

Supplementary Analysis Report: Two additional aggravating factors

Coversheet

Purpose of Document	
Decision sought/taken:	<p>This analysis was produced following advice from the Ministry of Regulation.</p> <p>A Supplementary Analysis Report (SAR) must be produced when an inadequate impact analysis proceeds and substantive decisions are made. In this instance, the aggravating factors were included in the Ram Raid Offending and Related Measures (Ram Raid) Bill, which was introduced to the House in August 2023. Due to time constraints, a Regulatory Impact Assessment could not be prepared, instead, a SAR was to be produced for it.</p> <p>The proposals in the SAR will be included in the Sentencing (Reform) Amendment Bill. The proposals share the same wider context outlined in the Regulatory Impact Statement: Amendments to the Sentencing Act 2002 (the RIS).</p>
Advising agencies:	Ministry of Justice
Proposing Ministers:	Ministry of Justice
Date finalised:	11 September 2024
Problem Definition	
<p>In recent years, there have been growing concerns about increases in the rates of retail crime reported to the Police. In some cases, the offending has involved adults being accompanied by children and offenders glorifying criminal activity by livestreaming or posting online. In the time available, it has not been possible to gather data on the prevalence of this conduct.</p>	
Executive Summary	
<p>The Sentencing Act 2002 sets out aggravating factors that judges must take into account at sentencing. Generally, the presence of an aggravating factor results in an uplift to the sentence.</p> <p>The Sentencing (Reform) Amendment Bill (the Bill) seeks to ensure tougher sentencing through a range of measures. These include the addition of a new aggravating factor of offending against victims who are working alone or where a victim’s business is physically joined to, or next to their home. To address the problem definition identified above, two additional aggravating factors are proposed, requiring the court to take into account whether:</p> <ol style="list-style-type: none">1. the offender livestreamed or posted a recording of their offending on the internet or similar online application, and2. the offender (aged 18 or over) has been convicted as a party to an offence committed by	

a child or a young person (as defined in section 2(1) of the Oranga Tamariki Act 1989).

There has been a steady growth in the number of aggravating factors in section 9 of the Act since 2002, which means that judges are required to take into account increasingly specific and potentially overlapping considerations when calculating sentences. To avoid making sentencing unduly protracted, it is generally advisable not to introduce further aggravating factors unless there is a clear gap in the law. On this basis and due to the time constraints to conduct a robust analysis of the influence of social media on retail crime, and sentencing outcomes for ram raid cases, our preferred option is the status quo.

These new aggravating factors are expected to have a relatively small impact on sentencing. This is because the concerning conduct they respond to can already be taken into account by the sentencing judge using the extensive range of aggravating factors already available under the Act. In particular, 9(4)(a) enables the court to take into account any other aggravating and mitigating factors it sees fit.

Recognising that the Government has already committed to introducing the new aggravating factors referred to above, we have assessed the likely impacts and risks and any mitigations that may be needed to address them. The primary impacts are:

- the potential for arbitrary sentencing outcomes in cases where offenders are close in age but fall either side of the 18 year age threshold
- a minor increase in sentence lengths where aggravating factors are relevant to the case
- sentencing becoming increasingly complex overall due to the accumulation of new aggravating factors.

We consider these potential impacts are not significant enough to require specific mitigations. Sentencing judges have sufficient flexibility under the existing law to avoid arbitrary sentencing outcomes by taking into account the particular circumstances of the case. Any increase in sentence lengths will be very minor relative to the impacts of the wider sentencing reforms, which are being factored into ongoing budget decision-making. The raising of the judicial cap which is part of this package of sentencing reforms will help to ameliorate the impact of more complex sentencing.

The Office of the Privacy Commissioner raised concerns that enforcement of these aggravating factors requires monitoring social media channels which may result in an intrusion into the privacy of individuals who are not directly involved with the crime.

Officials will monitor the impact of the present sentencing reforms in the coming years. As far as possible, the evaluation will consider the specific impacts of the new aggravating factors, including any privacy concerns that may arise. We do not expect there to be issues in this regard, as the new aggravating factors do not alter the legal powers available to Police to monitor social media accounts.

Limitations and Constraints on Analysis

Constraint leading to supplementary analysis: This analysis was not included in the RIS because the RIS was completed before the Minister of Justice directed officials to progress the new aggravating factors through the Bill. Because the inclusion of these two additional proposals came after Cabinet's agreement to the policy proposals for the Bill, the analysis was further constrained in the following ways:

Time constraints: the Ministry has had insufficient time to assess the problem definition, for example to establish the extent to which offenders are posting offending online or encouraging children and young people to offend or involving them in their criminal

behaviour.

Analysis of potential impact: The Ministry has also been unable to assess the potential impact the inclusion of the aggravating factors could have on sentencing. Had officials had time, we would have:

- sourced a selection of sentencing notes of ram raid cases, and analysed how sentences were calculated, and conducted a demographic analysis based on age, ethnicity and region
- conducted research on the impact of social media on offending
- looked at non-legislative approaches to addressing the influence social media on offending; and
- assessed how effectively other comparable jurisdictions respond to this type of offending.

Narrow scope: the Ministry was commissioned to include these proposals in this Bill. The specificity of the commissioning, and decision to include the factors as they are, meant that identification and analysis of other options was not feasible in the timeframe.

Lack of consultation: due to the stage at which these proposals were included as part of the Bill, these proposals were not part of the policies the Ministry undertook targeted consultation on. Their late addition meant we could not engage with Treaty partners or strategic partners. Consultation was very limited, as part of standard circulation of the draft Bill, to key agencies. With more time, we would have consulted on the issues raised by the Privacy Commissioner. There will be opportunity for stakeholders to comment on the Bill at the Select Committee stage.

The section on the limitations and constraints on page 3 of the RIS are relevant.

Responsible Manager(s) (completed by relevant manager)

Oliver Sanders
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Ministry of Justice



12 September 2024

Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry of Justice
Panel Assessment & Comment:	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.

Given the policy has already been approved, a key purpose of a SAR is to analyse the risks associated with a proposal. The SAR does a good job of analysing the risks and how they have been, or will be, mitigated. The panel also notes the statement in the SAR that the Ministry of Justice will monitor and review changes in sentencing outcomes, case times, appeals and other judicial decisions that relate to the amendments made. The Panel agrees with the view expressed by the Panel in respect of the RIS that a formal evaluation in future of whether the overall package of amendments is meeting the outlined objectives, and identifying any unintended consequences, would be beneficial.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem?

The aggravating factors were contained in the Ram Raid Bill

1. The proposals have been carried over from the Ram Raid Bill so that the law changes can be brought into effect quickly through the Bill. The Government has committed to introduce the Bill by 30 September 2024 as part of its quarterly action plan.
2. A RIA was not completed for the Ram Raid Bill nor was a SAR. The Ministry for Regulation has advised that a separate SAR must be completed for the two aggravating factors for this Bill.

The factors respond to Government's commitments to restore law and order

3. The Government's priorities for this term include law and order. As part of this, they have committed to introducing two new aggravating factors that the court must take into account where applicable:
 1. the offender livestreamed or posted a recording of their offending on the internet or similar online application, and
 2. the offender (aged 18 or over) has been convicted as a party to an offence committed by a child or a young person (as defined in section 2(1) of the Oranga Tamariki Act 1989).
4. These proposals, along with the other proposals in the Bill and the reinstatement of the three strikes law, are part of a commitment to taking a tougher approach to sentencing and tackling gangs.
5. The Sentencing Act provides courts with the tools to consider additional aggravating factors that are not specifically identified in section 9 of the Act. For example, under the existing aggravating factor section 9(1)(d), the court is required to consider the extent of loss, damage or harm resulting from the offence. Section 9(4)(a) enables the courts to take into account any other aggravating factor they think fit and states nothing implies that a factor listed must be given greater weight than any other factor the court might take into account.
6. Under current law, an adult who commissions or encourages a child or young person to offend is liable as a party to that offence pursuant to section 66 of the Crimes Act 1961. This means anyone who is a party to an offence is liable to the same maximum penalty as the person who carried out the actual offence.

What is the policy problem or opportunity?

7. The policy problem for these additional aggravating factors arises out of the same context outlined in the main RIS on page 9 including public concern over high profile offending such as ram raids and retail crime, and the lower rates of imprisonment (13.2 per cent in 2019/2020 compared with 11 per cent in 2022/2023).
8. Between 2018/19 and 2023/24, the number of reported victimisations in retail locations more than doubled. Police has indicated the introduction of other reporting channels such as the non-emergency reporting number 105 and online platform is driving an increase in overall reported crime.
9. The bulk of reported victimisations in retail locations are thefts (approximately 90 per cent) and most of the increase over the period has been for theft. However, there has also been a 42 per cent increase in recorded violent victimisations occurring in retail locations since 2018/19.
10. Within this context, there is concern over two specific behaviours that may feature in offending (whether retail crime, ram raid offending or other types), due to the level of potential harm:

Problem one: The increased accessibility and use of smartphones as well as the prevalence of social media applications such as Snapchat and TikTok present new challenges for the criminal justice system. Anecdotally, we understand that there is an emerging trend of offenders posting or sharing their criminal behaviour online to friends and followers, often resulting in this footage ending up in the public domain. This can encourage reckless behaviour and copycat offending.

Problem two: Adults encouraging or commissioning children or young people to offend on their behalf or become involved in their criminal offending is particularly nefarious and can have lifelong detrimental consequences on the child or young person. While commissioning or using children and young people to offend may be part of recruitment to an organised criminal group, the exploitation of vulnerable children or young people can arise in any context (including a belief that children will not be prosecuted).

International jurisdictions are taking different approaches to address social media influence

11. Officials have not found evidence of international jurisdictions taking a similar approach to concerns about social media. However, some comparable jurisdictions are creating new offences. For example, in August 2024, the Queensland Government passed new legislation that introduced a stand-alone offence for publishing material on social media depicting crimes where the purpose was to glorify the conduct or increase someone's reputation. It is too early to determine the impact of the legislation.
12. The New South Wales Government plans to introduce legislative changes to strengthen bail laws and introduce a new offence for disseminating material to advertise an offender's involvement in or commission of targeted serious offences.

The New Zealand legislative framework enables the courts to consider a range of factors

13. To determine a sentence, New Zealand courts consider the individual circumstances of the case, guided by the overall framework of the purposes and principles as they are set out in the Sentencing Act. They consider any guideline judgments and previous cases that consider similar offending. The court must also consider the non-exhaustive list of aggravating factors set out in Section 9 of the Sentencing Act, which can result in an uplift in the offender's sentence. The courts determine the relevant factors to the offending and the weighting.
14. While the Act does not prescribe aggravating factors that relate to the role of adults in the commissioning of offending by a child or young person, or recording and posting the offending online, the courts can take these factors into account under section 9(4)(a). However, there is no certainty that courts will take into account these specific factors during sentencing.

Time constraints have limited evidence gathering

15. Research shows that peer influence is a strong factor in anti-social behaviour and is heightened by the use of social media.¹ While it may be generally true that the negative impacts of offending are magnified when shared online such as the glorification of such behaviour, the Ministry has not reviewed the evidence on the impacts of sharing criminal behaviour online or the extent to which these aggravating factors would impact retail offending due to time constraints and the narrow scope.

What objectives are sought in relation to the policy problem?

16. As with the aggravating factor analysed in the RIA, the overarching objective of these additional proposals is to strengthen the consequences of offending.
17. In particular, this proposal seeks to denounce conduct that is particularly serious or harmful. In doing so, the proposals seek to improve public safety.

¹ [It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand - June 2018 - Office of the Prime Minister's Chief Science Advisor \(dpmc.govt.nz\)](#) see paragraphs 3, 17 and 18.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

18. Given the similarity in overall context and policy objectives with the aggravating factor analysed in the regulatory impact statement for the Bill, the same criteria will be used to compare the Government's preferred option to the status quo. The criteria are:
 1. Prioritising victims and reducing victimisation
 2. Ensuring appropriate consequences for offending
 3. Impacts on courts and the corrections system
 4. Workability and consistency with relevant laws and obligations

What scope will options be considered within?

19. As outlined in the overview, the specific nature of the Government's intention to progress these proposals, and the timeframe of the overall Bill, has restricted the range of options that can reasonably be considered. The only practical alternative is to retain the status quo.

What options are being considered?

20. Two options for each proposal have been identified:
 1. **Option one** – status quo; and
 2. **Option two – (for Proposal A)** introducing a new aggravating factor where the offender has livestreamed, posted or shared a record of their offending online; and
 3. **Option two – (for Proposal B)** introducing a new aggravating factor for where the offender is an adult who is convicted as a party to an offence committed by a child or young person .
21. Given the similarity of the impacts between the two aggravating factors, both proposals have been simultaneously analysed within the cost benefit analysis. Where impacts are different between the two proposals, this has been explicitly referred to in the table in and the body below.

Option One – *status quo*

22. The status quo could be maintained. Submissions from stakeholders on the Ram Raid Bill stated that the additional harms to victims by offenders posting their offending online is capable of being taken into account at sentencing. Section 9(1)(d) requires the courts to consider the extent of loss, damage or harm resulting from the offence. Section 9(4)(a) enables the courts to consider any other aggravating (and mitigating) factors they see fit.
23. The Crimes Act 1961 provides tools for the courts to consider the role of adults in the commissioning of offending. An adult who commissions or encourages a child or young person to offend is liable as a party to that offence pursuant to section 66 of the Crimes Act. This means anyone who is a party to an offence is liable to the same maximum penalty as the person who carried out the actual offence.
24. If the proposed aggravating factors are not included in the Act, courts will still have the ability to consider the relevant facts of each case, including the presence and extent of these sorts of factors where applicable and, using their discretion, to consider them in determining the appropriate sentence.
25. Maintaining the status quo also avoids potential issues with attempting to capture the circumstances in which it is relevant for the court to treat the offender's publication or sharing of a record of their offending as an aggravating factor. This may unintentionally

limit the court's ability to consider it in appropriate cases where the facts do not align with the construction prescribed in the Act.

26. The Ministry has been unable to investigate the impact the two new aggravating factors could have on current sentencing practice but because the factors can already be considered by the courts, officials consider the new aggravating factors may only have a marginal impact on sentence outcomes.

Option two (proposals A and B) – the Government's preferred option

27. The Government intends for the two aggravating factors to signal the denouncement of retail crime, which aligns with the government's commitment to make sure there are real consequences for crime. They are:
- **Proposal A:** an aggravating factor that addresses where the offender livestreaming, posting or distributing a record of their offending online
 - **Proposal B:** an aggravating factor where the offender (aged 18 or over) who is a party to offending committed by a child or young person.
28. Both proposals may have some benefit in reducing victimisation by clearly denouncing these behaviours in the Act and providing an element of certainty that harm resulting from this conduct is explicitly acknowledged in legislation.
29. The proposals would not require the court to take any specific action in terms of the type or length of sentence imposed. The amendment would, however, require the court to take these factors into account to the extent applicable in the case.
30. The aggravating factors would signal that offending involving these particular factors is to be viewed seriously and denounces such offending. However, in practice, they are expected to have a relatively low impact on sentencing outcomes because courts can already take these aggravating factors into account at sentencing.
31. The list of aggravating factors contained in section 9(1) is already quite extensive and includes some quite discrete aggravating factors such as if the victim was a constable or prison officer, acting in the course of their duty. Introducing additional aggravating factors that the courts would have to may lengthen sentencing hearings and decisions.

Specific risk analysis of Proposal A: the offender livestreaming, posting or distributing a record of their offending online

32. As the Government has already committed to the aggravating factors, officials have ensured that the relevant safeguards are in place to minimise the risk of non-compliance with the New Zealand Bill of Rights Act 1990 (NZBORA). For example, Proposal A could be considered inconsistent with NZBORA section 14 *freedom of expression*, which includes the freedom to seek, receive and impart information and opinions of any kind. Officials have adjusted the proposal to account for potential public interest in the offenders livestreaming, posting or distributing a record of the offending in exceptional cases. This adjustment protects the right to freedom of expression.
33. Anecdotally, we understand that children and young people are more likely to engage in this behaviour than adults. As a result, Proposal A could also engage NZBORA section 9 *freedom from discrimination*.

However, officials consider this is mitigated because the courts determine the appropriate weighting for aggravating and mitigating factors and case law about the relevancy of youth to offending which is often cited by the courts.²

34. The courts are also required to consider the purposes and principles of sentencing including the purpose to assist in the offender's rehabilitation and reintegration; and the principle to impose the least restrictive outcome that is appropriate in the circumstances.

² *Churchward v R* [2011] NZCA 531 [para 77]

35. Officials consider the risk raised by the Privacy Commissioner is also sufficiently mitigated. The Commissioner highlighted that the aggravating factor could result in an intrusion into the privacy of individuals not directly involved in the offending. However, this amendment has no bearing on the legal powers available to the Police to monitor social media accounts.

Specific risk analysis on Proposal B: the offender (aged 18 or over) who is a party to offending committed by a child or young person aggravating factor

36. Officials consider the risks associated with proposal B to be marginal. There is a potential risk that the amendment is used disproportionately against offenders aged 18–25, or applied arbitrarily. An example, being that an 18-year-old who is convicted as a party to an offence committed by a 17-year-old peer, may be treated in a disproportionate manner (similar to older adults) as a result of this proposal despite being at the same or similar stage of neurological development.
37. However, courts determine the appropriate weighting to give to the aggravating factors and rely on case law on age-related sentencing. Case law on the aggravating factor should develop in a way that guides judicial decision-making and helps to ensure a consistent approach to the application of the aggravating factors.

What are the marginal costs and benefits of the option two for proposals one and two?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
People who may be subject to the new aggravating factors	Ongoing – costs associated with legal fees.	Low – likely to be incremental.	Low certainty – no data about the use of the current law or the impact of this change.
Courts	Ongoing – may result in litigation over the presence of the aggravating factor i.e. whether the livestreaming or posting of the offending glorified the offending. May give rise to more appeals, especially when combined with the proposal to cap discounts, the cost of which would be absorbed within the current system. May result in longer hearings as prosecution and defence debate the additional factors, and courts consider the additional factors.	Medium – depending on nature of proceedings, substantial Crown involvement gathering information and legal costs may be required. Potential increase in debate at sentencing may require additional sentencing hearing time.	Low certainty – no data about the use of the current law or the impact of this change.
Department of Corrections	Ongoing – to the extent that the aggravating factors are not already reflected in sentencing practice, may result in small extension to sentence length, especially if the cap on discounts is progressed, and an increase in the prison population. Incarceration is expensive and will have flow-on consequences of requiring various resources. The marginal return on investment from imprisoning lower-risk offenders tends to produce less benefit than the cost.	Low – may add some pressure to an already overstretched frontline custodial and community workforce.	Low certainty – no data about the use of the current law or the impact of this change.
Prosecutors and defence lawyers	Ongoing – may involve additional debate over the presence of the aggravating factor as prescribed in the Act, and any overlap with other relevant factors. May give rise to more	Medium – depending on nature of proceedings, substantial preparation, information gathering and research by both prosecution and defence. This	Low certainty – no data about the use of the current law or the impact of this change.

	appeals, the cost of which would be absorbed within the current system.	would likely involve legal fees and engagement in court proceedings.	
Total monetised costs			
Non-monetised costs	Ongoing – a broad range of non-monetised costs.	Low certainty	Low certainty
Additional benefits of the preferred option compared to taking no action			
People who may be subject to the new aggravating factors	N/A	N/A	N/A
Victims of offending that is livestreamed, posted or distributed online by the offender	Ongoing – there may be a small impact for some victims who feel a factor, specified in the Act, that made the offending worse is recognised where it may not otherwise have been or may not have been clear from the sentencing.	Low – possible many victims may not recognise whether, or to what extent, the factor weighted the sentence to a different outcome, especially given the factor may be incorporated into the sentencing starting point.	Low certainty – no data available to estimate the impact of this change.
Courts	N/A	N/A	N/A
Department of Corrections	N/A	N/A	N/A
Crown Law	N/A	N/A	N/A
Total monetised benefits	N/A	Low	Low certainty
Non-monetised benefits	Ongoing –has the potential to have small benefits for victims where the livestreaming/posting aggravating factor is taken into account at sentencing, and, in relation to both factors, have the modest benefit of signalling the seriousness of these behaviours.	Low	Low certainty

Section 3: Delivering an option

How will the new arrangements be implemented?

38. Paragraph 245 of the RIA applies here. To summarise, no new administrative procedures would be required for implementation. There are no compliance costs associated with this change.

How will the new arrangements be monitored, evaluated, and reviewed?

39. The paragraphs 259 to 262 of the RIA are relevant here. The proposals analysed in this SAR require amendments to the Act too, which is periodically reviewed by the responsible policy functions. The Ministry of Justice administers the Act jointly with the Department of Corrections.
40. As referenced in the paragraphs noted above in the RIA, the Ministry of Justice will monitor and review changes in sentencing outcomes, case times, appeals and other judicial decisions that relate to the amendments made. This will include how the changes are being applied in practice and whether there are any issues with the changes that have been made.