



People Against Prisons Aotearoa

Submission to the Justice Committee on the Three Strikes Legislation Repeal Bill 2021

People Against Prisons Aotearoa (PAPA) is a prison abolitionist organisation working for a fairer, safer, and more just Aotearoa. Established in 2015, PAPA advocates for prisoners to ensure their human rights are met. We also push for changes to the New Zealand criminal justice system to create more just outcomes.

PAPA makes this submission to support the Three Strikes Legislation Repeal Bill (2021), as well as to make some recommendations for ways in which the bill could be improved.

This submission has been written on behalf of *PAPA* by Tom Pearce, Holly Willson and Max Harris.

PAPA wishes for its members to appear before the committee to present this submission.

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Introduction

The Three Strikes Legislation Repeal Bill (2021) represents a small but important step in the right direction for criminal justice in Aotearoa. The various changes made to legislation that created the three strikes laws have been in place now for more than ten years. Yet evidence is at best "inconclusive" that the laws are effective in regards to any of their goals; nor is there evidence to support many of the claims made by proponents of the laws.¹

In short, three strikes laws do not prevent crime, they do not rehabilitate people, nor do they make people safer. Instead the laws succeed only in creating unjust, perverse sentencing outcomes, and perpetuating violence and racism.

PAPA commends this government for making good on the commitment it first made four years ago to repeal these laws. We write to support this Bill, and to strongly recommend that the committee take the advice provided by the Ministry of Justice to include provisions in the Bill for people currently in prison as a result of three strikes laws.²

Part One: Support for repeal

Three strikes laws are based on the idea that severe punishments for crimes will deter people from committing them. This deterrence approach to criminal justice, in particular the idea that more severe punishments are more effective at preventing people from committing crimes, has been well researched and found to be ineffective at best.³ It is therefore unsurprising that there is no evidence to be found for the efficacy of three strikes-style laws, either in New Zealand or abroad.⁴

There are a number of reasons why this deterrent approach to criminal justice does not work. To begin with, people do not commit offences with the assumption that they will be caught, and more often than not they do so with little or no knowledge of what the consequences might be.⁵

In the case of the three strikes laws this is compounded significantly by the complexity of the laws. There are currently forty crimes covered by three strikes, and it seems unlikely that anyone -- even the people who wrote the three strikes laws -- could list all of them from memory, or explain what actions would lead to a conviction for each. Therefore even if the more severe punishments of three strikes did act as deterrents, people would still not be deterred by them because they are unaware of which offences count.

Beyond their simple inefficacy, there are several other reasons to repeal the three strikes laws. To begin with, they add to the criminal justice system a further layer of discrimination against Māori. Māori are already more likely to face punitive responses at all levels of the justice system.⁶

¹ Daly, T. & McClennan, M., *Three Strikes Law: Evidence Brief*, 2-5.

² See: Ministry of Justice, *Impact summary: Repeal of the three strikes law*.

³ Pratt, Cullen, Blevins, Daigle, & Madensen, "The Empirical Status of Deterrence Theory: A Meta-Analysis", 367-395.

⁴ Daly, T. & McClennan, M., *Three Strikes Law: Evidence Brief*, 2-5.

⁵ Nagin, D, *Deterrence in the 21st Century* 42, 192-263.

⁶ Te Uepū Hāpai i te Ora, 'He Waka Roimata: Transforming Our Criminal Justice System'; Quince, "Māori and the Criminal Justice System", 333-58.

The result is that, proportionally, far more Māori face first, second and third strikes: in recent years Māori have been 18 times more likely than non-Māori to receive a second strike, and 82% of all third strike sentences have been Māori.⁷ The government therefore has a clear responsibility under Te Tiriti o Waitangi to repeal the three strikes laws.

Three strikes laws also lead to perverse outcomes by preventing courts from taking into consideration all the factors involved in sentencing. This has been well covered in recent media attention to the case of a man who was initially sentenced to seven years for an offence that the judge said would not normally have received jail time. Unfortunately in this case the court was unable to consider the relatively low impact on the victim or the fact that the man was experiencing mental illness at the time of the offence.⁸ The fact that it took more than three years and significant effort to have this sentence reconsidered is testament to the injustice of the three strikes laws.

Just last month another seven year sentence determined by the three strikes laws was quashed by the Court of Appeal.⁹ It is clear from the initial decisions of judges in both of these cases that the time, expense, stress and uncertainty of an appeal process was unnecessary and unjust.

Furthermore in December, in a case where a person had initially been forced to serve a minimum period of imprisonment of 10 years and 2 months because of three strikes rather than the 4 years and 24 days recommended by the sentencing judge, the Court of Appeal set aside the initial sentencing order and recommended the 4 year and 24 day sentence be imposed because of inconsistency with the New Zealand Bill of Rights Act 1990. Justice Goddard, giving the judgment of the Court of Appeal, said: “The loss of opportunity for rehabilitation and release — the loss of hope — for a period two and a half times what would otherwise be justified is both exceptionally harsh and without rational justification.” As time goes on the three strikes laws will create more perverse sentencing outcomes of this sort unless they are repealed.

Finally, the three strikes laws are purely punitive. They do nothing to address the drivers of crime such as poverty, alienation, racism, ill health and various other forms of inequality. Legislation that does not address these issues will not have an impact on rates of offending, which is easily visible in the way that rates of specific crimes continued to trend in the same directions both before and after the introduction of three strikes laws.¹⁰

Nor does the punitive approach of three strikes laws allow for effective rehabilitation, or provide offenders access to programmes that might allow them to properly come to terms with and address the harm they may have caused. Instead, a prison-only response to the harm caused by people simply perpetuates that harm, in numerous ways.

The stigma involved in having been imprisoned remains with people for a long time, damaging their relationships, their ability to participate in their community, and making it difficult for

⁷ Ministry of Justice, *Impact summary: Repeal of the three strikes law*, 6.

⁸ Stuff news, “‘Cuba St kisser’ who beat three strikes sentence wants compensation”

⁹ RNZ, “Man’s maximum sentence for indecent assault overturned on appeal”

¹⁰ Daly, T. & McClennan, M., *Three Strikes Law: Evidence Brief*, 2-3.

them to find work. Meanwhile prisons themselves are violent places, where people often learn to apply violence to solve interpersonal problems.¹¹

This is not to mention the injustice involved in the social, emotional and financial burden often placed on the immediate family of someone carrying out a prison sentence. There is particular harm done to children by placing a parent in prison, as research shows that children of incarcerated people experience higher rates of poverty as well as lower outcomes in education, physical and mental health.¹²

The failure of the three strikes laws to aim at known drivers of crime thus contributes to the increased likelihood of people who have been in prison reoffending. ¹³ On top of this the three strikes laws remove access to parole on second and third strikes, posing yet another barrier for someone to reintegrate successfully into a community.

A repeal of the three strikes laws is therefore not only a just and necessary step: it is actually likely to be a helpful step in reducing crime and addressing the harms caused by incarceration. The Ministry of Justice estimates that in ten years' time there could be as many as 180 people in prison at any one time as a result of three strikes laws.¹⁴ This gives impetus to a repeal now, before further harm is caused at a greater scale.

Part Two: Transitional arrangements for people currently in prison

Having outlined the inefficacy, injustice and harm involved in imposing increasingly severe sentences on people via the three strikes laws, it follows that arrangements should be made for people currently in prison on sentences determined by these laws. We note that in its Impact Summary the Ministry of Justice has recommended the same, and outlined a number of possible arrangements that could be made depending on the offence and the sentence.

Broadly PAPA supports the recommendations made by the Ministry of Justice, and strongly urges the committee to include the following provisions in the bill based on the different three strikes sentences people are currently serving:

- Second strike sentences of two years or less: automatic release of people if or once they have served half of their sentence. This is in line with standard sentencing and thus avoids the need for resentencing a large number of people.
- Second strike sentences of more than two years: eligible for parole after completing or having already completed one third of a sentence. This is also in line with standard sentencing settings and avoids the need for resentencing a large number of people.
- Second strike sentences for murder: automatically referred to the High Court for resentencing. This is not the option recommended by the MOJ as we believe their

¹¹ National Health Committee. *Health in Justice: Kia Piki te Ora, Kia Tika! – Improving the health of prisoners and their families and whānau: He whakapiki i te ora o ngā mauhere me ō rātou whānau*, 31-32.

¹² Gordon, *Causes of and Solutions to Inter-Generational Crime: The Final Report of the Study of the Children of Prisoners*, 24-29; Mlinac, I. *Exclusion, over-Regulation and Complexities: The Effects of Parental Incarceration on Prisoners' Children and Their Families*; Gordon, L. & MacGibbon, L., *A Study of the Children of Prisoners: Findings from Māori Data June 2011*, 32-39;

¹³ Annaliese Johnston, *Beyond the Prison Gate: Reoffending and Reintegration in Aotearoa New Zealand*, 21.

¹⁴ Ministry of Justice, *Impact summary: Repeal of the three strikes law*, 14.

recommendation is out of line with the principle of justice underpinning the repeal, and that it places an undue burden on the individual. There are only 14 people in this category, so resentencing will not overly burden the court. There is already capacity for the Criminal Cases Review Commission to refer cases back to the courts in instances of injustice; our recommendation is in line with this approach.

- Third strike sentences, including those for murder: resentenced in the High Court. Again this is a relatively small number and will not overly burden the court. The court will also have access to prior sentencing materials, which will reduce the resourcing demands on the court.
- All people imprisoned on sentences involving a mix of strike and non-strike offences: eligible for resentencing. This recognises the complexity of these situations and the difficulty of determining how the three strikes laws might have influenced the original sentences.

Part Three: Compensation for people who have completed sentences

The final change to the Bill that we would recommend involves removing the restriction on compensation currently in proposed cl 15 ('No entitlement to compensation'). The discussion above establishes the clear injustice of the three strikes laws. This is a perspective shared by the current government and reflected in statements by numerous judges while sentencing people under the laws, as well as in the Impact Assessment prepared by the Ministry of Justice.

As a result of this injustice, we suggest that the harm done by the unduly long periods of time spent in prison as a result of three strikes laws may constitute a breach of various rights in the New Zealand Bill of Rights Act 1990, including s 9 (right not to be subject to disproportionately severe treatment), s 17 (freedom of association), s 18 (freedom of movement), and s 19 (the right to be free from discrimination); and may also amount to the tort of false imprisonment. All of these rights were mentioned as potentially relevant in three strikes cases in the Court of Appeal's recent decision in *Matara v R*. Compensation, particularly for those most disproportionately affected by these laws, seems well in line with the rest of this Bill.

Of particular relevance here is the case of *Booth v R* and *Marino v The Chief Executive of the Department of Corrections*. In this case the courts found that errors in interpretation of the law led to longer than expected periods of imprisonment. As Mr Marino had already completed his sentence, a settlement of \$50,000 was reached for the 127 additional days he spent in prison. Without accepting that the settlement represented what Mr Marino was legally entitled to, we believe the case illustrates just one example of financial redress being awarded on the basis of the hardship arising because of unjust imprisonment.

The Court of Appeal found in *Chief Executive of the Department of Corrections v Gardiner* that compensation between \$8000 and \$12000 per month of imprisonment was appropriate. This was based on Cabinet guidelines for *ex gratia* payments in recognition of wrongful conviction and imprisonment, but reduced to take into account that Mr Gardiner was not wrongfully convicted but instead served a period in prison longer than he should for an offence of which he was convicted.

That case also referred at [65] to an earlier annualised figure of \$130,000 recommended in *Manga v Attorney-General*, and the Cabinet Guidelines figure (originally set in 2000) of \$100,000 for wrongful conviction.

Ultimately, these decisions should be a matter for the courts, and the cases discussed above demonstrate that the courts are well placed to make such decisions. But the key first step is that Parliament removes the current proposed provision, cl 15 in the Sentencing Act 2002, which would block people from even making a claim of entitlement to compensation.

This provision is highly unjust. It restricts access to the courts for individuals who may have a legitimate claim in the law of tort, or under the New Zealand Bill of Rights Act 1990. It arbitrarily bars individuals from receiving compensation for the pain and harm they have faced. Parliament should not restrict the discretion of the courts in this way, or rule out the right of redress for individuals who have spent time in prison because of the three strikes legislation. It should leave this matter to the courts to determine, using principles developed in the case law (as discussed above).

If Parliament maintains this provision blocking access to the courts on ordinary principles of compensation, New Zealand may be vulnerable to an adverse finding from the United Nations Human Rights Committee. More importantly, however, in amendment legislation that should provide important vindication for people who have faced unjust sentences, this Government risks creating fresh injustice - leaving wounds opened by unjust prison sentences left to fester, and wrongs left not properly addressed. We urge the Government, and the Parliament, to do better than this.

Part Four: Recommendations

PAPA once again acknowledges the Government for undertaking to repeal these laws. The three strikes laws are significantly out of step with the rest of our justice system. They fail to achieve the goals that their proponents claim, and they do so at a significant cost to those sentenced under them. We strongly urge the committee to recommend the Bill largely as it is, with the following changes that have been discussed in detail above:

1. Make transitional arrangements for people currently in prison under the three strikes laws.
2. Remove the proposed new clause 15 of the Sentencing Act 2002 that blocks people from seeking compensation.

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