

In Confidence

Office of the Minister of Justice

Chair, Cabinet Legislation Committee

Three Strikes Legislation Repeal Bill: Approval for Introduction

Proposal

- 1 This paper seeks Cabinet agreement to introduce the Three Strikes Legislation Repeal Bill (the Bill).

Policy

- 2 The Bill repeals sections from the Sentencing Act 2002 and the Parole Act 2002 that create what is commonly known as the three strikes law, as approved by Cabinet on 14 June 2021 [CAB-21-MIN-0230 refers]. Repealing the law will deliver on a Labour party manifesto commitment.
- 3 Under the three strikes law, a person convicted of:
 - 3.1 a first specified offence¹ is warned of the consequences if the person is convicted of another specified offence committed after that warning,
 - 3.2 a second specified offence is 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, and
 - 3.3 a third specified offence is sentenced to the maximum penalty for that offence, and the term of imprisonment must be served without parole unless the Court determines that this would be manifestly unjust.
- 4 This Bill repeals the three strikes law because:
 - 4.1 it limits and then removes a judge's ability to consider the individual circumstances and context of the offending when determining sentences for offenders who commit certain specified offences;

¹ There are 40 qualifying three strike offences, comprising all major violent and sexual offences with a maximum penalty of seven years or greater imprisonment, including murder, attempted murder, manslaughter, wounding with intent to cause grievous bodily harm, sexual violation, abduction, kidnapping, and aggravated robbery.

- 4.2 it results in sentences that are excessive and disproportionate to the crimes committed;
 - 4.3 there is no clear indication that the law deters individuals from committing qualifying offences;
 - 4.4 the Court of Appeal has found sentences imposed under the law contravene the New Zealand Bill of Rights Act 1990 (Bill of Rights Act);
 - 4.5 the Courts have the power to impose sentences equivalent to those imposed under the law; and
 - 4.6 it disproportionately impacts Māori.²
- 5 The three strikes law introduced the term “serious violent offence” into the Sentencing Act. This term has since been referred to in other statutes so will be preserved after the repeal takes effect.
- 6 The repeal will apply from enactment to all relevant active criminal proceedings, except those where conviction and sentencing have been completed before the Bill comes into force. This will prevent offenders from filing appeals to bring themselves within the ambit of the repeal legislation.
- 7 The Bill excludes any entitlement to compensation relating to the impacts of the three strikes law. Compensation would go beyond the purpose of the repeal of the three strikes law, which is to prevent the ongoing imposition of the excessive and disproportionate sentences it requires judges to impose.

Need for legislation

- 8 Legislation is required to repeal the provisions that, collectively, create the three strikes law.

Outstanding policy issue: Application of the Bill to current strike offenders

- 9 The Bill does not address the impacts on those already sentenced under the three strikes law. It therefore does not provide retrospective arrangements for those individuals who are serving a sentence of imprisonment for a strike offence at the time the repeal legislation comes into effect.
- 10 Cabinet considered several approaches to this issue [CAB-21-MIN-0230]. Government intervention (or empowering the courts to intervene) would be required to adjust the sentences already imposed out under the three strikes law.
- 11 Any option for intervening would significantly affect the victims of those offenders. This would require including resentencing or other corrective

² As at 30 June 2020, 50% percent of those who have received a first strike and 63% of those who have received a second strike are Māori.

measures into the Bill and would mean that victims may have to deal with parole hearings and re-sentencing that they never expected to occur.

- 12 Further, the length of prison sentences and the procedures for release vary considerably according to the seriousness of offending and how many strikes each person has received. As such, no simple legislative measure can differentiate and then ameliorate the disproportionate sentences handed down.

s9(2)(h)

- 14 Cabinet has therefore decided that, on introduction of the Bill, I should invite the Justice Committee to consider whether (and, if so, how) the Bill should apply to individuals who have already been sentenced under the law.
- 15 The Committee will have the chance to hear from the public and other interested parties on this issue as a basis for recommendations to Parliament.

Public impact

- 16 The Bill should be progressed as a priority in 2021. This will limit the number of offenders being sentenced under the current law and minimise the impact from court delays through adjournments in anticipation of the Bill being enacted.
- 17 Officials will work with the Chief Victims Advisor and Court Victim Advisors in developing any communications directly to victims.

Impact analysis

- 18 A Regulatory Impact Statement (RIS) was prepared in accordance with the necessary requirements and was submitted at the time when Cabinet policy approvals were sought [SWC-21-MIN-0082]. The RIS was assessed as partially meeting the quality assurance criteria.

Compliance

- 19 The Bill complies with:
- 19.1 the principles of the Treaty of Waitangi;
 - 19.2 the disclosure statement requirements (a disclosure statement prepared by the Ministry of Justice is attached);
 - 19.3 the principles and guidelines set out in the Privacy Act 1993;
 - 19.4 relevant international standards and obligations; and
 - 19.5 The Legislation Guidelines (2018 edition), maintained by the Legislation Design and Advisory Committee (LDAC).

The rights and freedoms contained in the Bill of Rights Act and the Human Rights Act 1993

- 20 The Bill is consistent with the Bill of Rights Act and the Human Rights Act. Advice has been provided to the Attorney-General by the Crown Law Office on consistency with the Bill of Rights Act.

Consultation

- 21 New Zealand Police, Ara Poutama Aotearoa - Department of Corrections, the Judiciary, the New Zealand Parole Board, and the Crown Law Office were given the opportunity to comment on the proposal. The Department of the Prime Minister and Cabinet, Parliamentary Counsel Office and the Treasury were informed of the proposal.
- 22 All government agencies consulted support the repeal of the three strikes legislation.
- 23 The government caucus and other parties represented in Parliament have been consulted. LDAC was consulted on a working draft of the Bill.

s9(2)(h)

- 25 I note that the public will have the opportunity to make submissions on the Bill while it is at select committee.

Binding on the Crown

- 26 The Bill will be binding on the Crown [SWC-21-MIN-0082].

Creating new agencies or amending law relating to existing agencies.

- 27 The Bill does not create any new agencies.

Allocation of decision making powers

- 28 The Bill removes a restriction on judicial discretion when determining sentences. This aligns with the LDAC guidelines that legislation be consistent with the fundamental constitutional principles and values of New Zealand law.

Associated regulations

- 29 The Bill will not require regulations to be brought into operation.

Other instruments

- 30 The Bill does not include any provision empowering the making of other instruments that are deemed to be legislative instruments or disallowable instruments (or both).

Definition of Minister/department

- 31 The Bill does not contain any definitions of Minister, department (or equivalent government agency), or chief executive of a department (or equivalent position).

Commencement of legislation

- 32 The Bill's provisions will come into effect on 1 July 2022.

Parliamentary stages

- 33 I note that the Bill holds a category 3 priority on the 2021 Legislation Programme (to be passed if possible, in 2021). The Bill should be introduced into the House on the first available date after Cabinet approval to enable enactment in the first half of 2022.
- 34 The Bill should be referred to the Justice Committee.

Proactive Release

- 35 I intend to release this Cabinet paper, and related Minute, with any necessary redactions, following the introduction of the Bill.

Recommendations

- 36 The Minister of Justice recommends that the Committee:
- 1 **note** that the Three Strikes Legislation Repeal Bill holds a category 3 priority on the 2021 Legislation Programme;
 - 2 **note** that the Bill repeals sections from the Sentencing Act 2002 and the Parole Act 2002 that created what is commonly known as the three strikes law;
 - 3 **approve** the Three Strikes Legislation Repeal Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
 - 4 **agree** that the Bill be introduced into the House on the first available date after Cabinet approval;
 - 5 **agree** that the government propose that the Bill be:
 - 5.1 referred to the Justice Committee for consideration, noting the Committee will be asked to consider whether (and if so, how) the Bill should apply to individuals who have already been sentenced under the law [CAB-21-Min-0230]; and
 - 5.2 enacted by 1 July 2022.

Authorised for lodgement

Hon Kris Faafoi
Minister of Justice