

New Zealand Law Society

SUBMISSION ON SENTENCING AND PAROLE REFORM BILL

Introduction

1. This bill has two purposes:
 - 1.1. Creating a three stage sentencing regime with mandatory elements providing for increasing consequences for serious repeat offenders (clause 5); and
 - 1.2. Providing courts with the option of imposing a sentence of life without parole in the “worst” cases of murder (clause 7).
2. While the Society usually refrains from commenting on the policy behind a bill, this is an exceptional case. The three stage sentencing regime proposed in the bill has caused concern and disquiet among legal practitioners experienced in the criminal justice system.

Summary of submission

3. The proposed new ss86A to 86H in clause 5, to the extent that they set out a mandatory sentencing regime, constitute cruel and disproportionately severe treatment or punishment in terms of s9 of the New Zealand Bill of Rights Act 1990 (NZBORA), which cannot be justified in terms of s5 of the NZBORA.
4. The threshold established for the non-application of the new mandatory sentences - "manifestly unjust" - is a high threshold, which suggests that a significant level of injustice will be tolerated.
5. The mandatory sentencing regime proposed may constitute "inhuman" treatment under relevant international instruments because of restrictions on the ability of the courts and the Parole Board to consider the individual circumstances of a case.
6. A mandatory sentencing regime that overrides the sentencing principles contained in the Sentencing Act 2002 is likely to undermine confidence in the justice system.
7. There is no basis for the radical changes proposed by the bill, in particular clause 5. There is also no evidence that what is proposed would solve the problems the bill seeks to address.

8. The existing sentencing option of preventive detention deals adequately with the aims of the bill.

Recommendation

9. That the bill be withdrawn.

Inconsistency with the New Zealand Bill of Rights Act 1990 - Disproportionately severe treatment

10. Section 9 of NZBORA provides:

“Right not to be subjected to torture or cruel treatment -

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.”

11. The proposed s86D provides for life imprisonment for a third serious violent offence attracting a qualifying sentence, and also for a non-parole period of 25 years unless the court is satisfied that it would be manifestly unjust to impose such a period.
12. The proposed s86E provides for a life sentence without parole for offenders convicted of murder as their second or third listed offence, unless it would be manifestly unjust to impose such a sentence.
13. The mandatory nature of the proposed regime would result in there being some cases where the offender receives disproportionately severe treatment or punishment as a result of the inability of the courts to apply the sentencing principles contained in ss7 and 8 of the Sentencing Act 2002.
14. The Society endorses the analysis and comments in relation to the imposition of life imprisonment for all qualifying listed offences contained in the Interim Report of the Attorney-General under the NZBORA on this bill.
15. It is submitted that:
- 15.1. The term “manifestly unjust” suggests that injustice will be tolerated if the high threshold of "manifestly unjust" is not established.
- 15.2. Such a sentence imposed without taking all the circumstances into account has the potential to be disproportionately severe treatment or punishment. This would authorise the imposition of sentences even when that imposition would constitute a breach of s9 of the NZBORA, which cannot be justified under s5 (even assuming that

it is theoretically possible for something disproportionate to ever be capable of justification as “reasonable” under s5 of the NZBORA).

Inconsistency with New Zealand’s international obligations in respect of inhuman treatment or punishment

16. Section 9 of the NZBORA prohibits "cruel" treatment but does not specifically refer to "inhuman treatment". In practice inhuman treatment is also likely to be cruel.
17. New Zealand is a signatory to the International Covenant on Civil and Political Rights and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Both instruments prohibit "cruel, inhuman or degrading treatment or punishment"¹.
18. What might constitute cruel or inhuman treatment was considered by the European Court of Human Rights in *A v United Kingdom*². At paragraph 20 of the judgment the Court reiterated that “ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative. It depends on the circumstances of the case, the sex, age and state of health of the victim.”
19. The European Court of Human Rights has held that a disproportionately severe sentence of imprisonment could constitute "inhuman punishment" – see *Weeks v United Kingdom*³ and *Hussain v United Kingdom*⁴.
20. Because of restrictions on the court’s ability to consider relevant factors in relation to the particular circumstances of an offence, sentences resulting from the bill may well result in cruel or inhuman treatment. Circumstances of the offences which ought to provide guidance in determining any sentence for offenders subject to the proposed regime may become irrelevant. Factors such as the circumstances leading to the offence, and any mental impairment or intellectual disability, may not be considered, because of the requirement to impose a life sentence with a minimum non-parole period of 25 years, or a life sentence without parole, unless the court is satisfied that it would be manifestly unjust to do so.

Inconsistency with the principles underlying the Sentencing Act 2002

21. Sentencing involves balancing a range of factors, including the nature of the offence, the age and other personal circumstances of the offender, prospects of reoffending and the need to

¹ Article 7, International Covenant on Civil and Political Rights; article 16, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.

² (1998) 27 EHRR 611.

³ (1987) 10 EHRR 293.

⁴ (1996) 22 HRR 1.

deter offending and protect the public. These principles have been codified in ss7 and 8 of the Sentencing Act 2002.

22. Section 7 of the Sentencing Act 2002 sets out the purposes for which a court may sentence. Eight specific purposes are listed.
23. Section 8 of the Sentencing Act 2002 sets out the principles of sentencing. It provides that in sentencing or otherwise dealing with an offender the court must take into account a list of 10 different factors.
24. The proposed new section 86H provides for inconsistent provisions in the Sentencing Act to be overridden. The bill introduces a range of mandatory sentences that will require the courts to disregard the principles contained ss7 and 8 of the Sentencing Act.
25. The mandatory regime proposed will restrict either completely or substantially the ability of both the courts and the Parole Board to take account of:
 - intellectual impairment;
 - mental impairment;
 - the fact that qualifying offences have been committed over a short period; and
 - the fact that qualifying offences have been committed over a long period.
26. As noted above, while an offender is able to establish (in relation to a life sentence imposed for a listed offence under the proposed new ss86D or 86E) that the sentence would be "manifestly unjust", the phrase "manifestly unjust" suggests a very high threshold of injustice.
27. New Zealand's justice system and current sentencing regime represent the accumulated wisdom built up over a lengthy period. Highly trained judges are appointed by the Governor-General on the recommendation of the Executive to preside over the criminal courts. A mandatory sentencing regime effectively suggests that those judges are not competent to make appropriate decisions in the circumstances of each case and therefore undermines the justice system. The significant inconsistencies, disparities and injustices that are likely to arise as a result of the mandatory regime taking effect will undermine public confidence in the system rather than enhance confidence.

Impact in terms of enhancing public safety and public confidence in the criminal justice system

28. The general policy statement in the explanatory note states that the bill is intended to improve public safety and to increase the confidence of victims and the public in the justice system.

29. There is no statistical evidence to demonstrate that the approach being taken is necessary or justified. Nor is there any clear evidence that it will be effective. This is relevant in considering s5 of the NZBORA.
30. The Society is concerned that the provisions will not improve public safety, but may in fact have the opposite effect, leading to an increase in the homicide rate.
31. Studies in the United States of America on the impact of the three-strike laws on homicide rates suggest that the homicide rate tends to increase following the implementation of three-strikes laws in a way that is unable to be ascribed to any other identified source.
32. The first definitive study was done in 2001, by Marvell and Moody.⁵ The study found that “the three-strikes laws are associated with a 10-12 percent short-term increase in homicides and a 23-29 percent long term increase.”⁶ The study also found that:

“The mean number of homicides in the 24 three-strikes states was 537 during the 2 years prior to the laws, which suggests that on average each law caused roughly 60 additional homicides in the short term. This translates to roughly 1,400 in all 24 states (and by not enacting such laws, the remaining 26 states “saved” roughly 1,200 lives). The long-term impact is roughly 3,300 additional homicides per year in the 24 states.

We conducted a wide-ranging search for other possible explanations, and we found nothing that might bring into question these findings”⁷

33. The authors concluded that:

“Because three-strikes laws call for harsh prison terms for criminals with prior convictions, criminals who fear the laws because they have two strikes would be expected to take extra steps to avoid punishment. One such step might be to murder those who can aid in their capture and conviction. The benefit of removing opposition and eliminating potential witnesses, however, must be weighed against the heightened level of effort by the authorities to solve a homicide as opposed to a lesser crime. Because homicides are relatively rare, even if the balance is tipped toward eliminating victims and witnesses in only a very small portion of violent crimes, homicides can still increase noticeably.

Our basic finding is that three-strikes laws produce a 10-12 percent short-term increase in homicides, which implies that roughly .06 percent of violent crimes result in homicides that would not have occurred without the laws (assuming none are multiple homicides). The long-term impact is a 23-29 percent increase, which implies additional homicides in roughly .15 percent of violent crimes. In the absence of three-strikes laws, the homicide rate would initially be 7 percent lower, and the long-run impact would be a 17 percent reduction in homicides. This translates into

⁵ Thomas B Marvell and Carlisle E Moody “The Lethal Effects of Three-Strikes Laws” (2001) 30 *Journal of Legal Studies* 89.

⁶ The long-term effect was calculated in the usual way by a short-run coefficient divided by one minus the sum of the coefficients on the lagged dependent variables.

⁷ Marvell and Moody, p 96.

a long-run impact of 3,300 additional homicides each year. Using \$3.2 million dollars as the value of life, we find that three-strikes laws have a long-run social cost of \$11 billion per year.

The analysis becomes more complex when possible deterrent and incapacitation effects are taken into account, but in the end the basic results are not affected. We found almost no evidence that the laws have crime reduction impacts that might compensate for the additional homicides, although it is possible that there is an incapacitation impact delayed many years. The absence of a noticeable incapacitation impact is supported by the fact that the three-strikes laws have resulted in little or no prison population growth. Given their unintended consequences in terms of human lives, we see no justification for three-strikes laws.”⁸

34. These findings were confirmed in the 2002 paper of Kovandzic et al.⁹ This study also found an increase of homicide rates following the implementation of a three-strikes law. It recommended caution for policy makers, and called for more research to be done, both on the impact of the laws on homicide rates, and on surveys with offenders with respect to their propensity to commit homicide following the passage of three-strikes laws.¹⁰

35. A third study¹¹, by the authors of the Kovandzic paper, also confirmed the trend. The study found that:

“These particular results suggest that homicide rates in cities increase, on average, by 10.4% after a three strikes law is adopted. This finding is consistent with results reported by Kovandzic et al. (2002) and Marvell and Moody (2001). The most likely explanation is that a few criminals, facing lengthy prison terms on conviction for a third strike, may attempt to avoid such penalties by killing victims, witnesses, or police officers to reduce their chances of apprehension and conviction.”¹²

36. Rather than enhancing public confidence in the criminal justice system, the bill may have consequences that would tend to undermine that objective.

⁸ Marvell and Moody, p 106.

⁹ Tomislav V Kovandzic, John J Sloan III, Lynne M Vieraitis “Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of “Three Strikes” in US Cities (1980 – 1999) (2002) 1 *Criminology and Public Policy* 399.

¹⁰ A survey of this kind had been done some years earlier in 1999, 5 years after California first passed its three strikes law. A survey was administered by John Schafer in March 1997 to 604 offenders at the Challenger Memorial Youth Centre (an all male residential lockdown facility in California), of whom 523 chose to complete. The survey found that:

- 70% of the offenders said they would not or probably would not commit a serious or violent crime if they knew that they would receive life in prison, and 61% said they would not if they knew that their sentence was to be doubled.
- However 54% of the offenders indicated “that they would kill or probably would kill witnesses or law enforcement officers to avoid a life sentence. This figure rose to 62% among offenders who claimed gang membership. These findings should serve as a warning to all law enforcement officers that when offenders, especially gang members, have two or more strikes, the likelihood of violence increases substantially.”

This survey was only done on youth offenders in a particular location, so is of limited value. See John R Scahfer “The deterrent effect of three strikes law” *The FBI Law Enforcement Bulletin* 68.4 (April 1999).

¹¹ Tomislav V Kovandzic, John J Sloan III, Lynne M Vieraitis “Striking Out” as Crime Reduction Policy: The Impact of “Three Strikes” Laws on Crime Rates in US Cities”(2004) 21 *Justice Quarterly* 213.

¹² Kovandzic et al 2004, p 225.

37. There is no consistent approach towards charging, and the prosecution would be under serious pressure to bring the correct charge.
38. Judges would also be under pressure at all stages of sentencing, particularly the later ones. The sentence is dependent on the exercise of a particular judge's discretion. One judge might impose a 5-year sentence, and another judge in exactly the same case a 4-year sentence for the same offending.
39. Therefore, it would be possible for an offender who committed a third qualifying offence, who could potentially be liable to 5 years' imprisonment, to receive a sentence of either 4 years and 11 months' imprisonment, or 25 years' imprisonment. This policy will lead to increased costs, particularly as a result of an increased number of appeals.
40. The bill will limit the effectiveness of the Parole Board. Under the Parole Act 2002 offenders serving sentences of preventive detention are required, at sentencing, to be given a minimum non-parole period of at least 5 years. The current regime that offenders should become eligible for parole once they have reached that point is supported.
41. Eligibility for parole is no guarantee of release – it simply means an offender is entitled to a hearing in front of the Board. Under the Parole Act 2002 offenders can be kept in prison for their entire sentence, or until the Board is satisfied they no longer pose an undue risk to the community. All offenders should have the opportunity for rehabilitation and the Parole Board is well qualified to deal with decisions on release.

Sentence of preventive detention

42. The bill provides that, to qualify for each stage, offenders must be liable to a sentence of at least imprisonment for 5 years or more. The present sentence of preventive detention, which has associated with it protections to ensure that it is not imposed inappropriately and is not inappropriately lengthy in practice, meets the needs of victims and the community which the bill purports to meet in dealing with serious violent offenders.
43. Preventive detention is an indeterminate, life-long sentence, which is imposed on the highest-risk offenders and which means they need never be released from jail if they are still considered a risk to the community. Those who are released can be recalled at any point for the rest of their lives. The Sentencing Act 2002 broadened significantly the ability of judges to impose preventive detention. It extended the number of qualifying sexual offences from 12 to 20 and the number of qualifying violent offences from 5 to 18, thereby increasing dramatically the scope of preventive detention. In addition, the Sentencing Act 2002 also removed the requirement for a conviction for a previous specified offence, lowered the

mandatory minimum term from 10 years to 5 years, and lowered the age of eligibility from 21 to 18.

Comments on specific clauses

Clause 5 – New sections 86A to 86H and heading inserted

44. The proposed new s86A defines “*serious violent offence*”. Thirty-seven offences are listed, including incest, indecent assault and aggravated burglary as well as sexual violation, murder, attempted murder and manslaughter. The offences can be categorised as offences of a sexual nature, offences of violence towards the person including certain offences involving firearms, and a number of offences involving violence associated with property offences, for example aggravated burglary, robbery, aggravated robbery and assault with intent to rob.
45. A list of this kind is somewhat arbitrary. Indecent assault (s135) and assault with intent to rob (s236(2)) should not be categorised as serious violent offences. The Society accepts that the proposed regime would require the offending to reach a level of severity that would justify a sentence of 5 years.

Clause 7 – Imposition of minimum period of imprisonment if life imprisonment imposed for murder

46. Clause 7(3) would amend section 103 of the Sentencing Act 2002 by providing that a court may impose a non-parole order in the case of a murderer sentenced to imprisonment for life if the court is satisfied that no minimum term would be sufficient to satisfy one or more of the purposes stated in section 103(2) of the principal Act.

Recommendation

47. That, if the bill is not withdrawn, to be consistent with s103(2) of the Sentencing Act the phrase “1 or more” in the proposed new s86E(2A) be replaced with the words “all or any”.

John Marshall QC
President
23.4.09