



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Sentencing and Parole Reform
Bill

***Presented to the House of Representatives
pursuant to Section 7 of the New Zealand Bill of
Rights Act 1990 and Standing Order 261 of the
Standing Orders of the House of Representatives***

1. I have considered the Sentencing and Parole Reform Bill for consistency with the New Zealand Bill of Rights Act 1990.
2. The Bill proposes a number of changes to the Sentencing Act 2002 and the Parole Act 2002. In particular:

Repeat violent offenders

- 2.1 Offenders convicted of a second specified listed serious offence (other than murder) must be sentenced to serve their full sentence without parole.
- 2.2 Offenders convicted of murder as their second listed offence must be sentenced to life imprisonment without parole.
- 2.3 Offenders convicted of a third listed offence (other than murder) must be sentenced to life imprisonment with a non parole period of 25 years.
- 2.4 Offenders convicted of murder as their third listed offence must be sentenced to life imprisonment without parole.
- 2.5 In each case the offender must have been sentenced to at least five years imprisonment for the listed offending to qualify under the scheme.
- 2.6 None of these sentences will apply to offenders aged below 18 years of age, and the Court has a discretion not to impose the life sentences if to do so would be manifestly unjust.

Life without parole

- 2.7 The court is also empowered to impose a sentence of life imprisonment without parole on any offender convicted of murder where a minimum non parole sentence would not satisfy the objectives of holding the offender accountable, denouncing the conduct, deterring similar offending and protecting the community.
3. The Bill is intended:¹
 - 3.1 to maintain the integrity of the parole system and contribute to truth in sentencing and provide certainty to victims and victims' families by excluding the possibility of parole for the worst offenders; and
 - 3.2 to enhance public confidence in the criminal justice system by providing for increasingly severe penalties for repeat offending.
 4. I have concluded that the provision for a life sentence to be imposed for a third listed offence in proposed s 86D may raise an inconsistency with the right against

¹ Explanatory note, 1 & 5.

disproportionately severe treatment affirmed by s 9 of the Bill of Rights Act. I note that where s 9 is engaged there is no scope for justification in terms of s 5.²

5. As required by s 7 of the Bill of Rights Act and Standing Order 261, I draw this apparent inconsistency to the attention of the House.

Prohibition against cruel and disproportionately severe treatment or punishment

6. Section 9 of the Bill of Rights Act provides:

“Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.”

7. The Supreme Court³ has held that for s 9 to be engaged, the treatment or punishment complained of must reach the very high threshold of outrageousness. The Court has noted that the standard of disproportionate severity will be engaged by the length of a prison sentence only in extreme instances:

“... ‘disproportionately severe’, appearing in section 9 alongside torture, cruelty and conduct with degrading effect, is intended to capture treatment or punishment which is grossly disproportionate to the circumstances.”

8. The Court has followed the approach taken by the Supreme Court of Canada which has held that the length of sentences is a matter of broad legislative judgment.⁴ A similarly high or higher threshold has also been applied in the United States and by the European Court of Human Rights.⁵

The specified repeat violent offenders regime

9. Clause 5 of the Bill proposes increased penalties for certain repeat offenders. The regime applies to a list of serious offences, which have maximum penalties under the Crimes Act 1961 ranging from seven years imprisonment to life imprisonment.

² See for example *R v Hansen* [2007] 3 NZLR 1 (SC), 83.

³ *Tavioa v Attorney-General* [2008] 1 NZLR 429 (SC), 476, 501, 529, 544 & 552.

⁴ *R v Smith* [1987] 1 SCR 1045, 1070 and *R v Latimer* [2001] 1 SCR 3, [77] (both quoting, with approval, *R v Gwiller*, Ont. Dist. Ct., Sept. 23, 1985):

“It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.”

⁵ See, for example, *Harmelin v Michigan* 501 US 957 (1991), 1001 per Kennedy J (8th Amendment prohibition against cruel punishment prevents only “extreme sentences that are ‘grossly disproportionate’”; and *Sawoniuk v the United Kingdom* ECtHR 36716/00, ECHR 2001-VI: “matters of appropriate sentencing largely fall outside the scope of the Convention ... Nonetheless [the Court] has not excluded that an arbitrary or disproportionately lengthy sentence might in some circumstances raise issues under the Convention”.

10. Under proposed new s 86D of the Sentencing Act 2002, an offender who commits a third listed offence after being convicted of two other listed offences for which he or she has been sentenced to five years or more, and warned, and would then be sentenced to five years for the third offence, is instead to receive a life sentence and, absent manifest injustice, a 25 year non parole period.
11. The practical effect of the proposal is that for any particular listed offence (other than murder):
 - 11.1 An offender who is subject to s 86D who commits a third listed offence and would otherwise be sentenced to imprisonment for five years, and who does not satisfy the high threshold of manifest injustice, will receive a life sentence with a 25 year non-parole period.
 - 11.2 An offender who is subject to s 86D who commits a third listed offence and would otherwise be sentenced to imprisonment for five years, and who can establish manifest injustice, will receive a life sentence and a shorter non-parole period.
 - 11.3 An offender who has not committed previous listed offences and is therefore not subject to s 86D (although he or she may have committed other serious offending) who commits the same or a similar offence and would otherwise be sentenced to imprisonment for five years, will receive a sentence of five years.
12. The result is that the possible sentences for the same offence range from five years to life imprisonment, while parole eligibility may vary from one year eight months to twenty-five years.
13. The imposition of life sentences for listed offences other than murder proposed by this regime gives rise to three basic, and related, concerns:
 - 13.1 At the most general level, the imposition of a life sentence for all qualifying listed offences is inconsistent with the gradation of penalties that is otherwise provided by the Crimes Act 1961.
 - 13.2 Further, the application of the proposed scheme to a given offender is contingent upon previous commission of and conviction for earlier listed offences in terms of cl 5. That criterion is necessarily problematic as it does not consistently reflect the differences between, for example:
 - 13.2.1 an offender who has committed previous listed offences and an offender who has committed previous serious but non listed offences; or
 - 13.2.2 an offender whose previous listed offences occurred in the distant past and an offender who commits several listed offences in close succession, so that he or she was not yet convicted and warned for the earlier offending before committing the second or third listed offence, and is therefore not subject to the increased penalties.

- 13.3 The result is that, in a particular qualifying case, the sentencing court is effectively given a choice between a sentence of less than five years and a life sentence that is, absent manifest injustice, subject to a 25 year non-parole period. Absent manifest injustice, the sentencing court is obliged to impose a sentence on a qualifying offender that may be significantly more severe than that imposed on a more culpable, but non-qualifying, offender. As a result, the scheme does not ensure a consistently rational connection between the offence and the penalty. In contrast, the existing sentence of preventive detention under s 87 of the Sentencing Act 2002 involves a specific determination, based upon expert evidence, of the likelihood of reoffending and, once imposed, is subject to ongoing supervision that permits release only when, if ever, the risk of reoffending is found to have abated.
14. Almost all of the offences listed in respect of proposed s 86D are potentially subject to preventive detention under s 87 of the Sentencing Act 2002 where the court is satisfied of a risk of reoffending⁶.
15. I consider that the differential treatment of offenders, and in particular the imposition of a life sentence for offences that would otherwise be subject to a penalty of as little as five years, based on whether they have been previously convicted of listed offences and warned in terms of cl 5 may result in disparities between offenders that are not rationally based. The regime may also result in gross disproportionality in sentencing. For these reasons I consider that the proposed regime raises an apparent inconsistency with the Bill of Rights Act.

Clause 5 in relation to murder

16. Although I am obliged to report to the House when a Bill is introduced that appears to be inconsistent with any of the rights and freedoms in the New Zealand Bill of Rights Act, Standing Order 261 and Speaker's Ruling 95/3 make it clear that I am not required to report on a provision that is not inconsistent. Because the provisions in the Bill are closely interlinked, I have chosen to advise the House that the following two issues are not inconsistent; namely life without parole under clauses 5 and 7, for reasons that I will elaborate at a later date.
17. The effect of cl 5 as it relates to murder is as follows:
- 17.1 An offender who is convicted of murder as a second listed offence will, regardless of the circumstances of the offence, receive a life sentence with a minimum non parole period of 25 years. Currently, the usual non parole period for murder is 10 years, or 17 years for particularly egregious crimes (Sentencing Act 2002, ss 103 and 104).
- 17.2 An offender who is convicted of murder as a third listed offence will receive a sentence of life imprisonment without parole, without consideration of the circumstances of the offence.

⁶ Murder, which carries a life sentence in any event, manslaughter and aggravated burglary are not included in s 87 of the Sentencing Act 2002.

- 17.3 Both non parole orders will not be made if it is manifestly unjust to do so, but in each case the offender will be required to satisfy a significantly higher test than other offenders who may have committed a similar offence, and who may also have other serious previous offending.
18. The distinction in treatment between offenders who may otherwise have received a sentence of life with a minimum non parole period of 10 years, but who instead receive a minimum non parole period of 25 years, is disproportionate. I am not however satisfied that this would meet the test of grossly disproportionate in terms of s 9.
19. The sentence of life without parole imposed where murder as the third listed offence is discussed below.

Life sentences without parole for murder committed by repeat violent offenders

20. Clause 5 of the Bill proposes a new s 86E of the Sentencing Act. This provides for life sentences without parole for offenders convicted of murder as their second or third listed offence, unless it would be manifestly unjust to do so (in which case a minimum non parole period of 25 years is to be imposed, again, unless manifestly unjust).
21. It is not necessarily contrary to human rights standards that a very serious offender may in fact remain in prison for the remainder of his or her life,⁷ or to provide a higher threshold for parole eligibility for serious offenders.
22. The imposition of life imprisonment without parole has been upheld in the United States Supreme Court.⁸ The most recent jurisprudence in the United Kingdom is not wholly opposed to the concept of life without parole⁹ and in my view while the sentence may be harsh, it is not a disproportionate response to murder as a second or third listed offence, as proposed in clause 5.



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Attorney-General

⁷ See, for example, *Kafkaris v Cyprus* ECtHR (GC) 21906/04, 12 February 2008, [97]-[98]; *R v Secretary of State for the Home Department, ex p Hindley* [2001] 1 AC 410 (HL).

⁸ See, for example, *Harmelin v Michigan* 501 US 957 (1991).

⁹ See, for example, *R (on the application of Wellington) v Secretary of State for the Home Department* [2008] UKHL 72, [7] & [17]; [46]; [51]-[53]; [60]; [66].