People Against Prisons Aotearoa

Submission to the Justice Committee on the Sentencing (Reinstating Three Strikes) Amendment Bill 2024.

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 people in prison to ensure their human rights are met. We also push for changes to the Aotearoa New Zealand criminal justice system to create more just outcomes.

PAPA is submitting in opposition to the Sentencing (Reinstating Three Strikes) Amendment Bill ("the Bill") in its entirety. This submission was prepared on behalf of PAPA by Tom, Jean and Hannah Lucy.

We oppose this Bill because it disproportionately affects Māori, it is inconsistent with *Te Tiriti o Waitangi,* it is ineffective in keeping people safe or reducing harm, it creates perverse and unjust outcomes in sentencing, it is constitutionally inappropriate, and it is an approach to justice that causes significant harms.

Our recommendation is that the committee reject this Bill in its entirety. We discuss our reasons for this recommendation in detail below.

Introduction

1. People Against Prisons Aotearoa submitted only two years ago on the repeal of the three strikes regime. We were strongly in favour of the repeal for the same reasons that we now strongly oppose the reintroduction of the laws.

2. Our submission in support of repeal used much of the same evidence and research as we present here. We have also updated our submission to reflect the changes made to the regime this time around.

3. The changes made to the three strikes regime this time, supposed protections against manifest injustice and disproportionate sentences, are a tacit admission by the government that these laws are deficient and harmful.

4. More broadly, three strikes laws are the worst kind of populist lawmaking that causes nothing but harm. They lack any evidential basis and fail to achieve any of the stated goals.

5. Prisons do not reduce the number of people committing serious crime. They simply concentrate crime and harm in a particular location, and leave people more likely to reoffend when they get out.[1]

6. If the government is serious about its intention to reduce the number of victims of violent crime by 20,000 over the next five years, we need to address the drivers of crime. Unfortunately the broader policy programme of this government fails to address these drivers. We are left with little hope that this goal will be achieved other than through creative use of statistics.

7. Our submission below sets out our opposition to this Bill under five headings that reflect our greatest concerns with the Bill. These are that three strikes do not make people safer, the laws are racist, they are constitutionally inappropriate and unnecessary, they create further issues in sentencing, and that they use a purely punitive approach to reducing harm that is inadequate and harmful.

Three strikes laws do not make people safer

8. Three strikes laws are based partly on deterrence theory, which is the idea that harsh punishments deter people from offending.

9. Deterrence theory, and particularly the idea that more severe punishment are more effective deterrents, is not backed up by evidence.[2] Nor is there evidence that three strikes-style laws deter people from committing crime at all, either in New Zealand or abroad.[3] **The previous three strikes regime in New Zealand had no impact on rates of repeat serious offending**.

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[1] Ti Lamusse, *Abolitionist justice: Towards an abolitionist theory of justice and the state*, PhD thesis, (University of Auckland, 2023), 19-24.
[2] Pratt, Cullen, Blevins, Daigle, & Madensen, "The Empirical Status of Deterrence Theory: A Meta-Analysis", 367–395.
[3] Daly, T. & McClennan, M., *Three Strikes Law: Evidence Brief,* 2-5.

10. The reason for the inefficacy of three strikes laws are well understood. People committing offences do so with little or no knowledge of what the specific consequences might be, usually under the assumption that they will not be caught.[4]

11. There are 42 qualifying offences, and very few people would know what they all are, including members of the select committee scrutinising this Bill. People cannot be deterred by something they do not know or understand.

Three strikes laws are racist

12. The three strikes laws will add a further layer of discrimination against Māori to the criminal justice system.

13. Māori are already significantly over-represented in the justice system and prisons. This is in part because, **at all levels of the justice system, Māori face more punitive responses for the same offending**.[5] This begins with decisions around searches, arrests, charging or prosecutions, and proceeds through to sentencing decisions.[6]

14. Of particular concern is that the Bill will give police undue influence over outcomes, greatly amplifying existing bias. This is because provisions in the Crimes Act 1991 capture a broad range of behaviour. Many offences are 'tiered', with the same or similar actus reus and mens reus captured by multiple provisions. For example, assault is a charge that carries six months and is not a qualifying offence. It is defined as the intentional application of force. The same actions that meet an assault charge could also be met with charges for a qualifying offence, based on police discretion.

15. The result is that police hold significant influence over the judicial process in their charging decisions. This is inappropriate for a variety of reasons, but we are particularly concerned because police charging decisions lack significant oversight or accountability. Court decision can be appealed, but it is far more difficult to challenge a charging decision. Court decisions offer public reasons and must be based on precedent, while police charging decisions do not have the same transparency and are not restricted by precedent.

16. **The result of all this is that, proportionally, far more Māori will face stage-1, stage-2 and stage-3 sentences**. Under the previous three strikes regime, Māori were 18 times more likely than non-Māori to receive a second strike, and 82% of all third strike sentences were for Māori.[7] As we have discussed, this is a greater concern than under the previous three strikes regime because this Bill relies even more heavily on discretion of police. We also discuss issues relating to greater discretion of the courts in [23]-[27] below, which will further amplify this bias against Māori.

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[4] Nagin, D, *Deterrence in the 21st Century* 42, 192-263.
[5] Te Uepū Hāpai i te Ora, 'He Waka Roimata: Transforming Our Criminal Justice System'; Quince, "Māori and the Criminal Justice System", 333–58.
[6] Department of Corrections, *Over-represetation of Māori in the criminal justice system: An exploratory report* (Wellington: Department of Corrections, 2007).
[7] Ministry of Justice, *Impact summary: Repeal of the three strikes law*, (2021), 6.

17. This Bill is therefore a clear breach of the Crown's obligations under *Te Tiriti o Waitangi* because it will lead to more Māori imprisoned, and for longer, than Pākehā. The committee has a responsibility under *Te Tiriti* to reject this Bill.

Three strikes laws are constitutionally inappropriate and unnecessary

18. Parliament speaks to the courts through legislation. Parliament makes decisions around what behaviour is criminalised, and determines how that behaviour should be treated by setting maximum sentences. Individual judges then assess the offending and make a decision based on the facts in front of them as to what sentence is appropriate.

19. Parliament does not know the facts of individual offending, nor does it know the mitigating or aggravating circumstances. Judges who have the facts in front of them are therefore better placed to make decisions on sentencing. These decisions are best made by judges with involvement in and knowledge of the proceedings, rather than by politicians. It is appropriate for politicians to indicate the seriousness of charges, as they do with maximum sentences. Beyond this, it is an overstep to restrict judicial decision making that is inconsistent with the established relationship between parliament and the courts.

20. Judges will already take into account the seriousness of offending and past offences when making sentencing decisions. This Bill is unnecessary and will only lead to miscarriages of justice.

Difficulties in sentencing introduced by the Bill

21. The Bill will also introduce new difficulties and perverse outcomes in sentencing by preventing courts from taking into consideration the factors they need to make a just decision.

22. For example, many of the listed offences involve conduct that the police describe as "relatively minor".[8] S 86J acknowledges this by specifying that only custodial sentences greater than 24 months qualify.

23. However the laws then place courts in the position of potentially having to further discount a sentence to avoid applying a strike, or hand out a sentence that is unjust given the mitigating factors to which they must also give regard per section 9(2) of the Sentencing Act.

24. The "manifestly unjust" provisions in s 86T acknowledge this problem, but only add further complications to sentencing. Various decisions of the courts already indicate the complexity of determining "manifestly unjust" circumstances.[9]

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[8] New Zealand Police, *Regulatory Impact Statement: Sentencing and Parole Reform Act*, (2009), 4.
[9] See for example: *R v Harrison; R v Turner*, [2016], 3 NZLR 602, or *Dickey v R* [2023], 2 NZLR 405.

25. S 86T automatically opens the defence of "manifestly unjust", which will likely prolong proceedings and leave decisions significantly more open to appeal. S 86T also ensures that every stage-2 or stage-3 sentence and parole outcome depends on the discretion of the court and the quality of the advocacy available to the defendant.

26. As we discussed in [18]-[20], parliament is unfit to prescribe detailed guidelines for courts. Parliament is also practically unable to do so in S 86T, because the factual matrices that constitute a manifestly unjust sentence are non-exhaustive. However "manifestly unjust" is so value-laden that its interpretation inevitably imports the personal jurisprudential, political and social position of the court.

27. Of particular concern is that these provisions will further amplify bias against Māori. The broader result is that **the public cannot rely on a just, objective, consistent or fair application of these laws**. Injustice operates and structures the three strikes laws.

The inadequacy and harm of punitive carceral justice

28. Criminal punishment is already a significant imposition on people's liberty and lives, and should not be undertaken for the purposes of political populism via empty denunciations of crime. But three strikes laws are also purely punitive. They do not reduce or prevent crime because they do not address the known drivers of crime like poverty, alienation, racism, ill health and various other forms of inequality. Rates of offending will not meaningfully change unless these issues are addressed, as shown by the failure of the previous three strikes regime.[10]

29. **The purely punitive approach of the Bill also precludes effective rehabilitation, and does nothing to provide offenders with access to programmes that might allow them to properly come to terms with and address the harm they may have caused**. Instead, the Bill merely perpetuates the harm that offenders have caused, as well as the harm that many people in prison have suffered themselves.

30. The stigma of imprisonment damages relationships, participation in communities, and makes it hard for people to find work, accommodation or access important services like insurance.

31. Prisons are violent places, where people learn maladaptive social strategies for interpersonal problems.[11]

32. There are significant social, emotional and financial burdens placed on the families and communities of incarcerated people. There is particular harm to children of people in prison, who experience higher rates of poverty and worse outcomes in education and physical and mental health.[12]

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[10] Daly & McClennan, 2-3.
[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'*

33. **Rather than deterring crime or keeping people safe, incarceration increases the likelihood of people reoffending**.[13] This Bill therefore risks increasing rates of offending and causing significant harm, particularly to whānau and hapori Māori.

Conclusion

34. **We once again call on the committee to reject this Bill in its entirety.** Complete rejection of the Bill is the only way to avoid the harms and injustices discussed in this submission.

35. For the government to genuinely achieve its goal of 20,000 fewer victims of violent crime over the next five years, policy is needed to address the drivers of crime like poverty; alienation; inequality; drug and alcohol harm; systemic bias in the justice system; barriers to housing, healthcare, education and the workforce; and the colonialism that has lead to Māori being disproportionately affected by all of these things.

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* (Auckland: Salvation Army Social Policy & Parliamentary Unit, 2016), 21.