

**The Power of Penal Populism:  
Public Influences on Penal and Sentencing Policy  
from 1999 to 2008**

By

Tess Bartlett

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## **Abstract**

This thesis explains the rise and power of penal populism in contemporary New Zealand society. It argues that the rise of penal populism can be attributed to social, economic and political changes that have taken place in New Zealand since the post-war years. These changes undermined the prevailing penal-welfare logic that had dominated policymaking in this area since 1945. It examines the way in which ‘the public’ became more involved in the administration of penal policy from 1999 to 2008. The credibility given to a law and order referendum in 1999, which drew attention to crime victims and ‘tough on crime’ discourse, exemplified their new role. In its aftermath, greater influence was given to the public and groups speaking on its behalf. The referendum also influenced political discourse in New Zealand, with politicians increasingly using ‘tough on crime’ policies in election campaigns as it was believed that this was what ‘the public’ wanted when it came to criminal justice issues. As part of these developments, the thesis examines the rise of the Sensible Sentencing Trust, a unique law and order pressure group that advocates for victims’ rights *and* the harsh treatment of offenders. The Trust became an increasingly authoritative voice in both the public and political arena, as public sentiments came to overrule expert knowledge in the administration of penal policy. Ultimately, it argues that the power of penal populism is so strong in New Zealand that attempts to resist it are likely to come to little, unless these forces that brought it to prominence can be addressed and negated. To date, this has not happened.

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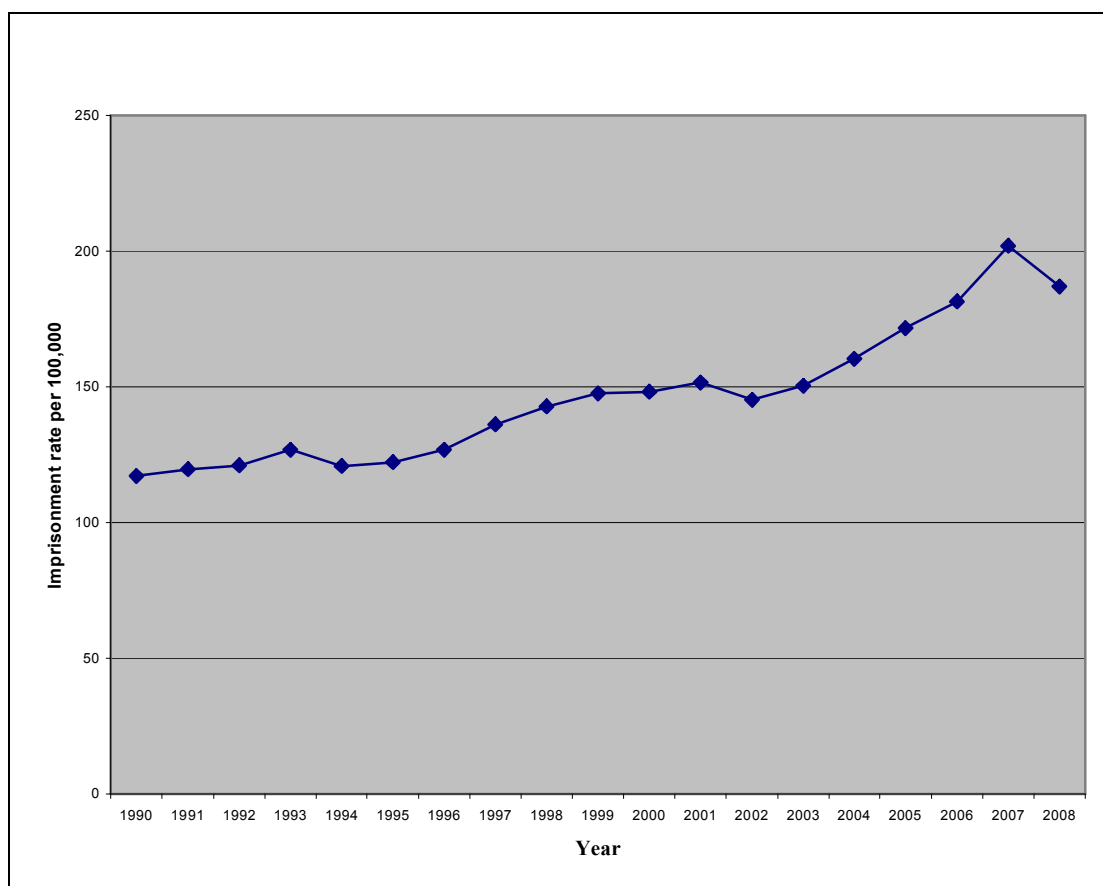
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# Introduction

In September 2007, New Zealand imprisoned 200 people per 100,000 of the population; amongst Organisation for Economic Co-operation and Development (OECD) countries, this rate was second behind the United States (Department of Corrections, 2008b).

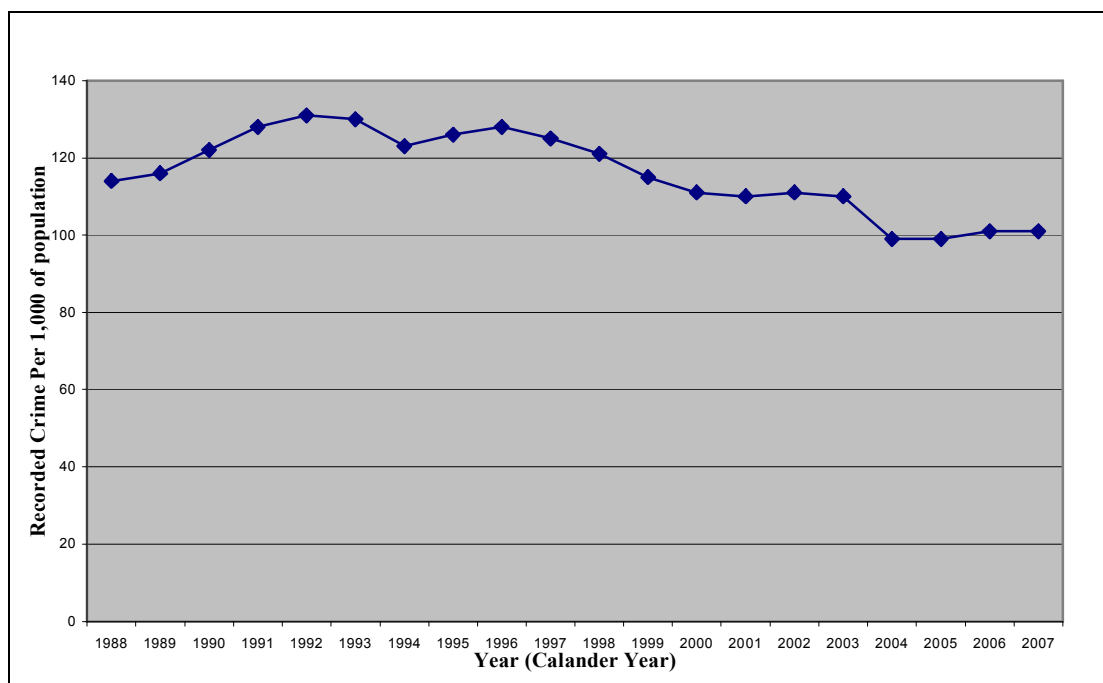


**Figure 1: Imprisonment rate in New Zealand (Including Sentenced and Remand Inmates) from 1990 to 2008 (Department of Corrections, 2006, 2008b; Ministry of Justice, 1997, 2008; Statistics New Zealand, 2008).**

New Zealand's level of imprisonment is illustrated in Figure 1 (displaying original data produced from population estimates and prison population statistics from 1990 to 2008)<sup>1</sup>. What can be seen is a steady increase in imprisonment up until 2001, after

<sup>1</sup> This figure excludes data prior to 1990, as the current population estimates are based on a resident population concept and are not comparable with estimates from earlier years which are based on the de facto population concept (Statistics New Zealand, 2008). Resident population estimates refer to the estimates of all people in New Zealand excluding overseas travellers and New Zealand residents temporarily overseas. Also, the count includes births and deaths of the resident population, and permanent and long-term population (Statistics New Zealand, 2006b). The de facto population

which comes a dramatic increase up until 2006, followed by a small decline. While New Zealand's imprisonment rate was increasing, paradoxically, the crime rate had declined, peaking in 1992 at 131 per 100,000 of the population before undergoing a series of fluctuations and stabilising at 99 per 100,000 of population in 2004 as seen in Figure 2.



**Figure 2: Recorded Crime in New Zealand per 1,000 of Population from 1988 to 2007 (New Zealand Police, 2001, 2008).**

This thesis addresses the phenomenon of growing imprisonment at a time of declining crime by examining the significant social, political, and economic changes that have taken place in New Zealand from the early post-1945 (post-war) years to the present. It will be argued that these changes, along with evolving cultural values, have contributed to a punitive shift in penal policymaking. Drawing on key commentators who have addressed these issues (such as Bottoms, 1995; Garland, 2001; Loader, 2006; Pratt, 2007, 2008; Pratt & Clark, 2005; Roberts, Stalans, Indermaur, & Hough, 2003), the thesis explores the rise of anti-crime, pro-victim lobby groups in New Zealand, which have become increasingly influential in the implementation of penal policy. While the public sector play an important role in New Zealand policymaking, these groups are not explored as the thesis focuses on

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estimates are based on all those people specified in the census including overseas visitors and those New Zealand residents temporarily overseas meaning there are frequent fluctuations in the de facto population in New Zealand.



how New Zealand, from 1999, became particularly vulnerable to populist influences in penal policy debate (discussed below). Thereafter, the Labour-led coalition government attempted to change direction by introducing a series of initiatives entitled Effective Interventions that would, *inter alia*, see the introduction of a Sentencing Council aimed to depoliticise sentencing. In so doing, the government ‘welcomed back’ expert knowledge to penal policymaking (in the form of the Law Commission). To some extent, this began to pay dividends, as is reflected in the decline in the rate of imprisonment from 2007 to 2008, as shown in Figure 1. However, the centre-right National Party won the 2008 election, jettisoned the Effective Interventions strategies, quickly imposed restraints on parole and introduced plans for longer prison sentences. The thesis thus explores the power and purchase of penal populism in the midst of these political struggles around punishment.

## ***What is Penal Populism?***

A great deal has been written on the concept of penal populism (Bottoms, 1995; Freiberg & Gelb, 2008; Garland, 2001; Pratt, 2007; Roberts, 2008; Roberts, et al., 2003). In 1993, one of the first writers on this issue, Sir Anthony Bottoms (1995: 40), coined the phrase ‘populist punitiveness’ to ‘convey the notion of politicians tapping into, and using for their own purposes, what they believe to be the public’s generally punitive stance’<sup>2</sup>. Since then, notions of populism, and more importantly penal populism, have been explored to explain the significant shift that has taken place regarding the role of ‘the public’ in the criminal justice system. Populism can be seen to reflect the disenchantment felt by a distinct segment of society who believe they have been left out, or simply forgotten, by a government that is thought to favour less worthy members of the population (Gustafson, 2006; Pratt, 2007). In this context, *penal populism* has been used to explain the relationship that has developed between one such ‘forgotten’ group – crime victims and their representatives – and government (Pratt, 2007). This new body, made up of ‘pressure groups, citizens’ rights advocates, talk-back radio hosts and callers and so on’, *claims* to speak on behalf of ‘ordinary people’ and have become increasingly

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<sup>2</sup> Here, punitivity will be used to refer to public responses that indicate support for the harsh control of offenders.

influential in policy development (Pratt, 2007: 12). This has ensured that law and order has become a fundamental element in both the public and political arena, where public sentiments continually overrule 'expert' knowledge (Christie, 1993; Pratt, 2007; Pratt & Clark, 2005). Penal populism, then, has seen a shift in power relations away from the criminal justice 'establishment' towards, in varying degrees, citizens' groups and politicians who have worked to align themselves with this 'establishment'.

One of the consequences of this has been that, for Anglophone societies in particular, prison numbers are the highest ever recorded per 100,000 of population (Barclay, Tavares, & Siddique, 2001). This has occurred despite a widespread decline in reported crime, evident in both recorded crime statistics and victim surveys (Bureau of Justice Statistics, 2008a; Gallup, 2008; HM Prison Service, 2008; Home Office, 2008; Mayhew & Reilly, 2007; Mirrlees-Black, 2001; Roberts, et al., 2003). For example, when examining prison statistics in England and Wales, one can see a paradox of rising imprisonment in a society with declining crime rates. The HM Prison Service reported in July 2006 that the imprisonment rate was just over 78,000 (HM Prison Service, 2006) and by July 2008 this had reached 83,601 (HM Prison Service, 2008), a seven percent increase in two years. This increase occurred despite the British Crime Survey revealing in 2008 that crime was the lowest it had been in England and Wales since 1981 when the victim survey was first published (Home Office, 2008). Similarly, in the United States, imprisonment continues to rise rapidly where at midyear 2007 there were approximately 2.3 million prisoners, with an imprisonment rate of 509 per 100,000 residents for persons sentenced to one year or more, up from 501 per 100,000 at midyear 2006 (Bureau of Justice Statistics, 2008b)<sup>3</sup>. Yet, in 2007, according to a National Crime Victimization Survey, property and violent crime rates in the United States were the lowest they had been since 1973, with figures showing violent crime at 20.7 per 1,000 persons (aged 12 or older), a 43 percent decrease since 1998 (McCarthy, 2008). These statistics are an illustration of what has become typical to many Anglophone industrial societies: escalating imprisonment in a time of declining crime.

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<sup>3</sup> These prisoners were held in federal or state prisons and in local jails (Bureau of Justice Statistics, 2008b).

What was it, though, that led to penal populism? It is clear that it emerged out of the breakdown of the penal arrangements that had dominated Anglophone societies in the post war period, referred to by Garland (2001) as *penal-welfarism*.

## ***Post-war Security and Penal-welfarism***

The early post-war years were defined by a number of characteristics that formed the basis of a solid and secure society. Not only were Anglophone societies able to take pleasure in the comforts of economic prosperity and a strong welfare state, the high level of public involvement in society also served to strengthen community ties and with it social cohesion. These solid and stable elements of society resounded in the penal policy of that day, where a strong penal-welfare framework prevailed. Garland (2001: 44) explains this phenomenon:

Like all social institutions, penal-welfarism was shaped by a specific historical context and rested upon a set of social structures and cultural experiences. Its ways of thinking and acting made sense to those who worked in the field, but they also resonated with the structures of the broader welfare state society, and with the ways of life that these reflected and reproduced. Penal-welfarism drew support from – and relayed support to – a particular form of state and a particular structure of class relations ... In short, its characteristic ways of thinking and acting, particularly its modernism and its ‘social’ rationality, were embedded in the forms of life created by the political and cultural relations of the post-war years.

The strength of penal-welfarism was drawn from the economic, social and political structure of the post-war years. This involved in particular:

### **(a) Security and wellbeing**

Anglophone societies during the early post-war years were characterised by the strong presence of the welfare state. This form of governance was one based on inclusion and solidarity, where it was anticipated that all citizens would be brought together on an equal footing (Garland, 2001). The ability of the strong welfare state to provide cross-class security and stability allowed citizens to feel protected and secure in their daily lives. At the same time, the extensive welfare state was funded largely by ‘full employment’ (Broadberry, 1994; Hazledine, 1984; Rosenberg,

1960)<sup>4</sup>. During the 1950s, all Anglophone societies were able to benefit from exceptionally low levels of unemployment. The average percentage of citizens unemployed from 1956 to 1957 was: in Australia 2.2, Canada 4.9, United Kingdom 2.5, United States 5.0 and New Zealand 1.0 (Bean, Layard, & Nickell, 1987). Such low levels were enhanced by high economic growth and low levels of inflation, adding to citizen wellbeing and security (Hazledine, 1984). In addition, jobs were ‘for life’ and the welfare state was simply a ‘safety net’ for those who might need it (Bauman, 1997: 36).

### **(b) Community involvement and social capital**

A second characteristic of the early post-war years was the strength of social cohesion, a feature enhanced by enthusiastic community engagement. Putnam (2000), for example, illustrates this by reference to high levels of religious observance, trade union membership, membership of voluntary organisations and so on. These activities then provide social capital (Putnam, 2000). The earliest writing on this subject was produced by Hanifan (1916: 19):

[Social capital is] that in life which tends to make these tangible substances count for most in the daily lives of a people, namely, goodwill, fellowship, mutual sympathy and social intercourse among a group of individuals and families who make up a social unit ...

It is, therefore, the contact between an individual and the rest of the community that brings about an accumulation in social capital, whereby conditions in the community improve. For post-war Anglophone societies, social capital, and the benefits that it brought – cohesion, trust, community engagement and networking – were considered crucial in maintaining a successful and evolving society. Outlets of social capital had enhanced the security provided by governments, resulting in a trusting and cohesive social body.

These features of the early post-war years had served as a strong foundation for penal policymakers. Criminal justice matters were not yet politicised and so there was little need for the community to become involved in them. If the crime rate was

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<sup>4</sup> The term ‘full employment’ has been used to denote the high level of employment in any given society and has differed across countries and over time. The general consensus is that full employment is based on the lowest margin of unemployment that can be sustained without incurring significant pressures on the economy (Fisher, 1946; Gower, 1989)

mentioned and any anxieties surfaced, experts – that is ‘politicians, senior administrators, penal reformers and academic criminologists’ – were able to ward these off (Loader, 2006: 563), believing the benefits associated with welfare and prosperity would eventually solve the crime problem (Garland, 2001). The ability of experts to control penal policy matters was a fundamental characteristic of post-war criminal justice (Loader, 2006). Consequently, criminal justice issues remained on the exterior of electoral politics, and crime was treated as an issue that should be kept out of the public arena as it was ‘potentially explosive and emotionally charged’ (Loader, 2006: 569).

### ***From Penal-welfarism to Penal Populism***

By the 1970s, however, the security and cohesion of post-war Anglophone societies had begun to erode (see Garland, 2001; Putnam, 2000). In particular, economic stability began to crumble during the 1970s and employment patterns shifted away from primary and secondary sector employment, to a massive increase in job availability in service sector industries (Advisory Committee on Prices and Incomes, 1986)<sup>5</sup>. These jobs offered less security and were either part-time, low paid jobs or highly skilled professional jobs, out of reach of those no longer needed in primary and secondary industries. Over the next decade, unemployment rose markedly and, for many, this unemployment was for increasingly long periods. The ‘life long’ jobs that had offered so much security and stability to citizens during the early post-war years had been stripped away. Reliance on the welfare state safety net became a way of life for many.

The growing decline in social solidarity and the unease associated with this was exacerbated by the growth of crime across Anglophone societies (Kury & Ferdinand, 1999). When examining Canada, for instance, the overall crime rates rose considerably from 1960 to 1990 (Statistics Canada, 2004). In 1962, the total criminal code offence rate was 2,771 per 100,000 of the population and by 1982 it had reached a rate of 8,773 (Statistics Canada, 2004). Ten years on it was peaking at a

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<sup>5</sup> Generally speaking, the primary sector includes industries such as agriculture, fishery and farming, which produce products from natural resources, while the secondary sector includes industries such as manufacturing, electricity and construction that make usable products (Heisz & Cote, 1999). The service sector is comprised of those industries excluded from the secondary and primary sector, such as tourism, government, marketing, hospitality and social services, where the emphasis is on the consumer (Australia Bureau of Statistics, 1986).

rate of 10,040 (Statistics Canada, 2004). Similarly, in the United States the crime rate rose steadily from a rate of 1,887 per 100,000 of the population in 1960 to a rate of 5,484 in 1993 (Bureau of Justice Statistics, 2008c). This pattern of rising crime added to the growing sense of insecurity amongst the publics of these countries (for statistics on Australia and England see, for example, Australia Bureau of Statistics, 1970; Barclay, et al., 2001; Hicks & Allen, 1999). Penal populism then emerged from this shift in economic and social arrangements as a result of two further coincidental factors:

### **(a) The influence of the mass media on public perceptions of crime**

The growth of the mass media enhanced crime visibility, further fuelling concerns about it. The increasing sophistication of technology during the post-war years saw television become an established part of family life by the 1960s. Initially, programming remained a 'state-sponsored public service monopoly' (Hilmes, 2003: 14). Since then, however, the deregulation and commercialisation of broadcasting has seen an increase in private sector enterprises along with the rapid increase in cable and satellite channels (Humphreys, 1996; Pratt, 2007). This growth was seen in the United Kingdom where in 1981 there were just three terrestrial television channels, but by 1995, around 5 million homes had satellite dishes and access to around 100 channels (O'Malley, 2001). In 2001, pay television had reached 44 percent of households in the United Kingdom – 20 percent of all television viewing (Hilmes, 2003). This meant that television channels became competitive. Consequently, there was an increase in crime shows because of their 'intrinsic attraction' to viewers (Pratt, 2007: 71). While the professional police officer has always been an attractive and popular genre (Reiner, 1992), the more competitive nature of television saw the presentation of crime become simplified and sensationalised, using short, dramatic sequences to entertain the public.

The prevalence of crime in the media was then exaggerated by the shift towards tabloid style crime news. Tabloidisation is present in specific media forms and has been made possible by an increase in the 'commercialization of modern life and a corresponding decline in "traditional values"' (Turner, 1999: 60). The term 'tabloid' journalism originated from the *New York Daily News* and the *New York Post* and

was used to refer to ‘screaming headlines’ in small copy newspapers (often regarding celebrity issues) conveyed in a sensationalised format to grab attention and sell issues (Shearer, 2008: 275). More recently, however, it has also been used to refer to current affairs and reality television crime shows, such as *60 Minutes* and *Cops* in Britain, and talk-back television shows such as *Oprah* in the United States (Turner, 1999). This has seen a shift away from informative, knowledge based treatments of social conditions, towards that which is visually entertaining yet simplistic in value (Turner, 1999). What has also become clear is that while fears and anxieties may not be linked directly to crime rates, these feelings *are* closely linked to the mass media’s *representation* of crime (Davis, 1952; Roberts, 2001; Salisbury, 2004).

### **(b) The politicisation of crime and the changing role of the victim**

As a result of the concerns that media coverage of crime generated, crime control became increasingly central to political life. This politicisation has opened penal policy up to fierce debate from both left and right wing politicians who have taken to using punitive law and order tactics in an attempt to gain support from the public (Garland, 2001). Prior to the 1980s, left-wing political parties mainly stayed away from punitive policies and instead chose to advance crime policy through welfare programmes (Young, 2006). In contrast, right-wing political parties were advocates of harsher criminal justice policies based around deterrence and individual responsibility. Since then, however, these tactics have changed substantially. In 1992, for example, the United States Democratic candidate Bill Clinton gained success using punitive policies in an attempt to outbid right-wing parties on punitivity (Applebome, 1992). This punitive focus, on who can be the ‘toughest’ on law and order, has seen the attractiveness of slogans such as ‘Three Strikes and You’re Out!’ and ‘Zero Tolerance’ grow as both left and right-wing politicians try to gain public approval by being ‘tough’ on law and order.

This politicisation of crime control has also helped to transform victimhood. Up until the 1970s, the focus was on the offender, and victims remained largely excluded from debates around criminal justice (Fattah, 1992b). When victim issues *were* addressed, it was mainly from groups drawing attention to the need for victim compensation (Henderson, 1992). Since then, however, the development of victimhood has changed this substantially, initially prompted by the rise of the

women's movement. Groups campaigning on behalf of women were concerned with making changes to sexual assault and violent crime laws, as these were considered to be the product of patriarchal power (Rock, 1986)<sup>6</sup>. However, more recent demands for victims' rights have come from new victims' rights groups such as Citizens United for Safety and Justice in Canada (CUSJ, 2006) and Justice For All in the United States (Justice For All, 2008). These groups differ markedly from those of earlier years as their personal views and demands usually speak for a small minority of crime victims (usually those in sensational murder cases) and at times may represent nobody's views but their own (Fattah, 1992b). They commonly draw on personal experience and 'common sense' arguments giving little consideration to evidence based research and analysis (Pratt & Clark, 2005). This focus on personal experience makes them highly desirable to the media, as this type of reporting suits the more sensationalised and dramatic approach that was noted above.

The formation of these new groups stemmed from the perceived failure of the courts to take into account factors of moral guilt, and the amount of harm caused by crime to innocent members of the law-abiding community (Harris, 1991). On the Justice For All website, for instance, the following is noted: 'Justice For All shall act as an advocate for change in a criminal justice system that is inadequate in protecting the lives and property of law abiding citizens' (Justice For All, 2008: Par. 1). This system inadequacy has motivated these groups to aim to place victims and their families at the heart of the criminal justice system (Sarat, 1997), while taking power away from experts in criminal justice who are regarded as being out of touch with ordinary citizens. As a result, politicians have increasingly addressed victims of crime when implementing penal policy. In his speech on proposed anti-social behaviour legislation, for example, then Prime Minister Tony Blair pledged to 'rebalance' the system in favour of the victim and 'the decent, law-abiding majority...' (Blair, 2006: Par. 59). The Prime Minister stated that widespread public anxiety surrounding crime and justice was the reason for the legislation. He further

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<sup>6</sup> At this time, feminists began to argue that the word 'victim' itself emphasised 'passivity' and 'powerlessness', in contrast the active resistance to oppression many women had to display in their lives in order to 'survive' (Walklate, 2008). Green (1993: 112) argues that this in effect has made feminist criminology 'to a large extent, victimology', because of the 'bourgeois analysis of women as victims', where the emphasis has been on victimisation rather than on challenging traditional assumptions of male dominated criminology. Green (1993) argues that in many instances this resulted in a strengthening of the state when it came to women and crime which in the end resulted in an increasingly punitive system.



noted that this anxiety was generated by a number of individuals who failed to abide by the rules and who were subsequently ‘getting away with it’ (Blair, 2006: Par. 9), thus implying that these individuals were not being punished with sufficient severity. It is the victim then, or groups speaking on their behalf, that have become central to penal policy development where they have claimed the right to speak about victimisation through their own highly political lens.

However, it is not the typical crime victim who is represented by politicians and the media, but instead an ideal victim. An example of this can be seen in the United States, where advocates of Megan’s Law (Office of Attorney General, 2007) reiterate that ‘Megan could have been anybody’s child. She was everybody’s child, a poignant symbol of the obligation that each of us has [to keep children safe]’ (Megan Nicole Kanka Foundation, n.d: Par. 8)<sup>7</sup>. Against such innocence, offenders have also been transformed to represent the particularly ‘evil’ subgroup whom victims’ representatives and politicians believe are significantly different from the law-abiding community (Pratt & Clark, 2005). The victim and the offender have therefore been typified as being representative of all that is good on the one hand and all that is bad on the other. Consequently, members of the public who are the receivers of this information are more likely to become increasingly sympathetic to crime victims and increasingly punitive towards offenders. The increased fear of crime, when coupled with its politicisation, has seen the public and the victim become more central to penal policy debate, ultimately leading to *penal populism*.

## ***Methodology***

The research for the thesis was undertaken using qualitative documentary analysis (with components of quantitative analysis used in Chapters Two and Three), an integrated method used to locate, identify, retrieve and analyse documents for their relevant significance and meaning (Altheide, 1996). The use of qualitative documentary analysis allowed the research to be reflective and interactive where themes emerged throughout the research process (Altheide, 1987). The thesis used progressive theoretical sampling. This sampling method allowed documents to be

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<sup>7</sup> Megan’s Law is an informal name given to laws in the United States that were named after seven year old victim Megan Kanka and require the public availability of information regarding sex offenders.

selected for theoretical reasons as the research and its arguments progressed (Altheide, 1996). The materials being analysed consisted of newspaper articles, parliamentary debates (as reported in Hansard and in the Appendix to the Journal of the House of Representatives), media releases, annual reports, yearbooks, and statutes. As the research developed, content analysis was undertaken to identify the nature and frequency of different penal 'frames' (Altheide, 1996). In this case, the penal frames included, for example, the 'politicisation of crime control', 'criminal justice' and 'law and order'. From here, search words were used to locate specific 'themes' as they emerged with the arguments, such as 'public opinion', 'prison population', 'public expectation' and 'overcrowding'. Once these themes were identified, the discourse was analysed to determine how language differed among key actors. For example, in Chapter Three an analysis was conducted of parliamentary debates to determine whether Members of Parliament (MPs) had taken to using expressive rhetoric common to law and order politics when implementing penal policy. These research techniques were employed as they offered a method of examining the justifications and key influences in the development of penal policy.

Using the frameworks established in the Introduction, Chapter One analyses the transformation that took place in New Zealand from the post-war years when the penal-welfare framework prevailed to the turn of the twenty-first century when penal populism began to dominate. Of particular significance in New Zealand was a law and order referendum posed to the public in 1999. This chapter explores how this referendum established public opinion as an authoritative force in penal policy.

Chapter Two explores the concept of the penal policy 'pressure group' and examines, in particular, the rise of the Sensible Sentencing Trust, a unique law and order lobby group in New Zealand. It uses the penal populist framework developed earlier to analyse the strategies employed by the Sensible Sentencing Trust to gain public support, outlining how this group has promoted, with great effect, the voice of 'ordinary people' as a force to be reckoned with in the development of penal policy. The chapter also explores the transformation of the victim in the criminal justice system and the way in which the idea of the 'symbolic victim' (Cressey, 1992) has increasingly been used by the Sensible Sentencing Trust and politicians to evoke emotions and generate public support for punitive policies.

Chapter Three analyses the development of four statutes introduced in the aftermath of the 1999 referendum: the Sentencing Act 2002, the Parole Act 2002, the Victims' Rights Act 2002 and the Prisoners' and Victims' Claims Act 2005. It explores the relationship between politicians and the public and the influence the latter had in the implementation of this legislation. The idea of symbolism is developed further in this chapter where 'symbolic politics' are explored (Tonry, 1996). In doing so, the chapter examines the influences behind different legislation and argues that the government began introducing policies to satisfy public expectations, rather than examining the effectiveness of these policies. The chapter uses Garland's (2001) commentary on the politicisation of crime control to further examine these influences, looking specifically at penal discourse, where policies have become increasingly 'emotive' and 'expressive'.

Chapter Four addresses and analyses the implementation of Effective Interventions in 2006 and 2007 and explains how the government looked to reclaim attributes associated with the post-war penal-welfare era in a bid to stop penal populism. The attempt to reconstruct penal policy came to an end with the election of the National government in 2008. The chapter assesses the current prospects for penal populism, and the possibilities of resistance to it, in the aftermath of these developments.

Overall this thesis argues that New Zealand society, like other Anglophone societies, has undergone a series of changes since the post-war years which has seen it change from a 'secure' society, where penal-welfare attributes dominated penal policymaking, to a society where penal populism prevails. Through the examination of penal policy developments in New Zealand from 1999 to 2008, it argues that the power of penal populism has become so strong that any attempts to resist it are unlikely to succeed without the strength of a secure political and social environment (like that which prevailed in the post-war era) to undermine populism's power base.

## **Chapter One:**

### **The Rise of Penal Populism in New Zealand**

From the early post-war years, New Zealand society, like other Anglophone societies, underwent a series of changes that brought about a shift from security and social cohesion as its dominant features to one of instability and social change. The purpose of this chapter is to examine the social, political and economic features of New Zealand society to determine how New Zealand became a society where penal populism was able to flourish.

From 1945 to the late 1970s, citizens were able to rely on the role of the state for security. Furthermore, the homogeneity of the population had created a strong sense of social cohesion, which further enhanced New Zealand's tranquil environment. These factors meant that while crime was on the rise, crime and punishment were not regarded as significant social issues. In 1954 and 1982, two pivotal and influential documents emerged in New Zealand: 'A Penal Policy for New Zealand' (Department of Justice, 1954) and the 'Report of the Penal Policy Review Committee' (Penal Policy Review Committee, 1981b). Both documents focused on the need to reduce the prison population. Furthermore, policymakers refrained from recommending punitive policies to bring about this reduction, with no reference made to public opinion – features that distinguish them from penal policy at the end of the twentieth century.

However, from the early 1980s through to the present, New Zealand society has experienced a decline in security due to a number of factors. Labour governments in the 1980s began to restructure the economy, making changes to taxation, which broadened inequalities and left citizens feeling distrustful of government and existing political processes. Citizens were no longer able to enjoy full employment, as employment patterns across the country began to shift. In addition, the increasingly heterogeneous nature of society, particularly the increase in Asian immigration, as well as the changing nature of the family, represented a loosening of social bonds where social cohesion no longer seemed to prevail. Citizens also became

increasingly aware of crime, gaining more access to crime news and crime-based programmes as the mass media turned to tabloid style journalism. This increase in crime visibility, combined with the unstable social setting, meant that crime problems became political issues. After a series of failed attempts by politicians to curb crime, members of the public began to speak out and form pressure groups addressing criminal justice issues. What could be seen, then, was a shift in society away from the secure and stable environment that existed in the post-war era to a period of immense instability, ensuring that New Zealand became a very fertile ground for the growth of penal populism.

### ***Penal-welfare and Post-war Prosperity***

This section will discuss the different attributes that contributed to New Zealand's stability during the post-war years as these provide a stark contrast to the unstable period that followed which allowed penal populism to flourish.

During the 1950s, New Zealand benefited from a period of high economic growth. This was fostered by the demand for agricultural exports, such as wool, which maintained a dominant position in the international trading market due to its use in strong supplies such as blankets and carpets (Belich, 2001). During these years, citizens were able to benefit from a nationwide equality, with citizens and visitors alike boasting of this. As one commentator remarked:

[An] outstanding social characteristic of New Zealanders ... is the feeling that they are all equal ... New Zealand is the first country with western traditions actually to have made the experiment of an approach to economic equality.

(Sutch, 1956: 5-6)

This equality created an environment where the range of income between the highest paid jobs and the lowest was minimal (Department of Labour, 1951). At the same time, New Zealand enjoyed one of the highest per capita incomes in the world (Douglas, 1987). Not only were incomes and pay distribution based on equality, allowing most citizens to prosper, these years were also characterised by full employment for men (at least). The National Employment Service (1947: 21-22) noted in an Annual Report for 1947 the following:

The second post-war year of reconstruction has seen unemployment [in New Zealand] reduced to extremely low levels ... by 31<sup>st</sup> March, 1947, they totaled only 67 males and 7 females, including 43 semi-employable persons.

The rate of unemployment continued to decline, with the *Labour and Employment Gazette* (Department of Labour, 1951) reporting in February 1951 that, in the previous year, 403 men were classed as unemployed. This was just .01 percent of the workforce – the lowest number of males unemployed on record. Citizens were thus able to feel secure in their daily lives, with the knowledge that their jobs were secure.

### **Social cohesion and homogeneity**

The sense of stability, security and comfort brought about by economic conditions was complemented by the homogeneity of the population and the pervading sense of togetherness this generated. At this stage, New Zealand's ties with Britain remained strong and most New Zealanders still spoke of Britain as 'Home' (King, 1988: 7). Entry of migrants was restricted on the grounds of 'race', where the profile of what was considered a 'good migrant' remained predominantly white and British (Smith, 2005: 172). A comprehensive assisted passage scheme was introduced in July 1947 for British residents, restricting entry to 'physically fit single persons between the ages of twenty and thirty-five who were experienced in certain specified occupations of an essential nature' (National Employment Service (N.Z), 1947: 8). The homogeneity amongst the majority population provided a strong sense of community where citizens united to form close social bonds.

In contrast, any group whose language, culture or looks made it clear they were not from Britain were faced with extensive barriers, with Chinese immigrants in particular suffering from prejudice and misunderstanding (King, 2003). While British immigrants and those from the Netherlands accounted for over 90 percent of all migrants to New Zealand in 1955, 'other foreign countries', which were not distinguished by ethnicity or race in annual reports, accounted for only 6 percent (Department of Labour, 1955: 7). The restrictive controls placed on all immigrants who were not British were deemed necessary to maintain 'White New Zealand' as

immigration was considered a threat to the nation's homogeneity rather than as a crucial source of diversity and growth (Belich, 2001: 224)<sup>8</sup>.

The only thing that seemed to stir white New Zealand was the increasing urbanisation of Māori, who, at that time, made up about 5 percent of New Zealand's total population. In the post-war period, the urban Māori population increased from 13 percent to 23 percent in fifteen years (Metge, 1964). Many Māori families, directed by the Department of Labour and Employment, had shifted from rural to urban communities to help out with the war effort, and to take advantage of labour market opportunities. This move, however, severed the tight bonds that still existed within Māori communities (Durie, 2008; Metge, 1964). A large proportion of the group who had moved shared similar attributes: they were between the ages of sixteen and thirty, were unmarried, unskilled and under- or un-employed, and were eager for adventure or new experience (Metge, 1964). The new visibility of Māori in urban centres had been accentuated by the 'patterns of dress and public behaviour which singled them out, not only as country folk, but also as Māori – culturally as well as ethnically "different" from the Pakeha population (New Zealanders of European stock)' (Metge, 1964: 2). These factors, combined with the low level of work available, had significantly impacted on levels of Māori imprisonment, which grew from 431 prisoners in 1952 to 573 prisoners in 1956 (Department of Justice, 1957). At this stage, however, the high level of Māori imprisonment did little to disturb post-war tranquillity.

### **Social security**

The serene New Zealand setting was further enhanced by the state's ability to provide firm guarantees of security. Indeed, in the post-1945 period, its welfare arrangements were amongst the most advanced of welfare societies (Pratt, 2006). The Social Security Act 1938 (which was in place until the Social Security Act 1964 came into force) stated that all persons who had been 'deprived of the power to obtain a reasonable livelihood through age, illness, unemployment, widowhood, or other misfortune' were eligible for assistance (Social Security Department, 1938: 5-

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<sup>8</sup> Modern historians consistently refer to this immigration policy as the 'White New Zealand' policy, similar to that which was in operation in Australia, Canada, and the United States from 1924 (Belich, 2001). However, unlike New Zealand, prior to 1945 all these countries had relaxed their immigration controls to allow for further diversity and growth.

6). The Labour government was at this time striving for ‘universal security’ (Social Security Department, 1938: 5). This meant that citizens were able to rely on the government for cash benefits as well as on a supplementary health benefit system that provided medical, hospital, pharmaceutical, maternity, and supplementary services to New Zealanders (Social Security Department, 1938).

Along with a reliance on welfare, citizens were also able to feel secure knowing they had access to a Crimes Compensation Tribunal as well as a ‘no-fault’ compensation system which had been in operation since 1900 (Accident Compensation Commission, 2008). The Crimes Compensation Tribunal arose out of the Criminal Injuries Compensation Act 1963 and was the first scheme in the world to offer injured victims compensation from the state, via the Compensation Tribunal (Stenning, 2008)<sup>9</sup>. The theory behind this policy was that a victim of personal violence was considered a consequence of the state’s failure to protect its citizens (Stenning, 2008). This was subsumed within the Accident Compensation Act 1972, affirming workers rights and providing ‘cover to all persons injured in motor vehicle accidents in New Zealand, and to other injured persons coming within the definition of “earners”’ (Accident Compensation Commission, 1973: 3). Injured workers were also able to sue an employer for negligence adding to employee security. In 1974 the Accident Compensation Commission (ACC) added amendments that gave *everyone* cover for personal injury by accident (Accident Compensation Commission, 1974: 2). The attempt to offer universal security to citizens meant that a large segment of the general population were entitled to provisions, with 931,446 social security benefits (covering almost 45 percent of the population) in force in March 1953 (Social Security Department, 1955). At this stage, members of the public were able to feel comfortable knowing they had ‘an automatic share in the total production of the community’ (Sutch, 1966: 238).

Even when economic difficulties began to surface in the 1970s, as a result of ‘a deepening world recession and stagnating international trade’ (Tizard, 1975: 2), the extensive provisions offered by the state meant citizens continued to have faith in state power. New Zealand had long relied on exports from the agricultural sector to maintain a prosperous economy. This became a challenge when there was a collapse

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<sup>9</sup> An injury was defined as those who had suffered bodily harm, mental or nervous shock from crime, or pregnancy (Stenning, 2008).



in agricultural exports, particularly due to declining meat and wool prices (Belich, 2001). The collapse had originated from the expansion of service sector industries and consequently resulted in a declining export share (Tizard, 1975). While Britain had remained the leading market for New Zealand during the early post-war years taking 66 percent of New Zealand exports in 1950 – by 1970 this had reduced to just 36 percent (Belich, 2001). Despite these economic difficulties, there was no retreat from the idea of the strong central state. In the early 1980s, the leader of the National Party, Sir Robert Muldoon, sponsored a ‘Think Big’ state interventionist scheme designed to strengthen the economy and relieve citizens of any doubts they had regarding economic wellbeing (Belich, 2001). The strategy required that the government borrow heavily from overseas investors (creating large external deficit) whilst using the borrowed funds for large scale industrial projects (such as a synthetic-petrol plant) (Smith, 2005). At that time, however, the solution to economic problems was still to have faith in the strong central state.

### ***Penal Policy in New Zealand from 1954 to 1984***

The presence of a strong central state that was committed to welfare was extended to all members of the community, even those who came into contact with the criminal law. The underlying assumptions of penal-welfarism that prevailed in other Anglophone countries during the post-war era were also evident in New Zealand penal policy development: reformation, rehabilitation and welfare, and proportionate punishment, as well as there being a consistent reliance on criminological expertise and knowledge. Two pivotal documents published by the Department of Justice were extremely influential in this regard:

#### **(a) ‘A Penal Policy for New Zealand’**

This report (Department of Justice, 1954) addressed what was in 1952 thought to be the high rate of imprisonment in New Zealand – 55 per 100,000 of the population (New Zealand official yearbook, 1954). As noted previously, the Māori population was disproportionately represented in prison statistics accounting for 12.6 percent of arrests and 13.1 percent of convictions, while this group accounted for only 5 percent

of the total population (New Zealand official yearbook, 1954)<sup>10</sup>. Interestingly, this high rate of Māori imprisonment was bypassed in the report. What was of importance to the government, however, was the high rate of imprisonment overall, with the Minister of Justice noting that ‘in relation to population, we have 50 per cent more people in our prisons daily than they have in England and Wales’ (Department of Justice, 1954: 3). The report attempted to reduce the prison population by ‘divert[ing] men from a life of crime’ (Department of Justice, 1954: 6). At the same time, the report placed strong emphasis on the training and rehabilitation of prisoners noting that as a main objective ‘[p]risoners ... should not only be detained, they should be trained’ (Department of Justice, 1954: 17). When offenders did not respond to treatment, they continued to be dealt to without recourse to the penal extremes of later years. The Department of Justice (1954: 6) notes, for example, that

[t]here is no safety in undue severity. There is no room for emotionalism. The reformable must be trained for citizenship; the deliberate and persistent offender must be removed from the community for a long period of time.

Therefore, in the post-war period, those citizens whose difficulties had led them to crime, but who were responding to treatment, were dealt with leniently, while those who were not responding to treatment were detained indefinitely. The emphasis in both scenarios was the consistent treatment of the offender.

The need to reduce the prison population was emphasised in ensuing annual reports from the Department of Justice (see Department of Justice, 1957, 1965). Nonetheless, prison musters continued to rise. By 1957 the male inmate population (including borstals and excluding minor prisons and police gaols) had increased by twenty percent over a twelve month period, from 1,083 men to 1,302 men (Department of Justice, 1957). The Minister of Justice stated in the 1957 Annual Report of the Department of Justice that the figures were ‘disturbing’ concluding:

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<sup>10</sup> Later publications of the *New Zealand Official Yearbook* and the Annual Reports from the Department of justice show sentenced and remand prisoners rather than convictions; the data is thus not strictly comparable with present data.

The time would seem to be appropriate to consider whether other methods could not be adopted, and to question whether there are not in prison many men who should not be held in penal institutions.

(Department of Justice, 1957: 11)

Accordingly, this report highlighted that imprisonment should only be used for serious offenders (Department of Justice, 1957). While the report still adopted penal-welfare attributes, noting that alternative measures of treatment should be sought wherever possible, it does not specify *how* this should be dealt with.

By 1965 penal discourse had shifted once more. The 1965 Annual Report of the Department of Justice (1965: 5) notes that the persistent offender is a main priority ‘against whom none of the existing measures of the criminal law has been, or is likely to be, of any avail’. This suggests that those attributes associated with penal-welfarism had done little to tackle the problem of the recidivist offender. It was beginning to be recognised that the commitment to treatment and rehabilitation was not going to solve all crime problems.

### **(b) The ‘Report of the Penal Policy Review Committee’**

The commitment shown to penal-welfarism during the early post-war years did little to reduce crime or the continued rise in imprisonment. This resulted in the decline of faith in penal-welfarism from the 1970s, as policymakers sought new ways of responding to crime. Hence, the suggestion by the Department of Justice (1980) that a review of penal policy take place. Following this, in 1981, the second pivotal document to have a profound influence on penal policy development emerged. The ‘Report of the Penal Policy Review Committee’ (1981b: 39) continued to regard the reduction in the prison population as the top priority where the aim was ‘to consider the means by which the incidence of imprisonment can be reduced to the greatest degree ...’. The means by which the reduction took place, however, provided a complete contrast to the objectives set out in the 1954 report (Department of Justice, 1954). The Penal Policy Review Committee (hereafter referred to as the Committee) argued that policy up until the 1980s had been inconsistent, with conflicting objectives, and this had ‘bred some degree of uncertainty and confusion’ between those implementing, administering and imposing penal sanctions (Penal Policy Review Committee, 1981a: 4). The Committee held the belief that this uncertainty

was 'reflected most clearly in a general decline of faith in rehabilitation as an objective of the penal system' (Penal Policy Review Committee, 1981a: 4-5).

The new ideas emerging from the Committee regarded crime as 'a social problem and not a penal problem' that should be tackled using prevention strategies in the community (Penal Policy Review Committee, 1981a: 8). The report states the following:

[T]he ultimate justification for a system of law enforcement, sanctions and dispositions must therefore be a utilitarian one – the prevention or minimisation of offending in society.

(Penal Policy Review Committee, 1981a: 9)

At this time, the emphasis was on the prevention of crime through interventionist state activities with no sign of the punitive policies that dominated penal policy throughout the following decades. For example, the report noted that 'the penal response, as a last resort, should be limited by the seriousness of the offence and the culpability of the offender, and accord with requirements of justice and fairness' (Penal Policy Review Committee, 1981a: 11). The need for proportionate punishments, along with the emphasis on prevention, meant there was no reduction in the role of the state. Work programmes and education were used to 'enhance' prison conditions in an attempt to cause 'as little permanent harm as possible to the offender' (Penal Policy Review Committee, 1981a: 15). The recommendation made by the Committee to engage in proportionate punishment was highly influential in the subsequent Criminal Justice Act 1985, which was concerned with the need to imprison only 'serious' offenders (New Zealand Parliament, 1985). Geoffrey Palmer, then Minister of Justice, stated at the time that the Criminal Justice Act 'discourages the use of imprisonment for property offenders and other minor offenders' unless in special circumstances (New Zealand Parliament, 1985: 5833). The emphasis, therefore, had shifted from the post-war treatment-oriented characteristics of penal policy to the use of crime prevention strategies and community sanctions. Further, while rising prison populations also remained a top priority throughout the post-war years, criminal justice issues still remained relatively free from public debate.

In keeping crime out of the public domain it is interesting to note, at this point, the approach taken by the National (conservative) and Labour parties to the 1987 election as it was markedly different from what was to follow at the beginning of the twenty-first century. Both parties refrained from trying to ‘popularise’ law and order as an election issue. For instance, instead of the popular law and order stance, the Labour Party focused heavily on the rule of law, omitting crime from its policy documents and instead, using the humane and equitable treatment of defendants and victims as its main priority (New Zealand Labour Party, 1987). Labour acknowledged that there was, indeed, growing public concern regarding violent crime, but this was to be addressed by calling on expert opinion (Pratt & Clark, 2005). To do so, the Labour Party requested the formation of a Ministerial Committee to tackle the issue of violent crime (see Ministerial Committee of Inquiry into Violence, 1987). In contrast, the National Party positioned themselves alongside the police, focusing its attention on public safety and law enforcement (New Zealand National Party, 1987). In a policy document, National noted that as a Party it would ‘meet any reasonable request from the police for the equipment and legal powers they need to do the job we expect of them’ (New Zealand National Party, 1987: Section 2). For both parties then, the 1987 election campaign had no involvement of victims of crime or groups claiming to speak on behalf of ‘the public’. Instead, crime and punishment were issues to be resolved by experts, of one kind or other.

## ***The Age of Insecurity***

However, after the stable post-war period in New Zealand, a period of immense insecurity began to develop. This section will examine the period of social insecurity from the 1980s through to the end of the twentieth century. The Labour government came to power in 1984 and governed through to 1990, restructuring the New Zealand economy, as New Zealand moved, almost overnight, from being the most regulated to the most unregulated Western economy. The new government made taxation changes that extended inequality and social division. This, along with rising levels of unemployment, increased public anxieties as citizens began to feel insecure in their daily lives. Furthermore, the sense of social cohesion and solidarity that had existed in the post-war era began to recede as the population became increasingly heterogeneous. At the same time, rising crime became established as a normal ‘social

fact' due to its political and media representation (Garland, 2001: 106). This combination made New Zealand particularly vulnerable to penal populism.

### **'Rogernomics' and economic restructuring**

The state's commitment to welfare during the post-war period led to major public expenditure. Thereafter, as a response to the subsequent imbalance between government income and outcome, in 1984 the incoming Labour government decided to cut back on public spending. This meant a new and reduced role for the state. Encouraged by Minister of Finance Roger Douglas, the government began to restructure the economy. Known as 'Rogernomics', after the Finance Minister, this was considered by Douglas to be a 'better way' forward for New Zealand (James, 1989: 11). Prior to the election, the Labour Party made assurances regarding taxation and the economy stating:

The next Labour Government will protect the family by providing jobs and keeping the lid on prices ... Labour's tax policies will reduce the cost of living and promote full employment. Tax cuts will certainly help the needy, but we're determined to encourage more enterprise and effort to get New Zealand's economy on the move.

(New Zealand Labour Party, 1981: 3-4)

However, the subsequent economic restructuring resulted in considerable tax reform. The changes to taxation had a significant impact on the general public, contributing to *broadening inequalities* and, in turn, a growing distrust of government. One element of the restructuring involved the introduction of indirect tax reform, in return for significant cuts to direct taxation, which was a 'broadly-based tax on goods and services supplied in New Zealand' (Douglas, 1985: 9). The Goods and Services Tax (GST) came into force on 1 October 1986 at a rate of 10 percent (later increasing to 12.5 percent) and was added to the user's end of all import goods (Douglas, 1985). Another move by the Labour government was to shift the reliance of the economy away from the British market to a more industrialised global economy. At this point, citizens were encouraged to invest their new found wealth in the stock market, encouraged by 'the wonders of the free market' (Newland, 2001: 93). In 1987, however, there was a worldwide collapse of share prices and many shareholders who had invested everything were left with nothing (Newland, 2001).

The Labour Party's response to the share market crash was to announce further reforms (New Zealand Parliament, 1987). For instance, those individuals who found themselves in a position whereby they needed to deregister from the Goods and Services Act (as they may have initially joined to receive tax benefits) were required to pay Inland Revenue one-eleventh of *all* assets that were brought into the tax scheme (New Zealand Parliament, 1987). Such changes contributed to the public feeling deserted and distrustful of the government and existing political processes.

New Zealand's economic stability began to deteriorate further as net public debt rose from \$21,879 million in 1984 to \$39,721 million in 1989 (Kelsey, 1997). The answer to growing debt was to 'improve the quality and efficiency of government spending' (Douglas, 1987: 13). This move consequently resulted in a reduction in social welfare spending when the National Party won the 1990 election. This new government delivered cuts across most welfare benefits (including sickness, widow's, unemployment, and domestic purpose benefit) as well as changing the eligibility criteria for all benefits and altering the stand-down period before unemployed persons were eligible for payments (which in some cases was six months) (Richardson, 1990). There were also charges imposed, and in some instances increased, on various social services including prescriptions for health care and fees for tertiary study (Boston, 1993). These changes to social welfare significantly impacted on the lives of citizens who relied on the government for security. Those who suffered most were Māori, young people, low income earners, women, the sick, and those individuals who were unemployed as these groups were overrepresented in social welfare dependency and could no longer rely on the government for assistance when required (Department of Social Welfare, 1975). The shift from direct to indirect taxes, as well as the reduction in expenditure on universal social welfare programmes, resulted in a significant increase in inequality (Weeks, 2005). The Labour government had initially attempted to create an efficient and equal society; yet, inequalities widened and those commodities associated with post-war life deteriorated, creating instability and insecurity for many groups.

### **The changing nature of employment**

The effects of the restructuring in the late 1980s could also be seen in changing employment patterns. The changing nature of the state sector meant long-term

employment was no longer guaranteed. State sector reform introduced a radically new idea, where the unified public sector was abandoned and replaced by centralised individual departments (Steering Group, 1991). The State-Owned Enterprises Act 1986 gave individual employers more flexibility in setting terms and conditions of employment, a move that reduced employee rights (Walsh, 1988a). Further, equal employment opportunities that were previously specified in law (for example the State Services Act 1962) were abolished by the State Sector Act 1988 (Walsh, 1988b). These changes meant citizens could no longer rely on job security or have the once guaranteed security of job tenure working in the state sector.

Despite Labour Party claims in the 1981 election manifesto that full employment was the party's 'top priority' (New Zealand Labour Party, 1981: 2)<sup>11</sup>, by the late 1980s, unemployment became normal for many citizens (Statistics New Zealand, 1990). Between 1986 and 1991 unemployment increased from a rate of 6.8 percent to 10.5 percent (Statistics New Zealand, 1998). Furthermore, the proportion of children living in households with no parent employed escalated from 14 percent to 25 percent over the same period (Ministry of Social Development, 2008). In the mid 1970s, primary sector employment had stabilised at 11 percent of employment providing secure job opportunities for New Zealander's in rural communities (Statistics New Zealand, 1993)<sup>12</sup>. Traditionally, Māori, Pacific Island Polynesian and youth employees were over-represented in both primary and secondary sector employment (Statistics New Zealand, 1993). However, the unforeseen emphasis placed on service sector employment in the newly driven consumer society meant these groups were greatly affected (Le Heron & Pawson, 1996; Smith, 2005)<sup>13</sup>. The decline in primary sector employment and the population flow from rural to urban areas also impacted on provincial European families who had invested heavily in the primary sector (Statistics New Zealand, 1993). This financial hardship, experienced

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<sup>11</sup> The Labour election manifesto of 1981 was the last publicly available manifesto to be released before the 1984 election, due to the impulsive nature of the election.

<sup>12</sup> In New Zealand, primary sector employment includes the Agricultural, Hunting, Forestry and Fishing, and Mining and Quarrying industrial divisions, while secondary sectors were those of Electricity, Gas and Water, Building and Construction and Manufacturing (Department of Statistics (N.Z), 1990).

<sup>13</sup> In New Zealand, service sector industries include the following major industrial divisions: 'Wholesale & Retail Trade, Restaurants & Hotels; Transport, Storage & Communications; Financing, Insurance, Real Estate & Business Services; and Community, Social & Personal Services' (Department of Statistics (N.Z), 1990: 11).



across a multitude of family households in New Zealand, de-stabilised the strong sense of security that was established during the post-war period.

The renewed emphasis on service sector industries also meant there was a rapid rise in part-time employment, which provided lower incomes and less job security than full-time positions (Le Heron & Pawson, 1996). In 1961, the number of part-time employees was 43,950, whereas by March 1992 they numbered 311,400 (Statistics New Zealand, 1990). Part of the rise can be explained by women combining part-time work with unpaid work in the home (Department of Labour, 1954). However, the rise was also a result of employers cutting back on full-time work to economise (Statistics New Zealand, 1990). In this respect, large businesses were able to survive by making employees redundant, leading ‘... to greater governmental expenditure in the form of increased benefits’ (Maitra, 1997: 36). This further affected the ability of the state to meet its more general welfare requirements<sup>14</sup>. The nature of employment in New Zealand had thus shown a marked shift from the post-war years, adding to the sense of instability and insecurity, which governments seemed incapable of addressing.

## **Heterogeneity**

During the 1980s and early 1990s, economic insecurity and the changing nature of employment meant citizens were increasingly feeling less secure (Kelsey, 1997; Pratt & Clark, 2005). At this stage, shifting social norms meant there was a decline in marriages, with couples choosing to live together without the legal sanction of marriage (Statistics New Zealand, 1996b). In 1999, for example, there were 21,085 marriages registered, which was ‘22 percent lower than the post-war peak of 27,199 in 1971, and lower than the number of marriages recorded in any year between 1965 and 1991’ (Statistics New Zealand, 2001: Par. 2). Furthermore, the trend in divorce has been upward since the late 1980s, with the divorce rate peaking in 1998 at 12.7 per 1,000 existing marriages (Statistics New Zealand, 2001). This changing family environment undermined social stability and security and was exacerbated by the

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<sup>14</sup> From 1991, the increase in redundancies saw the National government push for the de-indexing of superannuation payments. Under New Zealand’s national superannuation scheme individuals over 60 years (soon to become 65 years) received a set sum of money that was inflation indexed and paid at regular intervals for the rest of their lives. To cope with the growing pressures of climbing redundancies and economic insecurity, the National government brought the national superannuation for a married couple down to 65 percent of their net average wage, and for a single individual this was 33 percent (Thomson, 1996).

increasingly heterogeneous population, particularly Asian immigration, which was seen by some politicians as representing the threat of 'foreign control' (New Zealand Parliament, 1996a: 10923).

As detailed previously, by far the largest group of immigrants to New Zealand in the post-war years had been British. By the late 1980s, however, the Asian population was the fastest growing group of immigrants to New Zealand (Statistics New Zealand, 1996a: 10). Between 1991 and 1996, for instance, numbers from Northeast Asia increased threefold, 'accounting for over half the increase in the total number of overseas born' (Statistics New Zealand, 1996a: 10). Over this period, there was also an increase in the number of New Zealand residents born in Southeast Asia (an increase of 29.2 percent) and Southern Asia (an increase of 53.3 percent) (Statistics New Zealand, 1996a). As a result of the increasing Asian population, anti-Asian sentiments resurfaced revealing strongly entrenched racism (Bedford & Ho, 2008). For example, National Business Review polls conducted in 1992 revealed that over half the respondents believed there were too many Asian immigrants in New Zealand (cited in Kelsey, 1997). The high rate of individuals who held anti-Asian sentiments suggests that the government, which had allowed these changes to take place, was losing the trust of major sections of the New Zealand public.

The rising popularity of the highly populist New Zealand First Party (a minor political party that became increasingly significant, due to electoral reform that is discussed below), led by Winston Peters, with its anti-immigration and anti-establishment policies further highlighted a declining public faith in the leading organisations of government (Pratt, 2007). New Zealand First had chosen to be a key player in the politicisation of immigration in the run up to the 1996 election (Trlin & Watts, 2004). Leading his party's political campaign, Peters focused his attention specifically on Asian immigration with a series of speeches referring to the 'Asian invasion' that had taken place in New Zealand, followed by a series of speeches entitled 'Whose country is it anyway?' (Mark, 2004: Headline). In the October 1996 election, New Zealand First emerged as the third largest party, gaining support from voters who looked to populist leaders for salvation (Trlin & Watts, 2004) and indicative of the lack of trust citizens now had of the political establishment and organisations of government.

## Changes in New Zealand media

The difficulties emerging in the 1990s were further highlighted by dramatic changes in the news media. Deregulation and technological change in the 1980s meant there was a new commercial imperative. This had lasting consequences for the presentation of news items on television. Like other Anglophone societies, there was growing pressure to organise the television schedule into small saleable fragments, which meant news and current affairs items were condensed (Atkinson, 1994; Cook, 2001). News items overall became shorter. Longer interviews were more likely linked to 'human-interest' stories, and fast-paced, often fragmented, news items were more likely to be 'hard news' such as crime and criminal justice stories (Atkinson, 1994). A New Zealand study, conducted by Atkinson (1994), revealed that the length of news items for violent crime was one of the shortest on average in 1990 running for 58 seconds, while stories on politics averaged 118 seconds (Atkinson, 2002). This illustrates the lack of in-depth research needed for crime and prison stories as sensational headlines sufficed.

Crime visibility further increased with the introduction of New Zealand's first pay television service in May 1990 (Sky Television Ltd, owned by Rupert Murdoch) (Sky Television, 2007). While terrestrial television offered only two state provided channels in the early 1980s, suddenly, free to air networks had to compete with other television broadcasters offering a much wider variety of channels. This, paradoxically, meant the choice in programme content diminished as crime news took on a tabloid style format (McGregor, 1992). The consequences of this sudden competition was that channels no longer provided members of the public with a balanced selection of content; instead, there was a further increase in exciting crime-based programmes in the hope of gaining the widest possible audience. The increase in violent crime in the late 1980s from 833 per 100,000 of population in 1987 to 991 in 1992 and 1,393 in 1995 further provided the mass media with reliable news stories to gain public attention<sup>15</sup>. For example, Atkinson (2002) found that on New Zealand television's *One Network News* 13.8 percent of items in 1993 were crime and prison

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<sup>15</sup> The increase in recorded crime up until the 1990s can be attributed to changes in recording practices by the police, as well as fluctuations in economic cycles (for instance a study in England and Wales found that economic lows and highs are associated with dishonesty and violent offences respectively), sociological factors such as unemployment, and demographic factors such as the increase in the youth population (Triggs, 1997).

stories (second behind sport), 55 percent of these stories were on violent crime, 25 percent were regarding non-violent crime and 20 percent were stories on prisons (Atkinson, 2002). Similarly, a study by McGregor (2002) found that on two days in one week the *New Zealand Herald* (the largest circulation daily newspaper) carried 55.6 percent and 46.9 percent crime news.

### **Lack of trust in the democratic process**

During the 1990s, *despite* the overall decline in crime that was beginning to take place, the increased *visibility* of crime, particularly serious crime, meant politicians began implementing piecemeal legislation to show they were listening to the concerned public. In 1992, the Criminal Justice Law Reform Bill was proposed (but was consequently not enacted) by the National government to provide the public with better protection ‘particularly from violent crime’ (New Zealand Parliament, 1992: Intro). It was proposed amidst concern over a series of violent killings that had taken place, such as the mass killing of thirteen people by David Gray ("Tragedy at Aramoana," 1990)<sup>16</sup>. At this time, a Report of the Ministerial Committee of Inquiry into Violence was also undertaken to address violent crime and the report noted that ‘[t]he public, through the submissions made to this Committee, has expressed its concern at the increase in violence and has called on it to find solutions’ (quoted in New Zealand Parliament, 1993a: Par. 1). The National Party also made adjustments to parole, which meant courts were now able to impose ‘non-parole periods for serious violent offenders’ (New Zealand National Party, 1993: 12). These legislative changes, driven by expediency, marked the beginnings of the influence of public sentiments on legislation.

Another significant event that changed the role of the public in the political arena concerned the electoral process in New Zealand. This occurred in 1985 when the Royal Commission on the Electoral System (hereafter referred to as the Royal Commission) was established amid concern ‘that it was time a far-reaching and searching examination of [New Zealand’s] electoral system was undertaken’ (The Royal Commission on the Electoral System, 1986: 1). It was felt by some members of the Labour government that the egalitarianism and fairness that had been a

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<sup>16</sup> This event occurred in Aramoana on 13 November 1990 when David Gray shot dead thirteen residents before being found and shot dead by police the following day ("Hours of terror end," 1990).

dominant feature of New Zealand society during the post-war years should be more reflected in the democratic process. The Royal Commission was required to consider changes to the electoral system as well as 'other parliamentary and political arrangements' (The Royal Commission on the Electoral System, 1986: 1) and, in 1986, received submissions from the public, many of which concerned the First Past the Post (FPP) electoral system that was in place at this time (The Royal Commission on the Electoral System, 1985). Members of the public held concerns about the seemingly unfair system whereby a political party, which had received the most electorate seats but not necessarily the majority of the votes, could come to power. After the submissions were received and analysed, the Royal Commission recommended the adoption of a Mixed Member Proportional (MMP) system. The Commission also recommended that changes take place only after a lengthy public debate and only with 'the approval of a majority of votes at a referendum' (The Royal Commission on the Electoral System, 1986: 65). The referendum had thus become in itself, a major part of the electoral reform process.

After eight years of political debate surrounding MMP, due in part to the main political parties opposing the idea of electoral reform, the public made the final decision in 1993 by way of a Citizens Initiated Referendum (CIR). Here, 54 percent of voters selected a transition to MMP. In the MMP system each voter has two votes; one for a party and one for a constituency MP. It is the party vote that determines the organisation of parliament (Palmer, 2006b). This system was thought to offer a wider range of representatives to parliament and would, therefore, offer a more accurate representation of society. By this time, however, insecurities that had arisen during the 1980s meant citizens were hoping electoral reform would bring about greater political accountability and responsibility, rather than simply reflect New Zealand's fairness and egalitarianism which lay behind the initial motives (Vowles, Aimer, Catt, Lamare, & Miller, 1995). In effect, the use of the CIR and the change to MMP was a way of showing citizens that local MPs would now have to be more attentive to their wishes.

For those citizens who felt disillusioned by government, the introduction of the Citizens Initiated Referendum Act 1993 provided them with the opportunity to have a more direct influence on government. It gave citizens the opportunity to participate

in the policymaking process by voting on specific policy options (put forward by the public through the submission of a petition) that might otherwise have gone unnoticed by the government (Karp & Aimer, 2002)<sup>17</sup>. However, CIRs are non-binding, where the government has no obligation to implement policy as a result of the outcome. This became a source of frustration for citizens, as the first three referenda organised in the 1990s had little impact. In particular, Margaret Robertson, the organiser of the third<sup>18</sup> stated: 'It's just not good enough when these people (politicians) can sit in Parliament at the taxpayers' expense and ignore [the public's] wishes' (Venter, 2001: 1).

However, the fourth referendum (and to date, the last under this process), initiated by Christchurch shopkeeper Norm Withers, had a lasting impact on New Zealand penal policy. He gained a considerable amount of media attention leading up to the 1999 election where he was portrayed as the 'ordinary man' who was willing to stand up against 'out of touch' bureaucrats (Laugeson, 1999: Par. 2). He had been prompted to start a petition (that resulted in the referendum) 'after his elderly mother [Nan Withers] was bashed with an iron bar' while looking after her son's shop (Bain, 1999: 34). She was purposefully used in the campaign to gain public support for punitive policies. Her role as 'the perfect victim' allowed emotion to be brought into what had become a public debate, where the violence of the attack and the innocence of the defenceless, elderly woman were brought alongside each other. Withers' referendum question that was put to the electorate in the 1999 general election read as follows:

Should there be a reform of the criminal justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

(Withers, 2002: Section 1)

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<sup>17</sup> Before a referendum can be voted on, organisers are required to get 10 percent of the electorate to sign their petition (Elections New Zealand, 2009), which is at present around 320,000 signatures.

<sup>18</sup> The first CIR addressed the number of professional fire-fighters employed in New Zealand. The second addressed battery farming, but was deemed not valid and never went to vote. The third addressed the number of MPs in New Zealand parliament, and the organiser hoped to reduce the number of MPs from 120 to 99 (Karp & Aimer, 2002). The fire-fighter and MP referenda went to vote and despite the outcome (the first received an 87.8 percent negative response to reducing the number of fire-fighters, while the second received an 81.5 percent affirmative result) had little impact.

Despite its manifest contradictions, this question resulted in a 91.7 percent affirmative response from the electorate and went on to dominate penal debate in New Zealand for several years thereafter (see, for example, Ministry of Justice, 2002a). From the outset, the referendum had been a genuine community enterprise, with Withers receiving no assistance from trade unions or political parties in the initial stages (Pratt, 2008). The only support he *did* receive was particularly controversial, as the question itself was written by the leader of the Christian Heritage Party, who was later sentenced to prison for nine years for acts of rape, sexual violation and sexual indecency with minors ("Party official asked to resign," 2005). Withers' determination in bringing about the referendum marked a crucial stage in penal policymaking in New Zealand, demonstrating how 'ordinary people' could be an authoritative force in penal policy development.

The press used the 91.7 percent affirmative response as a way of pressuring politicians, rather than interrogating the validity of the referendum. In one instance, the [Wellington] *Evening Post* noted that if governments chose to ignore public support '[they] would be punished by voters' ("Tougher line," 2000: A2). Consequently, politicians used the referendum as a backbone for their respective policies, drawing the victim into the centre of the law and order debate (see, for example, Alley, 1999; Binning, 2004; Stepfather's loss," 2001; Tan, 2008). While Labour Party leader Helen Clark chose to speak out against the referendum saying the question was 'woolly' ("Clark and Anderton," 2000: 2), there seemed to be no further doubt in the validity of the question when her Party then launched a 'get tough' campaign in response to public expectations regarding sentencing. Furthermore, the result of the referendum seemed to legitimise common sense as the driver of policy rather than expert knowledge. For example, in 2000 the Justice Minister warned judges that they risked losing their discretionary powers 'if the public did not believe they were imposing sufficiently tough sentences for the worst crimes' (Bain, 2000b: 1). Subsequent legislation noted the need to 'respond to the 1999 referendum which revealed public concern over the sentencing of violent offenders' (Ministry of Justice, 2002a: 1). The triumph of the ordinary citizen over establishment elites would be reflected in the amount of control the vocal public, or those who claimed to speak for it, would have in the implementation of penal policy in the aftermath of the referendum, as the next chapter illustrates.

## Chapter Two:

### Pressure Groups and the Emergence of the Sensible Sentencing Trust

After the 1999 law and order referendum, citizen's groups began to play a pivotal role in penal policy development. The extensive reporting of violent crime in the mass media meant the New Zealand public were more inclined to unite over criminal justice issues that were considered a threat to the community – issues that had previously been addressed exclusively by criminal justice experts. This chapter will explain the circumstances that led to the formation of the Sensible Sentencing Trust, a unique law and order pressure group in New Zealand.

In order to discuss the various attributes of the Sensible Sentencing Trust, and the environment which allowed it to flourish, it seems necessary to first define those characteristics commonly associated with the pressure group. Rose (1961: 263) defines it simply as being 'a group that presses' while Jaensch (1981, cited in Cullen & Lloyd, 1991: 4, original emphasis) states that a '*pressure group* is a formal organisation of people who share one or more interests or objectives or concerns *and* who try to influence the course of public policy to protect, or to promote these objectives'. The common feature is the aspiration of pressure groups to *influence public policy and government* (Blaisdell, 1957; Cullen & Lloyd, 1991; Key Jr, 1967; Rose, 1961; Wilson, 1981). To advance their interests, pressure groups may engage in active lobbying, where pressure is applied 'directly on a legislature, or on individual members, in an attempt to achieve their aims' (Jaensch, 1981, cited in Cullen & Lloyd, 1991: 4). Groups such as the Howard League for Penal Reform (a British reform group that was established in New Zealand in the 1920s) have long adopted these lobbying techniques to advocate for penal policy change (Ryan, 1978).

One is able to contrast the Howard League, which Ryan (1978: Title) refers to as 'the acceptable pressure group', with the Sensible Sentencing Trust, as it provides a framework with which to analyse the organisation and the different strategies employed. Ryan (1978: 76) explains that the Howard League rely on facts, where the accuracy of the facts are of extreme importance:



Governments and their civil servants can be persuaded by reasoned argument supported by well researched evidence. But once a pressure group strays into idle speculation, and above all, inaccuracy, then all is lost.

The criteria for the acceptable (liberal) pressure group, then, as detailed by Ryan (1978), emphasised the need for informed debate where there was a reliance on factual information to advocate change. However, the Sensible Sentencing Trust employs a different approach than that of the Howard League. The Trust opposes criminal justice elites (for example, judges and academics), using victims of crime to advocate reform, and evidence that is in the form of anecdote and common sense rather than research based facts. In this chapter it will become evident that the approach adopted by the Sensible Sentencing Trust is markedly different from that of the early pressure group, but this approach has become acceptable in New Zealand society, thus indicating that the criterion for what constitutes pressure group acceptability has changed.

### ***Victim Support Groups in New Zealand***

The momentum with which pressure groups gained force in New Zealand at the turn of the twenty-first century was in many ways a reflection of the growth of single-issue women's groups throughout the world from the 1970s (previously noted in the introduction). At that time, the strong sense of social cohesion and solidarity that had supported society throughout the post-war period was diminishing. This made the introduction of a multitude of women's groups (see Grey, 2008) all the more significant to New Zealand, as individuals linked by a common identity – namely the victimisation and oppression of women in society – joined forces to push for social, cultural and political change (Sawer & Grey, 2008). One group in particular was Women's Refuge, a service developed in 1971 to confront the issue of family violence (Rape Crisis Dunedin, n.d: Par. 1). By 1981, the 'National Collective of Independent Women's Refuges Incorporated' was established to further advance the cause (Rape Crisis Dunedin, n.d). Its voice was reflected in various legislative changes made in the 1980s, one of which was the Domestic Protection Act 1982,

established to protect victims of domestic violence (Rape Crisis Dunedin, n.d)<sup>19</sup>. Groups such as these were resisting, what were considered to be, the dominant societal structures to confront gendered power relations (Foucault, 1994). In making this challenge, the agencies hoped to bring about positive social and legal change that would see women (and certain groups of men) empowered. The sentencing and treatment of offenders, however, was still left to policymakers and experts.

Another significant development to take place within the victim's movement in New Zealand was the inception of the Victims Task Force in 1987. This Task Force investigated the 'most appropriate models which could be used to develop policy initiatives in the area of victim support', whilst simultaneously working with other public agencies 'in developing awareness of victims' needs and how best to meet them' (New Zealand Parliament, 1989: Par. 2). The Victims Task Force was able to oversee the treatment of victims in the criminal justice system and made recommendations to government as to how these should be enacted (New Zealand Victims Task Force, 1993). In 1989, then Minister of Justice Bill Jefferies outlined a number of task force recommendations, which included: the production of a video providing victims with information about the court process, the organisation of seminars to bring together groups working in victim support, the distribution of leaflets informing victims of the provisions in the upcoming Victims of Offences Act and the allocation of funding, together with the New Zealand Police, for the compilation of victim statistics (New Zealand Parliament, 1989). The Victims of Offences Act, implemented concurrently, was further used 'to make better provision for the treatment of victims of criminal offences' (New Zealand Victims Task Force, 1993: 99). The Victims of Offences Act 1987 introduced radical change into the criminal justice system,

looking back over a thousand years to re-introduce the victim of a crime as a person with a special interest in the pursuit of justice, and deserving special acknowledgement for the experience they have had forced upon them.

(New Zealand Victims Task Force, 1993: 75)

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<sup>19</sup> Interestingly, Rape Crisis, the National Network for Stopping Violence and the National Collective of Women's Refuges did not support the 1999 referendum because they stated that the question was too confusing to be valid (Milne, 2000)

The Victims Task Force believed that if all the provisions set out in the Victims of Offences Act were achieved, the quality of justice provided to all New Zealanders would be improved (New Zealand Victims Task Force, 1993). These steps signified the government's attempt to include the victim in the criminal justice process, where they were to be better informed on criminal justice matters.

In 1986, another major development for victims' groups in New Zealand was the establishment of the first Victim Support office in Gisborne by police officer Kevin Joblin (Victim Support (N.Z), 2006). Victim Support Schemes had been introduced in Britain in 1974 and were concerned above all else with the care and welfare of victims (Maguire & Corbett, 1987). The early British Victim Support's primary objective was simple: 'to act as a "good neighbour", or perhaps "good Samaritan", to people who had suffered at the hands of the thief or assailant' (Maguire & Corbett, 1987: 2). The New Zealand model was largely based on the British example but had several other defining characteristics that illustrated the government's commitment to victims: the services were based in local police stations, Victim Support was given full access to police records, and the New Zealand Police provided 'full logistical support to their local Victim Support Group' (Outtrim, 1999: 3). After the initial inception of Victim Support in Gisborne, several Victim Support services emerged offering voluntary services to victims. The ad hoc community based groups were established to provide professional support and assistance to *all* crime, accident and emergency victims and witnesses at large, as well as their relatives and friends (Victim Support (N.Z), 2003a).

In March 1993, the new National government announced the disestablishment of the Victims Task Force claiming that it had been introduced on a limited five year plan as part of the Labour government's 'radical' Victims of Offences Act (New Zealand Parliament, 1993b: Par. 2). As a result, government funding, which had previously gone to this organisation, was transferred to various Victim Support groups around New Zealand, widening the scope of Victim Support (New Zealand Parliament, 1996b). Victim Support agencies were then able to offer a wider range of services to those in need and have since continued to assist victims of crime through counselling, court support, attendance at trials and parole board hearings (Victim

Support (N.Z), 2008a)<sup>20</sup>. But what sets Victim Support apart from contemporary victims' rights advocates is the fact that they are not only focused on *crime* victims, they also offer continuing support for those suffering trauma from disasters and other life crises (Victim Support (N.Z), 2003b, 2008a). Victim Support has remained a *generic victim support agency*, and, with the support of the New Zealand Police, continues to offer advice and support to victims of crime and trauma. The organisation operates on a non-political, non-campaigning platform, and because of this, has kept a relatively low public profile. In this respect they stand separated from the subsequent law and order pressure group Sensible Sentencing Trust that advocates, in a much more public manner, not only victims' rights but also the punishment of offenders.

### ***Introducing the Sensible Sentencing Trust: The Pressure Group***

The 1999 law and order referendum increased public awareness of victimisation and violent crime in New Zealand. Around the same time, public attention was drawn to what seemed to be the contrasting treatment of victim and offenders in the New Zealand justice system. In August 1999, Mark Middleton, the former stepfather of a murdered teenage girl, learnt that her murderer (Paul Dally) was eligible to apply for parole<sup>21</sup>. In a subsequent television current affairs show (indicative of the sensational style of this genre in New Zealand), Middleton stated: 'I'll take him if he comes out and so will my friends and we're organised and waiting for him' ("Threat could haunt stepfather," 1999). Thereafter, Middleton was convicted of threatening to kill and given a nine month suspended sentence ("How Middleton," 2001). The guilty verdict angered members of the public, including Garth McVicar, a Napier farmer who felt the sentence seemed to typify the way in which the priorities of the criminal justice system were all wrong, and in particular, were slanted towards the offender (Pratt & Clark, 2005). The judge's decision to punish Middleton and the fact that, from his point of view, the government had still not put the 1999

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<sup>20</sup> Since their inception, New Zealand has experienced an enormous growth in the number of Victim Support offices throughout New Zealand, with numbers rising from just one in 1987 to 71 across the country in 13 districts in 2007 (Victim Support (N.Z), 2008a), and by 2008 they also received 80 percent of their funding from the Crown (Victim Support (N.Z), 2008b).

<sup>21</sup> Paul Dally was sentenced to life imprisonment in March 1990 and became eligible for parole in September 1999. He was not granted parole on this instance and still remains in prison.

referendum into legislation, motivated McVicar to form the Sensible Sentencing Trust in March 2001 (McVicar, 2002b).

The Sensible Sentencing Trust is an anti-crime, pro-victim pressure group whose lobbying began with a specific focus on the recidivist violent offender. As outlined in its first newsletter, the Trust's main goal was to 'ensure that ... horrendously violent murderers never again pose a risk to New Zealand society' (McVicar, 2001: Par. 5); a move that would necessitate 'sensible sentencing' where life would 'mean life' (McVicar, 2001: Par. 15). The Trust first came to public attention in 2002 when it organised two marches, both of which gained extensive media coverage, due to the dramatic, newsworthy appeal (see Berry, 2002; 'Boos greet defence,' 2002; 'Murder victims,' 2002; Tunnah, 2002). The marches took place in Auckland two weeks prior to the election (Tunnah, 2002) and in Wellington a week later ('Murder victims,' 2002). Many of the marchers in the 'election-campaign focused rally' (Tunnah, 2002: Par. 5) held crosses, some bearing the names of murder victims, with participants chanting the populist 'war-cry' of 'enough is enough' (McVicar, 2006a: Par. 4). While they were intended to be remembrance rallies, the Sensible Sentencing Trust used the opportunity to draw attention to violent crime statistics in New Zealand. Offering no in-depth discussion on cause and effect, an article in the *New Zealand Herald* quoted McVicar, noting that while there were only two homicides in 1952 '[f]ifty years later, the victims of murder or manslaughter for the years 1992 and 2001 totalled 1,204' (Tunnah, 2002: Par. 4)<sup>22</sup>. The marches succeeded in attracting the attention of MPs and government ministers alike ('Campaign diary,' 2002). Their attendance demonstrated the power and authority the Trust had obtained since its inception in 2001 and the influence it was beginning to have. It also captures a strategy used by the Trust that is unique to New Zealand penal lobby groups: *the Trust actively campaign for the harsh treatment of offenders, whilst simultaneously advocating for victims' rights*. Despite the existence of various other victims' groups in New Zealand, the Trust managed to create a separate space and unique identity for itself. What it wanted to do was not simply to provide for victims, but instead, to bring about a more general rebalancing of the criminal justice

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<sup>22</sup> McVicar failed to mention the changes in reporting and recording of offences, see Maguire (2002) for further detail.

system, where the victim and the ‘law abiding’ community are at the centre, rather than the offender.

However, as Garland (2001: 144, original emphasis) notes, it is as if the crime victim has become a ‘*representative character* whose experience is assumed to be common and collective, rather than individual and atypical’. In New Zealand, the Sensible Sentencing Trust use the symbolic victim, in particular victims of high profile murder cases, to refer to the ‘thousands of *ordinary* citizens who every day are injured physically by street criminals’ (Cressey, 1992: 61, emphasis added). Yet, it is not just the direct injury that is of particular importance, it is the fear of crime that is shown to be a form of victimisation. Groups who adopt this stance emphasise the risk that criminals pose to the rest of society. The Trust has chosen to adopt this strategy using ‘the voice of the ordinary Kiwi’ (McVicar, 2002b: Section 1) to symbolise the image of the victim as the ‘blameless, pure stereotype, with whom all can identify’ (Henderson, 1992: 106). For example, it notes that ‘[i]t takes just a moment for any one of us to become a victim of crime and have our lives changed forever’ (Pedler, 2006: Section 3). In this way, the Trust suggests that we are *all* potential victims of crime (Henderson, 1992). This treatment of the victim grew out of the resentment of what was thought to be a tendency of criminal justice decision-makers to protect criminals while ignoring the law-abiding citizen (Fattah, 1992b).

### **General attributes of the organisation**

The unique identity of the Sensible Sentencing Trust, combined with the increasing visibility of crime and victimisation in the media, has gained it a large following. The exact membership of the Trust is kept confidential and it is difficult to even guess the extent of the membership. At conferences it gains an audience of several hundred, a good many of whom are high profile crime victims or family members. McVicar himself, in 2006, noted that he hoped to have 500,000 members by 2008, believing the Trust was halfway there (Chamberlain, 2006). However, this seems very optimistic as the total population of New Zealand at this time was only just over 4 million (Statistics New Zealand, 2006a). Even with 250,000 members, this would make it one of the largest organisations in the country. Yet, other than in the media, the organisation does not seem to have much of a physical existence outside of McVicar’s home base of Napier. Using media attention from the law and order

referendum to its advantage, the Trust hope to take the power to make policy away from the liberal elites in New Zealand (McVicar, 2005a). McVicar believes it is these individuals – the ‘well-meaning, short-sighted liberals’ – that are responsible for the crime problem in New Zealand (quoted in Chamberlain, 2006: 74). It is the ‘liberals’ that allowed for the deterioration of New Zealand society, with McVicar stating that

[New Zealand was] one of the safest countries in the Western world. But while I was out there working frantically [as a farmer] and gaining money I allowed the country that I loved to deteriorate to what it is.

(Chamberlain, 2006: 74)

Here, McVicar is blaming himself for not intervening and allowing insidious elites to let the country deteriorate to the state that it is in, where there is a lack of respect and accountability.

One only has to look to the Sensible Sentencing Trust’s mission statement on its website to gain a sense of its far-reaching aspirations. The statement does not mention direct victims, as it is understood that we are *all* potential victims of crime, as noted previously. Instead, it reads as follows:

To obtain a large base of community support, *and ensure safety for all New Zealanders from violent and criminal offending*, through education, development of effective penal policies, and the promotion of responsible behaviour, accountable parenting, and respect for each other at all levels of society.

(Sensible Sentencing Trust, 2008a: 1, emphasis added)

This assurance of safety is somewhat idyllic and has managed to draw a wide net of support for the Trust, especially from elderly members of society (such as Grey Power New Zealand) (McVicar, 2007a). Such people have been at the forefront of the effects of restructuring in New Zealand society and have experienced the various shifts that have taken place since the post-war years. Moreover, their anxieties and insecurities are likely to be crystallised by the representation of crime in the media. As a consequence, the Trust’s aspirations became increasingly attractive. As well as safety, the other characteristics mentioned in the mission statement such as

responsibility, accountability and respect are all attributes that promote effective sentencing policy and appear 'liberal' in nature. However, on closer inspection, the mission statement seems somewhat misleading as the objectives set out by the Trust are highly punitive.

The Sensible Sentencing Trust's objectives focus on what is believed to be the 'sensible' sentencing of offenders; sentences which would involve the harsh treatment of 'violent offenders' (a category of offenders whose crimes include 'graffiti, car conversion, sexual offences, rape and murder', according to McVicar) (McVicar, 2002b: 1). The goals set out by the Trust include: the requirement of life in prison to 'mean life' for all violent offenders; the enactment of legislation which ensures that parole is only granted to offenders in exceptional circumstances; the assurance that serious violent offenders receive maximum penalties; the assurance that victims of violent crime and their families have more of an input into court proceedings; the allowance of juries to recommend sentencing to judges; the promotion of cumulative sentences for repeat offenders (Sensible Sentencing Trust, 2008a: Par. 2-6); and the representation of the victim or their family at sentencing and parole board hearings as of right (Sensible Sentencing Trust, 2003). To realise these objectives, the Trust also recognises that the power of criminal justice elites to determine policy must be significantly reduced.

### **The Sensible Sentencing Trust and grass-roots lobbying**

In a bid to gain penal power, the Sensible Sentencing Trust use a variety of grass-roots initiatives to promote its ideas: by distributing newsletters and media releases, making contributions on talkback radio, and by holding public meetings and conferences (McVicar, 2002a). The Trust has also used digital technology to its advantage, offering the public a range of services and information on its website, including: a sex offender and violent offender database, extensive crime statistics, and victims' stories (Sensible Sentencing Trust, 2008b). Ippolito and Walker (1980: 333) note that if groups are able to move citizens to 'write individual, *rational letters* to government officeholders in large numbers', they are likely to be effective. The Sensible Sentencing Trust encourages its members to take action, prompting readers of its newsletter to '[w]rite letters to the paper. Write or phone your local Member of Parliament ... Hold them accountable' (Pedler, 2002: Section 2, emphasis added).



However, the letters that the Trust encourages are likely to invoke a different rationality – not objective social scientific reasoning, but emotive accounts of victimisation or denunciation of the supposed gentle approach to punishment in this country. Further, McVicar (2002b: Section 1) tells readers of the Trust's newsletter that he is 'convinced it is up to ordinary people like you and I to take ownership of this situation, to step out of our comfort zone and stand up to be counted!' After the law and order referendum, speaking out against the government through letters and submissions was another way 'ordinary' citizens could take part in the political process. The referendum had demonstrated what power the public now had, and grass-roots lobbying then allowed the Trust to apply strong public pressure on governments in the hope that 'such a show of strength from the people will convince the decision makers to act in accordance with [their] preferences' (Ippolito & Walker, 1980: 333).

### ***The Sensible Sentencing Trust and the Media***

The formation of the Sensible Sentencing Trust has since given the public a significant voice in penal policymaking – at least articulated through the Trust's spokespeople. This has seen it become an attractive source for the media as no in-depth research is needed to generate the 'screaming headlines' needed to sell newspapers. Because of the Trust's eagerness to approach the mass media to gain attention for its cause, it has become a common source of 'expert' opinion, despite its own denunciation of expert knowledge. In effect, it is as if the Trust and its spokespeople have become new kinds of experts, whose knowledge is based not on book learning and research, but on anecdote, common sense and newspaper headlines: a form of expertise that suits the news-making requirements of the contemporary media.

To illustrate the growing amount of attention the Sensible Sentencing Trust has gained in the press, a search was conducted of the organisation, as well as other individuals and groups, within the *Dominion Post* and the *New Zealand Herald* (the two main newspapers in New Zealand) using Newstext Plus (a newspaper database). The searches included the following search words and were conducted separately in the two newspapers from 1 January 2004 to 31 December 2004: 'Sensible Sentencing', 'Victim Support', 'Rape Crisis' (a support group for victims of rape),

‘Howard League’ (The Howard League for Penal Reform – a prison reform group promoting open and rational debate on criminal justice issues), ‘John Pratt’ (Professor of Criminology at Victoria University of Wellington, New Zealand, who has researched extensively on the sociology of punishment) and ‘Prisoners’ Aid and Rehabilitation’ (New Zealand Prisoners’ Aid and Rehabilitation Society, an organisation which hopes for a safer society by offering support to offenders and their families). Overall, 128 articles were retrieved in the search, all of which are shown in Table 1. Of these, seven were omitted as they did not refer specifically to the above organisations<sup>23</sup>.

**Table 1. Reference to specific influential individuals, victims’ groups, and prison reform groups in the *Dominion Post* and the *New Zealand Herald* from 01 January 2004 to 31 December 2004.**

The Dominion Post and The New Zealand Herald 2004			
	Representative or Quote	Reference to Organisation	Total
Victim Support	16	17	33
Sensible Sentencing Trust	25	32	57
Rape Crisis	3	2	5
Howard League for Penal Reform	8	2	10
Professor John Pratt	2	n/a	2
Prisoners' Aid and Rehabilitation Society	9	5	14

In the analysis of the newspaper articles, it was noted whether the article used the representative of the organisation (or the individual), either with a direct reference, or with a quote. An example of an article that fell into this category noted that ‘Victim Support chief executive Laureen Outtrim said the decision was a landmark’ (Yandall, 1999: Par. 10). Alternatively, if the article simply mentioned the group or individual but no opinion or interview details were reported then it was placed in the category ‘reference to organisation’. For example, ‘Somehow or other Victim Support got an email that went astray ...’ (Watkins, 2004: A1). Here, the organisation is mentioned but its views are not used in the article.

<sup>23</sup> An example of this can be seen in an article where the journalist stated the following: ‘most of the degenerates whose crimes against society have landed them in prison deserve a good scrubbing ... [r]ather than terming that an infringement on their human rights. I like to think of it as sensible sentencing’ (Te Radar, 2004: Par. 1). Here the article is not using ‘Sensible Sentencing’ as the title of the organisation, but as a descriptive verb. Furthermore, it was not a representative from the organisation being interviewed.

The frequency with which the Sensible Sentencing Trust is mentioned in the press is highlighted when examining the data. Victim Support is cited on 33 occasions, with information from the group being used in the article on 16 occasions. In contrast, the Trust was mentioned 57 times in the two main newspapers combined, as well as frequently being used as a provider of information, with 25 articles having a 'representative or quote'. This illustrates how dominant the Sensible Sentencing Trust has become in shaping crime and punishment news, and contradicts the view McVicar paints of himself as the 'ordinary' citizen who does not get heard. Instead, the views of the Trust are being used increasingly for 'expert' advice on criminal justice issues. In contrast, criminal justice professionals and elites who are highly knowledgeable in this area are overlooked as they do not offer the populist attitudes the media are seeking for a personal and 'newsworthy' story.

When examining articles from the *Dominion Post* and the *New Zealand Herald* (which had mentioned the Sensible Sentencing Trust) from 2004 one can see a shift in penal power away from expert opinion and analysis towards victims and their representatives. The politicisation of crime control had drawn the public into penal policy development and, in turn, gave the Sensible Sentencing Trust the authority it needed to become the new expert in criminal justice matters. The press commonly accept and represent the Trust as the new expert, providing not only the Trust's opinion on the issue at hand, but on how the process *should* be done in the future. For example, McVicar is interviewed in a *New Zealand Herald* article concerning parole. He notes that '[t]he safety of the community seems to be irrelevant and [the criminal justice system are] just recycling ... offenders on a regular basis (Devereux, 2004: Par. 19). Here, McVicar disagrees with the decisions made by policy makers. He then goes on to give his advice on what he believes *should* be happening, noting that New Zealand needs legislation that gives those in power the ability to hold repeat offenders in prison indefinitely when necessary (Devereux, 2004), ignoring (or perhaps being unaware of) the fact that such powers already exist under New Zealand's preventive detention law and are used with increasing regularity<sup>24</sup>.

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<sup>24</sup> Preventive detention is an indeterminate sentence which allows for the control of 'dangerous' offenders (Hall & O'Driscoll, 2002). Offenders who receive this sentence are not given a sentence end date as they are considered a threat to society. Instead, the offender is monitored in and out of prison for the rest of their lives by the Parole Board and is only released into the community when the Parole Board is satisfied that they no longer pose a threat to society. Upon their release they are liable to be recalled to prison at any time (Hurd, 2008). In 1985 in New Zealand there were 10 prisoners serving

McVicar, though, chose to bypass this fact, as it did not fit in line with his own agenda. And, as usual, he was completely unchallenged by the journalist concerned.

Of particular significance to the present argument is the way in which the Sensible Sentencing Trust advocates for the harsh sentencing of offenders – a strategy not undertaken by other victim support groups. With this in mind, it seemed necessary to compare the use of Victim Support and the Sensible Sentencing Trust in the media (as these are the most active victim support organisations in New Zealand) to determine whether the Trust has taken some of the publicity away from a group who focuses exclusively on victims. When examining newspaper documents from 1999, prior to the inception of the Sensible Sentencing Trust, Victim Support was mentioned a total of 63 times, while in 2004 it was mentioned 33 times<sup>25</sup>. In 1999, the majority of articles referred to the organisation in general; however, 17 articles cite or quote a representative (which is much like the 16 articles cited in 2004). This suggests that, over time, while Victim Support continues to be interviewed, Sensible Sentencing Trust has come to possess a stronger newspaper presence than that of Victim Support. It could be argued then, that the constant reference to the Trust, combined with its vocal and active presence in the media, has taken some of the focus away from Victim Support. This, in turn, has worked implicitly to shape public opinion by telling readers that the rights of victims are directly linked to the harsher punishment of offenders.

The growing authority of the Sensible Sentencing Trust in the news media, and the national focus on crime and punishment, has seen the relationship between politicians and the Trust develop. In the analysis of newspaper documents this was particularly apparent. Political parties are frequently cited in the press as having the same opinions as those of the Sensible Sentencing Trust (often by the Trust themselves), thus giving the organisation further popularity and credibility. For example, when conducting a search on the Sensible Sentencing Trust in the

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preventive detention (New Zealand official yearbook, 1990), in 2003 there were 33 defendants sentenced to preventive detention for that year alone (Ministry of Justice, 2008) and by January 2009 there were 215 prisoners serving preventive detention (Koubaridis, 2009).

<sup>25</sup> The *Dominion* and the *Evening Post* combined in 2002 to form the *Dominion Post* which could have affected the outcome of the data, as in 1999 three newspapers were analysed. Furthermore, 1999 was the year of the law and order referendum which was highly publicised and debated in the media. While these factors may have affected the frequency with which Victim Support were mentioned, when analysing the data there is still a substantial difference between those from 1999 and those from 2004.

*New Zealand Herald* in 2004 it was revealed that 23 articles mentioned the organisation. Further analysis revealed that of the 23 articles, 10 had been referring to a law and order speech given by then leader of the National Party, Don Brash, to an audience of Sensible Sentencing Trust members. In a true display of populist rhetoric, Brash makes the following statement in his speech: 'I don't intend to recite a lot of statistics to make my case. We all know that New Zealand has a terrible record' (Brash, 2004: 1). He then goes on to outline a series of 'horrendous' crimes that New Zealanders have been exposed to '[e]very day' in the media (Brash, 2004: 1). Brash is, therefore, suggesting that crime levels should be judged not on quantifiable data, which at this point indicated that crime had been in decline since the late 1990s (New Zealand Police, 2008), but on his own knowledge gained from the media.

In addition, Brash's speech highlights the growing influence groups such as the Sensible Sentencing Trust have in the implementation of penal policy. Brash outlined the National Party's law and order policies which included: compulsory DNA testing for all criminals, lowering the age of criminal responsibility to twelve years, targeting organised gangs and methamphetamine, the introduction of tough sanctions with post-release monitoring, and the abolition of parole for all violent and repeat offenders (Brash, 2004). The punitive policies being summarised were populist in nature and obvious, given the crowd. The idea was that the National Party would use the meeting to gain popular support, whilst the Sensible Sentencing Trust would simultaneously use the situation to gain further publicity and control over penal policy.

## ***Main Techniques of the Sensible Sentencing Trust***

The Sensible Sentencing Trust employs a series of strategies to advocate for victims' rights and the harsh treatment of offenders. This section will examine these strategies to establish how the public, and their representatives, came to have an impact on the development of penal policy in New Zealand.

### **(a) Challenging power elites**

Not only does the Trust strive for punitive policies, it actively opposes power elites, or any individuals whose sentiments are not in line with its own views. Its

spokespeople claim that '[w]e do not need academics, criminologists or psychologists to tell us the simple truth that if you reward bad behaviour you will get more of it!' (Sensible Sentencing Trust, 2008b: Section 1). Similarly the Trust has criticised judges who, in one instance, were condemned for awarding prisoners compensation for an abuse of human rights whilst in prison:

The willy-nilly signing of various warm, fuzzy UN treaties has encouraged *criminal friendly Judges* to make awards to prisoners under *so-called* breaches of human rights laws. New Zealand is a Sovereign Nation – these treaties are not binding on this country!!

(McVicar, 2005a: Section 1, emphasis added)

As the above quote shows, the Trust is critical of judges, as well as being contemptuous of international organisations, as it is thought that these distant officials know little about New Zealand and its crime problem. It has been noted by Garland (2001) that policy decisions may depend on how governments react to allegations such as these. When crime control issues are politicised and subject to harsh public scrutiny, he argues, the balance may shift altogether, with politicians moving towards a more populist and punitive model in an attempt to gain public support. This was indeed the case in New Zealand as the following case illustrates.

Between 1998 and 2004, six prisoners (one of which did not receive compensation) were held under what was initially called the 'Behaviour Modification Regime' but which later became known as the 'Behaviour Management Regime'<sup>26</sup>. This was an administrative tool adopted in 1998 by the Department of Corrections and involved isolating the prisoner in a separate cell with loss of conditions for all but one or two hours a day. Prisoners had no association with other prisoners (except prisoners between cells who could not be seen) and no ability to exercise. Further, any rehabilitative programmes were taken away during a prisoner's containment in BMR (*Taunoa v Attorney-General*, 2007). The sensory deprivation used here is similar to supermax prisons in the United States, but was not authorised in New Zealand. As a result Judge Ronald Young concluded:

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<sup>26</sup> This change was made to the title of the regime because the usage of 'modification' did not conform to psychological theories on behaviour modification (*Taunoa v Attorney-General*, 2007).

This combination of circumstances convinces me that inmates on BMR were not treated with the humanity, and with respect to the inherent dignity that they were entitled to as human beings. While inmates may not have been treated deliberately cruelly, this was collectively treatment that fell well below the standards that befits a human being including one who is in prison and who has behaved badly in prison. Unlawful and difficult behaviour by prisoners can never justify unlawful conduct by their jailors.

(*Taunoa v Attorney-General*, 2004: Par. 277)

Consequently, five prisoners were awarded a total of \$130,000 compensation in September 2004 for their ill-treatment in prison (one man, Christopher Taunoa, with a known mental condition spent 26 months on the regime and he alone was awarded \$55,000). The Sensible Sentencing Trust positioned the 'victory' of these prisoners against the fate of their unwilling victims, many of whom had not received any compensation for what had been done to them by these prisoners. McVicar believed that the court decision was 'a kick in the guts for victims of crime' (McLoughlin, 2004: 2) and that 'no prisoner should receive compensation while any victim of crime goes uncompensated' (Sensible Sentencing Trust, 2007: Par. 1.4.2). Much of the media approached the subject in a similar manner, with the *Dominion Post* publishing an article with the headline 'Mum attacks compo for girl's killer' in which the following comparison was made:

The mother of a girl run over and kicked to death for refusing sex has told a parliamentary committee that giving her killer compensation ripped away any human rights victims have.

("Mum attacks compo," 2005: Par. 1)

The focus here was on the seemingly unequal criminal justice system, in which prisoners received payments and victims got nothing, rather than on the inability of the Corrections Department to provide a humane prison environment.

The government reacted to these allegations and the Prisoners' and Victims' Claims Act 2005 was consequently implemented, preventing prisoners from receiving compensation for ill treatment whilst in prison ("Prisoners' and Victims' Claims Act," 2005). Zimring et al. (2001) have noted that for those citizens who feel distrust towards their governments, 'discretion and delegation become a target' (Zimring,

Hawkins, & Kamin, 2001: 174). To the Sensible Sentencing Trust, taking power away from judges was regarded as a valuable way of ‘increasing punishment for the truly serious offenders’ (Zimring, et al., 2001: 174), as establishment elites, and their perceived leniency, were considered responsible for the rise in violent crime in New Zealand (McVicar, 2004).

### **(b) The use of the victim**

The Sensible Sentencing Trust also use personalised victim accounts of crime and human suffering to gain popular and political support. For instance, it lobbied in 2001 to make changes to legislation regarding DNA, with the mother of a murdered teenager speaking before the Justice and Electoral Select Committee (Chamberlain, 2006). McVicar has noted the emotional pull crime victims have on MPs, stating that in this instance ‘politicians had to look into the eyes of a mother who’d lost her six-year-old’ (Chamberlain, 2006: 77). As a result, the Criminal Investigations (Blood Samples) Act 1995 was changed in 2002 to include bodily samples<sup>27</sup>. Rather than drawing on evidence-based research and analysis, the Sensible Sentencing Trust deliberately used personal accounts of human suffering as evidence that legislative changes were needed. Using accounts such as these is a way for the Trust to illustrate that ‘ordinary’ citizens were suffering due to the government’s lack of policy action.

The use of victims to evoke sympathy is a technique used worldwide by organisations hoping to gain public awareness and support (see Human Rights Watch, 2008; World Vision, 2009). Fattah (1992a: 4) notes the reasoning behind this:

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<sup>27</sup> This was amended to widen the scope of DNA testing ‘as a crime-fighting investigative tool’ and included not only those convicted, but also those under suspicion (New Zealand Parliament, 2003: Par. 8).



Sympathy, empathy, commiseration and compassion for people in distress or suffering great hardship are undoubtedly among the most noble human sentiments. The universality of these feelings has led some to suggest that they are innate and natural. Garofalo (1889), for example, identified what he believed to be the two *basic* altruistic moral sentiments: pity and probity. He defined pity as the revulsion we feel against the deliberate infliction of pain and suffering on others ... The more helpless and defenceless the victim, be it an infant, a child, one of the elderly or even an animal, the stronger is the sense of indignation at the victimizer and the pity we feel for the object of victimization.

In these respects, the Sensible Sentencing Trust is able to use victim accounts of crime and suffering to evoke pity and empathy, in the hope of winning over politicians and members of the public who feel they are not doing enough to ensure the safety of the community. However, unlike organisations which use, for example, the disaster victim or the victimisation of women to generate public support, the Trust use the murder victim to further attract feelings of anger and revulsion at criminals and those power elites who ‘have allowed their obsession with the well-being of criminals to override any concern for their victims – or the safety of innocent members of society’ (Sensible Sentencing Trust, 2008b: Section 1). This is demonstrated further in the following Sensible Sentencing Trust extract written by the husband of a woman murdered in December 2001:

[The offender] was on parole for aggravated robbery at the time, having 102 previous convictions, many for violence. He was not meeting his parole conditions or being correctly monitored as required by Probation Services. *[The victims] would be alive today if the Government services that are required to protect us all had followed their own rules and regulations.* Criminals are allowed to seek redress and [are] paid compensation for the wrongs done to them, but victims do not have the same basic right to Justice as the criminals. *Prisoners are given legal aid to seek justice and all their needs are taken care of - but the victims' needs are neglected and ignored.*

(Hobson, n.d: Par. 1, emphasis added)

The rhetoric used above in which the ‘victims’ needs are neglected’, whilst those of the offender are favoured, runs throughout the Sensible Sentencing Trust’s newsletters and publicly available information. The comparison also demonstrates

how victims and offenders have been typified using a 'good guy ... bad guy' theme (Claster, 1992: 15).

Common assumptions about crime victims – that they are all 'outraged' and want revenge and harsher law enforcement – have come to underpin victims' rights rhetoric (Henderson, 1992). For example, the Sensible Sentencing Trust and the press frequently note the 'anger' and 'outrage' victims and supporters of the Trust feel towards government and the criminal justice system (see Berry, 2004; Binning, 2004; Carter, 2004; Dewes, 2004). Apart from the fact that no quantification is ever given to their supposed public sentiments (something that, again, McVicar is never challenged on by journalists), anger and its manifestations are indeed normal responses to violent crime, but they are not necessarily tied to the desire or need to retaliate (Henderson, 1992). Thus, victims may experience anger as their initial impulse, but after the initial shock has passed, victim's emotions and reactions may vary considerably 'from physical retaliation to withdrawal, to efforts to prevent future harms, to forgiveness of the offender' (Henderson, 1992: 128). The Trust chooses to bypass the fact that many victims are remarkably forgiving – a contradiction that goes completely unnoticed by the New Zealand media. Instead, anger towards offenders is a common reaction held by supporters of the Trust.

Again, it is interesting to compare the different approach to victimisation of the Sensible Sentencing Trust and Victim Support. The latter is concerned with *victim* issues and *victims'* rights and not those of the offender. As with many victims' groups, one of Victim Support's aims is for the victim to be placed at the heart of the criminal justice system when addressing victims' rights. However, the organisation is careful not to disregard the rights of the offender and has refrained from becoming a campaign lobby group. For example, the 2005 report by Victim Support 'A Commitment to Victims' Rights: The Way Forward' states that '[i]t is important to maintain the rights of the offender – but much needs to be done to achieve equal rights for the victims of their offending' (Victim Support (N.Z), 2005: 12). Victim Support is careful not to make suggestions that will further undermine the rights of the offender and in so doing, has refrained from using the victim as a political tool. Interestingly, Rock (2004: 118) notes that worldwide, Victim Support

[h]ad not risen from the ‘victims’ movement’. It was not composed of ‘angry victims’ or their surrogates. It did not represent any specific victim group, or interest [and it] was committed politically not to engage in advocacy, to attack offenders, or to comment on sentencing policy.

Because of this, victims’ issues remained free from the public arena and were dealt with by organisations and experts who were dedicated to victims and their needs. In contrast, the Sensible Sentencing Trust has adopted all of the attributes mentioned by Rock (2004). While the Trust is able to offer victims of crime support, it has done so at the expense of the offender, where it continues to engage in political advocacy using emotional rhetoric to push for longer and tougher sentences.

### **(c) A simplified framework of knowledge**

A final important aspect is the tendency of the Sensible Sentencing Trust to lobby for harsh sentencing policies using a different framework of knowledge than that which was used to implement sentencing policy in the post-war years. The increase in tabloid style journalism has seen the Trust and its common sense arguments become a main source of information. As Fattah (1992b: 49) notes ‘[p]ressure groups, by nature and by choice, lack the neutrality and impartiality necessary for sound, objective scholarship’. The Sensible Sentencing Trust uses simplified arguments to put forward its policies, offering little by way of ‘objective scholarship’. In these respects, it *typifies* victims of crime, failing to acknowledge the complex relationship that exists between offender and victim. In doing so, the Trust ignores the fact that for most victims, particularly victims of violent and sexual crimes, the offender is an acquaintance whom they know, and not an ‘evil’ predator roaming the street (Elias, 1986; Fattah, 1992b). For example, a study conducted in 1993 on the prevalence of childhood sexual abuse in New Zealand found that of the 3,000 women included in the sample, the majority of the abusers were known to the victim at the time; 38.3 percent of sex abuse episodes occurring with family members and 15 percent with strangers (Anderson, Martin, Mullen, Romans, & Herbison, 1993). Both these groups, the offenders and the victims, need assistance in dealing with difficult circumstances and the argument should focus on treating *both* groups with respect and understanding (Wright, 1992). However, the Sensible Sentencing Trust fails to do so. Instead, using emotional rhetoric to misrepresent the

relationship between offender and victim, the group use fear and vengeance to gain support from individuals who feel they are at risk from the ‘cruds’ (Pedler, 2006: Section 3) that are thought to be roaming the streets committing ‘hideous and repugnant crimes’ (Sensible Sentencing Trust, 2008b: Section 1).

The refusal by the Sensible Sentencing Trust to provide an objective argument means issues are not critically addressed and the public are misinformed on issues that have become populist in nature. For instance, the Trust aims to ensure the safety of the community through public education on criminal justice issues; where education is considered ‘a key factor in achieving [the groups] ultimate goal of reducing crime’ (Sensible Sentencing Trust, 2008b: Section 2). However, the ‘education’ the organisation encourages involves informing ‘respective communities as to the horrific consequences and ongoing effects of crime, for those directly involved and the wider community’ (Sensible Sentencing Trust, 2008b: Section 2). The framework of knowledge that has been provided for the Trust, as a result of the changes to the New Zealand media, allows it to make these representations that fail to address the complicated processes by which the events have developed ‘out of the often-mundane situations that produce them’ (Lee, 2007: 188). Furthermore, the victim accounts portrayed by victims and supporters of the Sensible Sentencing Trust are not representative of crime victims in general, and draw once again on the symbolic victim, suggesting that we are *all* potential victims of crime when in reality this is not the case:

Of particular importance is the fact that a small number of victims experience the majority of victimizations. This is now one of the best-known lessons from victim surveys, all of them testifying to it. The probability of repeat (or multiple) victimization is more unevenly spread than the probability of being victimised at all.

(Ministry of Justice, 2007b: 58)

This uneven reality of victimisation is something that is overlooked by the Sensible Sentencing Trust. At the same time, while the Trust purports to speak on behalf of crime victims, it appeals to those groups who are least at risk of victimisation and may well be made more fearful as a result. Included in this group in New Zealand are retired people and individuals over sixty (groups that often overlap), and those people living in rural areas in New Zealand (Ministry of Justice, 2007b).

Interestingly, both groups are representative of individuals who support the Sensible Sentencing Trust. Victimisation is thus de-contextualised to illicit a response from the community due to the shocking nature of the events. By operating within a different framework than that which was available for, and helped to construct, penal debate in the post-war years, the Sensible Sentencing Trust has succeeded in shifting the debate towards a more populist form of penal policy. Consequently, ‘the public’ have gained a significant role in penal policy in New Zealand with politicians implementing harsh policies in an attempt to satisfy public expectations, as the next chapter illustrates.

## Chapter Three:

### Penal Developments in New Zealand: 1999 - 2006

The following chapter addresses the role of the public and the Sensible Sentencing Trust in penal policymaking and the subsequent products of this. Increasingly, penal legislation was introduced to satisfy public expectations raised by the 1999 referendum. The Labour-led government's subsequent implementation of the Sentencing Act, Parole Act, and Victims' Rights Act 2002, along with the Prisoners' and Victims' Claims Act 2005 can all be seen as emerging from the way in which the referendum had galvanised public and political debate<sup>28</sup>. Because of the increasing reliance on what the government claimed to be 'public opinion', penal policy became increasingly emotive and expressive. The emphasis was now on incapacitation and deterrence, with gestures being made towards victims of crime.

#### ***The Consolidation of the Sensible Sentencing Trust***

As the Sensible Sentencing Trust gained more authority through its media publicity, it also became an influential force in penal policy development. The Trust took to promoting itself in this manner, with McVicar (2006b: Section 2) noting the following in one of the organisation's newsletters:

The vibe we are consistently getting is that a decision has been made that the Government can no longer ignore public opinion and if they want to stay in power they will need to listen to and engage with organisations that represent public opinion.

McVicar's remarks rang true in the populist law and order environment, where political parties had no option but to engage with such self-styled representatives of 'the public', or risk being seen as out of touch with law-abiding citizens. The influence the Sensible Sentencing Trust had on politicians can be seen during the initial stages of the Sentencing and Parole Reform Bill 2002 (which produced the Sentencing Act and the Parole Acts 2002 and will hereafter be referred to as the

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<sup>28</sup> During this period, the Labour government formed a coalition with the Progressive Party, a faction of what had been the Alliance Party (but which had dispersed due to declining popularity), as well as forming confidence agreements with the United Future Party, New Zealand First and the Green Party.

Reform Bill). The Trust made submissions to the law and order select committee emphasising the need for ‘common sense’, and for harsher sentencing to prevail (Select Committee News, 2001)<sup>29</sup>. The power of the Trust was illustrated in comments made by Justice Minister Phil Goff when he stated: ‘I correspond frequently with the Sensible Sentencing Trust’ (New Zealand Parliament, 2002e: Par. 2), noting further that this group, along with Norm Withers, had shown its support for the legislation he had introduced (New Zealand Parliament, 2001b). The reference to the Trust by politicians (in particular by United Future member Marc Alexander who was sworn in to parliament as a representative of the Sensible Sentencing Trust, giving the group an automatic voice within parliament) once again reaffirmed its authority as a powerful and influential pressure group within New Zealand society.

While the power of the Sensible Sentencing Trust usually meant that political parties were uncritical of it, it was still prepared to attack *any* political party, be it right or left-wing, whose policies were not in line with its own political agenda. In the lead up to the 2005 election, for example, the Trust named the parties that did not endorse punitive policies in a campaign titled ‘Victims before criminals’ (McVicar, 2005b: Par. 4). The campaign involved a television advertisement featuring victims’ families and grew out of the frustration felt by the Trust towards a government that appeared ‘not to be listening’ (McVicar, 2005b: Par. 7), despite the way in which political parties had tried to position themselves much more closely to the Trust since 2002. Its expectations were, and continue to be, of such an absolute standard that they are likely *never* to be met. The Trust has visions of a ‘crime-free’ New Zealand (Select Committee News, 2001: Section 3), a ‘paradise’ (quoted in McVicar, 2007a) where all the ‘scumbags’ (Sensible Sentencing Trust, n.d: Par. 27) are behind bars while all the ‘ordinary’ citizens are free to live their lives without fear. This idealised society is unattainable, yet the Sensible Sentencing Trust has increasingly set this standard for the public to judge politicians by, and for politicians to aspire to, for fear of losing public support.

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<sup>29</sup> The Select Committee News material does not purport to being an ‘official’ record of Select Committee minutes (Select Committee News, 2001).

## ***Public opinion in sentencing***

The increasing power and authority of the Sensible Sentencing Trust has also contributed to a transformation in the role of ‘public opinion’ in policy development, as governments attempt to win back public confidence. In the aftermath of the referendum, this concept was used increasingly by politicians to push forward punitive policies, on the assumption that they knew what it was ‘the public’ wanted with regard to crime and punishment. For example, Brian Neeson, a member of Opposition, made the following reference to public opinion when defending a Degrees of Murder Bill put before the government in 2001 (which among other things would have resulted in murder being categorised into first, second and third degree murder):

The public’s opinion is clear. It wants tougher sentencing and flexibility in determining the degrees of culpability in murder cases. This sentiment has not changed since the [Sentencing and Parole Reform] bill’s introduction.

(New Zealand Parliament, 2001a: Par. 10)

Not only did ‘the public’ want tougher sentencing, but it was claimed by Act New Zealand Party member Muriel Newman that ‘[t]he country is calling out for a zero tolerance approach to crime’ (New Zealand Parliament, 2002c: Par. 2). In both cases, ‘the public’ are being used as a single entity by members of opposing parties to push forward punitive policies. However, the ‘public’ that is referred to is not a straightforward concept. There is no homogenous ‘public’ (Dalton, 1996). It is not a single entity that can be used by politicians to back up their arguments (Dalton, 1996). Even in this instance, assuming these politicians were drawing on the 91.7 percent affirmative response from the referendum, many of the voters had little prior knowledge of the issue at hand and would have been unaware that violent crime reported to the police had been in decline since 1996 (New Zealand Police, 2000), or that the custodial penalties for violence had been increasing since 1986 (Ministry of Justice, 2008). Inevitably, this lack of informed knowledge makes any reliance on public opinion questionable (Roberts, et al., 2003). Despite this, the advancement of punitive policies remained a top priority for politicians hoping to please ‘the public’ and is indicative of the shift in penal power relations in New Zealand.



The willingness by Opposition MPs to draw on public opinion was an attempt to win popular support for punitive policies. This meant penal discourse was now accustomed to the employment of catchphrases such as ‘life means life’. Such simplistic catch phrases became common during the election campaign in 2002 with the National Party and the right-wing minority party Act New Zealand using phrases such as ‘zero tolerance’ and ‘truth in sentencing’ to appeal to what they considered to be ‘public opinion’ (see, for example, Act NZ in New Zealand Parliament, 2002c). These strategies were also high on the Sensible Sentencing Trust’s agenda. This type of popular discourse has been described by Garland (2001: 132, original emphasis) as a form of ‘*acting out*’, where impulsive action ‘gives the impression that *something is being done* – here, now, swiftly and decisively’ or, as is the case here, that something *should* be done with immediacy (Garland, 2001: 135). Such measures in the United States have resulted in the ‘unprecedented rise in sentencing levels and rates of imprisonment’ (Garland, 2001: 135). So, too, did New Zealand witness the use of such ‘impulsive’ and ‘unreflective’ policymaking where Opposition MPs were advancing populist policies, driven by public sentiment and mood.

## ***Law and Order Politics***

To compete for public support, the Labour-led government then began introducing punitive policies in an attempt to outbid other parties. To acknowledge the importance of public opinion, the government drew on the 1999 law and order referendum. In doing so, it cemented the role of public opinion in sentencing policy. The referendum had proven to be a useful tool in the penal populist climate, where the 91.7 percent affirmative result was considered proof of what ‘the public’ wanted with regards to law and order. It was then used as justification for the introduction of four new statutes, namely: the Sentencing Act 2002, the Parole Act 2002, the Victims’ Rights Act 2002, and the Prisoners’ and Victims’ Claims Act 2005. Justice Minister Phil Goff noted, for example, that: ‘[f]irst and foremost, [the new legislation] responds to the need for reform and to public support for change, as indicated in the 1999 referendum’ (New Zealand Parliament, 2002d: Par. 1). When introducing the Sentencing and Parole Acts, the Labour Party attempted to please public expectations by placing a large emphasis on the more punitive elements of the legislation, while downplaying its more liberal components. On the one hand, it was

proudly advertising that the prison population would rise; on the other, it was quietly introducing strategies designed to counter the case of its own punitiveness. The following section will discuss the government's bifurcated approach to penal policy (Roberts, 2003): the force of penal populism had driven the government to focus on the punitive penalties that had been allocated for the worst cases, while simultaneously introducing more liberal reforms for less serious offences. Reduced sentences, for the government, were designed to avoid the additional cost of extra prison numbers to the penal system, which *at this stage* was estimated by Matt Robson, Minister of Corrections, to be an extra 300 prisoners over four years, at a cost of \$90 million (New Zealand Parliament, 2002d).

### **The Sentencing Act 2002**

The inclusion of lengthy sentences was one aspect of the Sentencing Act 2002 that symbolised the government's commitment to, what was understood to be 'public opinion'. The indeterminate sentence of preventive detention was modified and was available for the control of those offenders who were thought to pose an ongoing threat to society. The eligibility of this sentence, which could potentially be life-long, was widened and was now inclusive of 'a wider range of sexual and violent offences, and [would] no longer require the prerequisite of previous convictions' (New Zealand Parliament, 2002d: Par. 3). In addition, the age of eligibility was lowered from 21 years (which had been the minimum age limit from 1987 as stipulated in the Criminal Justice Amendment Act 1987 (No. 2)) to 18 years ("Criminal Justice Act," 1985; Sentencing Act," 2002). Tonry (1996: 160) argues that the political initiation of extensive sentences can be considered symbolic, as politicians and officials use the sentences to reassure the public 'that their fears have been noted and that the causes of their fears have been acted on'. When applying this to the political environment in contemporary New Zealand, the emphasis and pronouncement given to punitive provisions can be understood. Justice Minister Phil Goff, for instance, draws on what he considers to be the punitive aspects of the Sentencing Act in 2002 to illustrate the government's commitment to the public:

I remind [the National Party] that under the Sentencing Act, a court sentencing a person who commits an aggravated murder can impose a non-parole period of not 10 years, but 17 years. I remind [the National Party] that under the new laws the judges are instructed that the worst crime results in the maximum sentence ... an inmate will now stay in prison to the very last day of his or her sentence, I call that leadership. That is why 92 percent of New Zealand voted for the Norm Withers referendum.

(New Zealand Parliament, 2002f: Par. 2-3)

There are two points to be made about this statement. First, Goff has indeed made a symbolic gesture: he has attempted to confirm government capability by emphasising, what he considers to be, the punitive aspects of the legislation, and in doing so, he has reassured members of the public that their needs have been accounted for.

However, in making this statement he has drawn attention to the second significant point: while the government was attempting to win public support by outbidding the other parties on punitivity, the Sentencing Act changed very little in terms of sentencing practice. Goff has drawn attention to section 8(c) which informs judges (some would argue unnecessarily, see Roberts, 2003, for details) that the maximum penalty should be reserved only for the worst cases ("Sentencing Act," 2002). This is a common assumption in most jurisdictions and does little to alter what was already in place. The other purposes and principles outlined in section 7 reflect the philosophical purposes of imprisonment that have been characteristic of legislation in New Zealand throughout the twentieth century. These include reparation, denunciation, deterrence, incapacitation, rehabilitation and reintegration, and further, that the offender should be held accountable and responsible for their actions ("Sentencing Act," 2002). Ironically, at a time when the government was attempting to please the public by 'getting tough' on crime, section 7 did not include the term 'punishment' as a purpose of sentencing. Act New Zealand member Stephen Franks used it to illustrate the government's 'soft' approach to penal policy:

It is very obvious why punishment did not appear in the purposes or the principles of sentencing. The reason is that this Government does not believe in it. This Government believes that criminals are class victims; that they are victims of the oppressive, ordinary folk---the 92 percent (who voted in favour of the referendum). *This Government is embarrassed about punishment.*

(New Zealand Parliament, 2002c: Par. 13)

The Sentencing Act was used to satisfy public expectation, showing that the government was able to deliver on punitivity. However, the penal environment meant oppositional MPs continued to emphasise the more lenient aspects of the Act to prove that the government was not, in fact, punitive, and nor was it in line with public sentiment and mood.

### **Tough talking politics**

In this environment, the two main political parties competed with each other to ‘get tough’ on crime. The inclusion of aggravating factors in the Sentencing Act was thought to ‘considerably toughen the current sentencing and parole system’ and was subsequently given the most prominence by the Labour Party (New Zealand Parliament, 2002d: Par. 1). Such factors included acts of serious brutality, multiple murders, or instances where the age or health of the victim made them particularly vulnerable ("Sentencing Act," 2002). Furthermore, section 9 of the Sentencing Act also outlines any relevant aspects of the offender’s criminal record (including elements such as number of offences, date, and nature of previous convictions). If one or more of these aggravating factors is present when sentencing, those on trial receive a seventeen year non-parole period of imprisonment, substantially increasing the penalty for murder (in the 1980s, the average non-parole period was ten years) ("Sentencing Act," 2002). These factors were used by the Labour Party to show how ‘tough on crime’ it really was, with Justice Minister Phil Goff stating: ‘this legislation makes the penalties for those guilty of the worst forms of murder with aggravating factors *much, much tougher*’ (New Zealand Parliament, 2002c: Par. 4, emphasis added). The government was doing everything in its power to emphasise the punitive aspects of the legislation, even if, in reality, these would affect comparatively few cases.

However, the Labour-led government gave much less attention to those aspects of the Sentencing Act which would see an emphasis placed on community sanctions and a *reduction* in sentence lengths. For instance, section 16(1) ("Sentencing Act," 2002: emphasis added) states:

When considering the imposition of a sentence of imprisonment for any particular offence, *the court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.*

The message could not have been clearer: judges should use imprisonment as an option of last resort. Offering even more of a contrast to its 'tough on crime' rhetoric, however, was the inclusion of mitigating factors. The mitigating factors are set out under section 9(2) of the Sentencing Act 2002 (including aspects such as the age of the offender and the behaviour of the victim) and, when applied, have the potential to produce sentences for murder which are substantially less than ten years. In spite of all the tough talk, the legislation even stipulated that courts '*impose the least restrictive outcome ... appropriate in the circumstances*' ("Sentencing Act," 2002: s. 8(g), emphasis added). By using the word 'outcome' instead of 'sentence' the provision immediately allows for alternative community sanctions (Roberts, 2003). The government's inclusion of restraint principles had undermined all the 'tough' talk emanating from the government in the parliamentary debates. This was all the more so when the Parole Act 2002 reduced parole eligibility for *most* prisoners to one third of their sentence ("Parole Act," 2002: s. 84).

The Labour-led government's failure to deliver on punitivity was used by opposing parties who were straining to meet public expectations. In 2002, the National Party used the failure to meet expectations as a catalyst for its own 'tough' law and order policies, reinforcing the authority of public sentiment in penal policy. This can be seen in the National Party policy statement, which reads:

In 1999 the Withers' Referendum received 92% support for tough action against violent criminals ... The Government's Sentencing and Parole Reform Bill has completely failed to meet the expectation of the public that there will be tougher penalties for violent crime. Labour and Alliance have actually made parole easier to get for violent criminals ... *It is not surprising that Labour's policies are seen as a betrayal of public expectations.*

(New Zealand National Party, 2002: Summary, emphasis added)

The reference to failed public expectations in parliamentary debates, allowed opposing parties to outline punitive policies such as 'life means life' to show that these parties – unlike those of the parties in government – were able to acknowledge what it was the public *really* desired. Act New Zealand leader Richard Prebble argued against the changes to parole, stating:

[T]his Sentencing and Parole Reform Bill means that people will be out of detention after doing one-third of their sentence ... The government is creating new rights for its friends every day, and now we have prisoners having the right to be let out of jail.

(New Zealand Parliament, 2002c: Par. 1-3)

Similarly, National Party member Tony Ryall stated the following in 2001 with regards to the Sentencing and Parole Reform Bill:

[T]his bill is going to let career burglars, drug dealers, drivers who kill, rapists, and other sexual offenders out of jail earlier ... this is Mr Goff being tough on sexual offenders and on violent offenders – they can qualify for parole earlier.

(New Zealand Parliament, 2001b: Par. 14)

The Labour government's secret agenda had indeed been spotted, leading to a position where the government was unable to win: it had encouraged public expectations of toughness, but any attempt to offset the consequences of this was seen as Labour going back on its guarantees. Further, opposing parties saw straight past the exclamations of toughness: the Minister of Justice was criticised as being 'soft-talking' and 'smooth-talking' by Act New Zealand MP Stephen Franks (New Zealand Parliament, 2002d: Par. 1) while the National Party believed the Reform Bill 'goes soft on hardened criminals and rapists' (New Zealand Parliament, 2002c: Par.

6). While these opposing parties pointed out that the government had failed to live up to the expectations that it itself had created, there was no sign of expert opinion or analysis on sentencing and punishment practice. Instead, politicians opposing the legislation reverted to emotive rhetoric to outbid each other on toughness.

One voice that seemed to go unheard was, ironically, Corrections Minister Matt Robson (a representative of the left-wing Alliance Party, the junior coalition partner in government). He summed up the current New Zealand political scene perfectly when he stated the following:

The Opposition parties are falling over each other, trying to be the toughest kid on the block when it comes to sentencing and parole. *Acting tough does not equate with being effective.* It is irresponsible of [the Opposition] to attempt to create a sense of fear amongst New Zealanders that this Government would let out all the worst offenders. Nothing could be further from the truth.

(New Zealand Parliament, 2002d: Par. 2)

This statement illustrates how politicised law and order had become. Instead of using informed expert opinion to discuss how criminal justice matters should be dealt with effectively, policymaking had become increasingly expressive, where public sentiment was of paramount concern and experts received harsh criticism. Stephen Franks, for example, claimed that the implementation of non-parole periods in the Parole Act ‘confirms the current position whereby this House turns every judge into a liar’ (New Zealand Parliament, 2002d: Par. 2) while the Reform Bill ‘gives even more power to the experts, whose goofy theories have got us into our current sorry state ...’ (New Zealand Parliament, 2002d: Par. 3). Garland (2001: 134) notes the dangers of this expressive form of policymaking, which, he argues, has come to ‘downplay the complexities and long-term character of *effective* crime control ...’. As a result, he argues, penal policy has become ‘a matter of retaliatory gestures intended to reassure a worried public’ that their needs are being met (Garland, 2001: 134). Here, while the government attempted to satisfy public needs with what it considered to be a ‘tough’ approach to crime, opposition members used the same public sentiment and mood to outline just how ‘soft’ the government really was.

The Sensible Sentencing Trust's growing authority meant it was also speaking out about the government's failings. Stephen Franks (an Act New Zealand MP and a Sensible Sentencing Trust spokesperson), for example, tells readers of the Trust's newsletter that the government got it wrong, stating: 'The 2002 Sentencing Act increased a few headline sentences but gave even more control over sentencing to the goofy parole theorists' (Franks, 2006: Par. 2). While Louise Parsons (another Sensible Sentencing Trust representative) stated the following in the *New Zealand Herald*:

The thing that concerns us is that the way this is being spun by the politicians is that they have given the voters what they have asked for, but in fact it is all a big spin.

(Stickley, 2002: Par. 7)

The government's symbolic gestures had once again been uncovered. Public expectations had built up as politicians promised to 'get tough' on crime, but in reality little had changed (and that which had changed was considered lenient) and so the legislation remained unsatisfactory.

### **The Victims' Rights Act 2002**

In another attempt to please public expectations, the government introduced the Victims' Rights Act 2002 in response to the reference made to victims in the 1999 law and order referendum. Using familiar law and order rhetoric, Phil Goff noted that the legislation 'reflects the concern of the country expressed in the Withers petition in 1999, that over the preceding decades too little had been done for victims' (New Zealand Parliament, 2002g: Par. 3). While this was considered by many, including Victim Support, to be a positive step towards incorporating victims in the criminal justice system, it was more a *promotion* of victims' rights than a major transformation in legislation, doing little to increase public satisfaction. Among its main developments, the Victims' Rights Act introduced mandatory rights to information concerning programmes, services and proceedings, whilst giving victims the ability to complain to the Ombudsman about issues that may concern them ("Sentencing Act," 2002: s. 49(42)).



One development in particular increased the importance of Victim Impact Statements in court and in Parole Board hearings. Now, a statement 'should be prepared for the judicial officer ... so that he or she understands how the offence has affected the victim' (Ministry of Justice, 2002b: 8). But these provisions only increased the possibility of re-victimisation due to changes that were made to the Parole Act 2002, by the same government. In addition to reducing parole eligibility to one-third of a sentence, one national New Zealand Parole Board was established. This new Parole Board replaced the seventeen District Parole Boards across the country as well as the former National Parole Board (Smith, 2007). As a consequence, when victims chose to give their victim impact statements at Parole Board hearings they not only had more hearings to attend (due to the shortened non-parole period) but they often had to travel long distances to do so. Despite rising expectations regarding its new deal for victims, the reality that was delivered had no immediate impact. In effect, it further undermined any trust the New Zealand public had in politicians (which in the Mood of the Nation Poll 2004 had the public rank politicians 17<sup>th</sup> out of 17 professions in terms of trustworthiness) and *enhanced* the standing of law and order pressure groups, such as the Sensible Sentencing Trust.

### **The Prisoners' and Victims' Claims Act 2005**

As was discussed previously, this ad-hoc legislation was implemented with urgency and the political debate surrounding the issue illustrated that the main priority for the government continued to be satisfying public fears and anxieties. The purpose of the Prisoners' and Victims' Claims Act, which was retrospective as it had been back-dated to cover the prisoners in question, was to 'restrict and guide the awarding of compensation' to prisoners ("Prisoners' and Victims' Claims Act," 2005: s. 3). Any compensation was to be awarded only under exceptional circumstances and only 'after exhausting all avenues of complaint' (New Zealand Parliament, 2002a: Par. 3). Furthermore, if under exceptional circumstances, the prisoner received compensation, any outstanding monetary payments, such as reparation or legal aid, was to be paid immediately and victims could 'claim redress from any payment that the offender has received' (New Zealand Parliament, 2002a: Par. 4). In defending the Prisoners' and Victims' Claims Act, Justice Minister Phil Goff stated the following:

[M]ost people, including myself, have a deep sense of wrong that serious offenders can be awarded compensation for wrongful treatment without those offenders themselves being required to pay compensation to their victims for the serious wrongs inflicted on them.

(New Zealand Parliament, 2002a: Par. 2)

For the Opposition, however, the legislation demonstrated a further sign of government weakness. Because of the United Nations Convention against Torture and Cruel, Inhumane, Treatment or Punishment, the government was compelled to give the prisoners compensation, even if it was to be taken off them. This then raised the issue for the Opposition of New Zealand's sovereignty, with Georgina Te Heuheu claiming the following: 'What is annoying is that [the Prisoners' and Victims' Claims Act] is *typical, liberal, namby-pamby*, Labour-type legislation ... The government is obviously *soft on law and order*' (New Zealand Parliament, 2005c: Par. 2, emphasis added). In a similar display of rhetoric, the Sensible Sentencing Trust stated that it was the '[g]overnment's pathetic attempt to pacify the public outrage at compensation being awarded to prisoners for some factious abuse of their "human rights"' (McVicar, 2005a: Par. 2). Even though the government had attempted to defuse the situation by introducing legislation that was thought to offer victims more protection, it only seemed to draw the punitive enclosure tighter where there was little freedom to act in an informed and stable manner.

To demonstrate the increasingly punitive nature of penal discourse of this period, a search was conducted of New Zealand parliamentary debates for the words 'punishment' and 'reintegration'<sup>30</sup>. The timeframe used was from 1 January 2000 through to 31 December 2006 and was chosen to illustrate the tumultuous period that took place in New Zealand after the 1999 referendum through to the end of 2006, when law and order seemed to take control. 'Punishment' and 'reintegration' were chosen as they represent two distinct and contrasting strategies of New Zealand

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<sup>30</sup> Unfortunately the New Zealand Parliamentary website only retrieved data back to 11 Feb 2003. Consequently, two additional searches were conducted on 'punishment' and 'reintegration' using the Legislation New Zealand database. The remaining data was filtered and those articles that were not regarding criminal justice were removed. Furthermore, because the database brings up debates individually, those that addressed the same question were grouped together to make it consistent with the search of Hansard debates on the New Zealand Parliamentary website.

policymaking<sup>31</sup>. From 2000 to 2006, ‘punishment’ was mentioned in 124 parliamentary debates on criminal justice while reintegration was mentioned in 64<sup>32</sup>. The majority of the arguments mentioning punishment had a punitive overtone, in which politicians reflected on the Labour-led government’s *lack of punishment* as a way of illustrating its failings (an exact number could not be taken here as some debates had arguments for and against punishment). This can be seen in the following comment made by United Future member Marc Alexander:

*We have a range of criminals in this country who, seemingly at will, can walk away from their punishments. We witnessed just recently the case of a sex offender, the paedophile in Blackball [sic], who went there without his parole conditions allowing him to do so. What happened to him? Nothing! ... He just simply walked away, with no punishment. And we see again that same attitude demonstrated right throughout the criminal justice system—a lacksadaisical attitude towards the enforcement of punishment.*

(New Zealand Parliament, 2005a: Par. 71)

Articles that had this punitive overtone demonstrate that the enforcement of punishment was considered the number one priority of criminal justice.

There were a few individuals, however, that spoke out against this urge to punish. One of these was David Riley, the Director of Psychological Services for the Department of Corrections when he stated that ‘[t]here are now more than 23,000 studies showing that punishment is one of the least effective ways of influencing human behaviour’ (quoted in Nippert, 2005: Par. 10). However, this seemed to go unnoticed by the majority of politicians, where only a small number of those that mentioned ‘punishment’ criticised the emphasis placed on punishment and incapacitation. Green Party member Nandor Tanczos made one such judgement:

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<sup>31</sup> A search was conducted of ‘rehabilitation’ but the analysis became too problematic as there are multiple ways in which the term can be used. This resulted in thousands of articles being retrieved, many of which were not significant to the present argument. Instead, it was decided to search for articles pertaining to the use of reintegration, as politicians, when discussing the rehabilitation of offenders, frequently noted the reintegration of offenders also.

<sup>32</sup> In addition, there were 24 articles on reintegration, all of which involved an identical written question to the Minister of Corrections concerning 24 different offenders (see, for example, New Zealand Parliament, 2001c). Each article gave an identical answer, and for this reason all of these articles have been combined together as one debate.

If we think it is fear [that makes people behave themselves], then we will advocate more and more punishment. But if we think other things motivate people to be good citizens, we need to address how we can rebuild our communities, and how we can deal with the wider justice issues in this country.

(New Zealand Parliament, 2002b: Par. 5)

Suggestions about community intervention strategies (or related issues of reintegration and rehabilitation) were given little attention. 'Reintegration' was only mentioned on 64 occasions, the vast majority of which (61/64) were brought to the debate by left-wing or centre left politicians. This illustrates the change in penal mood in New Zealand. Penal discourse was no longer focused on the reformation of the prisoner, or on expert oriented analysis, but was instead based on punitivity and its ability to fulfil public expectations.

## ***The Growth of the Prison***

Nonetheless, New Zealand's imprisonment rate, which had grown to one of the highest in the OECD, second only behind the United States, came to increasing prominence in 2006. The Labour government had underestimated the force that the punitive penal environment would have on judges, who were already sentencing offenders to lengthier sentences. Previously, judges had been warned to take note of public expectations whilst sentencing, with Justice Minister Phil Goff stating that 'public opinion does not take kindly to being ignored' (Bain, 2000a: 1). As a result of growing pressures, and a lack of sentencing alternatives, judges were imposing increasingly lengthy sentences in a bid to meet public expectations. Thus, while in 1985 there were only 10 prisoners on preventive detention in New Zealand (Hurd, 2008), the number in 2009 is 215 (Koubaridis, 2009). Further, a Ministry of Justice report noted that 'minimum non-parole periods of more than 10 years have been more commonly imposed on life sentences than previously' (Ministry of Justice, 2008: 112). One particular case resulted in a 33 year non-parole term for triple murder, the longest non-parole sentence issued in New Zealand (*R v Bell*, 2002).

In addition, the pressure to incapacitate had become even more prominent, with judges increasingly using custodial sentences over other sanctions due to a lack of availability of community sanctions (Ministry of Justice, 2008). The Sentencing Act

had removed suspended sentences as well as community programmes, whilst periodic detention and community service were combined to create the sentence of community work (Ministry of Justice, 2002a). As was noted in the Ombudsman's report on the criminal justice sector,

[b]etween 1991 and 2001, community based sentences ranged between 33.8% and 30.1% of all sentences. In 2004 and 2005 the equivalent figures were 25.2% and 25.7%. Custodial sentences for the same periods ranged from 7.3% to 8.2% between 1991 and 2001, and were 9.4% and 9.6% of all cases for 2004.

(Smith, 2007: 49)

The inference clearly is that the populist climate that existed around penal policy meant there was extreme public pressure on the judiciary to keep the community safe. This then resulted in the greater and lengthier use of imprisonment. Consequently, prison numbers climbed by 321 over 2002/2003, followed by an additional 497 prisoners in 2003/2004 and 544 in 2004/2005 (Department of Corrections, 2006; Ministry of Justice, 2008). As a result of rising imprisonment, the government made plans to build four new prisons by 2006 which were to house an extra 1480 inmates (Department of Corrections, 2003). Due to the continual growth in prison numbers, the Department of Corrections was dealing with full capacity prisons on a daily basis.

In this punitive environment, one aspect that received very little political discussion was the government's commitment to approach the problem from 'both ends of offending' (New Zealand Parliament, 2001b: Par. 4). A report released by the government entitled 'About Time' was intended to be a corresponding package with the Sentencing and Parole Acts (Department of Corrections, 2001). This report was intended to curb 'the ever-growing numbers who go into prison' by concentrating on, amongst other things, the early prevention of crime in New Zealand (New Zealand Parliament, 2001b: Par. 4). While the government briefly acknowledged its commitment to crime intervention, it was noted by the Minister of Corrections that the initiatives would be implemented only when the government had 'earned the trust of the people' (assuming this was to be done by way of punitive policies) (New Zealand Parliament, 2001b: Par. 4). Therefore, it was as if the government was

attempting to satisfy public expectations, using the Sentencing and Parole Acts as a way of getting 'tough' on crime, before moving on to more 'liberal' ideas.

Overall, however, politicians lost the ability to control public participation in penal policy, which in turn made policymaking increasingly emotive. To please public expectations the Labour government introduced the four statutes – the Sentencing Act, Parole Act and Victims' Rights Act 2002, and the Prisoners and Victims' Claims Act 2005 – as an attempt to 'sign' its way out of trouble. In the ensuing parliamentary debates the Labour government placed much emphasis on the more punitive aspects. This, however, backfired. The liberal aspects fell by the wayside, while the punitive aspects were not 'tough' enough to satisfy expectations. The reduction in parole eligibility only confirmed public suspicions that politicians were not at all 'tough on crime'; while victims were, for all intents, only given the opportunity to be re-victimised under the government's victim legislation. At the same time, the public and political debate became predominantly punitive. Further erosion of prisoners' rights was one consequence of this. Meanwhile, imprisonment rates in New Zealand continued to rise.

## **Chapter Four:**

### **Resistance to Penal Populism in New Zealand – is it possible?**

In 2005, the penal climate in New Zealand was characterised by punitive rhetoric. The government had attempted to satisfy public expectations with little success and the punitive mood was inflamed rather than appeased. In August 2006, however, the introduction of a series of initiatives entitled ‘Effective Interventions’ offered a break in the populist penal rhetoric and seemed to mark the beginnings of an alternative framework of knowledge for penal policy development. The very title, ‘Effective Interventions’, implied some sort of change in penal policymaking, as well as being reflective of the punitive approach that had become so dominant. The purpose of this chapter is to outline the approach taken towards penal policy from 2006 to the 2008 general election. While the government may have had good intentions when introducing the new interventions, the power of penal populism overrode any effective policies that were put forward by the Labour government. Instead of effective crime control, discourse remained centred on punishment and the government’s main priorities were community safety, the effective management of offenders and security.

#### ***New Zealand’s Prison Crisis***

As noted in the previous chapter, the prison muster in New Zealand was growing at a faster pace than the Ministry of Justice had predicted. This had resulted in the government spending around \$1 billion extra to accommodate rising numbers. In June 2006, the Ministry of Justice projected there would be a growth in average monthly prisoner numbers from 7,656 prisoners to 9,028 prisoners by June 2014 (Ministry of Justice, 2007a). Yet, while these projections took into account policy initiatives and changes in sentencing practice, there was a tendency for the forecasts to be significantly *underestimated*. For example, a 2006 forecast estimated that without any interventions the prison population would reach 8,119 by June 2009 (Ministry of Justice, 2007a). At 1 November 2007 the prison population was 8,056 (190 per 100,000) (Smith, 2007). This was 9 percent above 2007 projections which

excluded any interventions (an estimated 7,985 prisoners) and 4 percent above the projection which had taken into account the new interventions (an estimated 7,809 prisoners). For the Māori population, prison figures were particularly alarming. Although Māori only comprised approximately 14 percent of the New Zealand population; in 2006 they accounted for 53 percent of cases leading to imprisonment (Ministry of Justice, 2008). Furthermore, the likelihood of receiving a custodial sentence was again greater for the Māori population, with 13 percent of Māori offenders receiving custodial sentences over community sanctions or fines, while for New Zealand European and Pacific peoples this was 8 percent (Ministry of Justice, 2008). The reality, then, was that New Zealand's prison population was fast approaching crisis point.

At first, the high prison numbers were celebrated by the Labour Government in parliamentary debates as proof that it had satisfied public expectations to 'get tough' on violent offenders. This was in part due to the fact that, since the inception of the Sentencing and Parole Reform Bill in 2002, New Zealand's rate of imprisonment had grown from 150 per 100,000 of population (Ministry of Justice, 2008) to peak at a rate of 200 per 100,000 of population in September 2007 (Department of Corrections, 2008b). Labour Party member Tim Barnett made the following comment in 2005:

*It seems to me that there is a very successful story to tell both in terms of law and order and in terms of justice. In the last 6 years we have seen New Zealand's crime rate go to the lowest level for 23 years. Labour in Government has responded to the outcome of the referendum in 1999 by implementing a series of tougher laws. That means that the more serious offenders spend longer in prison, having been sentenced for longer periods; also, there is a higher barrier prior to their getting released ... Four new prisons have been opened in that period, and New Zealand now has, internationally, a very high imprisonment rate.*

(New Zealand Parliament, 2005b: Par. 2, emphasis added)

One consequence of such high imprisonment rates was the operation of prisons at maximum capacity. The Department of Corrections noted in its Annual Report that '[the a]verage occupancy for 2003/2004 was 96 percent, although for the last two months of the year average occupancy exceeded 100%' (Department of Corrections,



2004: 44). The situation worsened in 2004/2005, when the Department noted that the average occupancy was 99 percent, ‘*although* for much of the year the prison system was operating at full capacity with court and police cells used to accommodate prisoners’ (Department of Corrections, 2005: 29, emphasis added).

Up until this point, the press was concerned with issues that were reflective of penal populism and the leniency of penal policy was of grave concern. However, concerns began to mount over New Zealand’s rising imprisonment when the press drew attention to the consequences of populist policies, particularly prison overcrowding. Articles began to refer to prison conditions, emphasising New Zealand’s ‘prison muster crisis’ (“Overcrowded jails,” 2005: Par. 1) where prisons were ‘bursting at the seams’ (Sonti, 2005c: Par. 2) due to ‘chronic prison overcrowding’ (Sonti, 2005d: 6). One article revealed, for example, that ‘[o]vercrowding in New Zealand prisons has led to an explosion in suicide attempts, assaults and other unmanageable inmate behaviour’ (Sonti, 2005a: Par. 1) while another noted that some prisoners were being housed in vans to cope with overcrowding. (“Inmates held in vans,” 2005). The public were also being informed of the constant threat of prisoner escape (“‘Failures’ led to inmate’s escape,” 2005) when ‘[i]nmates from one of New Zealand’s most notorious jails were sent to a nearby rugby club for showers’ (Sonti, 2005b: Par. 1). These reports began to highlight the inhumanity of the government’s prison policy, helping to shift penal debate away from punitiveness and towards more effective responses to crime control. The Labour government itself seemed to sense this change, as well as the moral bankruptcy of its own policies.

This coincided with increasingly vocal opposition to the growth of imprisonment from penal reform groups, particularly Prison Fellowship New Zealand (PFNZ). This Christian organisation is responsible for the implementation of faith-based units in New Zealand prisons, but had become an increasingly important player in policy debate. Annually from 2006 to 2008, PFNZ organised a ‘Beyond Retribution’ conference where academics, politicians, volunteers and all those interested in penal policy in New Zealand openly debated penal policy. This gathering of ideas provided an umbrella under which diverse critics of populism gathered and highlighted the dramatic change in direction penal policy had taken in New Zealand. Collaboration was taking place, as critics of penal populism hoped to change the direction of penal

policy. One particular critic, Judge McElrea (2006: 175-176), had the following to say about the administration of penal policy in New Zealand:

For too long justice has suffered from a sort of auction to find the “toughest” approach to criminals. It has failed to make New Zealand safer: to the contrary it has produced more prisons from which more and more inmates emerge as dangers to the community. Responsible segments of the community must let politicians and the media know that they do not find this conduct acceptable.

Similarly, an authoritative report published by the Salvation Army (2006: 72) spoke of the tendency of New Zealand politicians to use ‘crime as a political football’:

Good prison policy requires rationality, not rhetoric ... Certainly democracy requires debate about justice issues, but this debate needs to be based on evidence and research, not one-off criminal cases or distortions of the facts ... we need politicians who will show leadership and *resist the temptation to buy into popular, but failed, views*.

(Salvation Army, 2006: 72, emphasis added)

These groups encouraged politicians to resist penal populism through the use of informed debate. The ‘tough on crime’ environment that had become so engrained in popular rhetoric was being resisted and a new and informed body of knowledge was beginning to emerge.

### ***‘Effective Interventions’***

In a dramatic turn of events, the Labour government broke away from the populist ‘tough on crime’ stance it had adopted since coming to power in 1999 and instead, began to make policy decisions more indicative of penal-welfarism. In the presence of several senior Ministers (including *new* Ministers of Justice and Corrections) and the President of the New Zealand Law Commission (an independent government division that reports to parliament on how legislation can be improved), Prime Minister Helen Clark announced in August 2006 that the government would introduce a series of initiatives, entitled ‘Effective Interventions’.

As a reflection of the government’s commitment to move away from penal populism, where high rates of imprisonment had been acceptable, the new initiatives

were designed to address New Zealand's 'unacceptably high rate of imprisonment' (Clark, 2006: Par. 60). This, Clark (2006: Par. 16) acknowledged, had become 'neither financially nor socially sustainable for New Zealand'. The sudden inclusion of the Law Commission in the decision-making process was symbolic. It implied that the government was handing penal policy back to criminal justice experts who in the past had taken a more reasoned and informed approach to the implementation of penal policy. There was also a swift transformation in penal policy discourse. The size of New Zealand's prison population had led to new set of assumptions, where the country's reputation for fairness and international standing was being put at risk. No longer were the high rates of imprisonment looked upon as a 'success story' for the Labour government; instead, there was an overall feeling of moral guilt. Evidence of this can be seen in a comment made by Justice Minister Mark Burton in 2007 when he noted the following:

Over the last 7 years we have increased the prison capacity by 2,100 beds. It has cost over a billion dollars. We do not like spending money on prisons in this country ... [however], we built over 2,100 new cells in this country to address the sad but realistic situation that New Zealand locks up people at the second-highest rate in the Western World. That is something we are not proud of. No one in this country should be proud of that.

(New Zealand Parliament, 2007d: Par. 2)

In a similar fashion, the deputy of the Law Commission felt that New Zealand's high rate of imprisonment was a 'national shame' (Palmer, 2006c: 8), while the Corrections Minister acknowledged that the rate was 'shamefully high' and the exorbitant cost would be better spent on community programmes and development ("Jails policy a disgrace," 2006).

While the Labour Party had hinted at alternative interventions in 2002 (as mentioned in Chapter Three), the punitive penal environment meant little was done at the time to stem New Zealand's increasing prison population. In 2006, however, the sudden change in mood allowed the government to take a purposeful shift away from punitivity towards a more rational approach to penal policy. This was reflected in the interventions, which included:

- Measures to reduce the underlying causes of crime in the longer term, including effective early interventions for at-risk children and their families/whānau;
- Measures to reduce opportunities for offending, re-offending and to enhance victims' satisfaction in the criminal justice system in the medium term;
- Measures to alleviate immediate pressures on prison capacity in the short term.

(Burton, 2006c: Section 1)

In order to achieve its desired outcome the government adopted ‘a cross-sectoral and strategic approach to *reducing crime, reoffending and imprisonment*’ (Burton, 2006c: Section 2, emphasis added). It was anticipated that without the interventions there would be a shortfall of 908 prison beds by 2011 (as the demand for beds would increase by 1,200); with the interventions, this was reduced to 426 beds (as noted previously, the Ministry’s tendency to underestimate forecasts meant these figures were highly optimistic) (Burton, 2006c). The ten proposals outlined in the Effective Interventions package dealt with the following issues: crime prevention, the addition of 1,000 police, remand sentences, restorative justice, non-custodial sentences, home detention, sentencing guidelines and parole eligibility, the prevention of reoffending, corrections capacity, and Māori and Pacific peoples (Burton, 2006c). These proposals incorporated policy attributes more suited to policy during the post-war penal-welfare era, where high rates of imprisonment were regarded as unacceptable and there was a commitment to the rehabilitation and reformation of the prisoner.

## **Rehabilitation**

The government emphasised the attributes of the interventions that addressed what could be done *for* offenders, instead of focusing on the incapacitation *of* offenders. It intended to improve the rehabilitation of prisoners through a number of proposals. These included the addition of two drug and alcohol treatment units, two special treatment units for violent and sexual offenders, the expansion of employment and training in prison, and an increase in motivational programmes (O’Conner, 2006). These were considered critical and effective in reducing reoffending. They were also costly, with the special treatment units, and drug and alcohol units estimated to cost

\$3.341 million annually from 2009/2010 (Smith, 2007). Previously, the force of penal populism caused the Labour-led government to make symbolic gestures to satisfy public expectations, resulting in a raft of punitive policies. The government's new approach, on the other hand, seemed to offer nothing of the sort. Instead, rehabilitation and reintegration were heralded as the answer to the nation's prison crisis. The Minister of Corrections thus remarked that:

[R]ehabilitation is an important part of the total Effective Interventions package ... It is absolutely in all our interests that effective rehabilitation treatment programmes and so on are available in order that those who have offended can ultimately be rehabilitated, rejoin the community – which the vast majority of them do – and become contributing members of the community.

(New Zealand Parliament, 2007a: Par. 4)

Whereas punishment had dominated discussion of the Sentencing and Parole Acts 2002, the change in penal climate meant rehabilitation was being presented as a top priority. The Department of Corrections (2006: 7) also noted that a key focus for the 2005/2006 year was 'enhancing and expanding rehabilitation and reintegration initiatives'. In addition, an examination was to take place surrounding motivational programmes, such as Tikanga Māori programmes (a cultural motivational programme in prisons), to determine their effectiveness. Despite having spent the last few years introducing more punitive elements to the penal system in a bid to satisfy public expectations, it appeared as if the government was now focusing its attention on both short and long-term methods that were considered effective in reducing crime and in assisting offenders with their re-entry into society.

### **Proposals for sentencing and parole reform**

To bring about these changes, the Law Commission was co-opted into the penal policy making process. After being asked whether improvements could be made with regards to sentencing and parole legislation in New Zealand, a report entitled 'Sentencing Guidelines and Parole Reform' was produced, recommending the establishment of a Sentencing Council in New Zealand as well as substantial parole reform (Law Commission, 2006b)<sup>33</sup>. Previously, the credibility given to the 1999

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<sup>33</sup> More specifically, the Commission was asked to consider whether New Zealand would benefit from a Sentencing Council, which would give greater guidance to judges and whether improvements

law and order referendum meant that public sentiment and mood determined penal policy where it was driven by powerful law and order lobby groups. The sudden inclusion of the Law Commission, however, indicated that the government was attempting to reconstruct contemporary penal policy by handing penal power back to experts in criminal justice. This was reiterated by Justice Minister Mark Burton when he boasted of the government's fortune in having 'two of the country's foremost experts' on sentencing included in the decision-making process (Burton, 2006a: Section 7). The introduction of the Sentencing Council Act on 1 November 2007 was further evidence that the government was attempting to draw alternative voices into the decision-making process. It established the Sentencing Council as an independent body, with ten representatives including: four judges, the Chair of the Parole Board and five lay members with 'expertise or understanding' on a range of criminal justice issues (such as policing, victim issues and Māori issues) (Law Commission, 2006b: 33). This indicated a willingness by the Labour government to include representatives of the community in the decision-making process, *but only if they were informed and knowledgeable on criminal justice issues*. In effect, sentencing policy was no longer to be determined by 'public opinion' as reflected in the 1999 referendum, but by a newly constituted Sentencing Council.

### **The Sentencing Council**

As an expert body, one of the Law Commission's biggest concerns was the level of judicial discretion in New Zealand's sentencing and parole practices. It was noted in its report, for example, that

... the sentencing system remains a highly permissive one, characterised by substantial judicial discretion as to the way in which the purposes and principles of sentencing should be translated into sentencing levels.

(Law Commission, 2006a: 18)

While it has been noted by Spigelman (1999: 6) that judicial discretion is an important feature of sentencing arrangements, for the Law Commission it was the *level* of discretion that was cause for concern. The Commission, as a government

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could be made with regards to parole legislation in New Zealand to ensure that the time served by the prisoner was more in line with the sentence imposed by the court (Law Commission, 2006b).

organisation, was interested in bureaucratic efficiency. The broad discretion being exercised meant significant inconsistencies had been found between judges as well as between courts, with disparities exposed particularly with regard to lower level offences (Law Commission, 2006a). A study conducted on behalf of the Law Commission, for instance, revealed that some courts were 'systematically more severe than others' particularly in relation to the number of convictions resulting in imprisonment (see the Appendix of 'Sentencing Guidelines and Parole Reform' for further information). In the past, it argued, this inconsistency led to a lack of public confidence in the judiciary, and in turn, calls for harsher sentencing.

The Law Commission (2006b) also noted that, along with inconsistency, there was a public perception of judicial leniency. Part of this perceived leniency was due to the fact that, on average, offenders were serving about 62 percent of their sentences in prison (Law Commission, 2006b), a product of the 2002 parole legislation. This, the Law Commission (2006b: 47) acknowledged, 'did little to mitigate the anger and frustration of victims and others who believe that court-imposed sentences do not mean what they say'. As a result, the Law Commission recommended that for short-term sentences of twelve months or less, sentences should be served in full (where previously offenders were released after serving half their sentence). For long-term sentences, (those over twelve months) the prisoner would become eligible for parole at two-thirds of their sentence or at twelve months, whichever was longer (Law Commission, 2006b). In addition, judges would be required to articulate exactly how the sentence would be carried out (for example, if an offender was sentenced to six years the judge was required to stipulate that at least four of those were to be in custody, and further, that the remainder of the sentence would have the offender in or out of custody depending on a Parole Board's assessment). Under the Sentencing Act 2002, judges were only required to state the nominal sentence 'which does nothing to inform the victim, the offender, and the general public about what the sentence means in practice' (Law Commission, 2006b: 57). It was intended that this emphasis on 'built in sentencing' would restore public credibility to the sentencing process. It would also give legitimacy to the reduced penalties that were to be introduced as a substitute for the restriction on parole.

Under section 8(a) of the Sentencing Council Act 2007, the Council was guided to promote consistency and transparency in sentencing policy and practice, and promote effective management of penal resources through the provision of reliable information ("Sentencing Council Act," 2007: s. 8(a)). To achieve transparency, the Sentencing Council would be responsible for developing guidelines in a grid-like system. These guidelines were to include a mix of numerical and narrative elements to address sentence type and length (Palmer, 2006a) and would provide 'a mechanism for *structuring* discretion, not for *restricting* discretion' (Spigelman, 1999: 6, emphasis added)<sup>34</sup>. As noted previously, the phrase 'truth in sentencing' became popular in the penal populist environment. However, unlike the punitive proponents of 'truth in sentencing' who were striving for 'life means life' policies, the Law Commission (2006b) used this phrase to indicate greater transparency in sentencing. It acknowledged that in order to reach the desired parole outcomes, which would see offenders serving over eighty percent of their sentence in custody, the overall sentence length would need to decrease by around 25 percent. This was consequently reflected in the Parole Amendment Act 2007. The Law Commission had thus used 'truth in sentencing' to bring about more transparency and consistency in the criminal justice system. It was hoped that this, in turn, might reduce public criticism of the judiciary. In effect, the introduction of the Sentencing Council was an attempt by the Law Commission to depoliticise sentencing in a bid to protect the judiciary from populist criticisms.

## ***Media Scandal in Penal Policy***

On the surface, the Effective Interventions package offered a break from penal populism. Experts once again had a substantial amount of penal power and the government now looked to be resisting penal populism. However, one force in particular that continued to influence the government was the media. The tendency to dramatise extraordinary criminal events meant there was constant pressure on the government to respond. In the build up to Effective Interventions, the media played a significant role in highlighting scandals about deteriorating prison conditions.

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<sup>34</sup> For offence types (such as burglary or assault) judges would be guided as to the sentence type and the range of sentences available. They would also contain a 'brief commentary' on the context of the crime, thus allowing for a narrative element to be taken into consideration (Law Commission, 2006b: 37).



Because of the capability of the media to galvanize public opinion, the government remained very much a hostage to its fortune as it tried to change course and move away from populist influences. But as Smith (2007) has observed, the political climate in New Zealand was making this increasingly difficult:

Criminal justice has unfortunately reached the stage where rational debate is difficult. When an incident occurs the responses from the public, politicians and the media tend to polarize. The almost inevitable response of “let’s pass or amend the law” is often a fruitless reaction that is piecemeal and probably not effective ... The maxim “hard cases make bad law” is particularly appropriate.

As noted above, when politicians react to extraordinary events in the media there is little chance that the outcome will be rational. For politicians and policymakers, anecdotes and sensationalised reports of victim suffering are increasingly used as meaningful data in the implementation of sentencing policy (Steen, 2009). More specifically, political constructions of crime have become reliant on media abstractions about crime and criminal justice issues, or they are in response to ‘concrete but atypical cases’ (Keith Crew, Lutz, & Fahrney, 2002: 178). Two such cases occurred in New Zealand in 2006 and 2007, effectively sabotaging the government’s attempt to reconstruct penal policy.

### **The case of Liam Ashley**

The first involved the death of teenager Liam Ashley in September 2006. After Ashley (who suffered from Attention Deficit Disorder) took his mother’s car without permission, his parents made the decision to deny him bail, believing that a short time on remand would be the best option for their son (Hayman, 2006). During this remand, Ashley was beaten to death by another prisoner whilst being transferred in the back of a prison van. The media emphasised on the one hand, the vulnerability of the 17-year-old ‘baby-faced’ teenager, and on the other, the ‘unpredictable’ nature of the other ‘serial violent offender’ (“The parents of Liam Ashley,” 2006: Par. 1) who had 80 prior convictions (Hayman, 2006). To the media, the murder was not a portrayal of New Zealand’s prison system breaking down, or a consequence of prison overcrowding (which had led to prisoners being transported in overcrowded vans). Nor was it a question of why Ashley’s parents considered prison to be the ‘safest place’ for their son (Diaz, 2006: Par. 4). Instead, in another replay of the

innocent victim against the evil attacker (see Chapter One), it was why the Corrections Department put a young man in a van with a dangerous and violent prisoner. One article in *The Press*, for example, reported: '[R]egardless of any uncertainty over the rules, it defies belief that anyone could have thought it appropriate to place a 17-year-old remand prisoner in the same compartment as two adults, one of whom was classified as a dangerous criminal' ("Protecting prisoners," 2006: Par. 6). In these respects, the case shifted press interest away from reforming prison and reducing the prison population, to the way in which the government, and its penal bureaucracy, was unable to protect the innocent from predatory strangers. Instead of letting prisoners out, it provoked demands for a United States style 'Three Strikes' law, which the Sensible Sentencing Trust argued would have saved Ashley from his attacker. This can be seen in the following claim made by McVicar:

If New Zealand had a "Three Strikes" law Liam Ashley and many other victims would still be alive today [and] it is Parliament and weak spineless politicians that have Liam Ashley's blood on their hands.

(McVicar, 2006c: Par. 1)

This point was pushed further by David Garrett, then legal advisor for the Sensible Sentencing Trust, who in 2008 became a member of the political party Act New Zealand. He stated in a column in the *New Zealand Herald*:

The "fix" ... is simple and obvious: a New Zealand "three strikes" system, in which a "strike" is defined not as a felony, but an offence of violence carrying a sentence of two or more years in prison. If we had a system like that, Liam Ashley and countless other victims would be alive today.

(Garrett, 2006: Par. 15-16)

The crystallisation of the scandal by the media once again legitimised public demands for harsher sentencing practices, putting immense pressure on the government to respond to them, rather than being able to pursue its own Effective Interventions strategies.

## The case of Graeme Burton

The second event came to a head in December and January 2006/2007 when the media focused its attention on Graeme Burton – an offender serving a life sentence for murder since 1992<sup>35</sup>. Burton was released on parole in July 2006 by the Parole Board after he was perceived as no risk to the community (New Zealand Parole Board, 2006). He failed to appear at several appointments with his probation officer (some through no fault of his own, for details see Elsworth, 2007), the last of which would have seen him recalled to prison for non-compliance with the terms of his parole licence. Burton then went on to murder another man in January 2007 before being captured after a shootout with the police<sup>36</sup>. The media began to release reports on the dangerous fugitive whom the public should fear, consequently attracting a wide public interest in the case. Initially, reports included: ‘Armed, dangerous and back on the run’ (Watt, 2007: Headline); ‘a convicted killer ... left a trail of bloodshed in his wake’ (Lane, 2007: 1); ‘Bystanders shot as fugitive flees police’ (“Bystanders shot,” 2007: Headline). After his capture it was again the government and its bureaucracies that came under attack, with one article reporting that ‘[t]he finger of blame over the handling of Burton’s parole turned on the department [of Corrections] yesterday after it confirmed he breached his conditions two weeks in a row ...’ (Kay, 2007: 3). Another quoted National MP Simon Power who believed it was ‘typical of a justice system that too often lets the public down’ (Stevens, 2007: 1). This type of reporting infers blame on specific departments, leading to public concerns about safety and the government’s failure to guarantee this.

Yet, as was noted in a follow up report on the Parole Board’s decision-making, ‘[t]he degree of media and public attention the tragic aftermath of Mr. Burton’s release has generated is a reflection of the relative infrequency of the Board’s decisions ending so badly’ (Johnson & Ogloff, 2007: Par. 4). Reports on the Parole Board’s early release of Graeme Burton (Johnson & Ogloff, 2007; Le Petit, 2007) as well as the report into the management of his case (Elsworth, 2007) acknowledged that appropriate decisions had been made (while suggesting that changes could be made

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<sup>35</sup> From Burton’s parole release date, on 10 July 2006, through to the enactment of the Parole Amendment Act, on 31 July 2007, there were 154 newspaper articles referring to Graeme Burton, 77 in *The New Zealand Herald* and 77 in *The Dominion Post*.

<sup>36</sup> In the end, Burton received a minimum non-parole period of 26 years in prison; the third longest sentence to be handed out by a judge in New Zealand history (“Burton given third longest,” 2007).

in the future). However, the media had already attributed blame to the Parole Board for the breakdown of his case and, in so doing, had helped to create a very angry public and political backlash against penal bureaucracies.

If this case further undermined the credibility of establishment elites, the government was also pressured by members of opposing parties who drew on these events to highlight the government's failings. Leader of the Opposition, John Key, made the following statement regarding then Prime Minister Helen Clark and the Department of Corrections:

She knows that that department is operating in a culture of denial with a catalogue of failure. That is what she knows ... She knows that if that department were doing its job properly, Liam Ashley would be alive. She knows if that department were doing its job properly, a New Zealander would not have died at the hands of Graeme Burton.

(New Zealand Parliament, 2007c: Par. 26-27)

National Party member Chester Burrows followed suit with the following statement:

Let us have a look at the Graeme Burton debacle ... Who was in charge of Graeme Burton at that time? The answer is that it was the Department of Corrections. Burton was on parole, and it was the department's job to watch over him to ensure that his movements were compliant with his parole conditions ... The fact is that this Government does not know how to "do" corrections ... The Minister himself has to accept that the department has never been run so badly ...

(New Zealand Parliament, 2007: Par 1-20)

The government's attempt to reconstruct penal policy had been interrupted by two extraordinary scandals in the media. Not only were these scandals used by opposing MPs to highlight the government's incompetence, the scandals also breathed further life into the Sensible Sentencing Trust.

Along with its advancement of 'Three Strikes' laws after Liam Ashley's death, the Burton scandal provided the Trust with more 'ammunition' to use against the government; first, it was proof that the government favoured criminals over victims, and secondly, that the government's penal bureaucracy was acting against the interests of 'ordinary' people. The Burton case, it was believed, was evidence that

‘parole should be a privilege, not a right’ and Burton had been released ‘because of a scandalous government preference for criminals’ (McVicar, 2007b: Par. 8). The Trust concluded its argument in this case by exclaiming: ‘we will campaign to end parole as a right. There is no truth in sentencing while life does not mean life’ (McVicar, 2007b: Par. 8). The cases of Liam Ashley and Graeme Burton were, therefore, proof that changes needed to be made to New Zealand sentencing policy, as the government’s lack of action resulted in ‘innocent members of the public’ becoming victims of senseless crime (McVicar, 2007c: Par. 4). The government’s failure to address public concerns about crime in the past (see Chapter Three) meant there was immense pressure on it to respond to these two extreme cases.

### **‘Hard cases make bad law’**

However, the government failed to resist these pressures and made amendments to policy on the basis of two extreme cases. Prime Minister Helen Clark acknowledged in March 2007 that amendments to the Parole Act 2002 would ‘enable the Parole Board to respond more effectively to cases like that of Graeme Burton’ (Clark, 2007: Par. 1). Similarly, Justice Minister Mark Burton acknowledged that changes to parole would ‘address issues that were raised by the Graeme Burton case’ (New Zealand Parliament, 2007b: Par. 10). The Justice Minister outlined the changes as follows:

The Parole Act will be amended to make it clear that release on *parole is a privilege and not a right*. The Parole Board will be given the power to make confidentiality orders, which will help to ensure that the Board is in possession of all the relevant information when it is considering a case. The Commissioner of Police will be given the right to apply for the recall of a parolee to prison in limited circumstances. The Parole Board will be given the power to summon witnesses.

(Burton, 2006b: Par. 5, emphasis added)

However, in making the changes the government has done much to undermine its own Effective Interventions strategy, in which parole eligibility and planned sentence reduction were carefully balanced. Similarly as regards prison conditions, when in May 2007 when the Labour government announced that waist restraints were to be used whilst transferring prisoners in the back of prison vans (“Prisoners in

line for waist restraints," 2007). It was noted by then Acting Prime Minister Michael Cullen that this was a direct result of one specific case: 'I think it is worth reminding ourselves that this issue has arisen essentially because a young prisoner in custody was assaulted and killed by another prisoner' (New Zealand Parliament, 2007e: Section 1)<sup>37</sup>. The government's ability to implement penal policy once again rested with public expectations as constructed through the media. While it had attempted to reconstruct penal policy, which would have seen a reduction in crime, reoffending, and imprisonment, the government was too weak to stay committed to the interventions and resist public pressures for change. Instead of following through with its initial plans for Effective Interventions, it yielded to populist demands, changing laws based on the strength of extraordinary cases to prove it was once again in line with public sentiment and mood.

### ***The Underlying Rhetoric of Law and Order***

Thereafter, the government announced that the Effective Interventions would 'enable the government to "stay tough, and be smarter" about crime and punishment' (Burton, 2006c: Section 2). The government was once again making symbolic gestures to determine its legitimacy. Initially, the gestures made by Government were aimed at the public to show that it was 'tough' and in line with public sentiment and mood. The government's execution of Effective Interventions seemed of less concern than the outward appearance that something was being done to stem the ever-increasing prison population in a cost-effective manner. For instance, the long-term programmes designed to prevent crime, targeted at primary (early interventions), secondary (intervention into youth offending) and tertiary (addressing prolific offenders) levels, offered very few new initiatives and seemed to be a low priority for the government despite the admittance by the Prime Minister that 'more can be done on all these scores' (Clark, 2006: Par. 24). The Ombudsmen's report (2007: 39) noted that

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<sup>37</sup> The decision had also come down to cost effectiveness, where van restraints were considerably cheaper than recommendations made in an Ombudsman's report on prisoner transport, which would have seen separate prison compartments and would have come at a cost of up to \$30 million ("Prison vans get belts," 2008).

given the difficulties in measurement [of crime prevention] in a system where statistical results are important as a record of both the organisation's outputs and the individual's work performance, crime reduction may well not be given the focus it deserves.

Indeed, the government chose to prioritise issues that would achieve immediate practical results, adopting a conservative view that focused on the cost-effective management of crime control. In 2008, it was noted in an Effective Interventions progress report that, in July 2006, 'Cabinet approved funding for initiatives that saved prison beds in the short term' (Burton, 2008: Par. 11). In contrast, there appeared to be little urgency in addressing long-term initiatives aimed at reducing crime, as these provided little in the way of immediate political kudos.

The government's attempt to introduce cost-effective initiatives also meant a large amount of attention was placed on the benefits of home detention.

Home detention is an *effective alternative* for low risk offenders who would otherwise receive a short sentence of imprisonment. It provides positive support for reintegration and rehabilitation of offenders; has low rates of reconviction and reimprisonment; high compliance rates; and lower costs than prison.

(Burton, 2006e: Par. 5, emphasis added)

It was estimated that changes to home detention would see a reduction in the need for prison beds by 310, whilst simultaneously reducing overall costs, as the annual cost for holding an offender in prison was \$59,170, compared with \$21,640 on home detention (Burton, 2006e). The Sentencing Amendment Act, which came into force on 1 October 2007, made home detention a 'sentence in its own right' (Clark, 2006: Par. 48). Previously, when an offender was sentenced to two years or less, courts had the power to grant the offender leave to apply for home detention (known as front-end home detention) ("Sentencing Act," 2002)<sup>38</sup>. The changes meant home detention was available as an alternative to imprisonment for lower-risk offenders, involving a maximum term of 12 months, which could also be combined with a term of community work or a fine ("Sentencing Amendment Act," 2007).

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<sup>38</sup> Back-end home detention occurs where the defendant is released on home detention by the Parole Board prior to their parole release date, a factor that was not affected by the new initiatives.

Theoretically, however, the government had simply undertaken a ‘transferability of penal policy’ (Tonry, 2001: 527). In this sense, the government was making another gesture by transferring the placement of punishment, but doing little to alter the punishment itself. This dispersion was considered an ‘effective alternative’ to prison, and at the same time, it served another purpose as it was a way of expediting the reduction in the prison population (Burton, 2006e: Par. 5). Tonry (2001: 527) notes that this form of transfer, provides a ‘punitive sentencing option that can plausibly substitute for imprisonment, and be calibrated to assure proportionality of punishment’. Furthermore, for the government, it was seen as a cost-effective alternative to imprisonment; thus, Tonry (2001: 527) argues, sparing ‘the offenders the pains and the state the costs of imprisonment’. However, the increased reliance on home detention led to further criticisms about being ‘soft’ on crime, with National Party member Kate Wilkinson stating:

We have an increasing prison population. We are building, at exorbitant costs, more prisons. But softening the sentences is not the right, or the safe, way to reduce the number of prisoners.

(New Zealand Parliament, 2006: Par. 11)

Furthermore, changes to the Bail Act, which had arisen from public, political and media pressure in the aftermath of the Ashley and Burton cases, placed the onus on defendants to justify being released on bail (rather than the prosecution justifying a custodial remand) (Burton, 2006d). As a result, fewer offenders received bail and the remand prisoner population grew substantially. In 2000, the remand prison population was thirteen percent of the prison population at 767 prisoners (Ministry of Justice, 2008). By 2008, the remand population (including custodial and sentenced remand prisoners) was twenty percent of the total prisoner population (Department of Corrections, 2008b) with numbers reaching 1718 (Department of Corrections, 2008a). This was an increase of 124 percent over eight years. In the same period, the custodial prisoner population increased by 36 percent. If the remand prison population had increased at the same rate as the prison population, the remand population would have been about 1,043 by 2008, and the total prison population would be around 655 less than the actual prison muster; reducing the prison rate per 100,000 and, in turn, the fiscal demand. If the government had indeed been dedicated to reconstructing penal policy, one would have expected the Effective Interventions



package to prioritise this issue. However, the remand interventions only included expanding electronic monitoring for defendants on bail (which would add to the fiscal costs) and plans for a more efficient pre-trial court process (Burton, 2006d). The reason for lack of any major intervention once again came down to public safety with the Minister of Justice noting:

Radical changes to remand are not recommended because the size of any possible gains would be outweighed by the inevitable increase in the risk of offending on bail and absconding.

(Burton, 2006d: Par. 6)

This was despite the fact that from 2004 to 2006 less than half of defendants on remand were sentenced to a custodial sentence (Smith, 2007), which suggests that these individuals posed little risk in the first place.

## ***The 2008 General Election***

In a final bid to salvage its credibility and show its commitment to criminal justice expertise, the Labour-led government introduced a Criminal Justice Advisory Board in April 2008. Then Minister of Justice Annette King stated that the Board's appointees consisted of 'highly respected people who reflect the diversity of the community, and who will bring a range of skills and perspectives to the board' (King, 2008: Par. 5). It was designed to help generate informed public debate on criminal justice issues and as King stated, it would '[h]elp facilitate constructive community dialogue about criminal justice issues and solutions' (King, 2008: Par. 4). The establishment of the Board was the government's final attempt to enhance public understanding of crime and punishment and, in turn, undermine the influence of penal populism.

However, the 2008 general election interrupted the Labour government's attempt to resist the forces of populism. The National Party considered the proposal for a Sentencing Council to be a representation of the previous Labour government's weakness. It was a sign that the government had 'forgotten what they were elected to do' (Power, 2008b: Par. 39), instead of being heralded as a solution to rising imprisonment and a way out of the populist penal environment. This view is illustrated in the following statement by then shadow Justice Minister Simon Power:

There is no need for an extra layer of bureaucracy. National believes that we already have a body that tells judges how offenders should be sentenced. It's called Parliament. So I'm announcing today, that under a National Government there will be no Sentencing Council.

(Power, 2008b: Par. 42)

The new National government, after the election, came back into the penal populist enclosure, abolishing the Sentencing Council as well as the Criminal Justice Advisory Board, thereby reducing the influence of establishment elites on sentencing matters. The Labour government's final attempt to hand penal power back to experts and resist penal populism had been abandoned.

Overall, the Labour government's attempt to reconstruct penal policy and resist penal populism failed due to the overriding punitive discourse that continues to dominate public and political penal debate in New Zealand. Initially, persuaded by New Zealand's burgeoning prison population and the moral dilemma this had created, the Labour-led government diverged from penal populism in a bid to recover New Zealand's reputation for social justice as well as recognising the economic consequences of what it was doing. The introduction of Effective Interventions looked to reclaim those attributes associated with the post-war penal-welfare era, where there was a commitment to rehabilitation and reintegration and a reliance on expert knowledge. The government's attempt to resist penal populism also created an opportunity for an alternative discourse to be heard in what had become a predominantly punitive debate. In effect, the Sensible Sentencing Trust was not the only voice putting pressure on the government when it came to crime and punishment, allowing for a more informed and open debate on criminal justice issues. Indeed, the prison population dropped from 200 per 100,000 of population in 2007 (Department of Corrections, 2008b) to 185 per 100,000 of population in 2008 (International Centre for Prison Studies, 2008). However, when the media drew on two atypical cases, questioning the government's credibility, the government undermined its own Effective Interventions proposals by implementing punitive legislation in response to public expectations. The 'tough on crime' penal environment that was created in previous years left the government open to populist forces, despite all efforts to diverge from the punitive rhetoric. Furthermore, little had been done to alter the social and political environment in New Zealand which

remained insecure and overtly punitive. Because of this, the government was unable to overcome the power of penal populism, despite the channels of resistance that Effective Interventions had helped create.

# Conclusion

This thesis has explained that since the post-war penal-welfare years, New Zealand has undergone a series of social, economic and political changes that has seen it transform from an outwardly serene and secure society to one that has become more individualistic and divided, providing an ideal breeding ground for penal populism. While crime was on the rise during the post-war years, it was not regarded by citizens as being a particularly significant issue. There was no pressure on politicians to use punitive penal policies to get elected. Furthermore, sentencing policy was dealt with by experts on criminal justice matters and it was the treatment of the offender and the reduction in imprisonment that was paramount in policy and public opinion remained on the exterior of penal policymaking.

However, since the 1980s, New Zealand has experienced economic and political instability due to a number of factors: Labour governments restructured the economy, broadening inequalities and leaving citizens feeling distrustful of government and its political processes; employment patterns began to shift causing insecurity; there was a loosening of social bonds as the country became increasingly heterogeneous and the nuclear family began to erode. The thesis has argued that all of these factors caused immense social insecurity, whilst simultaneously leaving citizens feeling distrustful of a government that seemed distant from their day-to-day concerns. It also explained how the proliferation of the mass media exacerbated these insecurities by offering sensationalised accounts of crime that were visually entertaining, yet lacking in knowledge based research, as it was these accounts of crime and victimisation that suited the requirements of the deregulated media. The changing nature of the mass media led to an increased visibility of crime, where it became a favourable source for politicians looking to gain public support for punitive penal policies. The thesis argued that because of the credibility given by politicians to the 1999 law and order referendum, 'public opinion' has become a fundamental element in the administration of penal policy, while expert opinion is typically sidelined. The referendum also contributed to a 'tough on crime' discourse that has continued to dominate public and political debate on penal policy, *despite* the previous government's attempt to reconstruct contemporary penal policy towards

the end of its tenure. As a result, discourse remains centred on incapacitation and public safety, and any concern the Labour-led government displayed with regards to New Zealand's high imprisonment from 2006 was overthrown when National came to power in 2008. Instead of prioritising the reduction of imprisonment, the present government is approaching criminal justice from a populist perspective, drawing the victim and the law-abiding community once again into the heart of penal debate.

Overall the thesis concludes that in order to resist penal populism, consent for high levels of imprisonment must diminish. Pratt (2008: 379) has argued that there are 'limits to the level of imprisonment that can be provided and sustained, both economically and morally'. In this respect, he argues, when imprisonment jeopardises other areas of society, such as health and education, public consent erodes. However, at present, the National government's commitment to incapacitation has persisted, notwithstanding the consequences for these other, more productive rather than destructive, sectors<sup>39</sup>. Davies (1993: 21) has argued that high imprisonment 'is one form of punishment that instils public confidence'. For the present government it is a way of showing commitment to public safety through incapacitation. While the Labour government at last saw the danger in high imprisonment rates in 2006, and introduced its Effective Interventions strategies, for the new National government, imprisoning dangerous individuals is considered essential in maintaining public confidence *despite* any social and fiscal costs.

The implications of this for New Zealand can be seen in the present government's lack of concern for high rates of imprisonment. This is illustrated in the 'life means life' parole policies that have since been implemented for repeat violent offenders. The new government has approached New Zealand's high rate of imprisonment by delivering solutions that *manage* the high numbers, rather than prioritising its immediate reduction. This suggests that the government has accepted these rates will continue for some time and the best way of approaching it is to manage it effectively. The new approach includes proposals for privatisation and double bunking in prisons. Privatisation is considered by the new Minister of Justice to be an

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<sup>39</sup> To illustrate this point, Bill English, the new Finance Minister, announced plans to cut tertiary spending to allow for expansion in the probation and corrections service after making the following statement: 'We have to decide whether pre-commitments to adjustments in tertiary institutional funding 3 or 4 years away are more important than the growing demand on the probation service and corrections service' (New Zealand Parliament, 2009: Par. 4).

‘innovative’ (Collins, 2009b: Par. 1) way of approaching prison expansion, although, the private sector will have a vested interest in maintaining high levels of imprisonment. Such high rates can be expected, given that the prison population in May 2009 was 195 per 100,000 (8,300 prisoners) (Broun, 2009), up from 185 per 100,000 of population in 2008 (International Centre for Prison Studies, 2008), thus proving that the slight decline from 2007/2008 was a ‘false down’ and the National government has renewed its commitment to penal populism. Added to privatisation are proposals for double bunking. This is seen as a cost-cutting solution to New Zealand’s burgeoning prison population, adding 1,000 beds to New Zealand’s prisons (despite the effects this has both on prison staff and on prisoners) (Collins, 2009a). The government has also announced that Mount Crawford prison will be reopened in July 2009 to deal with rising numbers, after it was closed in June 2008 when prison numbers were in decline (Williamson, 2009). These strategies illustrate the acceptance of high prison numbers in New Zealand and are suggestive of the new direction penal policy will take in future years.

It has become clear that for those wanting to resist penal populism, one of the strongest forces is the punitive discourse that has become so engrained in both public and political debate on penal policy. This has been exacerbated by groups such as the Sensible Sentencing Trust who use this type of rhetoric to gain public and political support. The media’s continual reliance on simplified crime reporting, which offers no in-depth analysis of crime and justice, has meant that the public continue to be presented with a distorted view of reality. As a result, punitive policies put forward by the Trust and politicians are increasingly seen as attractive to the public whose anxieties surrounding crime remain high. Moreover, any efforts to oppose penal populism, such as the previous government’s Effective Interventions strategies, come across as being ‘soft’, as they are positioned against the punitive discourse that has become so familiar in penal policy debates. Potentially, then, strategies opposing penal populism need the strength to counter the punitive tide that has once again been created; otherwise, any opposing strategies of penal populism will be undermined, as was previously the case with the Labour government and its Effective Intervention initiatives.

The thesis has explained and analysed the consolidation of the Sensible Sentencing Trust in New Zealand and the influence it has had in penal policy development. As a depiction of the force of penal populism in New Zealand, the Sensible Sentencing Trust has secured itself a position in the public and political arena, unlike more fragile pressure groups, which coalesce very quickly then soon disappear. The authority it has gained as a perceived representative voice for victims means its views are increasingly used in the media. Furthermore, politicians continue to align themselves with the Trust to show they are committed to victims of crime. Overall, this looks set to continue as the National Party has promised to place the victim at the centre of the criminal justice system (Power, 2008a).

The thesis has also explained the changing role of the victim in the criminal justice system, where the victim has become central to public and political debate on sentencing and penal policy. The present government's priorities could not have been clearer when, after coming to power, it announced that the \$5.8 million set aside for the Sentencing Council, the project of the previous Labour government, along with the \$90,000 that was to be spent on the Criminal Justice Advisory Board annually (Power, 2009), would be used to establish a Victims' Compensation Scheme. Along with this, the government has pledged to bring 'fairness' back to the criminal justice system, a fairness that involves prioritising the rights of victims rather than their offenders (Power, 2008b). This, however, seems likely to be another set of symbolic gestures made by the government to crime victims, where they receive only token compensation (while all convicted offenders at sentencing also having to pay a \$50 levy for the victim fund). This will once again raise public expectations surrounding victims' rights, as was the case with the Victims Rights Act 2002, giving further momentum to the Sensible Sentencing Trust and populist forces. Justice Minister Simon Power, for example, states that '[f]airness is the expectation that criminals don't get more rights than their victims', and further, that fairness was the government responding to public fears about crime (Power, 2008b: Par. 5). What can be seen, therefore, is a return to the constraints of penal populism, where the definition of 'fairness' in contemporary New Zealand involves degrading the rights of offenders if this favours victims.

However, while the present government rejected any efforts to include expert opinion when it disbanded the Advisory Board and the Sentencing Council, it was willing to take a different approach when it came to the economy. Due to the global economy experiencing the deepest recession since the 1930s, New Zealand has been affected ‘both directly, through a reduction in demand from our trading partners, and indirectly, through a contraction in global credit’ (English, 2009b: 2). As one solution, the National government also introduced a National Infrastructure Advisory Board to ‘help formulate the first 20-year National Infrastructure Plan’ (English, 2009a: Par. 2). The members were chosen based on their ‘individual skills and collective knowledge’ to ‘engage with the private sector, local government and other stakeholders’ in order to discuss barriers that have been slowing investment in New Zealand (English, 2009a: Par. 3.5)<sup>40</sup>. The government is willing to approach the economy using expert opinion and analysis, as it is a way for the government to show that it is committed to providing security to its citizens. Yet, when it comes to criminal justice issues the power of penal populism is unmistakable, where expert opinion and analysis is considered to be an unnecessary ‘layer of bureaucracy’ and it is the public, and victims needs, that are of paramount importance (Power, 2008b: Par. 42). One person’s opinion, however much or however little they know, is regarded as the equal of anyone else’s in this field.

Overall, the thesis concludes that any attempts to oppose penal populism require the secure social and political setting to support it. While there continues to be a gathering of alternative voices critiquing penal populism and its outcomes, the main determinants of penal populism remain powerfully strong in New Zealand: high imprisonment has become an acceptable feature of New Zealand society; little has been done to minimise the mass media’s over-reporting of crime; the victim remains central to criminal justice debates, driving groups such as the Sensible Sentencing Trust; and public sentiments continually overrule expert opinion and analysis in the development of sentencing and penal policy and have become the driving force of law and order. The opposing forces may be successful in strengthening informed public debate on these issues, but they are unlikely to be successful unless these

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<sup>40</sup> The government has also established a taxation working group to ‘look at medium term policy options for the taxation system’ (Buckle, 2009: Par. 1). The members comprise of ‘officials, private sector and academic experts’ and are required to provide ‘tax policy discussion that can feed into advice to ministers and wider public debate’ (Buckle, 2009: Par. 5).



main determinants are addressed. As I conclude this thesis on 12 June 2009, the future implications of having a government that is not outwardly concerned with penal populism were detected, when on Radio New Zealand, in its flagship 'Nine to Noon' current affairs programme, a guest speaker was giving her opinion on why a proposed Three Strikes law (put forward under the Sentencing and Parole Reform Bill by the Act Party) does work. The speaker (an 'expert' on 'Three Strikes' from the United States) was brought to New Zealand by the Sensible Sentencing Trust and her speech symbolises the power of penal populism in New Zealand society.

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