

New Zealand Law Society

Submission on Sentencing and Parole Reform Bill (Revised)

Introduction

1. In its original submission the Society took the (for it) exceptional course of commenting on the policy behind a Bill. It noted that the sentencing regime proposed in the Bill had aroused concern and disquiet among legal practitioners experienced in the criminal justice system. The revisions proposed in the Select Committee's interim report have not dispelled the Society's concerns, which relate among other things to inconsistency with the New Zealand Bill of Rights Act 1990; inconsistency with New Zealand's international obligations in respect of inhuman treatment or punishment; and inconsistency with the principles underlying the Sentencing Act 2002.

Change to the threshold for the stages of the regime

2. In the original Bill the threshold was the imposition of a determinate sentence of imprisonment for 5 years or more, or an indeterminate sentence, for a qualifying offence. This provided some assurance that only serious instances of offending would result in the regime coming into play.
3. It is now proposed that the threshold will be a simple conviction, irrespective of the sentence imposed (if any). That will broaden the scope of coverage of the regime.
4. The Society remains of the view, expressed in its original submission, that some of the offences that would be captured by the definition of "serious violent offence" should not be categorised as such; for example, indecent assault (s135 Crimes Act 1961) and assault with intent to rob (s236(2)). However, the offence of acid-throwing with intent to injure or disfigure has a maximum penalty of 14 years and rightly should be included in the list of qualifying offences.
5. In relation to the remaining offences, the Society submits that many of these could be committed in circumstances that are mitigating, yet still result in a conviction. Those circumstances could include:

- 5.1. intellectual impairment;
 - 5.2. mental impairment;
 - 5.3. severe provocation; and
 - 5.4. lengthy periods of good behaviour separating the qualifying offences.
6. While there are some exceptions to the regime in the Bill for situations of manifest injustice:
- 6.1. This is a very high threshold; and
 - 6.2. An exception based on manifest injustice would not apply in the case of first warnings given under s86B, final warnings under section 86C, or orders made under s86C(2). It would apply only to sentences imposed at the third stage, under s86D(2) or s86E. A person convicted in circumstances where s86B or s86C applies would automatically suffer the consequences of the relevant provision even though the behaviour resulting in the conviction took place in highly extenuating circumstances. This would include having to serve a long-term sentence without parole, and a short-term sentence until its expiry.
7. One danger is that juries and judges may be tempted not to convict a defendant in circumstances where a conviction is justified, or judges to make decisions on sentencing, with a view to avoiding what is perceived as the unjust operation of the provisions of the Bill.

Change to the sentence for a qualifying offence at stage three

8. In the revised Bill the mandatory sentence of life imprisonment under s86D is replaced by the maximum term of imprisonment for the relevant offence or offences. While this will result in shorter sentences being imposed at stage three, there is still a likelihood that those mandatory maximum sentences will give rise in some cases to breaches of s9 of the New Zealand Bill of Rights Act and New Zealand's international obligations in respect of inhuman treatment or punishment. Such sentences may also still involve inconsistency with the principles underlying the Sentencing Act 2002.

Changes to the list of qualifying offences

9. The offences of incest and acid-throwing have been removed from the list in the revised Bill. The Society does not agree with the deletion of the offence of acid-throwing.

10. As the Society noted in its earlier submission, inevitably a list of this kind is somewhat arbitrary. The Society took comfort from the fact that the regime proposed in the original Bill would have required the offending to reach a level of severity that would justify a sentence of 5 years. That is no longer the case, due to the threshold for stages of the regime changing to conviction alone. That change will increase the risk of inconsistent and unfair application of the regime.

Amendment of section 86 of the Parole Act 2002 – changes relating to short-term sentences

11. This is discussed in paragraph 6.2 above.

Comments on specific clauses

Section 86B – First warning following conviction for serious violent offence

12. This provision has been redrafted to refer to the situation where a court convicts an offender of one, or more than one, qualifying offences on a single occasion.
13. If more than one conviction is entered, the offending may have taken place over a period of time. It is conceivable that some of the relevant offending may have occurred at a time before a first warning had been given, and some afterwards. In that case, s86C will apply and that the second stage has been reached. Section 86B can apply only if all of the offences for which a conviction is entered were committed before a first warning had been issued.
14. It is not entirely clear what happens if it is not known exactly when the relevant offending took place, in relation to a first warning that has been issued for other offending. This could be the case if the offending took place against a child, or in the distant past, when the charges laid could relate to a lengthy period of time rather than a specific date.

Recommendation

15. That the drafting of s86B(1)(b) be reviewed to make this explicit.

Section 86C – Final warning following conviction for further serious violent offending

16. In the case of multiple convictions, the second stage is reached when convictions are entered on one occasion for qualifying offences other than murder, and the offender had received a first warning at the time at least one of those offences had been committed. Therefore, some of the offending may have taken place before a first warning was issued.
17. Under s86C(2), if the court imposes a determinate sentence for any of the current offences, it must order that the offender serve the full term of the sentence. As the Society reads the provision, this applies even to sentences imposed for offending that predated the first warning.
18. If that reading is correct, this would be unjust.

Recommendation

19. That the Committee satisfy itself that the drafting is clear.

John Marshall QC
President
8 March 2010