

Departmental Disclosure Statement

Sentencing (Reform) Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

September 2024

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Part One: General Policy Statement

The Sentencing (Reform) Amendment Bill (the **Bill**) amends the Sentencing Act 2002 to strengthen the consequences of offending and ensure offenders take personal responsibility for the harm they cause.

The Bill responds to a reduction in the use of imprisonment in recent years. Since 2016/2017, fewer people have been sentenced to imprisonment and there has been a trend towards the use of higher level community sentences including home detention, community detention and intensive supervision (*Justice Sector Long-term Insights Briefing (2022)*, accessible at https://www.justice.govt.nz/assets/Documents/Publications/14.02.2023-LTIB_Report_extended_final_v5_Web.pdf). That is despite an increase in the average seriousness of crime committed by offenders since 2016/2017 calculated from underlying datasets used to create Ministry of Justice data tables, as at March 2024: *People charged and convicted data tables*, accessible at—

- https://www.justice.govt.nz/assets/Documents/Publications/3WOnHV_Peoplewith-finalised-charges-including-convicted-charges_dec2023_v1.0.xlsx

To achieve its objectives, the Bill—

- amends the principles of sentencing to take into account any information provided to the court about victims' interests. This is to give greater prominence to victims in sentencing decisions:
- introduces new aggravating factors. This is to address concerns about crime against public transport workers acting in the course of their duties, sole charge workers and those whose home and business are connected, deter adults from exploiting children and young people by aiding or abetting them to offend, and deter offenders livestreaming or posting serious crime online which may encourage copycat offences:
- limits the use of sentence reductions to 40% of the sentence when considering mitigating factors personal to the offender. The Bill also provides judicial discretion to depart from this 40% limit if the sentence would be manifestly unjust. Limiting the use of sentence reductions is to prevent unduly lenient sentencing:
- implements a sliding scale setting out maximum sentence reductions for guilty pleas that decreases the reductions the further into the court process a defendant pleads guilty. This is intended to maintain fair trial rights but avoid unnecessary trauma for victims, improve court timeliness, and reduce public expenditure:
- prevents repeat use of sentence reductions for youth and for remorse. This is to increase personal responsibility of offenders:
- encourages the use of cumulative sentencing for offences committed while on bail, in custody, or on parole. This is to denounce behaviour that indicates a disregard for the criminal justice process.

In addition, the Bill makes some minor but beneficial adjustments to sentencing law to clarify the law and provide more certainty. For example, by enabling the Judge to issue a warrant to arrest an offender who fails to appear at a judicial monitoring hearing. The Bill also makes a consequential amendment to the Family Court Rules 2002 to support the making of a protection order for family violence offences where the offender is being discharged without conviction for a family violence offence.

Possible alternatives for sentencing regulation to achieve the policy objectives included increasing penalties for particular offences. These were not progressed because of the specific nature of Government coalition commitments.

Aspects of the Government's objectives could potentially be achieved by the establishment of a sentencing council, which would issue evidence-based guidelines that provide comprehensive and structured direction on sentencing. This would improve transparency and consistency of approach in sentencing, ensure courts have access to detailed guidance, and be more flexible than primary legislation. A sentencing council would likely operate with a degree of independence. However, these benefits would take some time to be realised and would not necessarily result in tougher sentencing outcomes overall, so this was not considered a feasible option. The Sentencing Reform Amendment Bill (the Bill) amends the Sentencing Act 2002 to strengthen the consequences of offending and ensure offenders take personal responsibility for the harm they cause.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	NO
The policy to be given effect by the Bill was developed in response to sentencing commitments in the Coalition Agreement between the National Party and the ACT Party (54 th Parliament), and the Coalition Agreement between the National Party and New Zealand First (54 th Parliament).	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>The Ministry of Justice produced a regulatory impact statement (RIS) on 30 May 2024: <i>"Amendments to the Sentencing Act 2002"</i>.</p> <p>The RIS can be found and downloaded from the Ministry of Justice's and Treasury's website: https://www.justice.govt.nz/justice-sector-policy/regulatory-stewardship/regulatory-impact-assessments/ https://www.treasury.govt.nz/publications/legislation/regulatory-impact-assessments</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
The RIS above did not meet the threshold for receiving an independent opinion on its quality from the RIA Team based in the Treasury.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES
The regulatory impacts were not analysed for the new aggravating factor for offending where the victim was a public transport worker because it was added to the bill one working day before Cabinet agreement to introduce the Bill. This new aggravating factor is likely to have the same regulatory impacts as the new aggravating factor where the victim was working alone, which was analysed in the RIS. The main difference is that a public transport passenger service worker may be working with other workers who are not immediately available to help.	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	YES
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A supplementary analysis report on the two aggravating factors from the Ram Raid Offending and Related Measures Amendment Bill ('Ram Raid Bill') has been prepared. The Ministry of Justice Regulatory Impact Analysis Quality Assurance Panel has reviewed the Supplementary Analysis Report (SAR) prepared by the Ministry of Justice and consider that the information and analysis summarised in the SAR partially meets the Quality Assurance criteria.

The proposal for two additional aggravating factors to be added to the Sentencing Act 2002 will be progressed alongside the package of amendments analysed in the earlier *Regulatory Impact Statement: Amendments to the Sentencing Act 2002* (the RIS). As for that package, this proposal was developed under several constraints. Time constraints have meant that consultation outside of government and a more sophisticated analysis of the extent of the problems the proposal is intended to address and the likely impact on sentencing, drawing on a review of relevant cases, was not possible. The SAR nonetheless draws on what information is available to indicate the potential benefits, risks, and costs of the proposal.

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
Analysis of the expected benefits and costs for the policy is available in the RIS (see pages 22, 23, 24, 32, 33, 48, 49, 50, 51, 65, 66 and 67).	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>The courts apply and interpret legislation in light of its purpose (using the modern purposive approach to statutory interpretation). The Bill provides exceptions to limitations on sentencing reductions which allow for the courts to depart from the general rules if doing so would be manifestly unjust. The extent to which the judiciary are likely to apply these exceptions is unclear, however, the threshold for meeting the 'manifestly unjust' standard is high, so we expect a high degree of effective compliance.</p> <p>The Ministry of Justice will ensure that court registry staff know about the law changes, and the Ministry of Justice's case management system has been updated and is ready for when the changes come into effect. Judicial education through the Institute of Judicial Studies will be required to embed these changes. The Ministry of Justice will communicate the changes to court registry staff, to legal professional bodies, the New Zealand Police (Prosecutions Service), other government prosecuting agencies and the Public Defence Service to ensure compliance with the updated law.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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New Zealand's international commitments have been considered by Ministry of Justice officials in the policy development of the proposals. This includes international human rights obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Convention on the Rights of the Child (UNCROC). These include obligations not to arbitrarily deprive individuals of their liberty and not to employ cruel, inhuman, or degrading treatment or punishment. In developing these proposals, officials took into account the importance of facilitating consistency with international obligations. For example, excluding under 18-year-olds from the limitations on youth discounts aligns with our obligations under UNCROC.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Ministry of Justice has carried out Treaty of Waitangi (the Treaty) analysis on the policy proposals in this Bill in accordance with Cabinet Office requirements, to determine implications for the rights and interests of Māori protected by the Treaty and whether the effect of the Bill on those rights and interests are consistent with the Treaty. Policy advisors also consulted policy advisors in the Ātea a Rangi – Strategy Unit who have expertise in Treaty of Waitangi and Māori matters.

Māori will be disproportionately affected by the sentencing policies in the Bill and there are claims currently in front of the Waitangi Tribunal related to sentencing in *Te Rau o te Tika – The Justice System Kaupapa Inquiry* (Wai 3060). The Crown has an obligation to make informed decisions by consulting with Māori, consistent with the partnership principle and duty to act in good faith. Due to time constraints resulting from the legislative timetable, no external Māori groups or organisations were consulted by the Crown on the policy underlying this Bill. The lack of consultation and time constraints has limited the development of alternatives which may have been more consistent with Treaty principles. Officials were also restricted in their ability to develop alternative policy options as the scope of the substantive legislative changes is limited to implementing Coalition Agreement commitments.

The select committee process will allow for submissions from the public, including iwi and Māori, on the Bill's consistency with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

The Bill will be vetted for consistency with the New Zealand Bill of Rights Act 1990 by Crown Law Office.

Advice provided to the Attorney-General by the Crown Law Office, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>While the Bill does not create, amend, or remove any offences or penalties, the Bill has an indirect effect on the level of penalties that are imposed on offenders, by capping sentencing reductions unless manifestly unjust (clause 7, new section 9F), by introducing a sliding scale for guilty pleas (clause 7, new section 9C) and by limiting repeat use of sentencing reductions for youth and remorse (clause 7, new section 9B).</p> <p>The Bill also amends court powers and the orders courts can make:</p> <ol style="list-style-type: none"> 1. Clause 15 (new section 142R) provides that the court may order the destruction or disposal of weapons used in offending. This aligns the Sentencing Act 2002 with existing practice by enabling the destruction of all types of weapons used in offending. This change clarifies and codifies existing sentencing practice. 2. Clause 11 (new section 80ZLA) provides the court the power to issue a warrant to arrest an offender and bring them before the court when they have failed to appear for a judicial monitoring hearing, which is a condition that can be imposed on offenders sentenced to home detention. Where the court orders an offender to attend a judicial monitoring hearing, and the offender fails to appear, this change enables the court to compel the offender to comply with the judicial monitoring condition without the probation officer having to charge the person first. 3. Clause 10 (new section 80GA) enables warrantless arrest where an offender has lost their home detention address and Corrections is unable to file an application for a variation of the sentence (e.g., outside normal business hours). The change clarifies what should happen when an offender has lost their home detention address and Corrections is either not yet able to file an application to vary the sentence or is awaiting a court determination. Home detention is a restrictive sentence often imposed as an alternative to imprisonment and there are safety risks associated with the offender having nowhere to go in these circumstances. If an alternative suitable address is found, the offender should be released from custody to that address. 4. Clause 14 (new section 123B(1)(a) clarifies that the court has power to make a protection order at sentencing for a family violence offence even if the sentence is a discharge without conviction. 	

3.4.1. Was the Ministry of Justice consulted about these provisions?	NO
The Ministry of Justice was the lead agency for developing these provisions, and the relevant policy teams were consulted during policy development and drafting of the Bill.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
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Clause 6 makes it an aggravating factor at sentencing if an offender livestreams or posts a recording of offending online. The clause will maintain current New Zealand Police powers relating to the collection, access, use of personal information.

Clause 7 requires information about offenders' sentence reductions for youth and remorse to be included in the permanent court record. This is consistent with existing rules requiring information about charges and determinations to be recorded in the permanent court record.

3.5.1. Was the Privacy Commissioner consulted about these provisions?

YES

The Office of the Privacy Commissioner was consulted on the draft Bill.

The detail of this is set out in Appendix 1.

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?

YES

During policy development the Ministry of Justice consulted representatives of the judiciary, the New Zealand Law Society, the Parole Board, the Public Defence Service, and the Chief Victims Advisor to Government.

During drafting of the Bill, the Ministry consulted the Office of the Privacy Commissioner (see section 3.5.1 above), and some non-departmental central government agencies with prosecution functions. The detail of this is set out in Appendix 1.

More widespread external consultation with the general public or other groups was not carried out because of time constraints and Ministerial direction.

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?

NO

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>The Bill impacts judicial discretion to determine the sentence by limiting the use of sentencing discounts through the introduction of a 40 per cent cap, introducing a sliding scale for sentencing reductions for guilty pleas, and preventing the repeat use of discounts for youth and remorse. However, the Bill provides a limited ability to depart where the "manifestly unjust" exception applies. The court must also take into consideration factors listed in the Bill when determining the size of the sentencing discount for a guilty plea.</p> <p>Offenders can appeal sentencing decisions.</p> <p>The Bill also includes minor sentencing-related proposals that provide the court the power to:</p> <ul style="list-style-type: none">• issue a warrant to arrest an offender and bring them before the court when they have failed to appear for a judicial monitoring hearing which is a potential condition of home detention, and• enable warrantless arrest where an offender has lost their home detention address and Corrections is unable to file an application for a variation of the sentence (e.g., outside normal business hours). If an alternative suitable address is found, the offender should be released from custody to that address. There are safeguards about when the power should be used and what should happen once an arrest is made, which have mitigated rights concerns.	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO
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Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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Appendix One: Further Information Relating to Part Three

External consultation – question 3.6

Consultation during policy development

1. In April 2024, during policy development of the Bill, the Ministry of Justice consulted representatives of the judiciary, the New Zealand Law Society, the Parole Board, the Public Defence Service, and the Chief Victims Advisor to Government about the workability of options. Feedback received through targeted consultation raised some concerns about the rationale for the law changes, notably that:
 - taking a tougher approach to sentencing may limit opportunities for rehabilitation. Over time rehabilitation may result in fewer victims and better outcomes for communities;
 - prioritising victims' interests at sentencing shifts the focus towards achieving redress between individuals, potentially resulting in different sentences for similar offending; and
 - judicial sentencing decisions respond to emerging evidence (for example in response to scientific understanding of adolescent brain development) and this practice may influence sentencing trends, rather than greater leniency.
2. The targeted consultation also identified concerns about unintended consequences arising from the proposals, including unjust sentencing outcomes, more complex sentencing and resulting appeals that could exacerbate delays in the court system. As far as possible, the legislative design of the sentencing commitments has sought to address these concerns.
3. Concerns were expressed that limitations on sentence discounts may disincentivise offenders from taking steps that could benefit victims, such as expressing remorse, making reparations, and participating in restorative justice.
4. More detailed feedback can be found on Pages 4, 13, 14, 16, 39, 44 and 45 of the Regulatory Impact Statement.

Consultation with the Office of the Privacy Commissioner during drafting of the Bill

5. In August 2024, the Office of the Privacy Commissioner was consulted during the drafting of the Bill. The Office queried the effect of clause 6 (new aggravating factor for livestreaming/posting of a recording of offending online) on New Zealand Police powers regarding gathering of information. No Police powers are created or amended by the Bill in relation to gathering information.
6. Clause 7 (new section 9B) provides for information about offenders' sentence reductions for youth and remorse to be included in the permanent court record. The Office of the Privacy Commissioner queried the policy rationale and whether any other sentencing information is on the permanent court record. Including youth and remorse discount records on the permanent record is the mechanism by which the court, prosecutors and judges can ensure that sentence reductions for youth or remorse are not applied more than once if the offender reoffends later, consistent with the overall policy intent. It is also consistent with existing rules requiring information about charges and determinations to be recorded in the permanent court record.

Consultation with some non-departmental central government agencies with prosecution functions during drafting of the Bill

7. In August 2024, the Ministry of Justice provided a draft of the Bill to relevant departmental central government organisations, and to the following non-departmental central government organisations that have prosecution functions: Commerce Commission, Fire and Emergency New Zealand, Financial Markets Authority, Human Rights Commission, New Zealand Transport Agency, Real Estate Authority, and WorkSafe New Zealand. The Commerce Commission, Fire and Emergency New Zealand, Financial Markets Authority,

Human Rights Commission, New Zealand Transport Agency, Real Estate Authority did not comment.

8. WorkSafe commented that Clause 9(1)(fb) (new aggravating factor for sole charge workers and people whose home and business are connected) is likely to be relevant to health and safety sentencings. The Health and Safety at Work Act 2015 prosecutions can relate to incidents where a victim (a worker) was injured or killed when working alone or when working in a business that was joined to or near their home. While a sentencing Judge may find that these factors are aggravating on a particular set of facts, singling them out as aggravating would be an unusual focus in WorkSafe's prosecutions context.
9. WorkSafe also supported the addition of the sliding scale of maximum reductions for guilty pleas in clause 7, to encourage consistency in sentencing. WorkSafe also supported that this is not compulsory for sentences other than imprisonment. The majority of WorkSafe's prosecutions are in respect of finable-only offences. WorkSafe understands that this means that a sentencing judge would have discretion as to whether to apply the sliding scale.