

# Impact Summary: Repeal of the three strikes law

## Section 1: General information

### Purpose

The Ministry of Justice is solely responsible for the analysis and advice set out in this Impact Summary, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing key policy decisions to be taken by Cabinet.

### Key Limitations or Constraints on Analysis

Limitations and constraints on the analysis in this document include:

- Data provided on individuals currently serving a prison sentence under the three strikes regime is indicative only. Confirming how many people will actually be impacted by repeal of the three strikes regime is challenging because:
  - some people are sentenced for multiple strike and non-strike offences, and in such cases the relevant sentence end and parole eligibility dates may not be immediately evident, and
  - more people may be sentenced under three strikes before this proposal reaches Cabinet.
- The Ministry of Justice and Ara Poutama Aotearoa (the Department of Corrections) will continue to refine the data over the coming months.
- Consultation on the general purpose of the proposed legislation has been limited to those government agencies/entities affected by it. This reflects the fact that the government has already publicly stated its intention to repeal the three strikes law. Time constraints have prevented wider engagement.
- While there was no consultation with the public on this proposal, there has previously been engagement with the public through the Hāpaitia te Oranga Tangata: *Safe and Effective Justice* programme (Hāpaitia) between 2018 and 2019.<sup>1</sup> Hāpaitia became a vehicle for nationwide consultation on transforming the justice system and included the public, academics, legal experts, justice experts, non-governmental organisations and focus hui with Māori and victims' advocates. Some of the key messages from this work were that the justice system needs to be more rehabilitation focused rather than punitive.

### Responsible Manager (signature and date):



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Policy Manager, Sentencing and Rehabilitation  
Ministry of Justice  
4 March 2021

<sup>1</sup> Report by Hui Māori: Ināia Tonu Nei. (2019); Report by Te Uepū Hapai I Te Ora: Turuki! Turuki! Move Together. (2019); Report by Te Uepū Hapai I Te Ora: He Waka Roimata. (2019). These reports can be found on the Hāpaitia te Oranga Tangata: Safe and Effective Justice website (<https://safeandeffectivejustice.govt.nz>)

To be completed by quality assurers:

Quality Assurance Reviewing Agency:

Ministry of Justice

Quality Assurance Assessment:

The Ministry of Justice's Regulatory Impact Assessment quality panel has reviewed the *RIA: Repeal of the three strikes law* prepared by the Ministry of Justice on the proposal to Repeal Three Strikes and considers that the information and analysis summarised in the Regulatory Impact Statement **partially meets** the Quality Assurance criteria.

Reviewer Comments and Recommendations:

The proposal to repeal the three strikes law implements a manifesto commitment. The Government wishes to proceed swiftly, and the Regulatory Impact Statement also states that the change needs to be progressed quickly as some courts are already adjourning sentencing in anticipation.

There has therefore been no engagement with the public on the issue of whether the three strikes law should be repealed and, if so, what the transitional arrangements should be. However, the analysis is informed by the public engagement on the criminal justice system that took place through the *Hāpaitia te Oranga Tangata: Safe and Effective Justice* programme between 2018 and 2019 and engagement with affected government agencies.

The panel considers that the analysis is otherwise robust and can be relied on by Ministers to support their decision-making.

## Section 2: Problem definition and objectives

### 2.1 What is the policy problem or opportunity?

The three strikes law results in excessive and disproportionate punishment by preventing sentencing judges from taking the circumstances of offending into account.

The Government is responsible for putting in place appropriate systems to maintain public safety in New Zealand. It is also responsible for ensuring the rights of individuals are protected.

#### Background

The Sentencing and Parole Reform Act 2010 created what is commonly known as the three strikes regime. The regime takes away judicial discretion in sentencing and determining parole eligibility.

There are 40 qualifying three strike offences, comprising all major violent and sexual offences with a maximum penalty of seven years or greater imprisonment.

#### *Standard sentencing settings*

When sentencing under standard settings the judge must decide on an appropriate sentence within the maximum penalties set down in law for the particular charge. The judge decides on a sentence after considering the characteristics of the offence and the offender. The judge takes into account the full details of the offender's actions, including aggravating and mitigating factors, along with a victim impact statement (where provided), the submissions of counsel, the pre-sentence report, and anything else deemed to be relevant.

The judge must also take account of the principles and purposes of sentencing (sections 7 and 8, Sentencing Act 2002), which includes imposing a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate. The judge must also take account of other sentences imposed on similar offenders for comparable offending so that, as far as possible, sentencing is a consistent exercise.

The table below compares the current three strikes regime settings with standard sentencing settings:

<b>Standard sentencing process</b>	<b>Three strikes regime</b>
<b><i>Short-term sentence of imprisonment (two years or less)</i></b>	
	<i>Second strike</i>
Released after serving one half of sentence	Released after serving full sentence
<b><i>Long-term sentence of imprisonment (more than two years)</i></b>	
	<i>Second strike</i>
Eligible for parole after serving one third of sentence (unless court imposes longer minimum period of up to two thirds of sentence)	Not eligible for parole
Released at direction of Parole Board; released after serving full sentence if not granted parole	Released after serving full sentence
	<i>Third strike</i>
Sentenced under provisions of Sentencing Act; maximum penalty reserved for most serious cases of offence	Sentenced to maximum penalty available for offence (e.g. 14 years for aggravated robbery)
Eligible for parole after serving one third of sentence (unless court imposes longer minimum period of up to two thirds of sentence)	Not eligible for parole unless court rules this would be manifestly unjust
Released at direction of Parole Board; released at sentence expiry date if not granted parole	Released after serving full sentence unless the judge determines it to be manifestly unjust then the offender moves through the standard parole process
<b>Life imprisonment for murder</b>	
	<i>Second/Third strike</i>
Eligible for parole after serving minimum period imposed at sentencing (may not be less than ten years)	Not eligible for parole unless court rules this would be manifestly unjust <sup>2</sup>

<sup>2</sup> If the court determines that imprisonment without parole is manifestly unjust then a minimum period of imprisonment for third strike murder offence must not be less than 20 years.

Released at direction of Parole Board, subject to release conditions imposed by Parole Board.	If not eligible for parole, remains in prison for rest of life; if eligible for parole, released at direction of Parole Board
<b>Preventive detention</b>	
	<i>Third strike</i>
The minimum period of imprisonment must not be less than five years	The minimum period of imprisonment must be not less than the maximum penalty for the offence unless this would be manifestly unjust

### Problems and Opportunities

#### *Disproportionate sentencing outcomes*

In a number of cases, judges have expressed concern about being required to impose disproportionately severe sentences when there have been mitigating circumstances for the offending, such as mental health issues. The regime also involves denying the right to parole, which is a useful tool for gradually reintegrating people into the community under close supervision.

In 2020 in the case of *Fitzgerald v R* the offender's third strike offence was an indecent assault that the original sentencing judge considered to be on the lower end of seriousness and would normally not lead to a jail term. The Court of Appeal found that the sentence of 7 years imprisonment imposed on Fitzgerald "goes well beyond excessive punishment and would in their view shock the conscience of properly informed New Zealanders who were aware of all the relevant circumstances including Mr Fitzgerald's mental disability" and that Fitzgerald "should be receiving care and support in an appropriate facility, not serving a lengthy term of imprisonment".

Another example is in *R v Kingi Ratima* (2017), where the judge calculated that the offender would ordinarily have received a prison sentence of 3 years and 11 months, rather than the 10 year sentence the Court was obliged to impose.

#### *No evidence the regime is meeting its objectives*

The three strikes regime was intended to deter repeat offenders with the threat of progressively longer mandatory prison terms, and to incapacitate those who continue to reoffend despite the additional penalties. Evidence has shown that this regime has had little impact on deterring offending and reducing serious crime rates.

There is no substantive domestic or international evidence<sup>3</sup> that can conclude whether or not a three strikes regime reduces serious crime. The Ministry of Justice published an evidence brief that considered the impact of the regime on crime rates in New Zealand.<sup>4</sup>

It found that

- There have been no studies conducted on whether New Zealand's three strikes law reduces crime, although observations of crimes targeted by the law do not appear to demonstrate any obvious effects.

<sup>3</sup> Some US studies on three strikes laws have found crime reducing effects for both minor and serious violent crimes as well as reduced arrest rates among offenders who received a first or second strike. However, an equal number of studies have found no effect on the crime rate or found that the apparent effects of the law disappear when changes on other societal variables, such as alcohol consumption, are accounted for.

<sup>4</sup> Three Strikes Law: Evidence Brief. Ministry of Justice. December 2018.

- Since the three strikes law came into effect there has been a small decrease in robbery and a small increase in sexual assault, however both crime rates do not fall far outside rates observed in the years prior to the law's implementation.

Deterrence is one of the underlying principles of the criminal law and is based on the rational choice view of human behaviour – that individuals will commit crime if the benefits outweigh the cost, and that crime can be made less attractive by implementing policies that increase the costs of illegal conduct.

An empirical analysis of research into the effectiveness of deterrence reached the following conclusions:

- The severity of punishment has essentially no deterrent effect
- The certainty of apprehension has a small deterrent effect
- The deterrent effect of certainty of apprehension is found most consistently in relation to white collar offences such as fraud, tax violations and non compliance with regulatory laws.<sup>5</sup>

Deterrence theory assumes that offenders consider the consequences of their offending. However, research indicates that most criminals commit offences without considering the consequences, or in the belief they will not be caught.<sup>6</sup> Even if someone did consider the consequences of their potential offending, most people are unlikely to understand what constitutes a 'striking' offence and therefore whether the regime will apply to them.<sup>7</sup>

#### *Equivalent sentencing options available*

Public safety can be maintained through existing options focussed at targeting violent, sexual and serious offenders. The Courts already have a range of options to address very serious offending and the risk of subsequent re-offending, which include:

- **preventive detention** - an indeterminate prison sentence that allows for parole to be granted only when a person ceases to be an undue risk to the community. People in this category can be recalled to prison at any time for the remainder of their lives
- **public protection and extended supervision orders** – court-imposed orders that allow serious violent and sexual offenders to be intensively managed indefinitely at the end of their sentence, to prevent further offending, including (under public protection orders) at a secure residential facility if necessary
- **minimum periods of imprisonment** – the Courts can override standard parole eligibility when necessary to uphold the safety of the community and hold the offender to account for their actions, and
- **imposing maximum penalties** – the Courts can impose terms of imprisonment up to the maximum penalty for the offence where the offending is extremely serious.

These measures are a more proportionate means of protecting the public from the most serious violent and sexual offending, as they allow judges to take into account the aggravating and mitigating circumstances of the offending, as well as expert advice about risk from qualified health assessors.

The three strikes regime has had several adverse impacts.

<sup>5</sup> Pratt, T. C., Cullen, F. T., Blevins, K. R., Daigle, L. E., & Madensen, T. D. (2006). The Empirical Status of Deterrence Theory: A Meta-Analysis. In F. T. Cullen, J. P. Wright, & K. R. Blevins (Eds.), *Advances in criminological theory: Vol. 15. Taking stock: The status of criminological theory* (p. 367–395).

<sup>6</sup> Nagin, D. (2013). Deterrence in the 21st Century. *Crime and Justice Journal*.

<sup>7</sup> For example, 'injuring with intent to cause grievous bodily harm' is a striking offence, but 'injuring with intent to injure' is not.

### *Negative impact on Māori*

Māori are disproportionately over-represented in the prison population. This disparity is even more pronounced in the cohort of people convicted of a strike offence. Over 2018/19 and 2019/20 combined, Māori were almost nine times more likely to receive a first strike than those of Europeans/other ethnicity and over 18 times more likely to receive a second strike. Of the 17 individuals who have received a third strike, 82% are Māori.

Academics have highlighted that the three strikes regime disproportionately impacts Māori.<sup>8</sup> As at 30 June 2020, 50% percent of those who have had a first strike and 63% of those who have had a second strike are Māori.

### *Inconsistency with the Bill of Rights*

Section 9 of the Bill of Rights Act (BORA) states that: everyone has the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment.

In the case of *Fitzgerald v R* the Court of Appeal held that the three strikes regime was inconsistent with the Bill of Rights because it did not have a “safety valve” for cases where there was a clear injustice. It stated that that part of the Sentencing Act “is capable of producing results that are inconsistent with section 9 of BORA, as it has in . . . the present case”. The Court further stated that “A provision that mandates outcomes that are inconsistent with BORA in realistic scenarios is itself inconsistent with BORA. The fact that the provision will produce unobjectionable results in other scenarios does not save it.”<sup>9</sup>

The current law limits the protections of this section significantly because it has the potential to require disproportionately severe punishment to be handed to an offender. This is because the judge cannot take into account the characteristics of the offender and the offending when determining the punishment.

### *Removal of parole as an opportunity for rehabilitation and reintegration*

Under the current three strikes regime, an individual on a third strike, must serve the maximum penalty available, also without parole, unless that would be manifestly unjust.<sup>10</sup> Because parole provides an opportunity to closely monitor people in the community under conditions that can be tailored to manage risk, the regime undermines reintegration.<sup>11</sup>

The right to parole also ensures offenders are ensured timely access to rehabilitation programmes with the aim that they successfully complete their rehabilitation prior to their parole hearing.

### **Other considerations:**

If the three strikes legislation is repealed, consideration must be given to options for transitional arrangements for second and third strikers currently serving their prison sentence. Without transitional arrangements the repeal will only affect offenders whose sentences are imposed after the proposed legislation comes into force.

<sup>8</sup> Klinger, S. (2009) Three Strikes for New Zealand? Repeat Offenders and the Sentencing and Parole Reform Bill 2009. In *Auckland University Law Review*. p. 256

<sup>9</sup> *Fitzgerald v R* [2020] NZCA 292.

<sup>10</sup> Section 86D of the Sentencing Act 2002.

<sup>11</sup> Parole aims to encourage offenders to participate in rehabilitation programmes that target the cause of their offending. Parole also gives the community a way of controlling the release of an offender back into society. Offenders are supervised by probation officers after their release. The probation officers make sure offenders follow the conditions of their parole. (<https://www.justice.govt.nz/about/learn-about-the-justice-system/explore-the-criminal-justice-system/trial-and-prison/>)

Because one of the central grounds for the repeal is the view that the regime is unjust in principle, the Ministry recommends the repeal legislation includes provisions to reinstate conventional sentencing and parole arrangements.

Repealing the three strikes regime needs to be progressed relatively quickly because the Courts are already starting to adjourn sentencing in anticipation of the planned legislation. Adjournments will increase the backlog of people on remand and negatively impact victims through the delays in court as identified in the Te Tangi o te Manawanui Chief Victims Advisors report.<sup>12</sup>

## 2.2 Who is affected and how?

Once the proposed legislation is enacted, people who would otherwise be subject to the three strikes regime will be sentenced in accordance with standard settings, with consideration of the specific circumstances of their offending. People currently in prison for second and third strike offences will be dealt with as if the three strikes regime had not been in place when they offended. This has a flow on effect as they will have greater access to parole and release conditions which can provide opportunities for reintegration and support.

Victims may experience some anxiety and stress as a result of knowing that people who have offended against them may be released or become eligible for parole earlier than expected. This risk will be mitigated by the fact that at re-sentencing the judge will be able to refer back to any previous victim impact statements, so victims needn't submit again if they choose not to. Victims may choose to participate during re-sentencing and at parole hearings in accordance with their statutory rights.

The Ministry of Justice will engage with victims as appropriate, to ensure that they receive the information they need throughout the process.

Some groups may not support the removal of the three strikes law. For example, the Sensible Sentencing Trust are unlikely to support the regime being repealed as they advocated for its introduction in New Zealand. Proponents of the regime may argue it hasn't been applied long enough to demonstrate the effectiveness of punitive sentences on reoffending. However, research has found that making sentences longer is not as effective as other options in reducing reoffending rates<sup>13</sup> and there is no substantial international evidence that forms a consensus that three strikes reduces reoffending.<sup>14</sup>

As described above, the Courts can already impose sentences equivalent to those under the three strikes law, when it is considered appropriate. Other groups like JustSpeak support the removal of the three strikes regime.

## 2.3 What are the objectives sought in relation to the identified problem?

The Government is responsible for ensuring the rights of individuals are protected. It is also responsible for putting in place appropriate systems to maintain public safety in New Zealand.

<sup>12</sup> Report by the Chief Victims Advisor: Te Tangi o te Manawanui (2019).

<sup>13</sup> Klinger, S. (2009) Three Strikes for New Zealand? Repeat Offenders and the Sentencing and Parole Reform Bill 2009. In *Auckland University Law Review*. p. 252

<sup>14</sup> Three Strikes Law: Evidence Brief. Ministry of Justice. December 2018.

The overall objective of repealing the three strikes regime is to ensure New Zealand has a fair and proportionate justice system where sentence outcomes reflect the seriousness of the offending whilst maintaining public safety.

## Section 3: Options identification

### 3.1 What options have been considered?

#### **Decision one: Three strikes legislative options**

**Status quo** - Maintain current three strikes settings and continue to apply increasingly serious penalties on repeat serious and sexual offenders. A disadvantage of this is that the regime is unjust in principle and creates disproportionate sentencing outcomes.

**Repeal the Three Strikes law** - Introduce legislation to repeal the law. This will be more consistent with BORA. It would also better help to ensure New Zealand has a fair and proportionate justice system by allowing judicial discretion to be applied in each individual case.

#### **Decision two: What to do for current three strike prisoners serving their sentence**

**No transitional arrangements** - Once the three strikes regime is repealed individuals currently serving their sentence under the three strikes regime continue to serve their sentence in full. An advantage of this approach is that there will be no impact on Parole Board and Courts in arranging resentencing or considering release on parole, and greater certainty for victims. A disadvantage is that it perpetuates the identified injustice for people currently subject to the regime.

**Transitional arrangements** - Once the three strikes regime is repealed transitional arrangements are implemented to allow for individuals serving prison sentences under the three strikes regime to be treated as close to standard sentencing settings as practical.

The transitional arrangements will result in more just and proportionate sentences for people impacted by the regime. It will also result in:

- a small additional caseload for the Courts and Parole Board.
- some potential uncertainty and stress for a small number of victims.

#### **Decision three: Transitional arrangements for current three strikers serving their sentence**

Options are discussed in section 3.2.

#### **Criteria for options:**

**Proportionality with standard sentencing outcomes:** The fairest way of transitioning people currently adversely impacted by the three strikes regime will be to reinstate the sentences they would have otherwise received to achieve a more proportionate outcome.

**Administrative simplicity:** Transitional arrangements should be simple to administer due to the potential to (1) significantly impact on Court time when re-sentencing is required (2) the stress for victims of re-opening sentencing.

**Consistency with human rights norms:** The extent to which the disproportionate effects of the three strikes regime is mitigated has human rights and natural justice implications. Consideration is also needed of how to avoid perverse outcomes, such as offenders who are close to release being disadvantaged by having to wait for re-sentencing.



**Public safety:** Any option that involves the possibility of earlier release or parole needs to take account of what measures are in place to manage risk, for example through the imposition of parole conditions and reintegration supports.

The potential options are assessed against the criteria in **Appendix 1**. The criteria of proportionality and consistency with human rights is weighted above administrative simplicity.

### 3.2 Which of these options is the proposed approach?

#### **Decision one: Repeal Three strikes:**

Repealing the three strikes regime is the proposed approach because it will:

- address inconsistency with BORA. It recognises and supports the protections in section 9 by enabling the judge to determine an appropriate punishment for the offending and is consistent with how offences outside of the three strikes regime are treated. It reflects the approach in the Sentencing Act, which embeds the idea that the circumstances of the offender/offending need to be taken into account and therefore requires the judge to be sure that the sentence is not disproportionately severe,
- remove an aspect of the criminal justice system that disproportionately affects Māori and young people, and
- reinstate eligibility for parole as a vehicle for rehabilitation and applying conditions when the offender is reintroduced into society. This enhances public safety as it provides an opportunity to address an offender's needs that may contribute to their offending.

#### **Decision two: Introduce transitional arrangements:**

As one of the central grounds for the repeal is that the regime is unjust in principle, the proposed approach is to create transitional provisions that mitigate the adverse effects of the regime on those who are currently serving sentences of imprisonment.

Such an approach is consistent with the principle that legislation can be applied retrospectively if it is entirely to the benefit of those affected, in accordance with the Legislation Design and Advisory Committee's guidelines on retrospective laws.

The Ministry considers that individuals who have completed second or third strike periods of imprisonment should not be entitled to any readjustment of their sentence as they have already experienced the main adverse impact given their full sentence has been completed.

The Ministry does not recommend entitlement to compensation for anyone lawfully sentenced under the three strikes regime as it was the law at the time. This aligns with the approach taken in the Expungement of Convictions for Historical Homosexual Offences legislation.<sup>15</sup>

#### **Decision three: Proposed transitional arrangements**

People have been adversely affected by the three strikes regime in different ways according to whether they are serving:

<sup>15</sup> Section 23 of the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018.

- a sentence for a second or third strike (which determines whether the impact relates to their eligibility for parole or the length of their sentence)
- a short-term or long-term prison sentence (which determines whether they are eligible for parole or released automatically), or
- a second or third strike sentence for murder (which irrespective of three strikes is a life sentence, but where ordinarily a judge would set a minimum term of imprisonment).<sup>16</sup>

The options for each category are set out below.

*Second strike offenders (two years or less)*

- **Option 1 (recommended):** Automatic release after serving 50% of prison sentence (in line with standard sentencing settings).
- **Option 2:** refer short-term prisoners back to their original sentencing court for re-sentencing.
- **Option 3:** Automatic release after serving two thirds of prison sentence.
- **Option 4:** No transitional arrangements for this group.

If the recommended option is adopted, some offenders will be released immediately when the repeal legislation comes into force. There are approximately 17 offenders in this category. The fact they have received short sentences indicates that their offending was less serious.

Advantages:

- Offenders will be subject to any release conditions imposed at the time of sentence
- Avoids the risk of arbitrary detention arising for people who would ordinarily be due for release
- Consistent with standard release settings.

Disadvantages:

- There is the possibility that some people in this category may have been given a more lenient sentence to account for the “no parole” requirement for second strike offenders.

Alternative measures for this group have been considered to account for the potential undue leniency described above. Should Government wish to do more to minimise this risk, there are three able options: (1) raise the threshold for automatic release, for example two thirds of the sentence, (2) rule out transitional arrangements for this group altogether, or (3) refer these prisoners back to Court for re-sentencing.

Any decision not to apply transitional provisions for this group or to raise the threshold for automatic release may draw criticism because it would not take account of the individual circumstances of each case and would perpetuate an unfairness for those who gained little or no ‘discount’ at sentencing. Requiring these offenders to serve their full sentences may also invite a legal challenge on the grounds of arbitrary detention.

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<sup>6</sup> A minimum period of imprisonment (i.e. before parole eligibility) is determined by the Court at sentencing. It can be no less than 10 years for a life sentence. In exceptional cases, a life sentence can be imposed without the possibility of parole. The Christchurch mosque attacker was the first person in New Zealand to receive this sentence.

The Ministry considers re-sentencing would be the most viable option for addressing the risk of undue leniency. However, the Ministry does not consider that is it warranted because any benefit will have been small (several weeks). People in this category may end up serving their full term of imprisonment before re-sentencing occurs. Conditions imposed on release allow for monitoring for the remainder of the sentence.

*Second strike offenders (over two years)*

- **Option 1 (recommended):** Eligible for parole after serving one third of sentence. If individuals have already served one third of their sentence, they are to be considered for release by the Parole Board as soon as practicable.
- **Option 2:** Eligible for parole after serving two thirds of sentence. If individuals have already served two thirds of their sentence, they are to be considered for release by the Parole Board as soon as practicable.
- **Option 3:** Referred to Court for determination of appropriate minimum period of imprisonment (MPI).

The Ministry recommends that second strike offenders serving long-term sentences of imprisonment (over two years) become automatically eligible for parole after they have served one third of their sentence. Those who have already served one third would be considered by the Parole Board as soon as practicable. There are approximately 189 offenders in this category

Advantages:

- Parole is a means of reintegrating people into the community
- It reinstates standard sentencing settings
- Avoids risk of arbitrary detention
- Avoids administrative burden

Disadvantages:

- It does not account for the fact that in approximately 10% of cases, judges opt to impose a minimum period of imprisonment set between one third and two thirds of the sentence, which is a discretionary power.
- It is possible that a small number of prisoners will be released earlier than they otherwise might have.

The Ministry considers that there are adequate mitigations for any such concern, including:

- the fact that an earlier parole eligibility date is by no means a guarantee of earlier release - on average people serve approximately 75% of their prison sentence before being released on parole, and
- the Parole Board cannot grant parole to people who are considered to present an undue risk to the public.

*Life sentences for murder – second strike offenders*

- **Option 1:** Re-sentencing in High Court.
- **Option 2 (recommended):** Individuals can apply to the High Court for re-sentencing. However, they must demonstrate they have been materially disadvantaged by being sentenced under the three strikes law.

In cases involving second strike offenders convicted of murder (approximately 14 offenders), the Court must impose a life sentence without parole, unless it would be

manifestly unjust to do so. The Ministry thinks it would be prudent to allow a right to apply for a re-sentencing for this category of offenders. If this option is supported, offenders would be able to apply to the High Court for re-sentencing where they can demonstrate that they have been materially disadvantaged, in terms of their sentencing or parole outcome, by being sentenced under the three strikes regime.

Advantages:

- More proportionate with standard sentencing settings and consistent with BORA. There may be grounds for legitimate concern around sentencing outcomes in some cases.
- Reduces the administrative burden of automatic re-sentencing.

Disadvantages:

- No automatic right to resentencing. The burden of making the application and proving the disadvantage is on the offender. There will be potential legal challenges regarding New Zealand Bill of Rights Act 1990

*Third strike offenders*

- **Option 1 (recommended):** Referred back to High Court for re-sentencing (including to determine MPI).<sup>17</sup>

The Ministry recommends third strike offenders serving sentences of imprisonment should be referred back to the High Court for re-sentencing. There are approximately 17 offenders in this category. The Ministry considers this the only viable option available because for this category of offenders there is no original sentence to revert back to, so re-sentencing on an individual basis is the only real option if any action is to be taken for this small group.

Advantages:

- More consistent with standard sentencing settings and BORA. The disproportionate impact of the regime is greatest for third strike offenders, as in every case but one, judges have made it clear in their sentencing notes that they would not have imposed the maximum prison term had they been able to exercise discretion.<sup>18</sup>

Disadvantages:

- Could create a small administrative burden on Courts arranging the re-sentencing.
- Uncertainty and stress for a small number of victims.

*Life sentences for murder – third strike offenders*

- **Option 1 (recommended):** Re-sentencing in High Court.
- **Option 2:** Individuals can apply to the High Court for re-sentencing. However, they must demonstrate they have been materially disadvantaged by being sentenced under the three strikes law.

In cases involving third strike offenders convicted of murder (currently 3 offenders), the Court must impose a life sentence without parole, unless it would be manifestly unjust to do so. The Ministry recommends that all third strike offenders sentenced for murder be automatically eligible to be re-sentenced in the High Court.

<sup>17</sup> The High Court is the court where third strike offenders are sentenced. If they were sent to the Court of Appeal for resentence this would impact the right to appeal to the Court of Appeal.

<sup>18</sup> *R v Kingi Ratima*, Hamilton High Court (2017). The judge calculated that the offender would ordinarily have received a prison sentence of 3 years and 11 months, rather than the 10 year sentence the Court was obliged to impose.

The reason for this is that there is a clear disadvantage faced by third strike offenders of having to be sentenced to a minimum period of imprisonment of 20 years under the current three strikes regime. Victim's families will be proactively notified about re-sentencing through the Victims Notification Register and Court Victims Advisors.

Advantages:

- More proportionate with standard sentencing settings and consistent with BORA

Disadvantages:

- Small administrative burden for automatic re-sentencing.
- Impact the re-sentencing will have on victims and the stress and trauma potentially caused by reopening the case.

*All second strike offenders currently serving sentences of imprisonment*

Due to the fact that some offenders have received multiple sentences for a combination of strike and non-strike offences<sup>19</sup> there may be unforeseen cases that will merit special consideration by the Courts to ensure a just outcome. For this reason, the Ministry considers the right to apply for re-sentencing to be extended generally to those currently serving a sentence of imprisonment who can demonstrate they have been materially disadvantaged by being sentenced under the three strikes regime. Numbers will be dependent on when the legislation comes into force. Victims will be proactively notified about re-sentencing through the Victims Notification Register and Court Victims Advisors.

## Section 4: Impact Analysis (Proposed approach)

### 4.1 Summary table of costs and benefits

#### Additional costs of proposed approach, compared to taking no action

- Courts will have a one-off cost associated with re-sentencing of current third strikers this will also include costs associated with victims participating if they choose to do so.
- The Parole Board will have costs associated with offenders becoming eligible for parole and requiring parole hearings.
- There will be costs to Crown Law associated to re-sentencing of current strikers.
- These costs for Courts, the Parole Board and Crown Law will be absorbed within baselines.
- Legal Aid will incur costs associated with re-sentencings and parole hearings for second and third strike offenders. The Legal Aid appropriation is currently overspent. The additional funding required for three strikes will be sought through the existing legal aid cost pressure bid.
- There is a **medium** non-monetised cost on victims having to re-engage in resentencing and parole (stress of reopening sentencing and ongoing trauma and victimisation etc.) and support they might need during this process.

#### Expected benefits of proposed approach, compared to taking no action

<sup>19</sup> This complexity at sentencing also means that the data on second and third strike offenders currently serving sentences of imprisonment is not entirely reliable.

If the regime is repealed with the introduction of proposed transitional arrangements Ara Poutama Aotearoa will potentially avoid future costs associated with the three strikes regime.

Based on current volumes, and updated forecast trends in serious offending, the Ministry of Justice has forecast that by 2025 an estimated 75-90 prison places will not be required due to repeal of three strikes. The figure for 2032 is forecast to be 140-180 places. Repealing three strikes, therefore, will avoid the need for **75-90 places by 2025 and by 140-180 places by 2032**. The cost of a prison place is estimated at \$12,000 per annum. This will avoid potential future costs of approximately **\$996,000 by 2025 and \$1,920,000 by 2032**.

These figures should be viewed as approximate only and represent only a possible future. Changes in the justice sector will impact both crime levels and criminal justice sector settings over the next 15 years, making it very challenging to accurately project the prison population for those on second and third strikes in the future if the three strikes regime was to remain unchanged. With all longer-term projections, there is a greater degree of uncertainty for years further into the future of the projection.

There are **medium** non-monetised benefits from offenders being subject to fairer and more consistent outcomes. Offenders will also have access to reintegration, parole conditions and support that will help them to reintegrate into society.

#### 4.2 What other impacts is this approach likely to have?

We have not consulted Māori directly; however the ministry has considered the impact of the proposals on the Crown's Te Tiriti o Waitangi obligations. While repealing the three strikes law will not eliminate disparities faced by Māori in the criminal justice system it is a move to a more fair and equitable justice system.

Removing the three strikes regime will allow for background and cultural considerations of the offender to be considered at sentencing. This has been specifically highlighted in the Ināia Tonu Nei<sup>20</sup> report which calls for such considerations to be mainstreamed throughout the criminal justice system. Hāpaitia te Oranga Tangata reports<sup>21</sup> also highlighted the impact imprisonment has on Māori and their whānau as it removes individuals from their communities and cultural identity, who are best placed to rehabilitate them. This has intergenerational impacts financially and on their tamariki, continuing the intergenerational cycle of distrust in the system.

In 2009, Te Rūnanga o Ngāi Tahu in their submission on the three strikes legislation strongly opposed the introduction of the three strikes regime. They highlighted that the "bill is the antithesis of Te Ao Māori principles including restorative justice and the regulatory impact statement clearly indicates the bill will impact Māori disproportionately more than any other ethnic population". Repealing the three strikes regime has potential to increase the confidence and trust of Māori in the criminal justice system as the regime impacts on Māori the most.

<sup>20</sup> Ināia Tonu Nei was a group formed during the Hāpaitia programme to specifically focus on highlighting the Māori perspective on reforming the criminal justice system.

<sup>21</sup> Report by Hui Māori: Ināia Tonu Nei. (2019); Report by Te Uepū Hapai I Te Ora: Turuki! Turuki! Move Together. (2019); Report by Te Uepū Hapai I Te Ora: He Waka Roimata. (2019)

Three strikes work has become a priority for the Government, which has created a time pressure for developing these proposals. The Ministry of Justice has actively engaged with Crown law and Ara Poutama Aotearoa around transitional options.

The public will have the opportunity to make submissions as part of the standard Select Committee consideration of any legislative amendment.

## Section 5: Stakeholder views

### 5.1 What do stakeholders think about the problem and the proposed solution?

The Crown Law Office has been proactively engaged with this policy and provided their views and suggestions in the development of options, including in relation to BORA considerations.

The Parole Board and the Judiciary will be consulted when work has progressed. Ara Poutama Aotearoa has provided preliminary views. The Parole Board and the Judiciary has an interest in how transitional arrangements are implemented.

We have taken stakeholder feedback into account while developing and refining transitional arrangement options for all three strike prisoners. Crown Law and Ara Poutama Aotearoa support the options proposed.

## Section 6: Implementation and operation

### 6.1 How will the new arrangements be given effect?

Repealing the three strikes regime will be given effect by introducing legislation as a standalone bill. The bill will also include transitional arrangements and provisions such as removing the option of compensation and creating a right to apply for re-sentencing.

Courts, the judiciary, Ara Poutama Aotearoa and the Parole Board will be responsible for the operation of transitional arrangements that are agreed to.

The new arrangements are expected to come into effect no later than mid-2021. It is important for this to happen as quickly as reasonable to prevent ongoing impacts that may arise due to adjournment of court cases and a back log of people on remand.

A potential implementation risk is time being available for Parole Board hearings of strikers eligible for parole. The Parole board undertook approximately 6500 parole hearings in 2018/19. The estimated number of approximately 155 second strikers and costs associated with additional Parole Board hearings indicate that baselines are enough to accommodate the fluctuations that the transitional arrangements will create. 20% of these 155 second strikers already have a parole eligibility date which indicates they were sentenced on non-strike offences as well.

Court delays due to re-sentencing and adjournment of hearings waiting for the regime to be repealed is identified as an implementation risk. However, the High Court has indicated it will be able to accommodate the resentencing of third strike offenders, but we are not able to estimate how long it will take for resentencing to be completed. It is not yet known if new resentencing reports will be required, this could also have an impact on the timeframes for resentencing.

It is important to consider how information will be provided to those affected and the wider public of changes to the regime and transitional options available when this is

implemented. The office of the Ministers of Justice and Corrections will publicise material relating to the repeal of the three strikes regime and transitional arrangements for existing second and third strikers. Public messaging around transitional arrangements will be important to indicate in advance of legislation coming into effect as it will allow Courts, and defence counsel to prepare for these changes. If the approach to transitional arrangements is clear, this may reduce the number of people seeking adjournments until after the three strikes legislation comes into force.

Support will be provided to victims throughout the process. Victims of these offences who are on the Victims Notification Register will be proactively contacted to ensure they are aware that there will be an adjustment to parole eligibility or a re-sentencing hearing. The Court Victims Advisor responsible for the victims' case will notify the victim of re-sentencing outcomes for the offender and inform victims of services available to them. Victims will be advised of the offender's release or parole hearing date via the Victims Notification Register.

Another risk to implementation of the transitional arrangements is potential legal challenges arising. However, a mitigation for this is the general right to apply for a resentencing if an offender can show they have been materially disadvantaged by being sentenced under the three strikes regime.

## Section 7: Monitoring, evaluation and review

### 7.1 How will the impact of the new arrangements be monitored?

The Ministry of Justice will be responsible for administering the legislation. The Courts and Ara Poutama Aotearoa will be responsible for implementing the transitional arrangements that are agreed upon, through facilitating re-sentencings and parole hearings.

Data will be collected on the number of people who are eligible for the potential options and the results of the outcome of those options (e.g. change in sentences, early release, released on conditions).

The Ministry of Justice will collect data on number of offenders applying the case of material disadvantage and the outcomes of these applications.

### 7.2 When and how will the new arrangements be reviewed?

The proposals will be reviewed periodically in the context of the general oversight of the Sentencing Act. The Ministry of Justice administers the Parole and Sentencing Acts jointly with Ara Poutama Aotearoa.

The Ministry of Justice will continue to analyse differences in sentence outcomes and reoffending as part of our standard work programme. Stakeholders can also raise concerns directly with Justice and Ara Poutama Aotearoa.



Appendix 1: Options

**Options for three strikes regime**

KEY: XX - does not completely meet desired outcome, X - partially does not meet desired outcome, ~ - no effect on desired outcome ✓ - partially meets desired outcome, ✓✓ - completely meets desired outcome

Options	Criteria			
	Proportionality (dealt with as they would have been prior to the three strikes regime)	Administrative simplicity (simple to administer and stress of re-opening sentencing on victims)	Consistency with Bill of Rights (minimises disproportionate impacts and arbitrary detention)	Public safety (minimises risk to public safety by ensuring there are conditions to deal with the offender upon release)
<b>Option 1:</b> Maintain current regime	XX	✓	XX	~ No evidence to suggest punitive and long-term sentences reduces reoffending rates
<b>Option 1 (preferred):</b> Repeal three strikes regime	✓ In line with standard sentencing practices	XX Administrative burden due to transitional arrangements	✓	~ Already have measures in place to deal with serious and sexual offending

**Options for transitional arrangements for people serving sentences of imprisonment for second strikes**

Categories	Options	Approximate number of people in prison	Criteria			
			Proportionality (dealt with as they would have been prior to the three strikes regime)	Administrative simplicity (simple to administer and stress of re-opening sentencing on victims)	Consistency with Bill of Rights (minimises disproportionate impacts and arbitrary detention)	Public safety (minimises risk to public safety by ensuring there are conditions to deal with the offender upon release)
<b>No transitional arrangements</b>	Changes only apply prospectively. Require those offenders sentenced under the three strikes regime to continue to serve their sentences as imposed	ALL	X	✓	XX	✓
<b>Strike 2 offences - 2 years or less</b> Sentence to be served in full, without eligibility for parole.	<b>Option 1 (preferred):</b> Automatic release after ½	17 ppl	✓ In accordance with general sentence arrangements	✓	✓	✓ Original release conditions imposed at sentence will apply
	<b>Option 2:</b> Referred back to original sentencing court for resentencing	17 ppl	✓ The original sentencing judge may have been influenced by the three strikes regime when imposing sentence	X Re-opening sentencing may create stress on victims	X If offender already served 1/2 and would otherwise have been released this raises the possibility of arbitrary detention as they await a re-sentencing date	✓ Release conditions will be imposed at re-sentencing
	<b>Option 3:</b> Automatic release after serving 2/3	17 ppl	X	✓	X	✓
<b>Strike 2 offences - over 2 years</b> Sentence to be served in full, without eligibility for parole.	<b>Option 1 (preferred):</b> Eligible for parole after 1/3, if already served 1/3 before parole board at earliest opportunity.	189 ppl	✓✓ This is the default position for offenders not subject to the three strikes regime	✓	✓	✓ Offender only eligible for parole at 1/3, still up to the Parole Board to make normal assessment prior to release
	<b>Option 2:</b> Eligible for parole after two thirds, if already served before parole board at earliest opportunity.	189 ppl	✓	✓	X	✓ Prisoners serve an average of 75% of their sentence before release

	<b>Option 3:</b> Back to High Court for determination of appropriate MPI	189 ppl	✓✓ Restores offenders back to the position they would be in if the three strikes regime did not exist	XX Significant amount of court time that is unlikely to change the outcome for most offenders. Re-opening sentencing may create stress on victims	~ Could raise a risk of arbitrary detention depending on proximity to sentence end date	✓ Release conditions to be imposed by the Parole Board
<b>Strike 2 offences -murder</b> Sentenced to life imprisonment without parole, unless without parole would be manifestly unjust	<b>Option 1:</b> All resentenced in High court	14 ppl	✓	XX More burdensome as several reports required for a murder re-sentencing. Also resource intensive.	✓	✓
	<b>Option 2 (preferred):</b> Individuals can apply to the High Court for a rehearing. Must demonstrate they have been disadvantaged by being sentence under three strikes regime. <sup>22</sup>	14 ppl	✓	X	✓	✓

### Options for transitional arrangements people serving terms of imprisonment for third strikes

Categories	Options	Approximate number of people in prison	Criteria			
			Proportionality (dealt with as they would have been prior to the three strikes regime)	Administrative simplicity (simple to administer and stress of re-opening sentencing on victims)	Consistency with Bill of Rights (minimises disproportionate impacts and arbitrary detention)	Public safety (minimises risk to public safety by ensuring there are conditions to deal with the offender upon release)
<b>No transitional arrangements</b>	<b>Option 1:</b> Changes only apply prospectively. Require those offenders sentenced under the three strikes regime to continue to serve their sentences as imposed	ALL	X	✓	XX	✓
<b>Strike 3 offences – non-murder</b> Sentenced to max. available sentence without parole, unless without parole would be manifestly unjust	<b>Option 1 (preferred):</b> Referred back to High Court for re-sentencing (including to determine MPI) <sup>23</sup>	17 ppl	✓	X	✓✓	✓
<b>Stage 3 offences -murder<sup>24</sup></b> Sentenced to life imprisonment without parole, unless without parole would be manifestly unjust	<b>Option 1 (preferred):</b> Resentenced in High court	3 ppl	✓✓	XX More burdensome in terms of reports required for murder resentence. Also resource intensive.	✓	✓
	<b>Option 2:</b> Individuals can apply to the High Court for a rehearing. Must demonstrate they have been disadvantaged by being sentenced under three strikes regime.	3 ppl	✓	X	✓ The issue of arbitrary detention does not arise because the minimum period of imprisonment for murder is 10 years, none of these offenders have reached 10 years	✓

<sup>22</sup> Judges may have imposed a longer minimum period of imprisonment (MPI) than usual to account for not adopting the without parole requirement under the three strikes regime.

<sup>23</sup> The High Court is the court where third strike offenders are sentenced. If they were sent to the Court of Appeal for re-sentencing, this would impact the right to appeal to the Court of Appeal.

<sup>24</sup> Special provisions would apply for manslaughter but as there are currently no third strike offenders convicted of manslaughter, we have not included this category in the table.