# Regulatory Impact Statement: Reinstating three strikes sentencing law

## Coversheet

| Purpose of Document | |
|---|---|
| Decision sought: | This RIS provides analysis of the proposal to reinstate a three strikes sentencing regime, to support Cabinet's decisions on the regime, including changes to the design of the previous regime. |
| Advising agencies: | Ministry of Justice |
| Proposing Ministers: | Associate Minister of Justice |
| Date finalised: | 11 April 2024 |

| Problem Definition |
|---|
| There has been an increase in violent crime under some measures, including reported rates of violent crime victimisations, and there is public concern about serious violent crime and public safety. While there are a range of views about the factors contributing to crime and the appropriate system response, some may consider that the current discretionary sentencing process is failing to hold offenders accountable for repeat serious offences and current penalties are insufficient to denounce this behaviour and prevent further offending. |

**Executive Summary**

The three strikes regime that was introduced by the Sentencing and Parole Reform Act 2010 was repealed in 2022. The Government has committed to reinstating a three strikes regime for repeat serious offenders.

Three strikes is a sentencing model originating in the United States, which provides for progressively tougher penalties for repeat offending. Proponents of three strikes regimes argue that they deter and denounce serious repeat offending and increase public confidence in the justice system through the guarantee of tough sentencing outcomes.

Under the three strikes regime introduced in New Zealand in 2010, qualifying serious violent and sexual offences resulted in a warning (first strike); the loss of parole (second strike) and the maximum sentence without parole, unless the denial of parole would be manifestly unjust (third strike).

The Ministry's analysis of the 2010 regime found that:

- it was resulting in severely disproportionate sentences;
- there is limited evidence that it reduced serious crime;
- judicial discretion is preferable to mandatory sentences because it allows for the circumstances of each case to be taken into account by the sentencing judge; and
- the standard sentencing options enable judges to impose tough sentences of the kind required by three strikes when it is appropriate to do so.

The Ministry of Justice, based on its previous analysis, recommends the status quo (see **Section 2, Part A**). However, we recognise that planned reinstatement is an opportunity to

achieve more balanced outcomes from the three strikes regime through refinements to its legislative design.

On the options within the regime (see **Section 2, Part B**), the Ministry's preferred approaches align closely with the recommendations set out in the Cabinet paper, except for two areas noted below. The Cabinet paper accompanying this RIA adopts most of the recommendations in this analysis, by proposing:

- increased judicial discretion for murder and non-murder offences so that judges are able to depart from standard second and third strike sentencing in order to avoid a manifestly unjust outcome;
- clearer guidance on when judges will be required to apply the regime and where exceptions may be allowed;
- Introducing a threshold sentence of two years imprisonment, so that offending that results in a lesser sentence does not qualify for the regime; and
- ensuring some benefit for pleading guilty.

The Ministry supports these changes because they will significantly reduce the risk of disproportionately severe sentences. Case law that developed under the previous regime demonstrates that judicial discretion is exercised cautiously and consistently. On this basis we are confident that the proposed changes will not undermine the desired outcome of longer sentences being imposed for serious repeat offending. Providing for limited guilty plea discounts will benefit victims who will be spared the trauma of going to trial, which is a more likely outcome if offenders have no incentive to admit guilt.

The Ministry proposes two further adjustments to the design of the three strikes regime, not recommended in the Cabinet paper:

- *Setting minimum penalties for a second and third strike* so that judges have greater discretion at sentencing above a baseline set in legislation. This would strike a balance between ensuring that a longer sentence is imposed without requiring that sentence is set at the most punitive level, i.e. the maximum possible for the offence.
- *Excluding offences with a seven year penalty* from the reinstated three strikes regime. While offences in this lowest tier of qualifying offences can be serious, they can span a very wide range of conduct, which under the previous regime resulted in particularly disproportionate sentences. Such sentences have been successfully appealed on rights grounds and have resulted in ongoing compensation payments, at a cost to the Crown.

Reinstating the three strikes regime invites consideration of whether the strikes recorded under the previous regime should be reactivated. The Ministry supports the recommendation in the accompanying Cabinet paper that the planned legislation should not be retrospective as this would contravene a fundamental justice right only to be subject to penalties that were in place at the time of the relevant offending (New Zealand Bill of Rights Act 1990, section 26).

Due to time constraints there has not been consultation beyond affected government agencies. However, we have been able to rely on a considerable amount of data and analysis relating to the previous regime – including impacts on minority groups, the operation of the

courts and the prison system – which has informed the cost-benefit analysis in this regulatory impact statement, along with modelling of the proposed adjustments.

## Limitations and Constraints on Analysis

This analysis has been constrained by:

- **Narrow scope:** Agencies were commissioned to fulfil the Government's commitment on reinstating the three strikes regime included in the Coalition Agreement and election commitments. The Government wishes to proceed quickly with this legislation. This commissioning and timeframes prevented consideration of a wider range of sentencing approaches and other approaches for dealing with repeat serious offenders (other than a three strikes regime).
- **Lack of broader public consultation**: The timeframes in which the policy proposals have been prepared did not allow for consultation beyond government agencies affected. As the proposed changes require legislative amendment, the Select Committee process will provide an opportunity for broader scrutiny and input.
- **Data limitations**: The evidence regarding the impacts of a three strikes regime is limited and unclear, particularly in relation to the effect on offending. Where possible we have drawn on data from the previous regime. We have drawn on reports and academic research on overseas experience with comparable legislation and the submissions on the Three Strikes Repeal Bill.

A longer timeframe could have allowed officials to consult with stakeholders and the public, including groups most affected by these policies, especially Māori, given the disproportionate impacts. This could have provided more fully informed advice on the impact of these proposals, unintended consequences, as well as insights on repeat serious offending and efforts to address this more broadly.

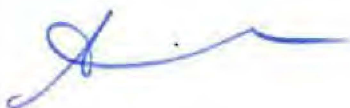
The existing knowledge base of data, case law and operational experience from administering the previous regime from 2010-2022, as well as government reports, academic research, and international experience provides a solid foundation for assessing the likely overarching impacts of the options. These are summarised in the overview and overall options, referenced where appropriate, as well as select additional references in the relevant sections.

## Responsible Manager(s) (completed by relevant manager)

Alida Mercuri

General Manager, Criminal Justice

Ministry of Justice



05 March 2024

| Quality Assurance (completed by QA panel) | |
|---|---|
| Reviewing Agency: | Ministry of Justice |
| Panel Assessment & Comment: | The Ministry of Justice's Regulatory Impact Assessment quality assurance panel has reviewed the Regulatory Impact Statement "Reinstating three strikes sentencing law" prepared by the Ministry of Justice and considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria.<br><br>The RIS presents a clear and robust analysis of the relevant policy choices and makes good use of the available international evidence and evidence from New Zealand's previous three strikes regime.<br><br>The RIS appropriately notes limitations and constraints on the analysis. The most significant constraint is the lack of public engagement on the proposals. The panel considered that while engagement on repeal of the previous regime is an adequate proxy for consultation about whether to reinstate the three strikes regime, it is not a proxy for consultation on options for the design of the regime. Despite this limitation, the panel considers the analysis is otherwise robust and can be relied on by Ministers to support decision-making. |

## Table of Contents

Regulatory Impact Statement: Reinstating three strikes sentencing law .......................... 1
Coversheet ........................................................................................................ 1
Section 1: Diagnosing the policy problem ........................................................................ 6
Context for the reinstatement of three strikes and wider trends ........................... 6
Problems that the reinstatement of three strikes is intended to address ............... 7
Opportunities to adapt the three strikes regime .................................................. 8
Section 2: How the analysis in this paper was developed ........................................... 10
Scope of the analysis is limited by a specific Government commitment ............ 10
Consultation ...................................................................................................... 11
Part A: The case for reinstating the three strikes regime .................................. 13
Option One – Status Quo .................................................................................. 13
Option Two – Reintroduce a three strikes regime ............................................ 13
Impacts on crime rates, re-offending and public safety .................................... 14
Impact on justice outcomes for Māori .............................................................. 17
Improving public confidence in the justice system ............................................ 18
Impacts on consistency and workability with relevant laws and obligations ........ 20
Cost-effectiveness of three strikes regimes ...................................................... 21
Recommended option ........................................................................................ 22
Part B: What are the options for modifying the regime? .................................... 23
Options within the regime (i): qualifying offences and scope of the regime ........ 24
Options within the regime (ii): penalty at each strike (non-murder offences) ...... 29
Options within the regime (iii): exceptions to the regime .................................. 33
Options within the regime (iv): providing for guilty pleas ................................... 37
Options within the regime (v): murder offences ................................................. 40
Options within the regime (vi): retrospective application of strike offences ......... 43
What options are likely to best address the problem, meet the policy objectives, and deliver the highest net benefits? .................................... 46
What are the marginal costs and benefits of the Ministry's preferred package of options? ........................................................................................ 47
Section 3: Delivering an option .......................................................................................... 52
How will the new arrangements be implemented? ............................................ 52
How will the new arrangements be monitored, evaluated, and reviewed? ......... 53

# Section 1: Diagnosing the policy problem

## Context for the reinstatement of three strikes and wider trends

### Reinstating three strikes is a Government commitment

1. The Government has committed to reinstating the three strikes regime that was introduced by the Sentencing and Parole Reform Act 2010 and then repealed in 2022.

2. Under the previous regime, there were 40 qualifying three strike offences, comprising almost all major violent and sexual offences with a maximum penalty of seven years or greater imprisonment. The penalties worked as follows:

   2.1. a first specified offence was warned of the consequences if the person is convicted of another specified offence committed after that warning;

   2.2. a second specified offence was required to serve any prison sentence in full (i.e., without eligibility for automatic release for short-term sentences or the possibility of parole for long-term sentences) and receive a final warning;

   2.3. a third specified was sentenced to the maximum penalty for that offence, and the term of imprisonment was required to be served without parole unless the Court determined that this would be manifestly unjust; and

   2.4. if the person was convicted of murder on their second or third strike, the court was required to impose a life sentence without parole, unless the court considered such a sentence would have been manifestly unjust.

### Trends in sentencing reform in recent decades

3. Under the standard approach to sentencing, judges consider the individual circumstances of the case, guided by the overall framework of the purposes and principles set out in the Sentencing Act 2002, any guideline judgments, and previous cases covering similar offending.[1] The Court must take into account an offender's previous convictions as an aggravating factor at sentencing, as one of a range of sentencing factors.

4. Over the past twenty years, a range of new tools and powers have been introduced that rely on the exercise of judicial discretion, underpinned by formal risk assessment where appropriate. These include:

   4.1. the introduction of extended supervision orders (ESOs) in 2004 that allow high risk sex offenders to be closely managed in the community upon their release from prison – expanded to include violent offenders in 2014;

   4.2. the introduction of public protection orders in 2014, which allow for the management of the highest risk offenders in a secure facility upon their release from prison; and

   4.3. the possibility of life imprisonment without parole in murder cases in 2010.

5. These measures supplemented options already available to the Court at sentencing to protect the public, including preventive detention (an indeterminate sentence that allows

---

[1] Murder offences are an exception: there is a presumption of life imprisonment, unless imposing life imprisonment would be manifestly unjust. The Court must impose a mandatory period of imprisonment (MPI) of at least 10 years (or 17 years in certain circumstances).

for parole only when a person ceases to be an undue risk to the community); minimum periods of imprisonment where the Court can override standard parole eligibility; and the ability to impose a term of imprisonment up to the maximum penalty where the offending is extremely serious.

### The reinstatement of three strikes is part of a wider shift to limits on judicial discretion

6. The reinstatement of three strikes is one of several legislative reforms announced by the Government that are explicitly focused on limiting judicial discretion at sentencing. These include the following law changes scheduled for this Parliamentary term:

   6.1. Capping the sentencing discounts that judges can make for mitigating factors at 40%;

   6.2. Preventing the repeat use of youth and remorse as aggravating factors at sentencing; and

   6.3. Requiring that offending on bail, in custody or on parole results in a cumulative rather than a concurrent sentence.

7. The introduction of these statutory requirements alongside the reinstatement of three strikes represents a significant rebalancing of the roles of Parliament and the judiciary in relation to sentencing. It also demonstrates a willingness to make greater use of imprisonment if necessary. One of the objectives of this regulatory impact analysis is to weigh the costs and benefits of this approach in relation to three strikes.

## Problems that the reinstatement of three strikes is intended to address

8. The impact analysis set out in this paper assesses the extent to which the reinstatement of three strikes will effectively address two core concerns that underpin support for mandatory sentencing regimes. These are: the need to more effectively deter and denounce serious repeat offending; and to improve public confidence in the justice system.

9. These concerns are summarised below and discussed in more detail in Section 2, **Part A**, which focuses on the overall merits of reintroducing a three strikes regime, and in **Part B,** which discusses options for improving the regime in light of the Government commitment to reintroducing it.

### Concerns about the prevalence of serious repeat offending

10. The public are rightly concerned about violent crime given its severe impact on victims and wider sense of community safety. High profile increases in specific categories of offending, such as ram raids and violent robberies provoke legitimate anger and fear. They also raise questions about whether more can and should be done at sentencing to deter and denounce these and other crimes, including New Zealand's very high rates of family violence offending.

11. Evidence about whether serious violent crime is increasing is mixed, and depends on the measure. For example, regular large scale public surveys conducted by the Ministry of Justice show that overall serious crime has not increased since pre-COVID levels.[2] On the other hand, the rate of violent crime victimisations reported to the Police has

[2] New Zealand Crime & Victims Survey Cycle 5 *NZCVS Cycle 5 resources and results | New Zealand Ministry of Justice* (2022).

increased by 37% in the last 5 years,[3] including a period during which the previous three strikes regime was in force.

12. Data indicates that reoffending rates have fluctuated over time and may have started to drop in recent years, although the effect of COVID-19 on offending and re-offending rates complicates the analysis.[4]

### Low levels of public confidence in the justice system

13. Public confidence in the justice system is difficult to measure, given the diversity of views about the purposes of sentencing and the multitude of factors that influence public attitudes, including media reporting. Analysis shows that victims of some types of crime have lower trust and confidence in the criminal justice system, particularly victims of interpersonal violence,[5] which can be as much caused by delays in the trial process and the levels of support and information provided.

14. Surveys and other research appear to show that public attitudes do not necessarily align with data on crime rates. For example, even when there have been sustained drops in offending on a variety of measures, this tends not to be reflected in surveys about how safe people feel in their communities.[6] Certain sentencing trends may gain more attention than others. For example, while it may be widely known that more offenders are now receiving community sentences rather than short sentences of imprisonment, it is perhaps less well known that those who are imprisoned are now receiving longer sentences.[7]

15. Public submissions on the three strikes repeal were strongly weighted against its removal (80%).[8] While submissions are not a representative sample, they are an indication of the depth of feeling around a particular issue. It is important to note too that support for mandatory sentencing may have more to do with the certainty of the outcome as much as the deterrent effect. Knowing that justice must be done in a particular way and with a strong emphasis on denunciation may be more important than the impact of the policy on re-offending.

## Opportunities to adapt the three strikes regime

16. The reinstatement of three strikes presents an opportunity to achieve more balanced outcomes from the three strikes regime through refinements to its legislative design.

---

[3] Violent crime per 10,000 population. Police Recorded Crime Victims Statistics (RCVS) and population estimates from Statistics NZ; See also, Ministry of Justice *New Zealand Crime and Victims Survey Cycle 5 key findings report* (2023), at 22. Findings indicated victims are experiencing more acts of interpersonal violence: There were 29 interpersonal violence offences per 100 adults in Cycle 5, compared to 19 per 100 adults in Cycle 4.

[4] Justice Sector Long-Term Insights Briefing *Long-term insights about imprisonment 1960-2050* (2022) at 86. Results from 2021/22 show that around two-thirds of those released (64 percent) were not resentenced, and the majority (almost 80 percent) did not return to prison, within the first year of release.

[5] Ministry of Justice *Victims' trust and confidence in the criminal justice system* (2021), at 4.

[6] M Manning and others "What Matters More, Perceived or Real Crime?" (2022) 163 Soc Indic Res 1221 at 1221. For a discussion of factors which correlate to perceptions of safety

[7] Between 2017/18 and 2021/22 prison sentences increased from 296 to 330 days. See Justice Sector Long-Term Insights Briefing, above n 4, at 44.

[8] Ministry of Justice *Departmental Report: Three Strikes Legislation Repeal Bill* (2022), at 3-4. Of the submissions received from individuals, 83 (18%) supported the Bill and 377 (82%) opposed the Bill. Of the submissions received from organisations, 16 (73%) supported the Bill and 6 (27%) opposed the Bill.

17. Under the previous regime, significant issues arose from the requirement for judges to impose severely disproportionate sentences in some cases. This resulted in a number of successful appeals, which confirmed that the Courts may disapply three strikes sentencing requirements in order to uphold offenders' New Zealand Bill of Rights Act 1990 (NZBORA) rights and that compensation may be available where those rights had been breached.

18. The Government's three strikes commitments recognise that changes are needed to make the reinstated regime workable in practice by:

    18.1. tightening the definition of three strikes offences so that lower-level offending is not captured by the regime;

    18.2. providing clearer guidance on when judges will be required to apply the regime and where exceptions may be allowed; and

    18.3. providing for recognition of guilty pleas so that offenders are not incentivised to try their luck at trial, resulting in unnecessary trauma for victims.

19. A core objective of this Regulatory Impact Analysis is to test a range of options for improving on the previous three strikes regime, including those listed above, to ensure that the new legislation is consistent with relevant laws and obligations and workable in practice.

# Section 2: How the analysis in this paper was developed

## Scope of the analysis is limited by a specific Government commitment

20. The Government has committed to reintroducing a three strikes regime. The Government has also recently announced a target to reduce violent crime by 20,000 cases by 2029. Therefore, officials have not explored other sentencing and non-sentencing options to address repeat serious offending, such as crime prevention approaches that focus on mental health, drug addiction and barriers to education and employment.

21. Following this approach, the regulatory impact analysis is divided into two parts:

    21.1. **Part A** considers the overall impacts of reintroducing a three strikes regime.

    21.2. **Part B** considers options for the various policy and design aspects of the regime that must be considered, given the Government's intention to reinstate the regime.

22. The following criteria for Part A *The overall approach to repeat serious offending* have been used to analyse options (weighted equally):

| Criteria | What this means |
|---|---|
| Reducing offending and improving public safety | The effectiveness of the option in reducing offending rates, either through deterrence of individual offenders or offending generally, or through the increased incapacitation of those who have offended. |
| Improves justice outcomes for Māori | The extent to which the option reflects te ao Māori approaches to justice, enables the Crown's obligations to the Treaty of Waitangi and contributes to equitable outcomes for Māori in the criminal justice system.[9] |
| Public confidence | The effect of the option on the public's sense of trust and confidence in the justice system, including their sense of safety, and the ability for law and order to be enforced through effective sentencing; sending a signal that there will be consequences for repeat offending. |
| Consistency and workability with relevant laws and obligations | The extent to which the option is consistent and workable with existing relevant laws and obligations, including:<br>- the general sentencing framework (including the purposes and principles of sentencing),<br>- consistency with the New Zealand Bill of Right Act 1990 (NZBORA), and, where a proposal may limit those rights, the extent to which such limitation may be justified or mitigated,<br>- compliance with obligations under the Treaty of Waitangi (the Treaty), and<br>- New Zealand's obligations under international law (such as the International Covenant on Civil and Political Rights) |
| Cost-effectiveness | The extent to which the option provides value for money and efficient use of resources. |

23. Additional matters that will be considered are international trends and experiences, and evidence from the 2010 three strikes regime. Administrative operability of the options (where relevant) will also be considered.

24. The criteria for Part B – *What are the options for modifying the regime*? – to assess options within the regime, are the same as the criteria for Part A (weighted equally), without the criteria on improving justice outcomes for Māori and cost-effectiveness.

## Consultation

29. The Government intends to proceed with legislation quickly in 2024, which does not allow time for stakeholder engagement beyond ministerial and agency consultation.

30. We have not been able to engage with Māori stakeholders including the National Iwi Chairs Forum and Ināiā Tonu Nei due to this timetable. Officials recognise the importance of engaging with Māori on the policy proposals given the disproportionate impact a three strikes regime will have on Māori (as discussed at paragraphs 53-58). Māori engagement would have informed the design of the regime and the potential

[9] This criterion also aligns with the Ministry's strategic priority to improve justice outcomes for Māori as outlined in: Ministry of Justice Our Strategy 2023 - 2027 (2024).

mitigations for the impacts. The lack of consultation will likely negatively impact the good faith obligations of the Crown.

32. Officials drew on research and evidence from the Department of Corrections, data analysis from the previous regime; Select Committee submissions on the repeal bill, the Three Strikes Law: Evidence Brief December 2018, academic writings, and international jurisdictions including the UK, Australia, Canada and the United States of America.

33. The policy is also informed by advice from New Zealand Police, Crown Law, the Law Commission and Ātea a Rangi, the Ministry of Justice business group focussed on improving justice outcomes for Māori.

34. Officials drew on the Departmental Report on the Three Strikes Legislation Repeal Bill, which provided an analysis of the submissions the Justice Committee received on the repeal, and a range of individual and organisational submissions (see paragraph 15). This provided a proxy for wider consultation to a degree.

## Part A: The case for reinstating the three strikes regime

35. The following section considers the overall merits of reintroducing a three strikes regime. The content is set out in a narrative form (rather than a table) with a description of the two broad options and discussion in respect of each of the criteria listed in the table at paragraph 22.

## Option One – Status Quo

36. One option is to retain the current sentencing framework under which sentencing is subject to judicial discretion. Currently, judges impose a sentence by considering the individual circumstances of the case, guided by the overall framework of the purposes and principles set out in the Sentencing Act 2002, any guideline judgments, and previous cases covering similar offending. In all cases, the court must take into account an offender's previous convictions as an aggravating factor at sentencing, amongst other factors.

37. Some of the purposes of sentencing in the Sentencing Act 2002 include denouncing the conduct in which the offender was involved, deterring the offender or other persons from committing the same or similar offence, protecting the community from the offender, and holding the offender accountable for the harm done to the victim and community.[10] The Court may uplift the sentence, by imposing a longer sentence or delaying parole eligibility, in order to give effect to these purposes.

38. There are a number of other measures at sentencing and prior to release which seek to prevent re-offending, including minimum periods of imprisonment where the court can override standard parole eligibility; the ability to impose a term of imprisonment up to the maximum penalty; and preventive detention.[11] Public protection orders (PPOs) and extended supervision orders (ESOs) are post-sentence orders available on application by the Department of Corrections.[12]

39. Exceptions to the standard sentencing approach, such as mandatory and presumptive sentences, are uncommon in New Zealand. The most notable examples are life imprisonment for treason and the presumptive sentence of life imprisonment for murder, with a minimum non-parole period of at least 10 years.[13]

## Option Two – Reintroduce a three strikes regime

40. Reintroducing a three strikes regime would require judges to sentence according to a structured, three-stage regime of progressively stronger penalties for certain repeat offending. This will generally require sentences which are longer than would otherwise have been imposed, especially at the third strike. For the purposes of analysis in Part A, the general structure of a reinstated three strikes regime is taken to resemble the 2010 regime, as described in paragraph 2, albeit with the potential for significant modifications.

---

[10] Sentencing Act 2002 section 7.

[11] Preventive detention is an indeterminate sentence that allows for parole only when a person ceases to be an undue risk to the community.

[12] These orders allow serious violent and sexual offenders to be intensively managed at the end of their sentence to prevent further offending, including (under public protection orders) at a secure residential facility if necessary.

[13] In the case of murder, this is a presumptive sentence because the Court need not impose a life sentence if it would be manifestly unjust to do so.

## Impacts on crime rates, re-offending and public safety

*Comparative research*

41. Other comparable jurisdictions have examples of mandatory sentences for some repeat or serious offending. There are a range of approaches, including:

    41.1. Larger-scale three-strikes style sentencing regimes with mandatory penalties for repeat offences, used in the United Kingdom[14] and the United States.[15]

    41.2. Narrower regimes with mandatory sentences for specific offences (with examples covering both single and repeat offending), seen in the UK, Canada and some Australian states.[16]

42. In the last decade or so, the trend internationally has been away from mandatory sentencing regimes,[17] narrowing the scope of these regimes and repealing them in some cases. For example, California removed non-violent offences from its regime in 2012,[18] and Canada passed legislation repealing one-third of its mandatory minimum sentences in 2022.[19] In many cases these changes have been influenced by increased prison populations as well as human rights considerations.

43. In 2018, the Ministry of Justice reviewed the evidence for the effectiveness of three strikes regimes at preventing crime.[20] Its key findings were that:

    43.1. Most studies of three strikes are based on the effects of such laws in the United States and more specifically California State.

    43.2. These individual studies have produced mixed results, in part due to political bias. 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.

---

[14] For example, the United Kingdom requires a life sentence for a second specified offence, unless it would be unjust to do so, with certain thresholds related to the sentence length the court would impose and the sentence imposed for the previous conviction. See United Kingdom Sentencing Act 2020, section 283.

[15] Notably in California where a broad regime with very high penalties was enacted in 1994, and approximately half of the US states, plus the federal jurisdiction have had some type of sentencing regime aimed at repeat offenders. Elsa Y. Chen "Impacts of 'Three Strikes and You're Out' on Crime Trends in California and throughout the United States" (2008) 24(4) Journal of Contemporary Criminal Justice 345 at 1.

[16] For example the United Kingdom *Sentencing Act 2020* includes a 6-month minimum sentence for threatening with weapon under section 312, and a minimum sentence for repeat offences involving a weapon of 6 months under 315. Canada's Criminal Code includes various mandatory minimum sentences, including a 3 year minimum sentence for a first offence involving a firearm, and a 5 year sentence for a subsequence offence under section 99(2). Western Australia's *Criminal Code Act Compilation Act 1913 s297(5)* includes a minimum sentence of at least 12 months for the offence of grievous bodily harm in certain circumstances.

[17] For a brief summary of international trends see Canada Department of Justice *Policy Qs and As – Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act* (2019).

[18] J Richard Couzens and Tricia A Bigelow *The Amendment of the Three Strikes Sentencing Law* (2017) at 5.

[19] Above n 17.

[20] Ministry of Justice *Three Strikes Law: Evidence Brief* (2018).

43.3. 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.

43.4. Other studies suggest that while the law appears to reduce crime in some jurisdictions, it also increases crime in others. Similarly, other studies have shown that while the law reduces some types of crime (e.g. burglary) it can potentially increase more serious types of crime (e.g. murder).

44. A brief review of the literature undertaken for this paper has confirmed that there have been no meta-analyses or systematic reviews on the effect of three strikes laws on crime. This is probably due to the the methodological difficulties in comparing the impact of three strikes regimes between jurisdictions that have very different justice systems and models of mandatory sentencing. This is certainly an issue when comparing New Zealand and California.

45. There are some more general observations from research into the use of penalties to deter offending that are relevant to three strikes. For example, meta-analyses have shown that in general, increasing the *certainty* of punishment modestly deters crime, whereas increasing the *severity* of punishment has a minimal effect.[21] Other research has shown perceived certainty of apprehension was most consistent with deterring white-collar offences, such as fraud and tax violations (rather than violent offending).[22]

*Insights from the experience of New Zealand's previous three strikes regime*

46. Ministry of Justice analysis from 2022 considered the impact of the previous regime on reducing crime.[23] This analysis considered both changes to the impact on rates of recorded crime for certain offences, and the rate at which offenders progressed through first, second and third strike offences.

47. On recorded crime, the analysis found there was no consistent pattern to changing crime rates before and after the three strikes regime was introduced in 2010 (see figure 1 below). Recorded sexual offending had increased significantly; recorded serious assaults continued dropping until 2013 then steadily increased, while robbery offences steadily dropped since 2006. On rates of reoffending, there was an approximately 1.4 percentage point reduction in the rate at which offenders progress from a first to a second strike, suggesting a possible small deterrent effect.

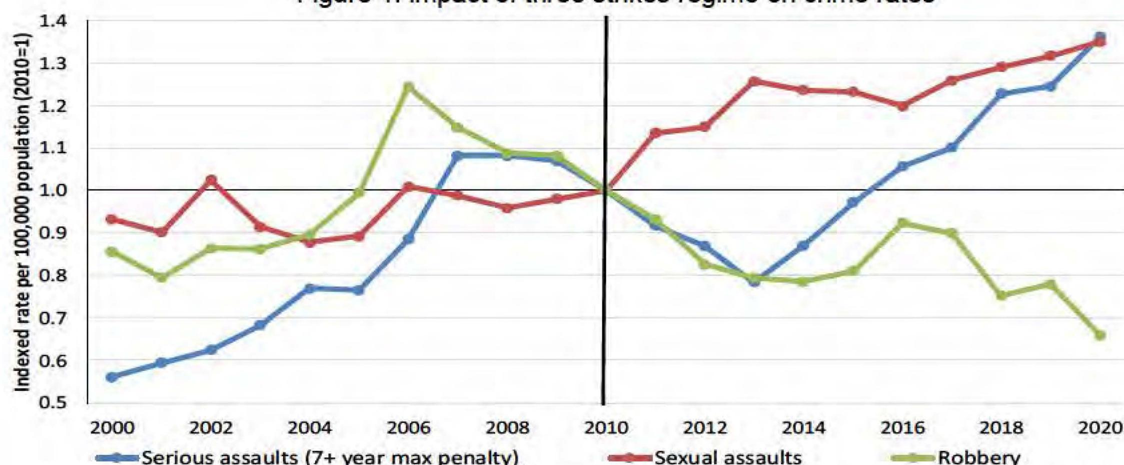
---

[21] Cullen and others "The empirical status of deterrence theory" in F. Cullen, J. Wright & K. Blevins (eds) *Taking Stock: The Status of Criminological Theory* (Transaction Books, New Brunswick, NJ, 2008).

[22] Pratt and others "The empirical status of deterrence theory" in F. Cullen, J. Wright & K. Blevins (eds) *Taking Stock: The Status of Criminological Theory* (Transaction Books, New Brunswick, NJ, 2008) 367.

[23] Ministry of Justice *Three Strikes Legislation Repeal Bill: Impact of the three strikes regime on rates of serious crime* (2022).

Figure 1: impact of three strikes regime on crime rates




48. There was a related concern the regime may have had an impact on the rehabilitation of offenders through the loss of parole eligibility, though this was not specifically assessed.[24]

*Will a three strikes regime prevent reoffending through incapacitation?*

49. Another consideration is whether a three strikes regime may prevent offending through the incapacitation of offenders, that is, removing their opportunity to offend in the community by detaining them in prison. We consider that any incapacitation effects are likely to be very small for second strike offenders (for whom the penalty is a loss of parole eligibility) because:

    49.1. Serious repeat offenders tend not to be released by the Parole Board until well after they become eligible for parole, and in many cases quite close to the end of their sentence – offenders serving sentences longer than two years for serious sexual or violent offending serve an average of 80% before release; on average they are released with slightly less than 12 months left to serve.[25]

    49.2. The individuals who would have been released but for the three strikes regime tend to be those who have demonstrated a low risk of reoffending and a degree of rehabilitation, who are less likely to have reoffended in the relevant time period.

    49.3. Judges already use other mechanisms to deal with serious repeat offenders, such as imposing minimum non-parole periods at sentencing.

50. There is a greater potential for an incapacitation effect for third strike offenders, given the periods of additional imprisonment are likely to be longer, where the maximum sentence applies. However, it is considered any incapacitation effect would still be

[24] Cabinet Paper *Repeal of the three strikes law* (2022) at 6.

[25] Corrections data. Offenders who would otherwise have served all or almost all of their sentence are most likely to be reimprisoned. Overall, 17.6% of those who serve all or almost all of their sentence are reimprisoned for new offending (of any type) that occurred within 12 months of release. By comparison, 3.6% of those released after serving half or less than half of their sentence were reimprisoned for new offending that occurred within 12 months of release.

limited; as desistance patterns show that offenders age out of criminal activity as a decreasing proportion reoffend or are reimprisoned over time.[26]

51. A further issue in relation to incapacitation is that keeping offenders in prison for longer periods does not wholly prevent offending. In some cases, further offending would be delayed until the offender is released from prison, rather than prevented entirely. Some offenders will continue to offend while in custody, with the pool of potential victims being Corrections staff or other prisoners. Under the previous three strikes regime, approximately 25 percent received their third strike while imprisoned or remanded in custody.[27] This risk that some prisoners will continue to offend while in custody means that the expected impact on offending from incapacitation would be even smaller.

*How would a three strikes regime affect rehabilitation of offenders?*

52. During the course of the three strikes repeal, concerns were raised that the previous three strikes regime was negatively affecting offender rehabilitation. Submitters raised concerns that the lack of parole eligibility, especially for those on a third strike, can disincentivise offender rehabilitation, as rehabilitation programme access is generally prioritised for offenders who are eligible for parole. Evidence indicates that individuals in prison are more motivated to engage in rehabilitation programmes as their completion is often a prerequisite for parole.[28] Research shows that New Zealand's managed release system results in lower rates of reoffending than limited supervision at the end of a sentence.[29] This is supported by international evidence which shows that offenders released without supervision are more likely to reoffend than those released under parole supervision.[30]

## Impact on justice outcomes for Māori

53. The Law Commission in its recent issues paper on its review of preventive detention identified tikanga Māori relating to community safety and offending.[31] While the Commission were seeking feedback to determine whether they have appropriately identified the relevant tikanga Māori, it is a good discussion of the perspectives of the experts in this area.

54. In summary, the Commission identified that:

> "In te ao Māori, the response to offending and community safety was ensured through tikanga Māori (such as pana and utu) rather than through detention

---

[26] This is a result of decreasing reimprisonment rates as individuals age, for an analysis of these rates by demographic see Department of Corrections *Reconviction patterns of released prisoners: A 48-months follow-up analysis* (2008). Note that both the frequency and severity of offending tend to decrease as offenders age, which contributes to lower reimprisonment than reconviction rates.

[27] Ministry of Justice analysis of the details of third strikes cases under the previous regime. The exact proportion would likely vary under a reinstated regime and as the regime beds in.

[28] Ministry of Justice *Towards a Humane and Effective Criminal Justice System: Evidence and Issues Paper* (2017) at 70.

[29] DLL Polaschek, JA Yesberg, and P Chauhan "A Year Without a Conviction: An Integrated Examination of Potential Mechanisms for Successful Reentry in High-Risk Violent Prisoners" (2018) 45(4) Criminal Justice and Behavior 425.

[30] See New Zealand Government *Post-release Supervision: Evidence Brief* (2017). Note that offenders who are not eligible for parole will still be subject to release conditions for 6 months (Parole Act 2002 s 18) and could be subject to an Extended Supervision Order.

[31] Law Commission *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu | Public safety and serious offenders: a review of preventive detention and post-sentence orders* (NZLC IP51, 2023).

> or removing people permanently from their community. In light of this tikanga, the notion of imprisonment was "simply unknown – in a very real sense it would have been culturally incomprehensible. […]
>
> At the same time, recent input from Māori on reform to the criminal justice system recognises that some people will need to be separated from the community for a time due to the risk to themselves and others. Nevertheless, this type of separation should have a rehabilitative focus and be a last resort."[32]

55. Data from the previous three strikes regime provides a reliable indication of the likely impact of the planned reinstatement on Māori. As at March 2022, just prior to the repeal approximately half of first strike offenders were Māori, and of the 21 offenders who received a third strike, 81% were Māori.

56. Over 2018/19 and 2019/20 combined, Māori were almost nine times more likely to receive a first strike than those of European/other ethnicity and over 18 times more likely to receive a second strike. These figures illustrate that Māori offenders and their whānau were strongly impacted by the previous regime.

57. Reinstating a three strikes regime would exacerbate the over-representation of populations which are already disproportionately represented in the justice system. While there are options to modify the regime which would minimise the overall impact on Māori, Māori would continue to be disproportionately represented in relative terms, perhaps even more so than under a broader regime.

58. Looking at who are victims of crime, Māori (36.9%) are more likely than the New Zealand average (30.7%) to experience a crime.[33] On this basis, it could be said that any policy that takes a tougher approach to sentencing is of benefit to Māori victims, depending on their outlook. Due to limitations on consultation, we have not been able to test this hypothesis or discuss potential mitigations for the disproportionate impacts of three strikes reinstatement with Māori stakeholders.

## Improving public confidence in the justice system

*Did the 2010 regime improve public confidence in the justice system?*

59. There are methodological barriers to assessing the relationship between increased sentences and public confidence in the wider justice system. These include limited information or ability to control for variables, the diverse views held by individual members of the public, advocacy groups and professional bodies. Interventions which may inspire confidence for one group may weaken confidence for another. This could be the case for issues such as whether the justice system should be primarily retributive or rehabilitative. Likewise, there may be bottlenecks to improving confidence, which would reduce the impact any single intervention would have on the overall confidence.

60. Public confidence in New Zealand's justice system declined between 2003 and 2016.[34] Meanwhile, imprisonment rates over that time increased by 25 percent, which includes the period during which the previous three strikes regime was in force.[35] When asked what would increase their confidence in the public sector in 2016, only 3 percent of

---

[32] Above n 31 at 30-31.

[33] New Zealand Crime & Victims Survey Cycle 5 *NZCVS Cycle 5 Who is experiencing crime* (2022) at sheet 1.

[34] Above n 28 at 93.

[35] World Prison Brief "New Zealand" World Prison Brief.

respondents answered 'harsher punishment'.[36] This low figure may have been the result of the three strikes regime satisfying demand for longer sentences, however it is not possible to test this hypothesis.[37]

61. The continued decline in public confidence in New Zealand's justice system, despite increasing rates of imprisonment, suggest that harsher penalties for offences do not increase public confidence.[38] While low public confidence appears to have driven longer sentences internationally, there is little evidence that these policies have restored or slowed the rate at which confidence has declined.[39] Public confidence does not appear to improve along with increases in sentence lengths.[40]

*What impacts public confidence in the justice system and sentencing process?*

62. The 2016 Public Perceptions of Crime Survey asked New Zealanders what would be the single most important thing which would increase their confidence in the criminal justice system.[41] The responses indicated that certainty and swiftness of consequences was significantly more important to the public than the severity of consequences.[42]

63. The Public Perceptions of Crime Survey also correlated public perceptions of crime and the criminal justice system with levels of confidence.[43] The perception that national crime rates are increasing is moderately correlated to a decrease in confidence in the criminal justice system, neighbourhood crime trends are weakly correlated, and victims of crime tend to have more negative views.[44] Therefore, efforts to reduce offending are likely to somewhat improve public confidence in the justice system, however this effect may be small.

64. The existing sentencing process under the status quo can be complex and unpredictable, which may contribute to lower public confidence, as the general level of trust in the judiciary is lower than that of the overall justice system.[45] There have further been widely reported cases where sentencing decisions have been contrary to public expectations; some of these cases have been appealed by the Crown for being manifestly inadequate.[46] Therefore, there may be a rationale from a public confidence perspective for a sentencing regime which is clearer, more transparent and more consistently applied.

---

[36] Colmar Brunton *Public Perceptions of Crime 2016 – Survey Report* (2016) at 53.

[37] For comparison, in a 2013 survey, also after the introduction of the regime, 5 percent of respondents reported that a longer sentence would improve their confidence in sentencing. See Colmar Brunton *Public Perceptions of Crime 2013 – Survey Report* (2013).

[38] Above n 28 at 54.

[39] Julian V Roberts "Public Opinion and Mandatory Sentencing: A Review of International Findings" (2003) 30(4) Criminal Justice and Behaviour 483, at 505.

[40] Julian V. Roberts and Jonathan Bild, Sentencing Academy *"The long view—How accurate are public estimates of sentencing practice?"* in Prison Reform Trust, Bromley Briefings Prison Factfile (2022).

[41] Above n 35 at 53.

[42] 13% of respondents reported that bringing more offenders to justice, and 11% that speeding up the delivery of justice, were the most important things that could be done to improve their confidence in the criminal justice system. This compares to only 3% of respondents who favoured sending more people to prison, and 3% who favoured harsher punishment. See above at 53-54.

[43] Above at 56-58.

[44] Above.

[45] Ministry of Justice *Victims' trust and confidence in the criminal justice system* (2022), at 17-18.

[46] *Solicitor-General v Meyer* [2022] NZHC 2692.

65. Media representations of crime focus on exceptional cases, which may drive misperceptions regarding trends in offending. News coverage tends to be reductive, focusing on only the most serious cases, and may not reflect the facts which inform sentencing outcomes.[47] Surveys consistently show that the public tend to underestimate sentence lengths.[48] Research in Australia, the United Kingdom, and New Zealand shows that when the public are asked to make sentencing decisions informed by the details of individual cases, they tend to be equally or more lenient than judges.[49] This suggests that the public favour proportional sentencing, and increasing sentence length would be unlikely to increase public confidence.

## Impacts on consistency and workability with relevant laws and obligations

66. Three strikes laws can be integrated into existing law governing sentencing and parole, however, they can serve competing purposes. The standard sentencing framework seeks to achieve sentencing outcomes that are fair and proportionate and that take into account the circumstances of the offence and the offender. Three strikes sentencing, particularly where there are substantial penalties and no or limited exceptions, is contrary to this approach.

67. The same issue arises with the parole system, which is concerned with the risk that an offender presents to the community. Offenders who are paroled because they do not present an undue risk are closely monitored and can be recalled if necessary. As discussed at paragraph 52, managed release on parole results in lower rates of reoffending.[50] Three strikes regimes' emphasis on punishment rather than rehabilitation overrides this approach.

68. Departing from the standard sentencing and parole settings has the most significant effect on offenders who have a history of less serious offending, and those individuals who show the most progress through their rehabilitation.[51] It can also be inconsistent with New Zealand Bill of Rights Act (NZBORA), notably the right to be free from disproportionately severe punishment (section 9) and the right to a fair and public hearing by an independent and impartial court (section 25(a)).

69. Experience from judicial application of the previous regime has shown that for the regime to be workable in practice, there is a need to ensure there is sufficient scope for a NZBORA-consistent interpretation, in order for the regime to be given effect to by the courts.[52] As discussed in **Part B**, there are important design choices regarding the use of appropriate thresholds, more proportionate penalties, and appropriate judicial discretion, that would help facilitate this approach.

*Consistency with obligations under the Treaty of Waitangi*

70. In line with the Cabinet Office Circular CO (19) 5 and policy quality guidance from DPMC, these proposals have been considered through a Treaty of Waitangi lens. The Crown is

---

[47] Sentencing Matters: Mandatory Sentencing Research Paper - PDF - 609KB - 24pp (sentencingcouncil.vic.gov.au) at 15

[48] Ministry of Justice *Attitudes to Crime and Punishment: A New Zealand Study* (2003).

[49] Above n 46 at 16.; Above n 47.; House of Commons Justice Committee *Public opinion and understanding of sentencing* (2023).

[50] Above n 29.

[51] This is because mandatory maximum penalties skew lower sentences (for less serious offending) towards the maximum more than for more serious offending which carries longer sentences.

[52] See for example *Fitzgerald v R* [2021] NZSC 131.

obligated to give effect to the articles of the Treaty of Waitangi, and the government has related responsibilities under international law, for example related to non-discrimination and other obligations under the United Nations Declaration on the Rights of Indigenous Peoples.[53]

71. Under Article Two and Three of the Treaty, the Crown has an active duty to protect the interests and rights of Māori, including the right to be free from crime.[54] Part of this obligation also includes mitigating unintended impacts of policy proposal on Māori. As mentioned at paragraph 58, Māori are more likely than non-Māori to experience crime. However, the low likelihood of a three strikes system reducing reoffending would mean that this policy does not give effect to active protection obligations.

72. Article Two of the Treaty also guarantees tino rangatiratanga.[55] Giving effect to tino rangatiratanga should enable Māori offenders to engage with culturally appropriate formal and informal rehabilitation and reintegration support. However, this would be less likely under a three strikes regime because of the loss of parole.

73. Article Three of the Treaty guarantees Māori equal rights as subjects of the Crown.[56] While a three strikes regime would ostensibly impose the same rights and obligations on both Māori and non-Māori, the disproportionate impact on Māori would result in divergent effective rights. In general, Māori offenders will be more likely to be sentenced in a disproportionate manner than non-Māori. This is likely to erode trust and confidence in the justice system, especially, but not exclusively, among Māori.

74. Under the current criminal justice settings, Māori are still disproportionately represented. It could therefore be argued that the Crown has failed to recognise its obligations to protect the rights and privileges of Māori, thus potentially being inconsistent with the Crown's obligations of Article Three of the Treaty.

## Cost-effectiveness of three strikes regimes

75. The primary cost associated with mandatory sentencing regimes such as three strikes is the increased use of imprisonment. Whether or not three strikes can be reinstated cost effectively very much depends on how the regime is designed. Reinstating the previous regime is estimated to cost approximately $8.9-16.8 million per annum after 10 years (from 74-140 additional prison places at a cost of $120,000 per place).

76. A reinstated regime could be more targeted resulting in smaller increases to the prison population and lower costs overall. On this basis, the estimated cost is reduced to a maximum of $6.2 million per year after 10 years (52 additional prison places), but this will vary depending on design choices.

77. Relative to the overall cost of the current prison estate, the additional prison-related impact of reinstating three strikes is modest, noting that we have not been able to identify significant quantifiable benefits, s9(2)(f)(iv)

[53] The three strikes policy proposal has been analysed using the Treaty of Waitangi guidance outlined in the Cabinet Office Circular "Te Tiriti o Waitangi / Treaty of Waitangi Guidance" (22 October 2019) CO 19/5.

[54] For a discussion of the duty of active protection see Te Puni Kōkiri "The principle of active protection" in *He tirohanga ō kawa ki te Tiriti o Waitangi* (2001) at 93.

[55] Above n 52 at [46]-[48].

[56] Above at [66]-[68].

78. There are likely to be some further costs that would not arise under the status quo. These include costs to implement the regime, costs arising from additional criminal and civil litigation and compensation claims, and potential costs from any effect the regime may have on guilty plea rates, which may lead to more cases going to trial. The costs of litigation and court system costs are unquantified but are still likely to apply.

### Recommended option

79. We recognise that against the criteria, the status quo has some deficiencies. A fuller examination of these weaknesses is outside the scope of this RIS. However, on every measure, the reintroduction of three strikes will exacerbate existing issues including the over representation of Māori, Pasifika, and young offenders in the justice system.

80. Of the two approaches, the Ministry of Justice prefers the status quo rather than a new three strikes regime due to:

    80.1. lack of evidence that the proposal would be effective at addressing repeated serious violent offending or sustainably improving public confidence in the justice system,

    80.2. risk of unintended consequences which have been observed in such systems internationally and in New Zealand's own experience with the former regime,

    80.3. known downsides such as cost and issues with consistency of legal obligations, including under the Treaty of Waitangi,

    80.4. the current sentencing system already has the capability to respond to serious repeat offending, and

    80.5. disproportionate impact of a three strikes regime on population groups, particularly disproportionately harmful impacts on Māori.

## Part B: What are the options for modifying the regime?

81. Should the Government proceed with reintroducing a three strikes regime, there are a number of design choices to consider that could address some of the issues outlined in Part A (e.g., the disproportionate impact of a three strikes regime on Māori, Pasifika and young offenders; and the limitations on judicial discretion to determine sentences).

82. This section analyses the different design choices for specific elements of a three strikes regime, against the design features of the 2010 regime (rather than against the status quo/'no nothing' option, as this is covered in Part A). It covers the following:

| No. | Design/policy issue | Options |
|---|---|---|
| (i) | Qualifying offences and scope of the regime | Option One – Retain the same set of qualifying offences<br>Option Two – Narrow the range of qualifying offences<br>Option Three – Introduce a threshold sentence |
| (ii) | Penalty at each strike | Option One – Retain the 2010 regime penalties<br>Option Two – Provide minimum penalties |
| (iii) | Exceptions to the regime | Option One – Change where exceptions apply<br>Option Two – Change the test for the exception<br>Option Three – Introduce guiding principles for the exception<br>Option Four – Provide a 'backstop' penalty where the exception is found to apply |
| (iv) | Providing for guilty pleas | Option One – No specific provision for guilty pleas<br>Option Two – Provide for a reduction below the mandatory sentence, capped at a certain level |
| (v) | Approach to murder offences | Option One – Same as 2010 regime<br>Option Two – Align more closely with ordinary approach to murder sentencing, with stronger penalties for strike offences |
| (vi) | Retrospective application | Option One – Regime is not retrospective<br>Option Two – The regime is applied retrospectively |

## Options within the regime (i): Qualifying offences and scope of the regime

83. The first set of choices in reinstating the regime is around the scope of offences and cases that would be captured in the regime. The previous regime was criticised for disproportionately harsh sentencing and parole outcomes in certain cases, particularly where lower-level offending was involved, which would otherwise have attracted a much lower sentence. In reinstating the regime, there is an opportunity to consider whether settings governing the scope of the regime ensure that the regime is sufficiently targeted to serious offending and more minor offending is not captured.

84. Three options have been identified:

    84.1. Option One – *Retain the same set of qualifying offences*;

    84.2. Option Two – *Narrow the range of eligible offences*;

    84.3. Option Three – *Introduce a threshold sentence*.

85. Option two and three are not mutually exclusive options but rather can work simultaneously.

### Option One – *Retain the same qualifying offences*

86. This option would see the list of offences included in the 2010 regime reinstated without adjustment. The 2010 regime had 40 qualifying offences, comprising almost all major violent and sexual offences with a maximum penalty of 7 years or greater imprisonment (with some specific carve-outs).

### Option Two – *Narrow the range of qualifying offences*

87. This option would see the list of offences that receive a strike reduced. This could be done in several ways; for example, by removing the 7-year offences, or both the 7- and 10-year offences, or only specific offences (e.g., indecent assault).

88. On balance, the Ministry's preferred approach would be to remove the 7-year offences, reducing the number of eligible offences from 40 (in the 2010 regime) to 33. Most of the 7-year penalty offences have an equivalent (but more serious) 10-year equivalent, which would be captured when the conduct is in the aggravated form of the offence.[57]

89. If the original list of offences is not narrowed to exclude 7-year offences, the Ministry of Justice considers that the offence of strangulation/suffocation[58] should be added to the list for consistency, although this would slightly broaden the scope of the regime. Strangulation is a violent offence with a maximum penalty of 7 years' imprisonment and would therefore be appropriate for inclusion on the list of offences that attract a strike if offences of this level are included.

### Option Three – *Introduce a threshold sentence*

90. This option would see a requirement for the court to impose a threshold sentence before a strike would apply. That is, an offender would need to receive a sentence of a certain length to trigger the application of the regime and receive a strike (and the relevant

[57] For example, the 7-year offence of discharging a firearm has similar 10-year offences of using a firearm with intent to resist arrest (s 198A(2) Crimes Act) or commission of a crime with a firearm (s 198(B) Crimes Act).

[58] Crimes Act 1964, s 189A.

penalties, at second and third strike). Offenders sentenced for a strike offence but who receive a sentence below the threshold would not receive a strike for that offence.

91. There would be various options for the length of the threshold sentence. The Ministry considers this threshold could be set at sentences of more than 2 years/'24 months' imprisonment. This is consistent with the current sentencing and parole regime, which distinguishes between 'short term sentences' (24 months or less) and 'long term sentences' (of more than 24 months).

92. There would also be other options for setting this threshold, which may be preferable depending on the other elements of the regime. If the qualifying offences were kept the same as the previous regime, it may be preferable to use a higher threshold, such as more than 36 months, to limit the scope of the regime.

| Options within the regime (i): Qualifying offences and entrance into the regime | | | |
|---|---|---|---|
| | **Option 1 – Maintain 40 qualifying offences** | **Option 2 – Narrow the qualifying offences** ***(Ministry of Justice's preferred option)*** | **Option 2 – Introduce a threshold sentence** ***(Ministry of Justice's preferred option)*** |
| **Public confidence** | – <br> There was some concern that the scope of qualifying offences in the 2010 regime was too broad, and unfair outcomes from unduly harsh penalties for relatively minor offending in some cases. | – <br> May improve perceptions of fairness, though some parts of the public may be concerned about fewer offences being subject to the regime. | + <br> Ensures the regime is better targeted to more serious offences which may improve perceptions of fairness; some may consider a threshold sentence excludes cases. |
| **Reducing offending** | 0 <br> Limited deterrent and incapacitative effects. | 0 <br> Offences outside the regime still subject to serious penalties in appropriate cases. | 0 <br> Somewhat reduces certainty. |
| **Consistency with relevant laws and obligations** | – <br> Greater risk of lower-level cases falling within the regime due to lower maximum penalty, resulting in more disproportionate penalties. More likely to engage NZBORA, particularly section 9, and may be inconsistent with the Crown's obligations under the Treaty of Waitangi, particularly Article 3.[59] | + <br> More workable as courts would not have to impose a strike penalty for low-level offences. Therefore more closely aligned with NZBORA and the Crown's Treaty obligations. | ++ <br> More consistent with sentencing principles as lower-level cases excluded, greater proportionality between seriousness of offending and penalty imposed, and provides an additional element of judicial discretion. Reduces the likelihood of grossly disproportionate outcomes that engage. |

[59] NZBORA, section 9: right to be free from disproportionately severe treatment; Treaty of Waitangi, Article 3 affords Māori the same rights and privileges as New Zealand citizens.

| | | | |
|---|---|---|---|
| | | | NZBORA or are inconsistent with Treaty obligations.<br>s9(2)(h) |
| **Overall assessment** | – – | 0 | ++ |

**Key**: ++ much better than the status quo + better than the status quo 0 about the same the status quo
– worse than the status quo – – much worse than the status quo

**Ministry's preferred options: Option Two – Narrow the range of eligible offences and Option Three – Introduce a threshold sentence**

93. The Ministry's preferred approach is options two and three. Taken together, these will narrow the scope of the regime to target the most serious and violent repeat offenders more effectively.

94. The broad scope of offences in the 2010 regime contributed to the severely disproportionate nature of the high mandatory penalties in some cases, where either the previous offending that had triggered a strike, or the instant offence that was attracting the mandatory penalty, or both, involved offending that was relatively low level.

95. As part of the repeal for the 2010 regime the list of strike offences (referred to in the Sentencing Act as serious violent offences) was moved to the Victims' Orders Against Violent Offenders Act 2014 and renamed as specified violent offences.[60] Retaining the original list of strike offences would, therefore, be potentially more consistent with the existing legislative framework.

96. s9(2)(h)

97. Removing the 7-year offences would focus the regime on the most serious offending, effectively minimising the risk of lower-level conduct being brought within the regime without excessively narrowing its application or risking perceived arbitrariness. s9(2)(h) s9(2)(h)

98. Offences no longer within the regime (i.e., offences with a 7-year maximum penalty such as discharging a firearm) would still be subject to strict sentences and orders in appropriate cases, including preventive detention and post-sentence orders.

99. The original version of legislation that brought in the previous three strikes regime included a threshold of 5 years at that Bill's introduction in 2009. This requirement was subsequently removed at Select Committee following a further Cabinet decision. The rationale for removing the qualifying sentence appears to have been an intention for the regime to apply more widely and capture more offenders.

**Cabinet paper's recommendations: Options one – Retain the same qualifying offences and Option Three – Introduce a threshold sentence**

100. The Cabinet paper recommends option one – maintain 40 qualifying offences, and to add the offence of strangulation/suffocation to the list of offences. This was a new offence that came into force in 2018. It carries a 7-year maximum penalty and is a violent offence, so it would be anomalous not to include it in the qualifying offences for the new regime.

---

[60] This was because the list of strike offences in the Sentencing Act was cross-referenced or referred to in several pieces of other legislation and it was considered the most straight-forward solution to avoid a significant number of consequential amendments.

s9(2)(h)

101. The Cabinet paper also recommends option three of introducing a threshold sentence.

## Options within the regime (ii): Penalty at each strike (non-murder offences)

102. In reinstating the regime, there is an opportunity to reconsider the penalty levels applying at each strike. Under the previous regime, there was concern that the penalties were unduly harsh and disproportionate, beyond what was necessary to denounce repeat offending. There was also concern about the effect on rehabilitation of offenders of removing parole eligibility entirely at both second and third strike. These penalties also did not allow any judicial discretion to respond to individual circumstances, except via the limited manifest injustice exception.

103. Two options have been identified for revising the penalties that could apply at each strike. These options are:

   103.1. Option One – *Retain the 2010 regime penalties*;

   103.2. Option Two – *Provide minimum penalties*.

### Option One – Retain the 2010 regime penalties

104. Reinstating the penalties from the 2010 regime would mean a person convicted of:

   104.1. a second specified offence would be required to serve any prison sentence in full (i.e., without eligibility for parole), and

   104.2. a third specified offence would be sentenced to the maximum penalty for that offence, and the term of imprisonment would be required to be served without parole.

### Option Two – *Provide minimum penalties*

105. There is a middle ground option between the status quo (of judicial discretion up to the maximum penalty) and the 2010 regime penalties, which is to retain the basic structure of the regime but provide more discretion in sentencing, by setting a minimum penalty and minimum period of imprisonment rather than requiring the maximum penalty and no parole eligibility. The Court may choose to sentence within the range from the minimum, up to the maximum, as appropriate for the circumstances of the offending and offender.

106. Several variations of this option would be possible. For the purposes of analysis, the following possible combination of penalties was assessed, where a person convicted of:

   106.1. a second specified offence would have a sentence imposed through the standard process, and be required to serve *at least two-thirds* of any prison sentence, and

   106.2. a third specified offence would be sentenced to a *minimum of two-thirds* of the maximum penalty for this offence, and the minimum non-parole period imposed by the Court must be at least *two-thirds* of that sentence.

107. The option would allow judges to impose sentences within the range, including higher than the minimum in appropriate cases, which ensures the penalties for repeated offending are increased, but that the sentence can more accurately reflect the individual circumstances of the case, including the seriousness of offending, and any aggravating and mitigating circumstances.

108. Within this option, there would also be scope to consider whether the minimum sentence should be expressed as a mandatory minimum, or as a presumption or default where

more departure may be expected. This links with the choices in the following section (iii) on exceptions to the regime: the lower the minimum penalty, the greater the scope for judicial discretion in imposing a fair and appropriate sentence, which means there would be less reliance on the "manifest injustice" exceptions that remove a person from the regime entirely.

109. This option would create a floor for parole eligibility of two-thirds of any sentence imposed for a second or subsequent strike. Allowing some scope for parole eligibility, albeit narrow, retains eligibility for temporary release activities such as release to work and incentivises engagement with rehabilitative programmes to manage an offender's release and reintegration into the community.

| Options within the regime (ii): Penalty at each strike (non-murder offences) | | |
|---|---|---|
| | **Option 1 – Penalties from 2010 regime: no parole eligibility at 2nd strike; maximum penalty and no parole at 3rd strike** | **Option 2 – Provide minimum penalties (Ministry of Justice's preferred option)** |
| **Public confidence** | 0<br>Higher penalties may make some communities feel safer, but may be viewed as overly punitive by some where they are wholly disproportionate to the offending, which may affect trust in the sentencing process to deliver just and appropriate outcomes. | +<br>Penalties higher than the status quo may make some communities feel safer. More proportionate penalties may better retain confidence in the justice system to respond appropriately to individual cases. |
| **Reducing offending** | –<br>May slightly reduce offending through incapacitation. However, may incapacitate some individuals who would not have reoffended. Removes rehabilitative incentive of parole, and ability to use parole supervision and the ability to recall post-release. Limited evidence of deterrent effect from the previous regime. | 0<br>More limited incapacitation effect but retains some possibility of parole eligibility, which incentivises rehabilitation, and assists Corrections to monitor and reintegrate offenders post-release. As severity of penalty less tied to deterrence, likely to have equivalent deterrent effect, if any.[62] Allows judicial and Parole Board discretion to keep offenders in prison longer than two-thirds where appropriate. |
| **Consistency with relevant laws and obligations** | – –<br>Poor workability as limits judicial/parole discretion to determine sentence length and parole eligibility. Would likely result in disproportionately severe penalties. Would also engage section 9 of NZBORA and may be inconsistent with the Crown's obligations under the Treaty, particularly Article 3. | –<br>Greater workability because of judicial/parole board discretion which safeguards against disproportionately severe punishment. Will disproportionately impact Māori, possibly to a lesser extent than option one. Less likely to engage section 9 of NZBORA and Article 3 of the Treaty. |
| **Overall assessment** | – – | – |

| **Key**: | ++ | much better than the status quo | + | better than the status quo | 0 | about the same the status quo |
|---|---|---|---|---|---|---|
| | – | worse than the status quo | – – | much worse than the status quo | | |

[62] California's extraordinarily punitive three strikes law had no greater deterrent effect than states with substantially more limited penalties, including states with presumptive rather than mandatory penalties. Above n 15 at abstract.

**Ministry's preferred option: Option Two – Lower minimum penalties with judicial discretion**

110. The Ministry's preferred approach to penalties for offences other than murder is option two, which requires less severe penalties than the 2010 regime and an element of flexibility. This option would continue to meet the objectives of increasing the severity of sentences imposed on repeat serious violent offenders but also enable some consideration of the circumstances of the case.

111. A minimum sentence, which is still mandatory (except for in narrowly defined cases) but provides some scope for discretion between the minimum and maximum penalties, would be more proportionate to the offending than requiring the maximum sentence. Such a policy approach could better align with our existing sentencing framework and NZBORA obligations compared to the more punitive option. This may make it a more effective form of denunciation compared with the maximum penalty approach. The same points apply to providing for a minimum period of imprisonment rather than removing parole eligibility.

112. It is likely that the deterrent effect of a shorter mandatory sentence is similar to that of a more punitive approach, as it equally signals certainty of punishment, which is more closely linked to deterrence than severity of punishment.

**Cabinet paper's recommended option: Option One – Penalties from 2010 regime**

113. The recommendation in the Cabinet paper is option one – to retain the penalties from the 2010 regime, that is: no parole eligibility at second strike; and the maximum penalty and no parole at third strike.

## Options within the regime (iii): Exceptions to the regime

114. Under the 2010 regime, there was no exception to the requirement to impose no parole at second strike, and at third strike for non-murder offences, the "manifestly unjust" exception applied only to the no-parole element of the penalty, and not the requirement to impose the maximum penalty.

115. This lack of flexibility in the regime created issues including NZBORA concerns and disproportionate penalties in some cases. There is an opportunity to consider whether these settings align with the criteria for reinstating the regime.

116. The options below are not necessarily mutually exclusive. Two or more could be applied together.

### Option One – Change where exceptions apply

117. Under the 2010 regime, the manifest injustice exception applied to the parole element of the third strike penalty (and strike 2 and 3 for murder).

118. In this option, the exception would be extended to apply to *all* mandatory elements (both parole and sentence), and both strikes.

### Option Two – Change the test for the exception

119. The text for the exception could be changed, for example to "grossly disproportionate" rather than the "manifestly unjust" used under the previous regime. This test may provide for a better defined and more certain analytical framework than "manifestly unjust", giving greater guidance to judges about the nature of the exception. It would make clear that the exception is set at a high level (with ordinary disproportion not being enough to meet the standard).

### Option Three – Introduce guiding principles for the exception

120. Establish legislative principles to clarify or limit the application of the exception. Appropriate principles may include, for example, that a sentence is not manifestly unjust merely because it is disproportionate; it must be severely or grossly disproportionate (in line with s 9 NZBORA).

121. A balance will need to be struck between providing meaningful principles that assist the court in applying the test, and allowing appropriate judicial discretion to consider relevant factors in each case.

### Option Four – Provide a 'backstop' penalty where the exception is found to apply

122. Under the previous regime, when the "manifestly unjust" exception applied, the courts would sentence using ordinary sentencing practice (e.g., considering the purpose and principles of sentencing, and the individual circumstances of the offence and the aggravating and mitigating features of the offender).

123. To provide a more prescriptive approach and ensure offenders to whom the exception applies will still face a harsher penalty, a 'backstop' sentence when the exception applies could be provided, rather than the court applying the ordinary sentence. This was effectively in place in the previous regime in respect of a third strike murder.

| Option within the regime (iii): Exceptions to the regime | | | | |
|---|---|---|---|---|
| | **Option 1 – change where exceptions apply** ***(Ministry of Justice's preferred option)*** | **Option 2 – change the test for exceptions** | **Option 3 – introduce principles for exceptions** ***(Ministry of Justice's preferred option)*** | **Option 4 - Provide a 'backstop' penalty where the exceptions is found to apply** |
| **Public confidence** | + <br> Ensures sentences are less likely to be disproportionately severe, which can increase public confidence; but some may consider the regime should have few or no exceptions. | – <br> Some may consider the "manifestly unjust" test to be too open-ended and apply in too many cases; for some, "grossly disproportionate" may be considered too narrow and restrictive. | 0 <br> Difficult to determine as the penalty itself will depend on how the courts apply the principles. | 0 <br> Difficult to determine as the level of public confidence will be determined by the length of the fallback sentence. |
| **Reducing offending** | 0 <br> May mean the strike penalties apply in fewer cases where the exceptions are met, which may slightly reduce the incapacitative effect, but offenders will still be subject to high penalties where appropriate to address public safety concerns. | 0 <br> Is unlikely to reduce imprisonment lengths because of the high test for grossly disproportionate sentences. | 0 <br> Impact will be determined by the nature of the principles. | 0 <br> Depends on the length of the 'backstop' penalty, but this will have a slightly increased incapacitation effect on offenders. |
| **Consistency with relevant laws and obligations** | ++ <br> Greater workability because of element of judicial discretion to address outlier cases and recognise manifest injustice at each stage. Greater consistency of approach | – <br> Less consistent with the current regime i.e. would depart from the "manifest injustice" test applying for murder sentencing in the Sentencing Act. However, may be a more | ++ <br> Has degree of workability as sentencing principles exist in the Sentencing Act and case law. New principles can be | 0 <br> Poor workability as courts would not have full discretion to determine the appropriate sentence. May therefore also engage NZBORA and be inconsistent with Treaty obligations |

| | | | | |
|---|---|---|---|---|
| | across the regime. More consistent with the Treaty and NZBORA. | determinate test that avoids issues associated with "manifest injustice" as a vague standard, which is liable to being applied and interpreted in different ways. | designed to reflect existing ones. | unless similar exceptions are provided for; may increase complexity. |
| **Overall assessment** | ++ | – | ++ | 0 |

**Key**:

| | | | | | |
|---|---|---|---|---|---|
| ++ | much better than the status quo | + | better than the status quo | 0 | about the same the status quo |
| – | worse than the status quo | – – | much worse than the status quo | | |

**Ministry's preferred option: Option One – change where exceptions apply and Option Three – introduce principles for exceptions**

124. The Ministry's preferred options are option one – change where exceptions apply – and option three – introduce principles for exceptions. This is preferred as it would make the regime more coherent and give a "safety valve" for dealing with outlier cases (for example, severe mental health issues, disability, a minor role where the offending was part of a group activity) at each stage of the process.

125. s9(2)(h) It may also lessen the disproportionate impact on Māori through increasing judicial discretion to consider individual circumstances. s9(2)(h)

126. Option three will provide courts with guidance to determine when it is appropriate to apply the exception. s9(2)(h)

## Options within the regime (iv): Providing for guilty pleas

127. In ordinary sentencing practice, courts may impose a sentence discount of up to 25% for an early guilty plea, in line with Supreme Court guidance in *Hessell v R* [2010] NZSC 135.

128. In the 2010 regime, a discount for a guilty plea was available at second strike (for non-murder offences) but not at third strike. For a second strike, courts imposed a sentence in line with ordinary sentencing practice, which could include a discount for a guilty plea and other mitigating factors.

129. At third strike, the courts imposed the maximum sentence. The term of imprisonment was required to be served without parole unless the court determined that no parole would be manifestly unjust. There was no discount available for a guilty plea. Similarly, for second and third strike murder offences, there was no provision for a guilty plea discount.

130. The previous regime did not provide an incentive for offenders to plead guilty via a reduction in sentence. There is an opportunity to consider how the regime should provide for guilty pleas at the third strike stage, given the benefits to victims and witnesses and the wider justice system, of avoiding a trial when the offender pleads guilty.

### Option One – No specific provision for guilty pleas (per 2010 regime)

131. A discount for a guilty plea is not available at third strike as the maximum penalty must be imposed.

### Option Two – Provide for a reduction below the mandatory sentence, capped at a certain level

132. Under this option, at third strike, a limited discount for a guilty plea would be available, allowing a reduction up to a certain amount below the mandatory sentence (or mandatory minimum period of imprisonment in the case of murder offences). Within this cap, judges would retain discretion to adjust the level of discount, to take account of the timing of the plea and other circumstances, with later pleas attracting smaller discounts.

133. A similar exception is not needed for a second strike as the plea can already be taken into account in setting the sentence.

134. There is some precedent internationally for guilty pleas enabling a reduction in sentence below a statutory minimum. The United Kingdom provides for certain mandatory sentences to be reduced to not less than 80% of the minimum to reflect a guilty plea. [63]

[63] Sentencing Act 2020 (UK), section 73.

| Option within the regime (iv): Providing for guilty pleas | | |
|---|---|---|
| | **Option 1 – No reduction for guilty plea where mandatory sentence imposed** | **Option 2 – capped reduction for guilty plea *(Ministry of Justice's preferred option)*** |
| **Public confidence** | -<br><br>May be public concern about the impact on victims and court delays from lack of incentive to plead guilty; no strong evidence of a link between public confidence and long sentences. | +<br><br>May improve public confidence from increased guilty pleas and associated acknowledgement of guilt; public support for avoiding victims undergoing unnecessary trials. |
| **Reducing offending** | 0<br><br>Sentences longer where no reduction available so may be slight incapacitation effect and limited deterrent effect. | +<br><br>May reduce reoffending as the longer an offender is imprisoned, the lower their motivation is for rehabilitation; however, discounts for guilty pleas reduce sentence lengths. |
| **Consistency with relevant laws and obligations** | 0<br><br>Limited workability due to lack of judicial discretion; could lead to disproportionately severe sentences, contravening both the Treaty and NZBORA | ++<br><br>Greater consistency with the general sentencing framework as courts have some discretion to apply guilty plea discounts at third strike, in line with ordinary sentencing practices. Sentences less likely to be grossly disproportionate and less likely to be inconsistent with the Crown's Treaty obligations or engage NZBORA. |
| **Overall assessment** | 0 | ++ |

**Key**:

| | | | | | |
|---|---|---|---|---|---|
| ++ | much better than the status quo | + | better than the status quo | 0 | about the same the status quo |
| – | worse than the status quo | – – | much worse than the status quo | | |

### Ministry's preferred option: Option two – capped reduction for guilty plea

135. The Ministry's preferred option is option two – capped reduction for guilty plea. This option is preferable to option one as it aligns more strongly with New Zealand's current sentencing framework and provides the courts with the judicial discretion to impose sentences that are not severely disproportionate.

## Options within the regime (v): Approach to murder offences

136. Under the 2010 regime, the approach to murder offences was as follows: if an offender was convicted of murder on their second or third strike, the court was required to impose a life sentence without parole, unless the court considered such a sentence would have been manifestly unjust. Where the manifestly unjust exception applied, there were various specific settings that applied depending on whether the offence was a second or third strike offence. Some of these further requirements in turn had exceptions that could apply.[64]

137. s9(2)(h)

138. Under the ordinary approach to murder sentencing, the court must impose a life sentence, unless this would be manifestly unjust, and must impose a minimum period of imprisonment of at least 10 years, unless manifestly unjust. In certain circumstances for more serious murders, the minimum period of imprisonment must be 17 years, unless manifestly unjust.

### Option One – Same as 2010 regime

139. This option would be per the previous regime, as set out above, with the required sentence being a life sentence, to be imposed without parole, unless no parole would be manifestly unjust.

### Option two – Align more closely with ordinary approach to murder sentencing, with stronger penalties for strike offences

140. This option would involve a life sentence, with a strict minimum period of imprisonment, increasing at each strike. A "manifestly unjust" exception would apply to both the life sentence and the minimum period of imprisonment.

---

[64] Where it would be manifestly unjust to impose no parole, at third strike, the offender was required to serve a minimum period of imprisonment of at least 20 years, unless this would be manifestly unjust; at second strike, or if 20 years was manifestly unjust at third strike, there must be a minimum period of imprisonment in accordance with s 103 (the standard provision requiring at least 10 years for murder).

[65] s9(2)(h)

| Option within the regime (v): Murder offences | | |
|---|---|---|
| | Option One – *Reinstate 2010 regime* | Option Two – *Life sentence with stronger MPI, exceptions ( Ministry of Justice's preferred option)* |
| **Public confidence** | – <br> Could be perceived as overly punitive and inflexible by the public. Limits the courts' ability to consider individual circumstances which may lead very harsh outcomes that, in some cases, may reduce the regime's credibility. | + <br> Provides a stern sentencing response while enabling courts to consider individual circumstances. |
| **Reducing offending** | 0 <br> Deterrent effect limited; may be small incapacitation effect. | 0 <br> Deterrent effect limited; may be small incapacitation effect. |
| **Consistency with relevant laws and obligations** | – – <br> May raise Issues with the Treaty – Article 3 – and NZBORA s 9, 25(a) and 26[66]; substantially limits the court's ability to consider individual circumstances; may result in severely disproportionate penalties; may result in additional litigation. | – <br> Greater consistency with wider sentencing framework as better aligned with ordinary approach to murder sentencing; enables a rights-consistent approach through relevant exceptions; may still lead to disproportionate and unjust outcomes and therefore risks inconsistency with the Crown's Treaty obligations and NZBORA. |
| **Overall assessment** | – | 0 |

**Key**:

| | | | | | |
|---|---|---|---|---|---|
| ++ | much better than the status quo | + | better than the status quo | 0 | about the same the status quo |
| – | worse than the status quo | – – | much worse than the status quo | | |

[66] Section 25 (a): the right to a fair and public hearing by an independent and impartial court; Section 26(2): no one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

### Ministry's preferred option: Option two – Life sentence with stronger MPI, exceptions

141. The Ministry's preferred approach is option two, providing for life imprisonment, unless manifestly unjust, with a specified minimum period of imprisonment, increasing at each stage. These minimum periods would also apply unless manifestly unjust.

142. This option is preferable to option one (reinstating the previous regime's approach) as it aligns more closely with the existing approach to murder sentencing, and provides appropriate flexibility for dealing with outlier cases, through the consistent use of the manifestly unjust exception. This approach would be more workable, straightforward and familiar to apply and would be more likely to be given effect to by the courts, than an approach requiring life imprisonment without parole.

143. While it would still risk disproportionate sentences in some cases, through a higher minimum period than would be imposed otherwise, where these may be grossly disproportionate, the courts would be able to consider whether to use the exception. Where the exception applies and the offender is instead sentenced in line with ordinary principles, the courts may still impose a strict sentence where appropriate.

144. Although option one may appear to provide a stronger response which may appeal to some parts of the public, this approach is likely to be undermined by difficulties in the courts applying these penalties in practice. The approach in option one may ultimately result in lower public confidence where the penalties are seen to apply in a way that is unfair, or the penalties are otherwise disapplied by the courts seeking to take a rights-consistent approach.

## Options within the regime (vi): Retrospective application of strike offences

145. Under 2010 regime, strikes could not be applied to offences committed before the regime came into force.

146. In reinstating a three strikes regime, following the repeal of the previous regime, there is a question of how to address strikes acquired under the previous regime, and whether the new regime should recognise these in some form. There is also a broader question about whether the regime should have any retrospective elements.

### Option One – Regime is not retrospective

147. Under this option, the regime would apply prospective only, to offences from the date of commencement. Offenders that were sentenced for a strike offence under the 2010 regime or who commit a strike offence before the new regime comes into force, will have the regime apply to them.

148. The regime would not apply to offenders who commit a strike offence before the new regime comes into force but are sentenced after it comes into force.

### Option Two – The regime is applied retrospectively

149. The regime could apply retrospectively in some form. In particular, there is an option that the new regime could recognise and reinstate strikes that offenders acquired under the previous regime. There could also be other retrospective elements, such as applying the new regime to offenders who commit a strike offence after the regime is enacted (but before commencement).

| Option within the regime (vi): Retrospective application of strike offences | | |
|---|---|---|
| | **Option One** – ***regime applies to offences committed after the regime comes into force*** <br><br> ***(Ministry of Justice's preferred option)*** | **Option Two** – ***regime applies to strikes incurred under the 2010 regime*** |
| **Public confidence** | 0 <br><br> Likely to be a range of views about whether previous strikes should be recognised. | + <br><br> Public may be reassured by greater coverage of the new regime and signalling to a wider pool of offenders about the ongoing unacceptability of repeat serious offending and consequences they will face; some may be concerned about fairness of reactivating strikes from repealed regime. |
| **Reducing offending** | 0 <br><br> Unlikely to have an impact. | 0 <br><br> Recognising previous strikes may mean more offenders fall within the regime and that offenders receive strike penalties more quickly; however impact on offending expected to be limited. |
| **Consistency with relevant laws and obligations** | ++ <br><br> Greater workability as it avoids the complexity of including past strikes in a regime that has since been modified. s9(2)(h) <br><br> Also consistent with NZBORA and the Treaty. | – – <br><br> The general position of the Legislation Act 2019 and the LDAC Legislation Guidelines is that legislation should have a prospective, not retrospective effect. Likely to engage NZBORA (specifically sections 25 and 26 (2)) and Article 3 of the Treaty. <br><br> Poor workability as it will be costly and complicated to implement. |
| **Overall assessment** | ++ | – |

**Key**:

| | | | | | |
|---|---|---|---|---|---|
| ++ | much better than the status quo | + | better than the status quo | 0 | about the same the status quo |
| – | worse than the status quo | – – | much worse than the status quo | | |

### Ministry's preferred option: Option One – regime applies prospectively

150. The Ministry's preferred option is option one – the regime applies to offences committed after the regime comes into force. Option one aligns with the general position of the Legislation Act 2019 and the LDAC Legislation Guidelines that state legislation should have a prospective, not retrospective effect. s9(2)(h)

## What options are likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

151. The package of recommended design features of the three strikes regime seeks to strike an appropriate balance between a sufficiently certain and stern sentencing response to repeat offending to enhance public confidence and public safety, providing a regime that will be workable within the existing sentencing framework and is consistent with New Zealand's rights and obligations. The package of preferred options for a three strikes regime are as follows:

    151.1. Narrowing the range of eligible offences and introducing a threshold sentence.

    151.2. Requiring the courts to impose the minimum penalties (rather than the maximum) for non-murder offences.

    151.3. Extending the exceptions so that there is an exception to apply to all mandatory elements (sentence and parole) and for both second and third strikes, and introducing principles to guide the application of the exceptions.

    151.4. Providing a reduction below the mandatory sentence, capped at certain level for third strikes and murder offences;

    151.5. Establishing a life sentence with a minimum period of imprisonment for second and third strike murder offences, and a "manifestly unjust" exception that applies to both the life sentence and the minimum period of imprisonment.

    151.6. Ensuring the three strikes regime only applies to offenders who committed strike offences after the commencement date.

152. The Ministry's preferred options align with those in the Cabinet paper in all elements of the regime apart from the elements relating to the qualifying offences in section (i) and penalty levels in (ii).

### Consistency with NZBORA and international obligations

153. The proposed package of design features for the three strikes regime should overall facilitate consistency with NZBORA and international obligations, particularly the right to be free from severely disproportionate treatment under section 9 NZBORA and right to a fair and public hearing by an independent and impartial court (section 25(a)). In particular, extending the use of the "manifest injustice" exceptions, and introducing threshold sentences, will facilitate consistency with these obligations.

### What are the marginal costs and benefits of the Ministry's preferred package of options?

154. The below tables are a costs and benefits analysis of the Ministry's preferred package of options for a three strikes regime.

| **Affected groups** *(identify)* | **Comment** *Nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks.* | **Impact** *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.* | **Evidence Certainty** *High, medium, or low, and explain reasoning in comment column.* |
|---|---|---|---|
| | **Additional costs of the Ministry's preferred package of options** | | |
| Repeat offenders of serious violent and sexual crime | **Ongoing** – Where the regime applies, offenders will serve a sentence of imprisonment (over the threshold sentence length). Approximately 650-750 first strikes, 30-40 second strikes, and 5 third strikes are expected annually. | **High** – offenders in prison will increase contact with criminal associates and reduce links with whānau and community (including possible employment). | **Medium certainty** – the data is based on modelling. |
| Māori offenders | **Ongoing** – Māori more likely to receive a first and second strike than other ethnicities. During the period the regime was in force from 2010 – 2022, approximately half of first strike offenders were Māori and as at March 2022, of the 21 offenders who received a third strike, 81% were Māori. | **High** – Māori offenders are likely to be incapacitated for longer than they would if not for the regime. Likely to lose connections to whānau, hapū and iwi, and their turangawaewae. | **Medium certainty** – the data is based on modelling. |
| Pasifika offenders | **Ongoing** – Pasifika offenders are likely to be disproportionately overrepresented in the three strikes regime. For example, if seven-year penalties were removed, of the 400 offenders that would receive a second strike, 16% would be Pasifika offenders, despite the Pasifika | **High** – Pasifika offenders are likely to be incapacitated for longer than they would if not for the regime. Likely to lose connections to the families and communities. | **Medium certainty** – data is based on modelling. |

| | | | |
|---|---|---|---|
| | community making up 8% of the New Zealand population. | | |
| Young people | **Ongoing** – young offenders who are 29 years or younger are more likely to be convicted of a strike offence than offenders over 29 years old.[67] | **High** | **Medium certainty** – data is based on modelling. |
| People indirectly impacted by a strike offence (such as family) | **Ongoing** – whanau and families will be separated from loved ones in prison, serving a strike offence. | **High** – whānau and hapū are disconnected from incapacitated offender. | **High certainty** – offenders that commit strike offences will receive a prison sentence. |
| The Judiciary | **One-off** – Judicial education and information on the changes will be provided. | s9(2)(f)(iv) | |
| Frontline staff (Courts etc.) | **One-off** – Justice will train court staff on the regime.<br>Updates will be made to the IT system functionality that records strikes.<br>**Ongoing** – impacts on court timeliness due to:<br>• Additional processes and requirements for the court e.g. judicial consideration of threshold sentence; delivering strike warnings.<br>• Defendants appealing sentences and making civil claims. | | |

[67] Strike offences including strangulation and suffocation. Offenders 29 years and under are equally as likely to be convicted of a non-strike offence as offenders over 29.

| | | | |
|---|---|---|---|
| | • Defendants entering late pleas or not guilty pleas because of the severity of the strike offence penalty. | | |
| Department of Corrections | **Ongoing** – the rise in prison population will lead to increase costs for Corrections.<br><br>**One-off** – there will be implementation costs associated with the regie including amending operational guidance, reviewing and updating any internal processes that had been changed after the repeal, and ICT changes. | The Ministry of Justice's preferred option: Modelling indicates that the Ministry of Justice's minimum preferred package (remove 7+ year maximum penalty offences, and a more than 24-month threshold sentence), would increase the prison population by 26-52 individuals after 10 years, at $3.1-6.2 million per annum.<br><br>(Cabinet paper's recommended option: Modelling indicates that keeping the same qualifying offences as the 2010 regime (retain 7+ year maximum penalty offences, plus the strangulation offence, and a more than 36-month threshold sentence) would increase the prison population by 12-27 individuals after 10 years, at $1.4-3.2 million per annum. This would increase to 33-89 individuals at $4.0-10.7 million per annum if a more than 24-month threshold was opted for.)[68] | **Medium certainty** – the figures are an estimate. The actual fiscal cost will depend on the final shape of the overall package of options, judicial behaviours, and other sentencing policy changes (e.g., limiting the use of sentencing discounts). |

[68] Modelling indicates a marginal impact on the prison population for the first ten years of the regime as enough time needs to pass for offenders to commit first and second strike offences and serve their sentences. The additional time in prison (resulting in an increase in prison population) would not occur until the offender on their second strike would previously have been released on parole – that is, not until an average of 78% of their imposed second-strike sentence.

| | | | |
|---|---|---|---|
| New Zealand Police | **One-off** – Police will provide training, policy, and communications for prosecutors on the new regime.<br><br>IT systems will be updated to ensure prosecutors are aware of the strike or strikes an offender has received, to enable them to make appropriate charging decisions. | **Medium** – costs including training, policy and communications will be met through use of use of existing staff time.<br><br>IT changes will cost approximately $60,000.<br><br>All costs will be met through Police baseline funding. | **High certainty** – IT changes have been costed based on currently proposed policy approach. |
| Crown Law | **Ongoing** – training prosecutors and other legal staff on the regime and the judiciary's interpretation and application of the three strikes law when they release their decisions.<br><br>**Ongoing** – time spent on cases where offences are considered strike offences, time spent on potentially longer sentencing hearings. | Unquantified costs, may require future budget bid funding. | s9(2)(h) |
| Crown | s9(2)(h) | s9(2)(h), s9(2)(f)(iv) | |
| Legal Aid Services | s9(2)(f)(iv) | | |

| | | | |
|---|---|---|---|
| | (LSMS) to accommodate the new three strikes regime.<br><br>**Ongoing** – more time spent preparing cases and longer sentencing hearings. | | |
| Legal professionals | **Ongoing** – Law firms will need to train solicitors and other legal staff on new regime and on the judiciary's interpretation and application of the three strikes law when they release their decisions. | Unquantified costs. | **Medium certainty** – assumption of costs is based on commentary from Crown Law. |
| **Total monetised costs** | **Ongoing and one-off costs.** | s9(2)(f)(iv) | |
| **Non-monetised costs** | **Ongoing and one-off costs.** | **High** | **Medium certainty** |
| | **Additional benefits of the preferred package of options within the regime** | | |
| Victims of serious violent and sexual crime/ general public | **Ongoing** – the regime denounces serious violent and sexual crime and holds the offender responsible for their actions. | **Low** – perceptions of safety and public confidence in the criminal justice system likely to increase. | **Low certainty** – limited evidence to suggest that increased sentences increase public confidence. |
| Repeat offenders of serious violent and sexual crime | **Ongoing** – repeat offenders are less likely to receive a severely disproportionate sentence, and have certainty of outcome. | **Low** – offenders are still likely to receive sentences that are longer than what they would receive under ordinary sentencing practices. | **Low certainty** - will depend on the final shape of the overall package of options, judicial behaviours, and other sentencing policy changes (e.g., limiting the use of sentencing discounts). |
| **Total monetised benefits** | N/A | | |
| **Non-monetised benefits** | **Ongoing** | **Low** | **Low certainty** |

# Section 3: Delivering an option

## How will the new arrangements be implemented?

155. We have analysed the Ministry of Justice's preferred package of options to reinstate the three strikes regime:

    155.1. Narrowing the range of qualifying offences.

    155.2. Introducing a threshold sentence for each strike.

    155.3. Reduced penalties for a strike sentence.

    155.4. Exceptions extended to each mandatory element of the regime, including the sentence at second strike, and no-parole element at third strike.

    155.5. Providing recognition for guilty pleas.

    155.6. Changes to the approach for murder offences.

    155.7. No retrospective elements.

156. The reinstatement of the three strikes regime will be given effect by a bill amending the Sentencing and Parole Acts. The regime will come into effect once the bill passes and comes into force. The bill is expected to pass in late 2024; the commencement date is recommended to be delayed by six months to allow time for implementation activities including changes to IT systems to record the strikes, training court staff, and communicating the new regime to the judiciary and the legal profession.

*Responsibilities for ongoing operation and enforcement of the new arrangements, and support for implementation*

157. The Ministry of Justice and Department of Corrections will be responsible for administering the legislation containing the policy. The Courts will be responsible for applying the legislation and determining sentences under the three strikes regime.

158. The Ministry of Justice will provide operational support for the judiciary and the Courts, to complete the required system and process changes to ensure that the courts are prepared to give effect to the new regime. The Ministry will ensure training and education materials are prepared for court staff and the judiciary. The Ministry will facilitate the provision of information and resources to Te Kura Kaiwhakawā/Institute of Judicial Studies to enable them to provide independent judicial education and support. The Ministry will also communicate the changes to wider stakeholders such as the legal profession. Crown Law will provide training to Crown solicitors.

159. The Ministry of Justice will work with usual external providers to prepare changes to relevant IT systems. This will be project managed and tested in-house. New Zealand Police will also be establishing new IT systems.

160. New Zealand Police and prosecutors will be responsible for charging decisions and making submissions at sentencing (for example, making submissions as to whether or not an exception applies). The ordinary processes will apply for reviewing charging decisions. Crown Law will also conduct criminal appeals for cases heard by the Court of Appeal and Supreme Court and act on behalf of the Government in civil litigation relating to the new regime.

161. New Zealand Police and Corrections will also undertake implementation activities including training staff, reviewing and updating any internal processes that were changed after the repeal and changes to ICT systems to distinguish between strikes from the previous regime and the new regime.

162. Corrections will update training and guidance for receiving office staff responsible for ensuring that sentences of arriving prisoners can be calculated accurately, as this can depend on factors such as parole eligibility and strike warning notices. This will involve working closely with the Ministry of Justice to ensure that relevant information e.g. strike warnings is issued to Corrections. Changes to ICT systems will be required to clearly distinguish strikes under the previous regime and the reinstatement and ensure that previous strikes are not carried over.

*Implementation period*

163. As noted in paragraph 156, the Ministry recommends having an implementation period of six months before the new legislation comes into effect. Commencement immediately following enactment is a risk as time is needed to set up the system to record strikes. If there is insufficient time to implement system and process changes, the Ministry cannot systematically record strike offences when they first occur, provide strike warnings, or make necessary changes to various notices and orders. Manual workarounds can provide a mitigation but can be time-consuming and may result in inconsistent treatment.

164. Other risks to a shorter implementation period include limited time to inform the judiciary and train court staff, and communicate with external stakeholders, across the country, on the new regime. This could lead to the inconsistent or incorrect application of the regime, and therefore exposes the Crown to legal challenge.

## How will the new arrangements be monitored, evaluated, and reviewed?

165. The Bill will be required to make changes to the Sentencing Act 2002 and the Parole Act 2002, which are periodically reviewed in the context of the general oversight of the Acts. The Ministry of Justice administers the Parole and Sentencing Acts jointly with the Department of Corrections.

166. The Ministry will periodically monitor and review selected sentencing decisions, appeals and other judicial decisions relating to the new three strikes regime to see how it is being applied in practice and whether any issues are arising.

167. The Ministry will collect data on charges where a strike is imposed, and the age, gender and ethnicity of the offenders. The Ministry will monitor the impacts of the regime on population groups, specifically Māori.

168. The Ministry will continue to analyse sentence outcomes and other data as part of our standard work programme. Stakeholders can also raise concerns directly with the Ministry and the Department of Corrections.

169. There will also be ongoing monitoring of offending rates. However, it will not be possible to determine whether different in rates of offending and reoffending are directly attributable to these amendments as many different factors that affect offending activity. This prevents accurate attribution of cause and effect.