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## Three Strikes Legislation Repeal Bill

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*21/12/2021*

## **Submission on the Three Strikes Legislation Repeal Bill**

### **1      Introduction**

- 1.1    The New Zealand Law Society | Te Kāhui Ture o Aotearoa (the **Law Society**) welcomes the opportunity to comment on the Three Strikes Legislation Repeal Bill (the **Bill**).
- 1.2    The Bill, if enacted, will remove the mandatory sentencing requirements introduced into the Sentencing Act 2002 by the Sentencing and Parole Reform Act 2010 (the ‘Three Strikes regime’).
- 1.3    The Law Society supports the repeal of the Three Strikes regime, and reversion to a sentencing regime in which the full individual circumstances of an offender are considered, alongside other factors, to ensure a fair and proportionate sentencing outcome.
- 1.4    However, the Law Society recommends the Bill be amended to include transitional provisions broadly along the lines of those identified by the Ministry of Justice in the Regulatory Impact Statement,<sup>1</sup> so that persons currently in prison and sentenced under the Three Strikes regime have their sentence modified or reconsidered to ensure it is not disproportionate.
- 1.5    The Law Society wishes to be heard in relation to this submission.

### **2      Inclusion of transitional provisions**

- 2.1    If enacted, the Bill will restore sentencing law to the position it was in prior to the introduction of sections 86D and 86E of the Sentencing Act. This is intended to address the issue of excessive and disproportionate sentence outcomes, which arose in at least some cases where the Three Strikes regime imposed mandatory sentencing requirements.
- 2.2    One instance of such an outcome occurred in *Fitzgerald v R*,<sup>2</sup> where the Supreme Court held the sentence imposed on the appellant under s 86D(2) of the Sentencing Act 2002 went ‘well beyond excessive punishment’ and was ‘disproportionately severe,’ and was therefore in breach of section 9 of the New Zealand Bill of Rights Act 1990 (BORA) (the right not to be subjected to disproportionately severe treatment or punishment).
- 2.3    The Regulatory Impact Statement<sup>3</sup> also cites the case of *R v Kingi Ratima*<sup>4</sup> in which the sentencing judge calculated the offending would ordinarily have attracted a sentence of three years and 11 months imprisonment. Under the Three Strikes regime, the court was obliged to impose a 10-year sentence.
- 2.4    The Bill is intended to ensure such outcomes do not occur in the future.
- 2.5    Not every sentence imposed under the Three Strikes regime will necessarily be in breach of section 9. However, it is not currently known whether some are. The Law Society’s primary concern with the Bill as drafted, is that it does not include transitional provisions to address

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<sup>1</sup> Ministry of Justice *Impact Summary: Repeal of the three strikes law* 4 March 2021.

<sup>2</sup> *Fitzgerald v R* [2021] NZSC 131.

<sup>3</sup> Above, n1.

<sup>4</sup> *R v Kingi Ratima* [2017] NZHC 252.

the fact that persons currently in prison may be serving sentences inconsistent with their section 9 BORA rights.

- 2.6 While those sentences were lawfully imposed at the time, it may be that they too could be challenged on the same basis as occurred in *Fitzgerald*. However, it is not sufficient to rely on an individual having both the eligibility and resource to exercise appeal rights where the risk of disproportionate or severe punishment is known.<sup>5</sup> Even setting aside BORA considerations, if the Three Strikes regime is to be repealed on account of its perceived injustice, it is wrong not to re-examine whether there are prisoners currently on sentences imposed under that regime who should have been sentenced by reference to their circumstances and their offending.
- 2.7 The Ministry of Justice<sup>6</sup> has recommended transitional arrangements to this effect. The Law Society agrees transitional arrangements are required and supports the Ministry's preferred options for those arrangements (and the reasons for them), save in respect of one category.
- 2.8 The Society supports:
- i. strike two offenders on two year or less sentences being automatically released after serving 50% of their sentence (17 people);
  - ii. strike two offenders on two year or over offences being eligible for parole after serving one-third of their sentence (189 people);
  - iii. strike three offences, non-murder, to be referred back to the High Court for resentencing (17 people); and
  - iv. strike three murder offences being resentenced in the High Court (three people).
- 2.9 The Law Society does not support the Ministry's preferred option for strike two murder offences, that affected individuals (there are 14) can apply to the High Court for a rehearing and must demonstrate they have been disadvantaged.
- 2.10 Instead, the Law Society supports option 1, which is for those individuals be resentenced in the High Court. The basis for treating these offenders differently to those sentenced under a strike three murder offence is not explained in depth within the Regulatory Impact Assessment. There does not appear to be a strong basis on which to impose the burden of making an application and proving disadvantage, where that potential disadvantage is a known risk and consequence of legislative provisions that are being repealed. This is a small number and ought to be accommodated without difficulty.



**Tiana Epati**  
**President**

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<sup>5</sup> Noting that many would now find themselves 'out of time' to appeal.

<sup>6</sup> Above, n 1, at Appendix 1.