; parole after 1 year 3 months					Relatively young, mental health difficulties (bipolar aff	Yes	No
R v Fitzgerald [2018] NZHC 1015	Indecent assault (7 years)	7 years imprisonment; normal parole rules apply	3 December 2016 ((https://global-factiva-com.ezproxy.c	*Truncated consideration because Crown concurred					Has significant mental health issues (schizophrenia), an	Yes	Yes
R v Waitokia [2018] NZHC 2146	Wounding with intent to injure (7 years)	7 years imprisonment without parole	4 January 2018	2 years 3 months imprisonment					Genuine regret, desire to undertake rehabilitative mea	No	No
R v Nuku [2018] NZHC 2510	Wounding with intent to injure (7 years)	Preventive detention; 7 year MPI		5 years 1 month imprisonment					Dysfunctional childhood, Guilty plea (however very stro	No	No
R v Pomee [2018] NZHC 2891	Aggravated robbery & Kidnapping (14 years)	14 years imprisonment; 5.5 year MPI	3 & 9 August 2017	6 years 3 months imprisonment; 50% MPI					Age, desire to rehabilitate, guilty plea	Yes	No
R v Sanders [2019] NZHC 164	Wounding with intent to cause grevious bodi	14 years imprisonment; 7 year MPI	21 July 2018	7 years imprisonment; 50% MPI					Dysfunctional childhood, lack of redemptive measures	Yes	No
R v Rutherford [2019] NZHC 1628	Indecent act on child (10 years)	10 years imprisonment; normal parole rules apply	7 February 2019	14 months' imprisonment					Guilty plea, no previous opportunity to undertake a tre	Yes	No
R v Williams [2019] NZHC 2832	Attempted murder (14 years)	Preventive detention; 14 year MPI	30 July 2019	9-10.5 years imprisonment; 66% MPI					Guilty plea, but no remorse; high risk of violent reoffen	No	No
R v Wereta [2019] NZHC 2734	Wounding with intent to cause grevious bodi	Preventive detention; 8 year MPI	12 November 2017	10 years imprisonment; 66% MPI					Guilty plea, but no remorse; extensive history of violen	Yes	No
R v Winitana [2019] NZHC 3229	Wounding with intent to injure (7 years)	7 years imprisonment without parole	4 July 2018	4 years 3 months imprisonment; 66% MPI					Guilty plea; Dysfunctional childhood; drug and alcohol u	No	No
R v Mitai-Ngatai [2020] NZHC 410	Indecent assault (7 years)	7 years imprisonment; normal parole rules apply	8 March 2019	14 to 24 months imprisonment					Offending driven by substance abuse; Willing to addres	Yes	No
R v Edmonds [2020] NZHC 557	Wounding with intent to injure (7 years)	7 years imprisonment; 3 years 6 months MPI	25 November 2018	5 years 2 months imprisonment					High risk of reoffending, denies wrongdoing, uninteres	Yes	No
R v Nuku [2020] NZHC 506	Wounding with intent to injure (7 years)	Preventive detention; 7 year MPI	31 October 2017 & 23 November 2017	5 years 1 month imprisonment	Wounding with intent to cause grievous bodily harm (14 years)	Preventive detention imposed, 14 year MPI	8-Apr-19	10.5 years, 2/3 MPI	Guilty plea; Dysfunctional childhood; systemic deprivat	No	No
R v Love [2020] NZHC 1215	Robbery (10 years)	10 years imprisonment; 3 years 4 months MPI	15 August 2020	18 months imprisonment					High risk of reoffending; bipolar disorder, controlled by	Yes	Yes
R v Sheers [2020] NZHC 1596	Aggravated robbery (14 years)	14 years imprisonment; normal parole rules apply	15 March 2019	2.5 to 3 year					ADHD; FASD; functions at a level below his age	Yes	No
R v Allen [2020] NZHC 1796	Wouding with reckless disregard (7 years)	7 years imprisonment; normal parole rules apply	15 June 2019	2 years 1 month					Guilty plea; Abusive and dysfunctional childhood; subst	Yes	No

s86E (When murder is a stage-2 or stage-3 offence)

Case Name	Offender Name	Court	Location	Judge	Counsel	Date Decided	Strike	Sentence under s86E
R v Kingi [2016] NZHC 139	Turei Rawiri Kingi	High Court	Hamilton	Edwin Wylie	Thomas Sutcliffe	11/02/2016	2	Life imprisonment without parole
R v Herkt [2016] NZHC 284	Ben Bosch Herkt	High Court	Auckland	Simon Moore	Peter Kaye	26/02/2016	2	Life imprisonment without parole
R v Eruera [2016] NZHC 532	Hiakita Hori Eruera	High Court	Rotorua	Christian Whata	E R Fairbrother QC & M M Dorset	23/03/2016	2	Life imprisonment without parole
R v Harrison [2016] 3 NZLR 602	Shane Pierre Harrison	Court of Appeal		Ellen France P, Randerson, Harrison, Stevens and Miller JJ	Christopher WJ Stevenson & SJ Gill	10/08/2016	2	Life imprisonment without parole
R v Turner [2016] 3 NZLR 602	Justin Vance Turner	Court of Appeal		Ellen France P, Randerson, Harrison, Stevens and Miller JJ	Nick P Chisnall & L Freyer	10/08/2016	2	Life imprisonment without parole
R v Heihei [2017] NZHC 2243	Jason Jake Heihei	High Court	Whangarei	Graham Lang	Kelly Ellis	15/09/2017	2	Life imprisonment without parole
R v Puna [2018] NZHC 79	Johnnie Puna	High Court	Napier	Helen Cull	Eric J Forster (Elvidge & Partners)	8/02/2018	2	Life imprisonment without parole
R v Davis [2018] NZHC 1162	Dylyn Mitchell Davis	High Court	Hamilton	Paul Davidson	Thomas Sutcliffe & PJA Buckle	22/05/2018	3	Life imprisonment without parole
R v Alexander [2018] NZHC 1584	Jayden Shane Alexander	High Court	Timaru	Nicholas Davidson	James R Rapley & Paul Bradford	29/06/2018	2	Life imprisonment without parole
R v Tai [2018] NZHC 1602	Turiarangi Tai	High Court	Auckland	Matthew Muir	Peter J Kaye & R Keam	29/06/2018	2	Life imprisonment without parole
R v Hone [2018] NZHC 2605	Martin Hone	High Court	Rotorua	Geoffrey Venning	W Lawson (Bill Lawson) (Lance Lawson, R	05/10/2018	2	Life imprisonment without parole
R v Lothian [2019] NZHC 2938	David James Lothian	High Court	Napier	Robert Dobson	R B Philip	11/11/2019	2	Life imprisonment without parole
R v Ngatai [2020] NZHC 2106	Tyson Ellis Ngatai	High Court	Whanganui	Christine Grice	P M Keegan & J Waugh	14/08/2020	2	Life imprisonment without parole
R v Webber [2020] NZHC 2328; BC2	Matthew Winara Webber	High Court	Christchurch	Nation	K Gray & K Bucher	8/09/2020	3	Life imprisonment without parole

Case Name	First Strike Offence	First Strike Sentence	Date of First Strike Offending	Date of Conviction for First Strike Offence	Estimated End of Sentence for First Strike Offence	Second Strike Offence	Second Strike Sentence	Date of Second Strike Offending	Date of Conviction for Second Strike Offence	Estimated End of Sentence for Second Strike Offence
R v Kingi [2016] NZHC 139	Robbery (10 years)	(relatively minor)		11 April 2014		Murder (Life; MPI according to s103/104)	Life imprisonment with 13 year MPI	10 August 2015	1 September 2015	Not Applicable
R v Herkt [2016] NZHC 284	Robbery (10 years)	3 years 6 months imprisonment	04/01/2012; 10/01/2012 ((https:	27 July 2012; sentenced in 2012	July 2015	Murder (Life; MPI according to s103/104)	Life imprisonment with 12 year MPI	17 November 2014	05/11/2015 ((https://global-factiva-com.ezprox	Not Applicable
R v Eruera [2016] NZHC 532	Injuring with intent to cause grievous bodily harm (10 years)	4 years imprisonment		2010	2014	Murder (Life; MPI according to s103/104)	Life imprisonment with 17 year MPI	29 November 2014 (still subject to parole condi	11/12/2015 ((https://global-factiva-com.ezprox	Not Applicable
R v Harrison [2016] 3 NZLR 602	Indecent assault (7 years)	1 year 4 months imprisonment		2011	2012	Murder (Life; MPI according to s103/104)	Life imprisonment with 13 year MPI	22 August 2013	25/09/2014 ((https://global-factiva-com.ezprox	Not Applicable
R v Turner [2016] 3 NZLR 602	Wounding with intent to injure (7 years)	3 years 4 months imprisonment	2010		15 January 2014	Murder (Life; MPI according to s103/104)	Life imprisonment with 17 year MPI	22 March 2014 (2 months after release)	08/10/2014 ((https://global-factiva-com.ezprox	Not Applicable
R v Heihei [2017] NZHC 2243	Indecent assault (7 years)	4 months home detention		sentenced on 24 June 2014	March 2015	Murder (Life; MPI according to s103/104)	Life imprisonment with 10 year MPI	22 July 2016		Not Applicable
R v Puna [2018] NZHC 79	Aggravated robbery (14 years)	9 months community supervision; 6 months community detention		2016	2017	Murder (Life; MPI according to s103/104)	Life imprisonment with 14 year MPI	5 February 2017	24 November 2017 ((https://global-factiva-com	Not Applicable
R v Davis [2018] NZHC 1162	Wounding with intent to injure (7 years)	1 year 6 months imprisonment	(R v Davis DC Hamilton CRI-201	2 July 2014	2016	Aggravated robbery (14 years)	2 years 4.5 months imprisonment	March 2015	(R v Davis [2015] NZDC 15681)	12 August 2017 ((https://global-factiva-com.ezproxy.ca
R v Alexander [2018] NZHC 1584	Wounding with intent to injure (7 years)	1 year 11 months		17 August 2015	April 2016	Murder (Life; MPI according to s103/104)	Life imprisonment with 11 year MPI	13 September 2016 (5 months after release)	3 March 2018	Not Applicable
R v Tai [2018] NZHC 1602	Wounding with intent to injure (7 years)	9 months imprisonment	January 2016?	10 May 2016	Feb 2017	Murder (Life; MPI according to s103/104)	Life imprisonment with 17 year MPI	4 April 2017	28 March 2018 ((https://www.radionz.co.nz/ne	Not Applicable
R v Hone [2018] NZHC 2605	Unlawful sexual connection (20 years)					Murder (Life; MPI according to s103/104)	Life imprisonment with 20 year MPI	7 August 2017 (on prison release and subject to	5 October 2018 ((https://global-factiva-com.ez	Not Applicable
R v Lothian [2019] NZHC 2938	Wounding with reckless disregard (7 years)	2 years 5 months imprisonment		2013	2015	Murder (Life; MPI according to s103/104)	Life imprisonment with 20 year MPI	29 September 2018	24 September 2018 ((https://global-factiva-com	Not Applicable
R v Ngatai [2020] NZHC 2106	Aggravated robbery (14 years)	5 years 5 months imprisonment (served 4 years)			Apr-19	Murder (Life; MPI according to s103/104)	Life imprisonment with 15 year MPI	20 September 2019	29 June 2020 ((https://global-factiva-com.ezpr	Not Applicable
R v Webber [2020] NZHC 2328; BC2	Aggravated robbery (14 years)	3 years 6 months imprisonment ((https://global-factiva-com.ezprox	28 September 2010	Sentenced on 23 May 2012	2015	Aggravated robbery (14 years)	1 year 9 months imprisonment ((https://global-	30 April 2015	10 September 2015	

Case Name	Third Strike Offence	Third Strike Sentence	Date of Third Strike Offending	Sentence but for s86E (*Harrison* step 2)	Personal circumstances	Manifest injustice found	Crown agrees with manifest injustice
R v Kingi [2016] NZHC 139	Not Applicable	Not Applicable	Not Applicable	pre-Harrison	Relative youth, first strike relatively minor, present offending not t	Yes	No
R v Herkt [2016] NZHC 284	Not Applicable	Not Applicable	Not Applicable	pre-Harrison	Remorse, age (39), circumstances of offending less serious, no viol	Yes	No
R v Eruera [2016] NZHC 532	Not Applicable	Not Applicable	Not Applicable	Life imprisonment with 17 year MPI (s104)	Provocation — circumstances do not engage the need for deterren	Yes	No
R v Harrison [2016] 3 NZLR 602	Not Applicable	Not Applicable	Not Applicable	Life imprisonment with 13 year MPI	Relative youth, mental health, guilty plea, attempts to live a more	Yes	No
R v Turner [2016] 3 NZLR 602	Not Applicable	Not Applicable	Not Applicable	Life imprisonment with 17 year MPI (s104)	Guilty plea, mental health (not on prescribed anti-psychotic medic	Yes	No
R v Heihei [2017] NZHC 2243	Not Applicable	Not Applicable	Not Applicable	Life imprisonment with 10 year MPI	Age, guilty plea, views of the victims, nothing in his criminal histor	Yes	Yes
R v Puna [2018] NZHC 79	Not Applicable	Not Applicable	Not Applicable	Life imprisonment with 14 year MPI	Mother's pre-natal use of alcohol and drugs, engaged well in rehab	Yes	Yes
R v Davis [2018] NZHC 1162	Murder (Life; MPI according to s103/104)	Life imprisonment with 20 year MPI (s104)	4 February 2018 (5 months after release)	Life imprisonment with 14 year MPI	ADHD at a young age, suicide attempt in 2014. Many prior convictio	Yes	No
R v Alexander [2018] NZHC 1584	Not Applicable	Not Applicable	Not Applicable	Life imprisonment with 11 year MPI	Expression of extreme remorse and distress. Significant criminal hi	Yes	Yes
R v Tai [2018] NZHC 1602	Not Applicable	Not Applicable	Not Applicable	Life imprisonment with 17 year MPI (s104)	Youth, victim of sustained physical abuse by his father from age 5,	Yes	No
R v Hone [2018] NZHC 2605	Not Applicable	Not Applicable	Not Applicable	not stated	Relative youth, PTSD diagnosis, second stage murder rather than th	Yes	Yes
R v Lothian [2019] NZHC 2938	Not Applicable	Not Applicable	Not Applicable	Life imprisonment with 20 year MPI (s104)	Guilty plea, remorse, age (27), first strike offending relatively less s	Yes	No
R v Ngatai [2020] NZHC 2106	Not Applicable	Not Applicable	Not Applicable	not stated	Guilty plea; dysfunctional childhood; remorse	Yes	Yes
R v Webber [2020] NZHC 2328; BC2	Murder	Life imprisonment with 15 year MPI	8 December 2018 ((https://global-factiva-com.ezproxy.c	not stated	Guilty plea; dysfunctional childhood; desire to separate from gang	Yes	Yes

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