

# **Three Strikes – Five Years On**

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## **Introduction**

Your Honours, distinguished guests, ladies and gentlemen. It is my great pleasure to have been invited to give the inaugural Greg King Memorial Lecture. I knew Greg, but not well. On the occasions I did encounter him I was always impressed by his enthusiasm and his ready sense of humour. My last meeting with him was at a conference in Auckland early in 2012, dealing with Drug and Alcohol Courts. Greg's forensic curiosity had drawn him to Auckland to learn more about this new wave of court-based problem –solving, which has now become firmly established in New Zealand's criminal justice system. Greg told me he planned to enroll in my LL.M course on therapeutic jurisprudence, to be taught later that year. I said I looked forward to it and would be delighted to have him in the class. Sadly, it never happened. Greg died soon after that conversation.

Greg was undoubtedly a leader in the law, and had he lived, would certainly have had a significant contribution to make to the development of criminal law in New Zealand. He had a passion for justice and was concerned to fight vigorously for those who had been victims of unfair dealings. Today we remember him as one whose life in the law, though relatively short, was of great significance. We remember him fondly.

What Greg's view was of New Zealand's Three Strikes Law I do not know. I never discussed it with him. But I imagine he had strong views about it, whether for or against. But that is the nature of controversial laws like the Three Strikes law. They tend to polarize opinion one way or another.

In any event I am indebted to Garth McVicar and David Garrett for inviting me to give the lecture and enabling me to be here today. I have not been constrained in any way in the things I am about to say.

My brief is to address the broad proposition "Three Strikes Five years on".

The legislation was modeled on a number of different overseas 3S laws, including Californian legislation introduced in 1994. However, the New Zealand model is significantly less harsh than its Californian counterpart. The legislation's purpose was to identify and punish the "worst- of -the -worst" offenders. Whether it has

achieved that aim is something I want to consider. Curiously, although the 3S law remains controversial for the most part, and for most citizens, it has flown largely under the radar of public debate in the last 5 years.

In this lecture I have four principal aims. First, to briefly summarize the history and the key elements of the New Zealand three strikes law. Secondly, to consider how the law has evolved and impacted on the criminal justice system. Thirdly, to consider the extent to which the law has achieved its intended goals. Finally, to ask 'what is the future of three strikes in New Zealand'?

## **History of 3S in NZ**

### *Rationale*

The Sentencing and Parole Reform Act 2010 amended the Sentencing Act 2002 and the Parole Act 2002 by introducing a "three strikes" sentencing regime. The aim of the new law was to significantly increase penalties on certain repeat offenders. But as criminologist James Oleson has pointed out in an article published earlier this year<sup>1</sup> it was not a "stand alone" legal reform. It was one of a number of statutory changes which gave effect to the 1999 citizen-initiated referendum which advocated a greater focus on the needs of victims, support for minimum sentences and harsher penalties for serious violent offences. The particular rationale for three strikes was that it would protect the public, deter serious sexual and violent offenders, and improve public confidence in the criminal justice system.

One of the concerns expressed by myself and colleague Richard Ekins at the time the legislation was passed was that it was unjust in that it departed from the central principle of just sentencing, namely, proportionality. Our concern was that it was likely to punish many relatively minor offenders more harshly than they deserved. Some critics of the legislation saw it as an expression of "penal populism", by which politicians serve their own ends by tapping into the public's punitive sentiments. I still have this concern.

### *Key features of 3s*

Before considering the effects of the three strikes law on the legal system, it might be useful to remind ourselves as to how three strikes works in New Zealand. The Sentencing and Parole Reform Act 2010 created a three stage regime by which the consequences for repeat serious violent offenders are aggravated with every 'strike' conviction. At present there are 40 qualifying offences which include all major violent and sexual offences attracting a maximum penalty of 7 years or more. They include murder, manslaughter, rape, robbery, aggravated robbery, sexual violation, indecent assault, wounding with intent, abduction and kidnapping. The regime

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<sup>1</sup> James C Oleson, "Habitual criminal legislation in New Zealand: Three years of three-strikes" (2015) 48(2) Australian and New Zealand Journal of Criminology 277-292.

applies to all 40 offences, though special rules apply to murder and manslaughter (see Sentencing Act 2002, s 86A).

When an offender aged 18 or over at the time of the offence, and who does not have any previous warnings, is convicted of a “qualifying offence” he or she receives a first warning (strike one). That warning is not accompanied by any unusual or additional penal consequences. If an offender is convicted of a qualifying offence committed *after* a first warning the judge must issue a *final* warning (strike two) and the offender must serve the whole sentence imposed by the judge without parole. If an offender is then convicted of a qualifying offence committed after a final warning (strike three) the judge *must* sentence the person to the *maximum term of imprisonment* prescribed for the offence and order that it be served without parole, unless the removal of parole would be “manifestly unjust”. A third strike sentence varies according to the offence: 7 years imprisonment for indecent assault, 10 years for robbery, 14 years for kidnapping, 20 years for rape, life imprisonment for manslaughter. The “manifestly unjust” exception only applies to parole eligibility. There is no discretion about sentence length for a third strike offence.

### **Effects of 3S on CJ System**

#### *Worst of the worst offenders-impact of deterrence*

From the outset one of the most vigorously affirmed features of the three strikes regime was that it would target the “worst of the worst” repeat offenders and deal with them accordingly. In a Cabinet paper, entitled “Sentencing and Parole Reform Bill: Final Approval for Introduction” the then Minister of Justice outlined the Government’s policy to remove eligibility for parole “for the *worst murderers* and the *worst recidivist violent offenders*”. A National Party broadsheet on 6 October 2008, made the same claim. An interesting question 5 years on is whether this goal has been realized. We can only judge this by looking at the published data.

In the article I mentioned before, and published earlier this year James Olesen, has drawn on publically available sentencing data to paint a picture of the operation of the three strikes law following the first 42 months of the regime’s operation. At the time of writing the article there had been 3,623 first-strike warnings issued, while between June 2010 and November 2013, 28 final warnings had been issued. By April 2015, on my count, a total of 5382 first strike warnings had been issued and 76 final warnings.

Oleson has noted that Ministry of Justice data shows that, as at 30 April 2013, only 9 of the 40 strike-eligible offences had triggered a warning. At this time I do not know whether this situation has changed. However, Oleson’s study also found that just three offences (sexual assault, robbery/aggravated robbery and serious assault) accounted for 89.8% of all first-strike warnings imposed. These three offences also accounted for 95% of all second strike warnings during the same period. By contrast, between them manslaughter, murder and attempted murder, undoubtedly

the worst-of -the -worst *offences*, accounted for only 2.9% of the first strike warnings issued. This reflects the fact that while homicide offences understandably cause a great deal of public alarm and outrage, they still only constitute a very small percentage of overall offending – 58 ‘resolved’ cases of ‘homicide and related offences’ in 2013/2014. This figure includes 39 cases of murder. Clearly, the ‘worst of- the -worst’ offences were not attracting the majority of first and second strike warnings.

What this tells us is that a *very narrow band* of serious offences are producing the vast majority of strike warnings and constitute the greatest level of risk to public safety. They stand glaringly apart from the remaining qualifying offences. In fact, there could be an argument for *reducing* the list of qualifying offences, rather than *increasing* it, as some have advocated, while developing policy for dealing more effectively with the most prolific strike offences.

There is also some evidence that the three strikes law may not have been applied consistently by the courts, because of conflicts over statutory interpretation. There is also anecdotal evidence that some District Court judges are simply forgetting to give strike warnings. In some cases interpretative problems have led to judges refusing to issue warnings in what would appear to be strike offences.<sup>2</sup> At this stage we do not know how many other cases may have been affected by legal uncertainties. The practice, for whatever reason, of failing to issue strike warnings inevitably distorts the figures, and suggests that figures for both first and second strikes may be higher than the statistics indicate.

### *Deterrence*

One of the claims that has been made about the three strikes law is that it will deter offenders from committing serious offences of violence. The fact that we only have 81 second strikers, as at April 2015 is said to support that claim. However, we should not forget that, as at the same date, we have 5382 first strikers, who we might also have expected to be deterred by this new law, but apparently were not. Deterrence, if it is effective at all, should operate across the full criminal justice spectrum, not simply once a first strike conviction has been entered. Considering the first strike numbers it is arguable that three strikes has not had the impact it was designed to have. It may have made little difference to the pattern of serious offending in relation to the offences most commonly associated with a first strike warning.

As for the deterrent value of the risk of a second or third strike for those who have received a first strike warning, I would suggest that the small numbers of those receiving a second strike is, at best, equivocal. Supporters of the law argue that the very small numbers of second strikers proves that the law is working, and at a level of success that even ACT did not predict! I will accept, for argument’s sake, that

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<sup>2</sup> *Police v Maipiara (AKA) Murphy* [2012] NZHC 690.

these figures *could* mean that first strikers have been deterred. That is a possible interpretation. But we would not know that is the case until an exhaustive and detailed empirical study has been undertaken, based on prisoner interviews, to determine the deterrent effect of the law.

But there is another possible explanation. Offences for which an offender may receive a strike are very serious, often warranting a prison sentence. Therefore, it is going to take some time for offenders become eligible for a final warning. That is probably why there are so few second strikers. The Justice Sector Forecast, December 2014 puts it this way:

“Clearly it will take some time after June 2010 for there to be a discernible impact: offenders must commit an offence, be prosecuted and serve the sentence given with the first warning; then they must commit a further offence, be prosecuted, and serve a proportion of this second sentence before they contribute any addition to the sentenced prison population by serving that part of the second sentence they would otherwise have served on parole. The impact of third strikes is even further removed. Last year's forecast included an allowance for this factor, but we have waited for a sufficiency of second strikes to occur under the new regime before attempting to calculate a more precise estimate of the impact. (at p6)

Over the passage of time we may well find many more offenders receiving final warnings, as their cases begin to filter through the system, and they are discharged from prison.

The Ministry of Justice considers it unlikely that any significant impact from *third* strikers will be noticed in the prison population forecast 2014 -2024<sup>3</sup>. This suggests, as with the second strike figures, that the time estimate between ‘strike’ offences is such that third strikes will simply not register until many years after the first strike. This may have little to do with deterrence but everything to do with how long it takes cases to work their way through the system.

But there is no doubt that three strikes law has a *declaratory* function. It declares ‘*if you commit these types of offences, this is what will happen to you*’. This is a proper function of the criminal law. But if it is to be a truly deterrent regime, people should be deterred by its punitive provisions *per se*, not only once a person has committed a first strike. However, it would seem offenders are not being deterred by the declaration of this law in the statute books. If they were we would not now have over 5000 first strikers.

### *Demographics of strikers*

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<sup>3</sup> Justice Sector –Justice Sector Forecast –*Prison Population Forecast 2014-2024*, December 2014.

Another issue concerns the demographics of the strikers. In his research James Oleson noted three key features concerning the demographics of the “striker” population:

- (1) They are predominantly male;
- (2) They are predominantly young;
- (3) Minority groups are over-represented.

Let me focus on the third feature, since this, in my mind, is the most disturbing feature, because it tends to reinforce what is already bad about our criminal justice system. Oleson points out that 67.6% of New Zealanders are of European descent, 14.6% are Maori and 9.2% are Pasifika. The remaining categories need not concern us here. But when we look at the “striker” figures we find that 32.9% are European, 47.6% are Maori and 15.2% are Pasifika. This means that, compared to Pakeha, Maori are 6.68 times as likely to be first-strikers and Pasifika are 4.49 times as likely. When we compare strikers to the general population we see a “dramatic ethnic overrepresentation of both Maori and Pasifika, akin to that of African-Americans under California’s three strikes...” (Oleson, 285).

Oleson continues, because three strikes is triggered by serious and violent crimes, which typically result in prison sentences, “we would *expect* striker demographics to resemble those of the prison population” (Oleson, 285). This is, in fact, what the data confirms. James Oleson is thus correct in stating that the three strikes law is being applied to the same kinds of offences that fill our prisons, while there are also indications that it is being used for common offending. Rather than targeting the *worst* of offenders, three strikes appears to be targeting mainly *young* and *Maori* or *Pasifika* male offenders, who in many cases have committed pretty typical, albeit serious, offences of their type, but hardly qualifying as the “worst-of-the-worst”!

### **3 S - has it achieved its goals?**

In reality we have no certain way of judging whether or not 3S has achieved its goals. There was initial optimism that the new law would deter offenders from committing serious sexual offences and offences of violence, because of the threat of lengthy sentences without parole. The fact that we have well over 5000 convictions for first strike offences over this period is worrying and seems to defeat the early optimism.

Furthermore, the actual numbers of convictions for first strike offences may not represent the true position because, as noted earlier, it would seem that some judges are not consistently giving first strike warnings. In other words, the numbers of first warnings issued and the numbers of people who received a first strike warning may not match the actual numbers of people convicted of strike offences, but not given a warning.

As I have tried to show, the numbers of offenders given a final warning, although very small, cannot be taken as an indication of the deterrent effect of the new law.

The numbers are highly equivocal. They *might* indicate a powerful deterrent effect of the Three Strikes law. Equally, and more probably, they may indicate that it takes time for offenders to proceed through the system, before they are liable for conviction for further strike offences that might trigger a final warning.

#### *Anticipated public safety outcomes*

Public safety outcomes can only be judged by looking at the incidence of serious violent and sexual offences over the last five years, and determining whether there has been a decrease in the number of offences committed. As I noted above the three most highly represented amongst the specified strike offence categories are the offences of serious assault, robbery/aggravated robbery and sexual assault, together accounting for 89.8% of all first strike offences. What we need to determine is whether there has been a marked decrease of cases resolved for strike offences from 2010 onwards as compared to the rate of resolved cases for strike offences, prior to the enactment of the Three Strikes legislation. This may provide some indication of whether the 3S legislation is working as a deterrent.

What I did was look at the figures for crimes resolved by the Police over the period 2008 -2014 to see if there was any discernible reduction in the number of offences being committed, especially post 2010, that might indicate that 3S was, in fact, having the hoped for deterrent effect. Crimes “resolved” is not the same as “convictions” entered.

It may be that a significant proportion of the offences resolved by police do not proceed to a conviction, which may explain why the numbers of first strikes does not match the raw numbers of offences resolved within particular categories of offences. I looked at the offences of serious assault, sexual assaults and robbery offences, on the basis that these constitute the majority of strike convictions.

#### *Sexual assault*

For the year 2008 a total of 1523 cases of “sexual attacks” were recorded as “resolved.” In 2009 that figure had slipped marginally to 1486.

However, in 2011 the figure had climbed to 1984 resolved sexual assault cases. In the year 2012/2013 there were 2079 cases and in 2013/2014 1856 cases.

What these figures suggest is that over the relevant period 2008 – 2013, while there have been some minor variations in the numbers of resolved crimes within the category of serious sexual offences, the numbers have, overall, remained relatively stable. In particular, there is no evidence whatsoever of a dramatic decline in the numbers of cases resolved during the period 2011- 2013, as might have been expected if the 3S regime had been acting as a deterrent. The numbers simply do not support that view. In fact what we see is that from 2008/2009 the numbers of sexual assaults recorded per 10,000 of population actually began to rise appreciably and have continued to rise, apparently *despite* the enactment of 3S. There has been

some leveling out of these figures since 2013. At the present time sexual assaults seem to be beginning to decline slightly.

Yet when we look at serious assaults resulting in injury we see that numbers spiked in 2008/2009 and have been declining ever since. In other words the decline began *before* the enactment of the 3S law.

Similarly, cases of robbery peaked, with a high of 7 offences per 10,000 of population in the 2006, and then declined during the period 2006-2013, with the decline beginning *before* the enactment of 3S. Again, 3S appears to have had little impact on this crime.

This seems to be consistent with overall crime figures. When we look at overall *Crime Trends in New Zealand* provided by the New Zealand Police, it is now clear that from 1995 there has been a steady overall decline in the number of recorded offences, from approximately 1300 recorded offences per 10,000 of population in 1995 to just under 800 per 10,000 of population in 2014.

Although reading statistics is never an entirely accurate means of measuring crime trends, it is hard to avoid the message that crime overall in New Zealand has been declining since 1995, consistently with international trends. While it is possible that 3S may have made some contribution to this decline, it is clear that other factors are also at work that we do not fully understand. Indeed, given the fact that some crime categories actually increased following the enactment of 3S, its deterrent effect may be much less significant than had been anticipated.

### *Three strikes in California*

Before moving to my concluding comments, I wish to make a few observations about the 3S law in California, which was an influential model for New Zealand's 3 strike laws. In some important respects there are some remarkable parallels with California's experience.

For a long time Californian political and law enforcement officials have powerfully advocated the idea that three strikes law has been the main reason for the drop in violent crime witnessed in that state in the period from 1990 to 2010. However, a major recent study suggests that the imposition of Three Strikes in 1994 has had no impact on violent crime in the state, but that alcohol consumption and unemployment have important impacts on the rate of violent crime. In particular, the study found that when California's violent crimes rates were compared both with states that had a 3S law and those that did not, all the states surveyed showed a dramatic decline in rates of violent crime from 1990, which had nothing to do with

the 3S policy. The study concluded that the research studies undertaken found no evidence that 3S had had an impact on crime in California.<sup>4</sup>

This is remarkable in light of the fact that New Zealand's overall crime rate has also been declining since 1995, and which clearly has nothing to do with the impact of the introduction of 3S in 2010.

### **The future of 3s in NZ**

The question is how are we to regard the 3S law going forward? Has it had a chance to prove its worth? Are its full benefits yet to be discovered? Or is it a failed idea?

Whenever there is a call for new legislative offences or new criminal justice initiatives that result in greater penalization, they should be based on clear empirical evidence that the present law is failing to achieve its aims.<sup>5</sup> The question is whether, when the 3S law was enacted, there was any consensus upon which the new and radical approach to sentencing enhancement could be endorsed. I did not discern any such consensus at the time of its enactment. But now, and more importantly five years on, has 3S contributed to the goal of improving the safety of the public from the impact of violent offending?

There is no simple answer to any of these questions. In a real sense the jury is still out. However, none of the empirical data we have so far points strongly to 3S having a powerful deterrent effect on criminal offending. It may be deterring some offenders. We simply do not know.

However, it is clear, at least in respect of those specified offences that account for the vast majority of the first strike warnings imposed, the 3S law appears to have had little, if any, effect. This is evident from both the numbers of first strike warnings issued and the total numbers of offences being committed in these categories of offences. Police statistics seem to suggest that there may have actually been an increase in some of these categories of offending, despite the 3S law. Perhaps rather than persisting in trying to *deter* these offenders by judicial warnings and ratcheting penalties, we might be better to look at what is *causing* this offending and think about how we might deal with that. Undoubtedly, much violent offending is associated with alcohol, as the Californian study also found, and will continue to occur as long as younger age groups of people have easy access to unlimited amounts of alcohol, and society's sanctioning of its use. We can't have our cake and eat it too.

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<sup>4</sup> R N Parker, "Why California's 'Three Strikes' Fails as Crime and Economic Policy, and What to Do" (2012) 5(2) California Journal of Politics and Policy 206, 213.

<sup>5</sup> O Quick, "Medicine, Mistakes and Manslaughter: A Criminal Combination?" (2010) Cambridge Law Journal 186, 198.

As for sexual offending, that is also largely socially determined, and not amenable to any 'quick fix' solutions. The big unknown is, of course, the impact of the Internet, and the ready access people have to unlimited amounts of pornography and sexually violent and explicit material. While we may have some success in changing the procedures for how we deal with sex offence prosecutions and new approaches to victims of sexual offending (and the Law Commission is currently looking at these issues), the bigger challenge is how do we deal with the problem of sexual addiction and its causative impact on violent sexual offending. This is a societal problem of significant proportions that will not be 'fixed' simply by imposing deterrent criminal sentences.

Robbery offences are relatively few in number, but may be difficult to deter. Many are associated with other antisocial conduct like substance abuse, and will continue to occur as long as there are desperate people willing to chance their arm in order to score drugs to feed their addictions. Others are the product of a calculating cost/benefit analysis that may be impervious to 3S warnings.

It may be that, at the end of the day, the 3S law is a symbol of an administration that is 'tough on crime'. But simply being tough on crime does not do the work necessary for reducing the incidence of serious and violent crime. Deterrent sentences may deter some offenders but can never be expected to totally eliminate offending which has deep societal roots and demonstrates engrained patterns of societal dysfunction. We must look as well to other solutions which address the causes and the psychological drivers of crime. But that is a discussion for another day.