Regulatory Impact Statement: Amendments to the Sentencing Act 2002

Purpose of Document	
Decision sought:	The RIS provides analysis of proposed amendments to the Sentencing Act 2002, to support decision making on each individual proposal.
Advising agencies:	Ministry of Justice
Proposing Ministers:	Minister of Justice
Date finalised:	30 May 2024

Problem Definition

In recent years, there has been a reduction in the use of imprisonment and growing concerns about increases in the rates of reported crime. The Government has committed to introducing legislation to strengthen the consequences of offending and restore public confidence in sentencing outcomes.

Executive Summary

Overview of planned sentencing reform and its impacts

The Government has committed to reform the Sentencing Act 2002 (the Act) in order to:

- give priority to the needs of victims and communities over offenders
- include a victim working sole charge or where a victim's dwelling adjoins a targeted business as an aggravating factor during sentencing
- cap sentence discounts at 40% [with a supplementary proposal from the Minister of Justice to introduce a sliding scale for early guilty plea discounts]
- prevent offenders from receiving sentence discounts for youth or remorse more than once, and
- remove concurrent sentencing for those who commit offences while on parole, on bail or whilst in custody.

These planned law changes will strengthen the consequences of offending and result in tougher sentences. The proposed amendments, alongside the reinstatement of the three strikes regime, rebalance the roles of Parliament and the judiciary in relation to sentencing. Broad limitations on judicial discretion and blanket limitations on sentence discounts are inconsistent with the purposes and principles of sentencing, which require that the sentencing Judge takes account of all the relevant circumstances of a case. Some of the planned law changes also present potential inconsistencies with the New Zealand Bill of Rights Act (NZBORA), for example due to the risk of disproportionately severe penalties.

The Ministry supports the mitigations recommended in the Cabinet paper, notably the introduction of limited exceptions intended to ensure that judges are not required to impose sentences that are manifestly unjust. Nonetheless, consultation has confirmed that there are outstanding risks. These include: increases in legal challenges to how the exceptions are applied and the unintended consequences of disincentivising offenders from taking steps that will benefit victims. For example, expressing remorse and participating in restorative justice conferences, as in some cases there will no longer be credit available for these steps at sentencing due to the cap on sentence discounts. The planned law changes will also make sentencing significantly more complex, which is likely to result in delays to Court

processes. These consequences may be alleviated by the introduction of a sliding scale for early guilty pleas, which should result in fewer cases going to trial.

In the limited time available, the Ministry has prepared initial modelling of the likely impacts on the prison population that will result from the likely increase in new and longer prison sentences. It is estimated that the total cost after 10 years will be up to approximately $150 million, resulting from the addition of approximately 1,350 to the prison population. There may also be costs to the Courts, agencies that service the Courts and the legal profession more widely arising from new sentencing processes. These could not be quantified due to time constraints and the complexities of the necessary modelling.

The Ministry identified that establishing a sentencing council would be preferable to the status quo to address some of the areas of concern. For example, a sentencing council could address discounts for guilty pleas and sentencing for specific offence types in a more detailed and flexible way. However, officials recognise that it could take several years before the council is established and begins producing guidelines. As a sentencing council is likely to operate with a degree of independence, guidelines addressing areas of concern would be developed independently. For this reason, this was not considered a feasible option to address the specific commitments at this time.

Summary of advice on specific proposals

For each of the proposals, officials considered the following options:

- the status-quo
- the proposal as committed to in the coalition agreement, and
- variations on the proposal as it is committed to.

We have analysed each of the Government's commitments and advised on the Ministry's recommended approach to deliver on them, in comparison to the status quo.

For the **commitment to prioritise victims**, the Ministry prefers retaining the status quo. There are already provisions in the Act specifying provision for victims' interests as one of the purposes of sentencing, and a requirement that the Courts take into account the impact of the offending on the victim. The premise that victims' needs should be prioritised in the Sentencing Act is fundamentally incompatible with other necessary purposes of sentencing and related legal safeguards. Of the range of possible options for fulfilling this commitment, the Ministry supports the recommended approach in the Cabinet paper, which is to strengthen the reference to victims' interests in the principles of sentencing with revised language. This approach can be accommodated within the existing settings and will emphasise the importance of a focus on victims' needs without incurring significant costs or delays in the court process.

For the proposal to include the **victim working sole-charge or adjacent to a dwelling** as an aggravating factor at sentencing, the Ministry's preferred option is to maintain the status quo on the basis that the vulnerabilities contained in the specific factor can already be considered at sentencing. The addition of increasingly specific aggravating factors in the Act unintentionally risks diminishing, by omission, other circumstances in which the victimisation may warrant equal recognition.

For the proposal to **prevent the repeated use of youth and remorse discounts**, the Ministry of Justice's preferred option is the status quo. There is strong evidence to show that young people's brain development, in combination with the high levels of trauma and abuse in the backgrounds of young offenders, is a logical mitigation at each and every sentencing. With regard to remorse, judges already take into account prior offending as an aggravating factor at sentencing. Preventing its repeat application may only serve to disincentivise offenders from taking steps to engage with the harm they have caused, including through restorative justice, which can be of great benefit to victims.

For the proposal to **limit sentence discounts to 40 per cent** the Ministry of Justice's preferred option is retaining the status quo. Placing a blanket limit on sentence discounts will prevent legitimate mitigating factors from being reflected in final sentences, which is contrary to the broader purposes of sentencing. A more evidence-based approach, which addresses concerns about leniency in relation to specific offence types, would have greater legitimacy from a rights perspective. It would also guard against unintended consequences, such as offenders taking steps to mitigate their offending that are ultimately beneficial to victims, for example engaging in rehabilitation and making reparations.

The Ministry supports the Cabinet paper's recommendation that judges should be able to make exceptions when limiting **youth and remorse discounts and capping sentence discounts to 40 per cent.** While this will not remedy the risks and consequences identified above, judges will as a result have some flexibility to avoid the most unjust outcomes. Applying the same threshold across the two policies will help to ensure consistency and setting it at the higher of several possible levels meets the Government's expectation that it will be used sparingly.

The Ministry supports the introduction of a **structured sliding scale for early guilty pleas**, which we expect will reduce unnecessary trials and guard against offenders gaining undue benefits from pleading guilty very late in the process. There is an evidence base from other jurisdictions that demonstrates that a sliding scale can work in practice. The impact of its introduction in New Zealand is complicated by both a lack of data on current practice, and significant delays in court processes that can influence when offenders can reasonably enter a guilty plea. For this reason, the Ministry supports the Cabinet paper's recommendation that:

- further design work is done on the incremental discounts for the sliding scale; and that
- the sentencing judge can depart from the sliding scale provided that they explain their reasons for doing so.

For the commitment to remove concurrent sentencing for offending while on bail, parole or in custody, the Ministry is generally supportive of the Cabinet paper's recommendation to insert a provision that states that cumulative sentences are generally appropriate in these settings. This option would provide greater clarification, transparency and consistency in sentencing outcomes. At the same, providing for flexibility in the choice of sentence will ensure that legitimate reasons for preferring concurrent sentencing are upheld. These include outcomes that align with Government priorities, such as upholding public safety and reducing court delays.

Limitations and Constraints on Analysis

The analysis in this regulatory impact statement has been constrained by:

- **Time constraints**: Time constraints have not allowed for detailed and peer reviewed modelling of impacts. For costing, this has meant that officials have been unable to disaggregate operational and capital expenditure regarding the impacts on Corrections. The general modelling of the impact of the proposals on the prison population has been limited in detail and not peer reviewed. While officials have had access to a sample of cases, there is limited information about whether this sample is representative of sentencing practice across New Zealand. With more time, officials would have inquired further into these issues meaning modelling of impacts was based on greater certainty.
- Due to the time constraints, officials have been unable to address some of the wider issues raised by stakeholders. For example, there are aspects of the existing regime that could benefit from a review, especially when implementing further changes (e.g., such as the interaction between parole eligibility and concurrent sentencing).

- **Narrow scope:** The Ministry of Justice was commissioned to fulfil the Government's commitments as agreed to in the relevant coalition agreements. This commissioning narrowed the scope of feasible options when considering the most effective policy intervention. The analysis and scope of feasible options is therefore constrained by a need to deliver on the commitment. Timeframes have further limited the scope of possible changes.

  Officials have identified other legislative options that we consider could more effectively address some of the policy issues raised – however, not all of these have been assessed in this document. For example, establishing a Sentencing Council would be a means of improving consistency in sentencing and strengthening public confidence through greater transparency. Such an approach would help to ensure that limits on judicial discretion are rationally connected to the issues arising in specific offence categories. Due to the prescribed scope of the Government's planned sentencing reforms and time constraints such options are not within the scope of this regulatory impact analysis.

- **Lack of broader consultation:** Targeted consultation has been undertaken with the New Zealand Law Society (NZLS), the Public Defence Service, a judicial representative, the Chair of the Parole Board and the Chief Victims Advisor. Limited agency consultation has also been undertaken. As far as possible given the timeframes detailed below, feedback has informed the advice in this RIA. The constrained timeframes under which these proposals have been progressed have not allowed for broader consultation beyond required consultation with affected agencies. The inability to engage in dialogue with Treaty partners, strategic partners, and practitioners has provided further difficulties in anticipating the direct impact of some of the legislative amendments. This has been further exacerbated by a need to maintain judicial discretion to mitigate the risk of adverse sentencing outcomes and the complex nature of sentence practice and calculation. As the proposals require legislative amendment, the Select Committee process will provide an opportunity for broader scrutiny and input.

- **Data limitations:** There are complexities with modelling the consequences of amendments due to the complex nature of sentencing practice and calculation, the inability to engage more broadly with practitioners in the field, and the lack of precedent for some of the proposed changes. As a result, officials have been unable to adequately test the implications and unintended consequences that could undermine the stated objectives of the legislative changes. The existing knowledge base of government reports, research, and international experience provides some foundational basis for assessing the likely implications of the proposed changes. Within the timeframe available, some targeted consultation was undertaken which included relevant agencies and some representatives of the judiciary. Despite the identified limitations, they provide some assurance that the likely outcomes and risks for the proposed options have been identified and considered in the analysis contained in this regulatory impact statement.

Responsible Manager

Rajesh Chhana
Deputy Chief Executive
Policy Group
Ministry of Justice

30 May 2024

Quality Assurance	
Reviewing Agency:	Ministry of Justice
Panel Assessment & Comment:	The Ministry of Justice Regulatory Impact Analysis Quality Assurance Panel has reviewed the Regulatory Impact Statement prepared by the Ministry of Justice and consider that the information and analysis summarised in the Regulatory Impact Statement (RIS) partially meets the Quality Assurance criteria. The package of proposals implements the Government's commitments including those set out in coalition agreements. The panel notes that the package was developed under several constraints. The time constraints have limited the consultation with key affected parties, especially, as noted, Treaty partners, strategic partners, and a wider range of practitioners. There are data limitations. Despite this, the RIS draws on what information is available to indicate the potential benefits, risks, and costs of the proposals. The RIS does a good job of conveying the complexity of sentencing practice and the analysis is persuasive, although there are areas (for example, the summaries of analysis) that would have benefited from more time and refinement. The panel considers that, because the package of proposals overall amounts to a fairly significant change in sentencing practice, and because of the uncertainties over the impacts on the prison population and the courts, that it would be important to track outcomes. A formal evaluation in future of whether the changes are meeting the outlined objectives, and identifying any unintended consequences, would be important from a stewardship perspective. Overall, within the narrowed scope of available options, and despite the identified limitations and constraints on the analysis, the panel considers that the analysis is reliable and can be relied upon by Ministers to support their decision-making.

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The proposed changes

1. The Government has committed to a range of sentencing reforms as set out in manifesto and coalition agreements. The planned legislation will introduce new statutory requirements regarding what is considered at sentencing, and how the sentences imposed are calculated. The specific proposals included in this amendment Bill are as follows:

    1.1. Giving priority to the needs of victims and communities over offenders;

    1.2. Including a victim working sole charge or where a victim's dwelling adjoins a targeted business as an aggravating factor at sentencing;

    1.3. Capping sentence discounts at 40% and introducing a sliding scale for early guilty plea discounts;

    1.4. Preventing offenders from receiving sentence discounts for youth or remorse more than once; and

    1.5. Removing concurrent sentences for those who commit offences while on parole, bail, or whilst in custody.

2. The introduction of these legislative amendments, alongside the reinstatement of the three strikes sentencing law, are part of a significant rebalancing of the roles of Parliament and the judiciary in relation to sentencing.[1] Generally, the amendments represent a more prescriptive approach, which limits the extent to which the judiciary can consider the individual circumstances of a case. The proposals signal a tougher response to offending and demonstrate a greater willingness to impose sentences of imprisonment where this is required.[2]

The overarching objectives of the amendments

3. The various amendments being proposed share some overarching objectives including:

    3.1. Strengthening the consequences of offending;

    3.2. Increasing public safety for both people and communities; and

    3.3. Ensuring the functioning of a fair and effective justice system.

The overarching criteria and scope for options

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

4. The following criteria have been used to analyse the options for each proposal. Some of the proposals have been assessed against additional criteria, where these are considered more suitable to measure outcomes.

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[1] A three strikes regime is a sentencing regime that provides for progressively tougher penalties for repeat offending. Under the first regime introduced in 2010, qualifying serious violent and sexual offences resulted in a warning (first strike); the loss of parole (second strike) and a maximum sentence without parole unless this would be manifestly unjust (third strike).

[2] Ministry of Justice, NZ Constitutional system, New Zealand's constitutional system.

Criteria	What this means
Reducing victimisation and acknowledging the needs of victims	Does the option support a reduction in victimisation and adequately acknowledge the needs of victims and contribute to increasing a sense of safety among people and their communities?
Ensuring appropriate consequences for offending	Does the option support appropriate consequences for offending under the prescribed circumstances and adequately consider the risk of unjust sentencing outcomes?
Impacts on the Corrections system	The extent to which the option can be met within existing and committed prison capacity baselines.
Impacts on the Courts and timeliness	The extent to which the option affects the court system and timeliness.
Workability and consistency with relevant laws and obligations	The extent to which the option is consistent and workable with existing relevant laws and obligations, including: • the general sentencing framework (including the purposes and principles of sentencing) • Consistency with the New Zealand Bill of Rights Act 1990 (NZBORA) • Obligations under the Treaty of Waitangi • Obligations under international law (such as the International Covenant on Civil and Political Rights).

What scope will the options be considered within?

5. The scope has been limited by the Government's coalition agreements which contain specific commitments to amend the Act. For the proposal to establish a sliding scale for early guilty pleas, the analysis has been limited to identifying the appropriate discount increments by establishing a maximum and minimum amount. The scope of feasible options for all amendments is constrained due to the Government's timeframes which have limited the opportunity to undertake consultation.

6. Officials have considered options within these parameters. In doing so, analysis was undertaken in relation to the range of feasible options to deliver on each of the specific amendments committed to.

7. With more time available, officials would have undertaken more thorough consultation with Māori, practitioners, and the public, to determine whether more significant legislative amendments would be more suitable for achieving the indicated policy intent. In doing so, the agencies may have been able to provide more in-depth analysis and advice to inform Cabinet decisions.

Options not considered in this regulatory impact statement

8. Officials identified other legislative options that may achieve the Government's stated objectives. However, for the purpose of this regulatory impact statement these options were considered out of scope. For example, the Ministry of Justice is of the view that the establishment of a sentencing council is an effective means of improving transparency and consistency of approach in the sentencing process, and ensuring sentencing courts have access to detailed guidance.

9. Sentencing councils can issue guidelines that provide comprehensive and structured direction on critical components of sentencing. Sentencing guidelines may be informed by evidence including data on sentencing levels, public and expert input, practice issues,

case law and statutory developments, which means that the limitations they place on judicial discretion are evidence based and rights compliant. Such guidelines may be binding on the courts depending on the model.

10. Establishing a sentencing council would be preferable to the status quo for some of the proposals contained in this document. For example, discounts for guilty pleas and sentencing for specific offence types could be addressed in a way that is more flexible and detailed than would be possible or appropriate in primary legislation.

11. Officials recognise that it could take several years for the council to be established and start producing guidelines. As a sentencing council would operate with a degree of independence, any guidelines that addressed the areas of concern would be developed independently.

12. Other options could have included tailoring a tougher approach in sentencing towards specific kinds of offending. For example, changes could target domestic violence or violent and sexual offending. This more targeted approach limits the extent to which judicial discretion is limited across sentencing more generally but targets areas of concern.

The context for sentencing reform

Trends in sentencing reform

13. Under the current approach to sentencing (set out in **appendix 1**), judges 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 2002. The judiciary considers any guidelines judgments and previous cases that consider similar offending. The Court must also consider an offender's previous convictions as an aggravating factor at sentencing, among other aggravating factors set out in Section 9 of the Sentencing Act.

14. Beyond imprisonment, a range of new tools and powers have been introduced over the last twenty years that can be used, subject to judicial discretion and considered, thorough formal risk assessments where appropriate. These include:

    14.1. the introduction of extended supervision orders (ESOs) in 2004 that allow high risk sex offenders to be closely managed in the community upon their release from prison – expanded to include violent offenders in 2014;

    14.2. the introduction of public protection orders in 2014, which allow for the management of the highest risk offenders in a secure facility upon their release from prison; and

    14.3. the possibility of life imprisonment without parole in murder cases in 2010.

15. These measures added to the options available to the Court at sentencing to protect the public, including preventive detention (an indeterminate sentence that allows for parole only when a person ceases to be an undue risk to the community); minimum periods of imprisonment where the Court can override standard parole eligibility; and the ability to impose a term of imprisonment up to the maximum penalty where appropriate.

16. The increasing range of options and requirements available to judges at sentencing have enabled more punitive responses that do not necessarily result in longer periods of imprisonment. The overall framework does allow for relatively restrictive responses to criminal offending such as the imposition of minimum periods of imprisonment and the ability to impose a term of imprisonment up to the maximum penalty where offending is

extremely serious. New Zealand's rate of imprisonment has been high relative to the other jurisdictions we tend to compare ourselves to.[3]

17. There are some existing limitations on judicial discretion. For example, for murder offences there is a presumption of life imprisonment, unless imposing a life imprisonment would be manifestly unjust. The Court must impose a mandatory period of imprisonment (MPI) of at least 10 years (or 17 years in some circumstances).
18. The proposed amendments to the Act are one of several legislative reforms announced by the Government that are explicitly focused on further limiting judicial discretion at sentencing. In particular, the reinstatement of the three strikes regime provides for mandatory sentencing outcomes.

What are the implications of limiting judicial discretion?

19. The proposed amendments to the Act, in combination with the implementation of the three strikes regime, represent a significant shift in the willingness to limit judicial discretion to ensure a more retributive response to offending. Generally, restricting judicial discretion and prescriptive sentencing frameworks can make sentencing less efficient.
20. A fundamental issue with this approach is that it limits a judge's ability to consider the circumstances particular to that case and deliver an individualized sentence. Conversely, it could be argued that a more prescriptive approach to sentencing can have some benefits around consistency and provide certainty of sentencing outcomes.
21. Limitations on judicial discretion can be difficult to introduce in way that is consistent with the New Zealand Bill of Rights Act 1990 (NZBORA) and the existing framework for sentencing. When the previous three strikes regime was introduced, parts of it could not be applied by the courts, as they were inconsistent with NZBORA. For example, a sentence imposed without parole was found to be disproportionately severe and was therefore overturned based on s 25(a) of NZBORA.[4]
22. Stakeholders have advised that the limitations on judicial discretion included in the proposed changes create the potential for unintended consequences. These risks include legal challenges on procedural grounds or for breaches of NZBORA. A prescriptive approach can drive court delays as sentencing becomes increasingly complex and can drive the potential for later guilty pleas, which in turn may lead to an increase in the prison and remand populations. Officials therefore consider it important that appropriate levels of judicial discretion are maintained across the various proposed amendments in this reform Bill.
23. The changes proposed, if implemented, are still subject to some discretion and judicial interpretation. This means that it's difficult to anticipate the exact impacts of the legislative amendments.

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[3] Justice Sector, 2022 Long-term insights briefing, long-term-insights-briefing-consulation-document.

[4] Marata v Attorney General, 2023, NZHC 2888.

Has sentencing become more lenient?

24. The public are rightly concerned about crime and its impacts on people and their communities. A range of high profile increases in offending such as ram raids and violent robberies can provoke fear and anger. These dynamics raise questions around whether more can be done in sentencing to denounce and deter crime.

25. In recent years, there has been a shift towards more therapeutic approaches intended to promote rehabilitation by addressing the root causes of offending. This approach seeks to enable treatment in the community, and avoids the disruption to relationships, employment and housing that is often associated with short prison sentences.[5]

26. In sentencing, this approach has resulted in fewer people being sentenced to imprisonment and a greater use of home detention, intensive supervision, and community detention.[6] This approach has leveraged the additional options and technology now available to the court when imposing sentences (such as electronic monitoring).

27. When the courts place a greater emphasis on rehabilitation and reintegration, this could be perceived as a weakening of accountability and denunciation. The role of the judge is to strike this balance, and trends have indicated that courts do adjust their approach to sentencing.

28. The total proportion of adults convicted receiving an imprisonment sentence (imprisonment rate) increased from 10.3% in 2013/14 to 13.5% in 2016/17 and remained relatively unchanged to 2019/20. From 2019/20 to 2020/21, the imprisonment rate dropped from 13.2% to 10.7% and has remained at a similar rate over the last two years. In comparison, the proportion of convicted adults receiving one of the three high-

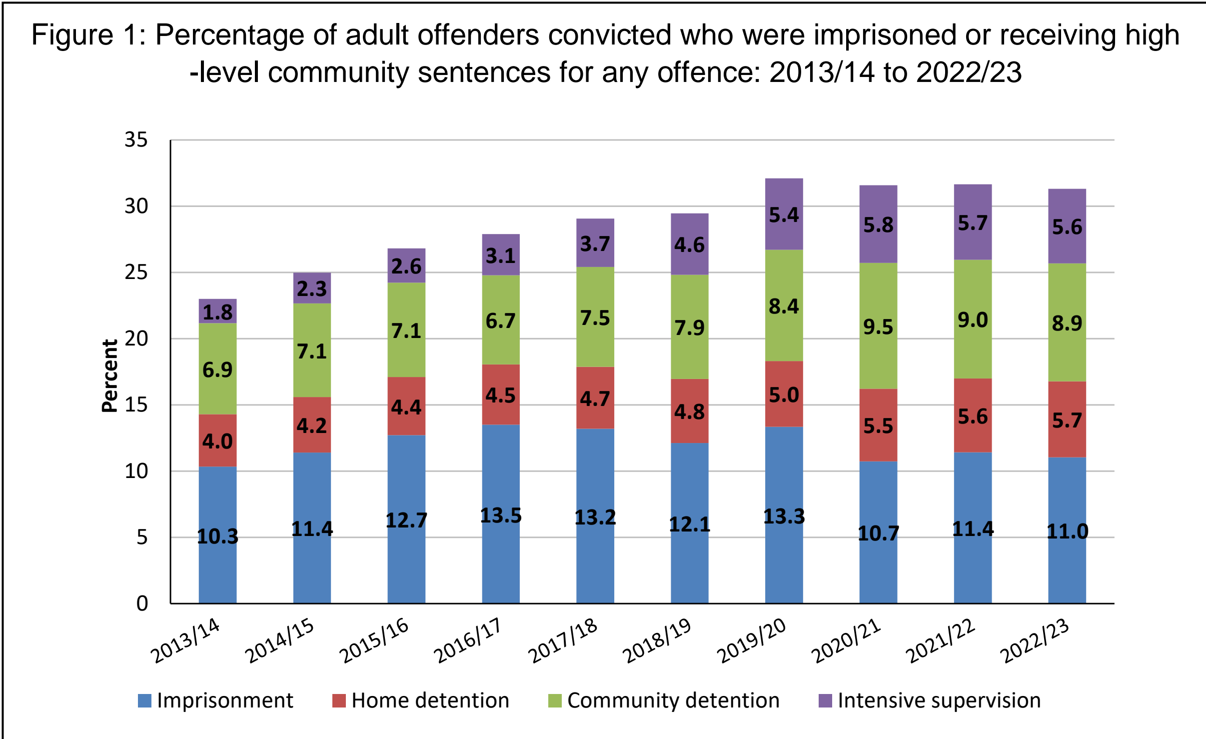

Figure 1: Percentage of adult offenders convicted who were imprisoned or receiving high -level community sentences for any offence: 2013/14 to 2022/23

[5] Justice Sector, 2022, Long-term insights briefing. Long-term insights briefing.

[6] Office of the Prime Minister's Chief Science Advisor, 2018, Using evidence to build a better justice system.

level community sentences increased almost constantly between 2013/14 and 2020/21 from 12.7% to 20.8% with a very slight reduction over the last two years.

29. Deterrence through imprisonment is one of several possible responses to concerns about offending. Our rates of re-offending are relatively high, with 56.5% of people with previous convictions being reconvicted within two years following release from prison.[7] Changes in the prison population over time have suggested that many of the drivers of crime and imprisonment sit outside of the levers available to the criminal justice system.[8]

30. Simply ensuring longer sentences of imprisonment are imposed may not address some of the factors that result in people feeling unsafe. Research has indicated that early prevention programs have been a successful measure in substantially reducing long term criminal justice costs and that investing into early intervention can be more cost effective than imprisonment.[9]

31. For example, research identifying the most validated risk factors for criminal behaviour and recidivism concluded that anti-social attitudes, anti-social associates, history of anti-social behaviour and anti-social personality patterns were “the big four”. Additional factors identified as “the big eight” include problematic circumstances at home (such as poor parental supervision, neglect and abuse), problematic circumstances at school or work (low levels of education and achievement and unstable employment history), and issues with leisure (poor use of recreational time) and substance abuse.[10] The likelihood of criminal behaviour increases with the number and variety of major risk factors assessed.

32. In isolation, changing the Act to encourage the use of longer periods of imprisonment may not directly interact with the commonly identified drivers of offending. Regardless, sentencing should still strive to effectively denounce the conduct in which an offender was involved and hold the offender accountable for harm done to the victim.[11]

Consistency with obligations under te Tiriti o Waitangi - the Treaty of Waitangi

33. In line with the Cabinet Office Circular CO (19), and policy quality guidance from DPMC, the proposals have been considered through a Treaty of Waitangi lens. The Crown is obligated to give effect to the articles of the Treaty of Waitangi, and the Government has related responsibilities under international law. For example regarding non-discrimination and other obligations under the United Nations Declaration on the Rights of Indigenous Peoples.[12] The Ministry of Justice also has an overarching strategic outcome to improve justice outcomes for Māori.[13]

34. Article One of the Treaty relates to 'good government', meaning government conducted with due regard to the people it governs. Under this Article, DPMC directs policy makers to consider the specific effect of proposals on different Māori groups, as well as

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[7] Hāpaitia te Oranga Tangata (2018), New Zealand Ministry of Justice.

[8] Justice Sector December (2022), Long-term insights briefing. Long-term insights briefing.

[9] Welsh BC, Farrington DP, Gowar BR. (2015) Benefit-cost analysis of crime prevention programs. Crime and Justice, 44(1): 447-516.

[10] Andrews D. A., & Bonta, J. (2003). The psychology of criminal conduct (3rd ed.). Cincinnati: Anderson.

[11] Sentencing Act 2002, Section 7, Purposes of sentencing or otherwise dealing with offenders.

[12] The overall sentencing reform package has been analysed using the Treaty of Waitangi guidance outlined in the Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi Guidance” (22 October 2019) CO 19/5.

[13] Te Tāhū o te Ture Statement of Intent: 2023-2027, Ministry of Justice (2023), SOI_2023-2027.

demonstrate that the policy meets the good faith obligations of the Crown.[14] The limited consultation has constrained the ability of officials to ascertain the specific effects of the proposed sentencing policy on Māori victims, offenders, and communities. There has also been limited time to engage Māori in the design of the regime, despite statistics suggesting Māori could be the most affected cohort.

35. Article Two of the Treaty guarantees tino rangatiratanga and decision-making rights over resources and taonga. Giving effect to tino rangatiratanga should enable Māori offenders to engage with culturally appropriate formal and informal rehabilitation and reintegration support. However, the cumulative impact of the proposed amendments to the Act and the reinstatement of the three strikes regime may result in lengthier periods of imprisonment being imposed. Longer sentences of imprisonment may remove the opportunity to engage with culturally appropriate rehabilitation and reintegration services which may be more community based and oriented.[15]

36. Article Three of the Treaty guarantees Māori equal rights as subjects of the Crown. While the proposed amendments to the Act impose the same rights and obligations on both Māori and non-Māori, Māori are already over-represented among the prison population and the forthcoming re-instatement of the three strikes regime is likely to result in further disproportionate sentencing outcomes for Māori. Additional changes to the Act that exacerbate these issues could have negative implications for trust and confidence in the justice system, especially, but not exclusively, among Māori.

37. Since the 1980s, Māori have made up around 50% of the people in prison despite Māori only representing approximately 15% of the total population.[16] Māori are also more likely (36.9%) than the New Zealand average (30.7%) to be victims of crime, but have not been consulted to provide their perspective on this issue.[17] It could therefore be argued that the Crown has failed to recognise its obligations to protect the rights and privileges of Māori, thus potentially being inconsistent with the Crown's obligations under Treaty/ te Tiriti, as well as negatively impacting on the Ministry of Justice's ability to deliver improved justice outcomes for Māori.

Consultation

38. In the time available, some targeted consultation on the workability of the Government's commitments was undertaken with a representative from the judiciary, NZLS, the Chief Victims Advisor to Government, the Parole Board and the Public Defence Service. The Department of Corrections, Police, Oranga Tamariki and Crown Law were consulted on the draft Cabinet paper. Feedback has been noted throughout this paper and is briefly summarised below.

39. Broader consultation did not occur due to the significant time constraints in preparing the policy proposals. Broader consultation could have included the general public, practitioners, front line staff, iwi, hapu and Māori communities, and communities and services that are most effected by crime and victimisation.

40. Stakeholders noted their concerns with unintended consequences arising from restricting judicial discretion in favour of tougher sentences, including unjust outcomes. Stakeholders expressed concerns that fewer guilty pleas would be made, with flow on impacts for case disposal times and associated resourcing (e.g., prosecution and

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[14] Cabinet Office, Te Tiriti o Waitangi / Treaty of Waitangi Guidance CO (19) 5, 22 October 2019.

[15] Chief Victims Advisor, Research report, Kaupapa Māori, 2022, Kaupapa Maori Resolution Pathways.

[16] Tu Mai Te Rangi! (2017), Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates; New Zealand Ministry of Justice, 2018, Hāpaitia te Oranga Tangata, Hāpaitia te Oranga Tangata.

[17] New Zealand Crime & Victims Survey Cycle 5 NZCVS Cycle 5 Who is experiencing crime (2022) at sheet 1.

defence costs). There is also a risk of disincentivising rehabilitation and restorative justice. Over time, rehabilitation results in fewer victims and better outcomes for communities.

41. It was noted that increased incarceration will add pressure to the work of the Parole Board and Corrections. While some indicative modelling of the potential impacts has been carried out, the full extent of these impacts would be unclear for two or more years, as cases progress through the justice system.

42. Stakeholders expressed that the commitments may not achieve the desired impacts. For example:

    42.1. perceptions of tougher sentences may make some victims of family violence more reluctant to report offending to Police if the offender is likely to go to prison rather than remain in the community.

    42.2. existing aggravating factors already recognise the vulnerability of some victims due to the nature of their employment and the nature of the premises targeted.

    42.3. lengthening sentencing hearings by creating debate as to whether/how the proposed aggravating factor applies, and/or overlap with existing factors.[18]

43. In relation to sentencing discounts, stakeholders emphasised the importance of judicial discretion in appropriate circumstances. The feedback also pushed back against the notion that sentencing outcomes have become more 'lenient'. Instead, judicial sentencing decisions respond to emerging evidence (for example, in response to an increased scientific understanding of adolescent brain development). This practice explains the trends towards shorter sentences of imprisonment, rather than a tendency towards greater lenience. Perspectives and information provided by stakeholders has fed into the analysis and discussion throughout the document where relevant.

Proposal 1: Prioritising victims and communities

Section 1.1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

44. The Act is largely offender focused. One of the stated *purposes of sentencing* in the Act is to hold the offender accountable for the harm caused to the victim and the community by the offending. Others require the Court to provide for the interests of the victim and protect the community from the offender. The *principles of sentencing* require the Courts to take into account the gravity of offending and any information on the effect of offending on the victim but do not require specific consideration of the victims' or community's needs.

45. The State traditionally has responsibility for investigating and prosecuting all reported crime on behalf of society generally. This recognises that crimes against an individual victim are also acts against society as a whole. It also ensures that criminal proceedings are conducted in a fair, consistent, and transparent manner that upholds the rights of the person accused of the offence. However, the criminal justice system is consequently

[18] For example, particular cases may give rise to argument over whether the offending involved a victim who was working sole-charge or whether the victim's dwelling adjoins the targeted business.

heavily weighted towards offenders and individual victims have tended to be marginalised in the process.[19]

46. The progression of criminal proceedings is largely determined by the readiness of the prosecution and defence and the availability of court facilities. Victims of serious offences may be consulted on matters such as bail decisions but often the role of victims is largely limited to being a witness if required and providing a victim impact statement to inform sentencing. As a result, there is concern that the Act and the criminal justice system do not give sufficient weight to the views and needs of victims. There is a view that victims should have a more central role within the criminal justice system and that greater consideration of the needs of victims and communities will lead to stronger sentencing. In turn, such an approach would contribute to the overall sense of safety for New Zealanders.

What is the policy problem or opportunity?

47. The Coalition agreements commit to amending the Act "giving priority to the needs of victims over offenders" (New Zealand First) and "giving greater weight to the needs of victims and communities over offenders" (ACT New Zealand). Currently, the Act requires the Court to take the effect on the victim into account in sentencing but does not give greater priority to victims and public safety over other principles and purposes of sentencing (e.g., rehabilitation and reintegration of the offender).

48. Currently, victims are considered in several ways in the sentencing regime. The purposes of sentencing include providing for the interests of the victim and the protection of the community.[20] The principles of sentencing require the courts to consider the gravity of offending and any information on the effect of offending on the victim, but not victims' interests specifically.[21] There are also specific aggravating factors at sentencing relating to victims.[22] For example, the extent of any loss, damage, or harm resulting from the offence is taken into consideration.[23] Where appropriate, the victim may be invited to participate in a restorative justice process with the offender.

49. On average, almost one in three New Zealand adults (31%) experience crime over a 12-month period. People overrepresented as victims of offending include those who identified as LGBT+ (52%), followed by separated adults (45%) and Māori (37%). This is significantly higher than the New Zealand average.[24] Children under the age of 15 are not included in the survey.

50. Only some victims of crime are involved in cases that are sentenced in the criminal justice system. Many crimes are not reported. Results drawn from Cycle 5 (2021/22) of the New Zealand Crime and Victims Survey showed the proportion of crime incidents reported to the Police was 19%. People were more likely to report household offences (34%) to the Police than personal offences (14%). The most common reason that people give for not reporting is that they think the incident is too trivial to be worth reporting (45%). Another 18% of respondents decided to deal with the issue themselves. A significant proportion

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[19] New Zealand Law Commission Preliminary Paper No 28 CRIMINAL PROSECUTION.

[20] Sentencing Act 2002, s 7(1)(c) (provide for the interests of the victim of the offence) and s 7(1)(g) (to protect the community from the offender).

[21] Section 8(a) – gravity of offending, s 8(f) – effect on the victim.

[22] Sentencing Act 2002, s 9.

[23] Section 9(1)(d).

[24] New Zealand Crime & Victims Survey Cycle 5 NZCVS Cycle 5 Who is experiencing crime (2022) at sheet 1.

of victims did not report an incident because they believed that the Police could not do anything (24% of respondents) or would not be interested (15% of respondents).

51. Victims are not a homogenous group, and their needs vary. The Chief Victims Advisor advised that when victims are asked what they want from the justice system they often say they want:

- the offender to stop harming.
- the offender to take responsibility for the harm they caused.
- to receive a heart-felt apology.
- to see true remorse demonstrated through self-motivated action in rehabilitation and an offender's determination to lead a life free of crime and harming.
- to see efforts, where possible, to repair the harm.

52. The Chief Victims Advisor also noted that while some victims may welcome stronger consequences for those who cause harm, this is not true for all victims.

53. Research on the experiences of victims in the criminal justice process found that only a minority of victims felt justice had been served in their case and had faith in the justice system.[25] Over two-thirds (68%) felt justice had not been served in their case, despite 86% of cases resulting in a guilty verdict and 52% resulting imprisonment for the offender. Participants' dissatisfaction was often that "the time didn't fit the crime". Some victims mentioned the outcome they wanted was not necessarily a punishment for the offender so much as seeing them held accountable for the crime. Others saw the purpose of the offender's sentence as a deterrent to others or to keep themselves and the public safe.

54. Even when cases are prosecuted in court, victims may not be satisfied with the outcome. Due to the criminal justice system's focus on the offender, victims may feel unsafe, that they do not have enough support, information, or an insufficient voice in the process. The Chief Victims Advisor noted that victims regularly complain about being bystanders to the trials about crimes committed against them. Victims are not a recognised party in the adversarial system, they do not have their own lawyer to represent or advise them and are often only included within the trial process when they are required as a witness. Generally, the psychological, physical and social costs of reporting crime can be significant for victims. This has led to growing dissatisfaction and a decrease in confidence in the criminal justice system, which can result in hesitation to report crimes.

55. The judiciary noted that judges are acutely aware of victims and their interests, but that this consideration alone cannot determine the sentence. Judges must ensure the sentence reflects the offending and the circumstances of the offender, taking into account the relevant factors specified in the Act and court decisions. The Public Defence Service also noted that the criminal justice system, while dealing with individual offenders and victims, must have at its centre a focus on justice and the community as a whole.

56. The NZLS noted that factors related to the offending and the offender can restrict the degree to which the wishes of the victim can be fully accommodated. Also, that the victims' best interests do not always match the outcome they desire (e.g., the victim's safety in family violence matters). They also noted that it would be difficult for either the prosecution or defence to accurately represent community interests in sentencing submissions.

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[25] Petrina Hargraves, (2019). *Victims' Voices: The Justice Needs and Experiences of New Zealand Serious Crime Victims.* Research report for Victim Support.

What objectives are sought in relation to the policy problem?

57. The main objective is to give priority/greater weight to the needs of victims and communities over offenders without unduly impacting on the defendant's right to a fair trial and general sentencing principles (including consistency and proportionality). In addition, the general criteria apply, namely:

    57.1. Strengthening the consequences of offending

    57.2. Increasing public safety for both people and communities

    57.3. Ensuring the functioning of a fair and effective justice system.

Section 1.2: Deciding upon an option to address the policy problem

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

58. As discussed in the overview, the following criteria will be used to compare the options to the status quo:

    58.1. Reducing victimisation and prioritising victims;

    58.2. Ensuring appropriate consequences for offending;

    58.3. Impacts on the corrections system;

    58.4. Impacts on the Courts and timeliness; and

    58.5. Workability and consistency with relevant laws and obligations.

What scope will options be considered within?

59. As outlined in the overview, the timeframe within which policy options could be developed, has restricted the range of feasible options which can be considered.

60. The specific nature of the Government's commitment to amend the Act has restricted the range of options which can reasonably be considered. Better recognising the needs of victims and communities would require a wider review of legislation, including the Victims' Rights Act, as well as a review of supports, services and funding for victims. The constrained timeframe for this work has limited the analysis of more prescriptive options that may result in unintended impacts on human rights, on Māori offenders and victims, and the proportionality and consistency of sentences.

61. As noted by the Chief Victims Advisor, providing a comprehensive victims' perspective would take time and require considerable research and consultation. A similar approach would be required to develop a detailed perspective on communities' interests at sentencing.

What options are being considered?

Option One – *Status Quo*

62. Relying on the existing purposes and principles of sentencing to give appropriate weight to the needs of victims and communities.

Option Two – Strengthen reference to victims' needs and interests

63. Amending section 8(f) (Principles of sentencing or otherwise dealing with offenders) to add the italicised words:

    63.1. must take into account any information provided to the court concerning *the victim's needs* and the effect of the offending on the victim.

64. While this provision does not specifically refer to the community, the needs of the victim will align generally with the needs of the community (i.e., public safety). One of the purposes in the Act is to protect the community from the offender. Focusing on the needs of known victims may help the Court consider what additional measures are needed to protect the wider community.

Option Three – Prescriptive hierarchy of purposes

65. Introducing a more prescriptive hierarchy of purposes into section 3 of the Act – e.g., by amending section 7 of the Sentencing Act (Purposes of sentencing or otherwise dealing with offenders) to:

    65.1. state the paramount (or primary) purpose of the Act is to hold the offender accountable for harm done to the victim and the community by the offending

    65.2. make the remaining provisions in section 7(1)(b)-(h) secondary considerations, retaining the ability to combine 2 or more of the provisions

    65.3. apply section 7(2) (about the weighting of the purposes) to the secondary considerations only.

Option Three (a)– Requiring the Court to give reasons

66. Placing explicit requirements on the sentencing judge to give reasons for any departure from the above approach.

How do the options compare to the status quo/counterfactual?

	Option One – Status quo	**Option Two – Strengthen reference to victims' needs and interests**	**Option Three - Prescriptive hierarchy**	**Option 3a – Requiring the Court to give reasons**
Prioritising victims and reducing victimisation	0	May make consideration of victims' needs and interests more visible to court participants and the general public. However, consideration of victims' and the harm experienced by victims is already clearly set out in the Act and factored into sentencing so real impact on reducing **victimisation** may be modest. It is also dependent on the relevant information being provided to the Court. There may be some benefit in ensuring the victim's specific interests can be taken into account when setting conditions of sentences to enhance their sense of safety. +	May make victims' needs more visible to court participants and the general public. However, consideration of victims' interests is already clearly set out in the Act and factored into sentencing so real impact on reducing victimisation is minimal. 0	Requiring the Court to give reasons could improve transparency and show how victims' needs are factored into sentencing which could have a positive impact. However, it could also have a negative impact if victims and the general public do not consider that victims' needs were given sufficient weight. The Courts would be limited in how much weight they can give at sentencing to recognise individual victims as sentencing needs to be consistent. 0/+
Strengthening the consequences of offending	0	Any impact is likely to be minimal. Other mechanisms such as restorative justice and victim impact statements are likely to be more effective in helping offenders understand the impact of their offending on the victims. 0	Any impact is likely to be minimal. Other mechanisms such as restorative justice and victim impact statements are likely to be more effective in helping offenders understand the impact of their offending on the victims. 0	Any impact is likely to be minimal. Other mechanisms such as restorative justice and victim impact statements are likely to be more effective in helping offenders understand the impact of their offending on the victims. 0
Impacts on the Corrections system	0	No additional impact on the Corrections system is expected because victims' needs are largely factored into sentencing already and the focus may be more on	Creating a prescriptive hierarchy of purposes could result in slightly longer sentences or longer minimum	No additional impact is expected. 0

		qualitative improvements (e.g., sentence conditions) rather than longer sentences. 0	non parole periods for some offenders, but no overall impact is anticipated. 0	
Impacts on the Courts and timeliness	0	Changes to sentencing practice will cause some minor disruption to the court system as the new rules are tested through submissions in court and appeals. Hearings may take longer if the Court is required to consider additional material about the victims' needs, especially in cases involving multiple victims. The defence may seek to challenge the material provided or the resulting sentence if it is considered to have been unduly influenced by material provided by, or on behalf of the victims. Victims may seek legal representation to assist in preparing information about their interests which may incur additional costs to government. - -	Changes to sentencing practice cause some disruption to the court system as the new rules are tested through submissions in court and appeals. Hearings may take longer if the Court is required to consider additional material about the victims' interests, especially in cases involving multiple victims. The defence may seek to challenge the material provided or the resulting sentence if it is considered to have been unduly influenced by material provided by, or on behalf of the victims. Victims may seek legal representation to assist in preparing information about their interests which may incur additional costs to government. - -	No additional impact is expected. 0
Overall assessment	0	-	-	0

Key for qualitative judgements

++ much better than doing nothing/the status quo/counterfactual

\+ better than doing nothing/the status quo/counterfactual

0 about the same as doing nothing/the status quo/counterfactual

\- worse than doing nothing/the status quo/counterfactual

\- - much worse than doing nothing/the status quo/counterfactual

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

67. The Ministry is of the view that the status quo is preferable to the changes proposed in response to this commitment. There are already a number of provisions in the Act that reference victims and public safety which would limit the impact of the proposed options improvements. As noted above, a more comprehensive review of legislation, supports and services for victims may be more effective in identifying and addressing the specific needs of victims and communities.

68. While the proposed change acknowledges victims it does not address some of the core issues that victims face in their interactions with the criminal justice system. In particular, these issues relate more to the way victims are treated during criminal procedures and the dissatisfaction with the outcomes that the system delivers.

69. To deliver on the Government commitment, the Ministry prefers option two – strengthen the reference to victims' needs, such as their safety – over a hierarchy of principles. While a prescriptive hierarchy may provide more visibility to victim's needs, there are significant risks of unintended impacts such as disruption to court processes, lengthened case disposal times, and increased appeals, without there necessarily being a corresponding impact on sentencing outcomes.

What are the marginal costs and benefits of the option?

Affected groups *(identify)*	**Comment** *nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.*	**Impact** *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	**Evidence Certainty** *High, medium, or low, and explain reasoning in comment column.*
Additional costs of the preferred option compared to taking no action			
Offenders	**Ongoing -** costs associated with legal advice for additional material to consider and longer hearings.	**Low** – likely to be incremental.	**Low certainty** – no data about the use of the current law or the impact of this change.
Victims	**Ongoing –** costs of legal advice, advocacy and additional resources required to prepare representation to ensure their interests are represented.	**Medium-** There may be some additional time required for court proceedings and individual cases may require additional inquiry.	**Low certainty –** There is no data available to gauge the monetary or emotional impact of the proposed change.
Māori offenders	N/A	N/A	N/A
Families and youth	N/A	N/A	N/A
Courts	**Ongoing –** changes to the way in which proceedings operate may cause disruptions as the new rules are tested through submissions in court and appeals.	**Medium –** There are ongoing pressures regarding court timeliness and case disposal times. The proposed changes could exacerbate these pressures. The impact will be small for individual cases but the overall volume of cases will have a cumulative impact.	**Medium certainty –** Based on stakeholder feedback.
Department of Corrections	N/A	N/A	N/A
Legal professionals	**Ongoing –** Additional legal advice may need to challenge the material provided or the resulting sentences. There might be additional pressures to prepare material on behalf of victims. Both these	**Medium –** Legal advice is expensive, and many offenders are defended through legal aid which is funded by Government.	**Medium certainty –** Based on stakeholder feedback.

	costs may be incurred by the Government.		
Total monetised costs			
Non-monetised costs	**Medium**	**Medium**	**Medium certainty**
	Additional benefits of the preferred option compared to taking no action		
Offenders	**Ongoing –** Offenders may gather a deeper understanding of the consequences of their offending.	**Low –** there are existing mechanisms to achieve this outcome.	**Low certainty**
Victims	**Ongoing –** There may be some benefit to victims in the Court explicitly acknowledging their interests at sentencing rather than only focusing on the direct harm they experienced. Cultural considerations will be able to be taken into account by the Court.	**Medium –** The impact is likely to be more about the victim's emotional wellbeing rather than direct financial impacts.	**Medium certainty –** based on stakeholder feedback.
Māori	**Ongoing –** where offenders and/or victims are Māori, understanding the cultural implications of the offending may help encourage the offender to feel remorse and help rebuild the mana of Māori victims.	**Low –** there are existing mechanisms to achieve this outcome	**Low certainty**
Families and youth	N/A	N/A	N/A
Courts	**Ongoing –** some additional training may be required.	**Low** – there are existing mechanisms to notify judiciary and staff of changes and training can be incorporated into existing processes.	N/A
Department of Corrections	N/A	N/A	N/A

Legal professionals	**Ongoing –** some additional training may be required.	**Low** – there are existing mechanisms to notify legal professionals of changes and training can be incorporated into existing processes.	**Medium certainty**
Total monetised benefits			
Non-monetised benefits	**Low**	**Low**	**Low certainty**

Proposal 2: New aggravating factor: victim working sole charge or where victim's dwelling adjoins targeted business

Section 2.1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The policy context

70. The Government's coalition agreement committed to including that a victim working sole charge or where a victim's dwelling adjoins their business as an aggravating factor during sentencing. This policy is intended to target violent crime of the kind that would be especially traumatising to a sole-charge worker, such as taxi drivers, bus drivers, dairy owners, and those harmed while working in a business that adjoins their home.

71. The retail sector and other sectors with staff providing a service directly to the public are more exposed to the possibility of harm from other members of the public, and consequently are more vulnerable. Crime against workers in public facing roles can have both financial implications for the businesses they work for and significant personal impacts. The Government considers the Sentencing Act should be amended to include an aggravating factor to recognise the vulnerability of these workers and denounce offending against them.

How the victim's vulnerability currently factors into sentencing outcomes

72. Sentencing an offender convicted of a crime typically involves the judge setting a 'starting point'. A judge determines the starting point by assessing the seriousness of the offence and the culpability of the offender, the aggravating factors of the offending, and then considers the aggravating and mitigating circumstances personal to the offender, which may result in uplifts or discounts to the starting point. Aggravating factors of the offending, such as the use of a weapon or particular cruelty in the commission of the offence, will not typically result in a quantified 'uplift' per se as they are factored into the starting point.

73. There are existing aggravating factors relating to the victim's vulnerability. These recognise that the victim:

    a. was as a constable, or prison officer, acting in the course of his or her duty;[26]

    b. was an emergency health or fire service provider acting in the course of his or her duty at the scene of an emergency;[27] and

    c. was particularly vulnerable because of his or her age or health or because of any other factor known to the offender.[28]

74. The list of aggravating factors within the Act is not exhaustive. Section 9(4) states that the Court may take any other aggravating or mitigating factor that it thinks fit into account. This means that there is no impediment to the court Court regarding the fact that an

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[26] Sentencing Act, section 9(1)(fa).

[27] Sentencing Act, section 9(1)(fb).

[28] Sentencing Act, section 9(1)(g).

offence is committed against a victim who is vulnerable by way of working sole charge or where the victim's place of work is adjoined to a dwelling currently as an aggravating factor.

75. The occupation of a victim who is exposed to a greater risk of violent attack while carrying out their occupation is another category of vulnerable victim.[29] Case law indicates that offences against taxi drivers, prison officers, bank tellers and police officers acting in the course of their occupation will invariably attract sentences that recognise their vulnerability.[30]

76. There are several examples where the Court has taken into account that the victim was working alone when determining the starting.[31] The Court of Appeal has recognised that dairies or superettes are "…so often the target for robberies because it is known that they are more often than not staffed by only one person".[32] In fact, the sentencing guideline judgment for aggravated robbery delivered in 2000 considered that the vulnerability of small business operators and the frequency with which they are targeted give rise to the need for deterrence.[33] In many of these cases, the Courts have upheld deterrent sentences.

77. Courts also take into account the extent to which an offence involved unlawful entry or presence in a dwelling place as an aggravating factor under section 9(1)(b) of the Act. The rationale behind this factor is, if Courts find that there was an intrusion into an area where a victim was entitled to feel secure, the offending is considered more serious. Although the Act codified this aggravating factor, the Courts had already treated this factor, of targeting a premises with an adjoining dwelling place, as similar to a home invasion and applied higher starting points in appropriate cases.[34]

78. The law also currently provides a range of criminal offences which cover crimes against retail workers and other workers in public facing roles. For example, assault, aggravated robbery and attempted murder, all carry significant maximum penalties.

Protections for vulnerable workers in other jurisdictions

79. In 2022, the United Kingdom introduced a new aggravating factor which must be considered by courts when an assault has been committed against those who provide a public service, perform a public duty, or provide a service to the public. This includes retail workers, hospitality workers, public service workers, parliamentarians and those working in the social and educations sectors.

80. Other countries have introduced specific offences to protect – and denounce offending against – vulnerable workers. For example, in 2021 Scotland introduced a new offence for assaulting, threatening, or abusing retail workers and provided for a statutory aggravating of the offence where the retail worker is enforcing a statutory age restriction (i.e., liquor store employee).

What is the policy problem or opportunity?

81. The Government's Coalition Agreement with the ACT Party commits to including the victim working sole charge or adjacent to a dwelling as an aggravating factor in the

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[29] Simon France (ed) *Adams on Criminal Law* (looseleaf ed, Thomson Reuters) at SA9.12.

[30] Westlaw, Adams on Criminal Law, Section 9 Aggravating and mitigating factors.

[31] *R v King* [2008] WL 5235884; *R v Salanoa* [2008] NZCA 185; *R v Makara* [2009].

[32] *R v Matahaere* [1988] CA 170/88.

[33] *R v Mako* [2000] 2 NZLR 170 at [42].

[34] See *R v Clarke* [2000] 3 NZLR 354 at [17] – [18].

Sentencing Act. The commitment can be understood in the context of ACT Party manifesto commentary on the issue, which states:[35]

81.1. The policy is intended to target violent crime of the kind that would be especially traumatising to a sole-charge worker.

81.2. Sole-charge worker covers anyone who is working alone and is therefore especially vulnerable – this includes taxi drivers, bus drivers, take-away restaurant and dairy owners.

81.3. The aggravating factor is also intended to address the scenario in which one or more victims were attacked while working in a business that adjoins their home.

82. The commitment appears to respond to public concerns that sentencing outcomes for offenders, particularly those who target victims because of vulnerabilities due to their employment circumstances, do not appropriately reflect the gravity of the offending or the harm inflicted on those victims. It is generally well-known that people who run small businesses, like dairies or off-licence liquor stores, often work alone or with their family, making them particularly vulnerable. If their workplace is attached to their place of work, a crime carried out in their place of work can be just as traumatising as a home invasion.

83. A further concern could relate to a perception that there is no certainty that courts will take into account these specific vulnerabilities during sentencing.

What objectives are sought in relation to the policy problem?

84. As noted in the overview section, the overarching objective is to strengthen the consequences of offending. In particular, this proposal seeks to denounce conduct that indicates a disregard of the criminal justice system and deter repeat offenders. In doing so the proposals seek to improve safety for people and communities.

Section 2.2: Deciding upon an option to address the policy problem

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

85. As discussed in the overview, the following criteria will be used to compare the options to the status quo:

85.1. Prioritising victims and reducing victimisation

85.2. Ensuring appropriate consequences for offending

85.3. Impact on courts and the corrections system

85.4. Workability and consistency with relevant laws and obligations

What scope will options be considered within?

86. As outlined in the overview, the timeframe within which policy options could be developed, has restricted the range of feasible options which can be considered.

87. The narrow and specific nature of the Government's commitment has restricted the range of options which can reasonably be considered. In practical terms, the only alternative is to retain the status quo.

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[35] ACT, Tougher Sentences for Attaches on Vulnerable workers.

What options are being considered?

88. Two options have been identified:

    88.1. Option One – status quo; and

    88.2. Option Two – including the victim working sole-charge and working adjacent to a dwelling as an aggravating factor.

89. Adjustments for aggravating and mitigating factors are recorded in sentencing notes, with varying levels of specificity. Additionally, as previously discussed, adjustments for aggravating factors are not always quantifiable as they may be accounted for in the starting point (as opposed to being a discrete uplift from the starting point). This makes it impractical to extract data on adjustments for these sorts of aggravating factors from sentencing notes. Further, sentencing notes from the District Court jurisdiction, which deals with the majority of sentencing, are not readily accessible due to the high volume of criminal proceedings in the District Court. Therefore, data on these options is constrained significantly and the development of options has instead relied on targeted consultation feedback and relevant research.

Option One – *Status Quo*

90. The status quo, as described above, could be maintained. Courts can, and do, take into account the presence and level of a victim's vulnerability as an aggravating factor when determining the starting point. The specific circumstances of a victim's employment, including where their occupation exposes them to a greater risk of a violent attack, are commonly accounted for by judges at sentencing. However, under the Act, the fact that the victim was working sole-charge or adjacent to a dwelling is not specified as an aggravating factor that must be taken into account.

91. Maintaining the status quo would not achieve the Government's objective of strengthening consequences of offending as the status quo already accounts for these factors as requiring a deterrent sentence. If no action is taken, judges will continue to consider the relevant facts of each case, including the presence and extent of relevant aggravating factors and, using their discretion, may or may not account specifically for the fact that the victim was working sole-charge or adjacent to a dwelling. However, if the other proposals in this paper are progressed (i.e., limiting sentencing discounts), it is likely there will be an increase in severity of punishments for offenders generally.

Option Two – *Including the victim working sole-charge and adjacent to a dwelling as an aggravating factor*

92. This option proposes to include victims working sole-charge and adjacent to a dwelling as an aggravating factor in section 9 of the Act. This would explicitly require the Court to consider these specific vulnerabilities as an aggravating factor whenever they are applicable at sentencing. We expect this would be an important signal of the seriousness of this type of offending and the significant impact on its victims.

93. The proposed amendment would not require the Court to take any specific action in terms of the type or severity of sentence imposed. If applicable, the Court would be required to take this factor into account – along with other applicable aggravating factors – in arriving at the appropriate sentence in a particular case.

94. While the presence of a statutory aggravating factor does not automatically result in an increase in the severity of a sentence, explicit legislative denunciation of this type of offending, however, will help ensure that courts have the ability to impose heavy penalties where appropriate.

95. The wording of this aggravating factor would need to be carefully constructed to ensure it targets the intended group of people. It must be specific enough, for example, to ensure that the adjoining dwelling is the home of the victim or victims, rather than a neighbour.

If constructed too broadly, there is a risk the aggravating factor will apply to more people than the Government intended.

96. As the new aggravating factor contains similar features to other aggravating factors in section 9 (i.e., section 9(1)(g) – "victim was vulnerable because of his or her age or health or any other factor known to the offender"), there is some risk of double counting. This might occur if the presence of the aggravating factor is already reflected in the penalty for the offence. However, due to existing similarities among other existing aggravating factors, the courts are adept at avoiding double counting.

97. The option is expected to have a relatively low impact on sentencing outcomes, as the circumstances of offending, including the target premises, the impact on, and vulnerability of the victim, are already considered aggravating factors at sentencing. However, this option would signal that offending that involves these particular factors are to be viewed seriously.

How do the options compare to the status quo/counterfactual?

	Option One – *Status Quo*	Option Two – new aggravating factor
Prioritising victims and reducing victimisation	0	A new aggravating factor would be an important signal of the seriousness of this type of offending and the significant impact on its victims. +
Ensuring appropriate consequences of offending	0	Could strengthen the consequences for offending by requiring courts to take into account the fact that the victim was working sole-charge or adjacent to a dwelling at sentencing. However, given the amendment largely codifies existing case law, we predict at most a modest increase in the number and length of sentences of imprisonment. The change is unlikely to result in disproportionately lengthy sentences of imprisonment. +
Impacts on the courts and corrections system	0	Sentencing hearings where the aggravating factor is applicable may take a little longer than is currently the case. However, as courts already recognise the circumstances of the victim's employment at sentencing, it is not expected to result in any significant delays in courts. 0
Workability and consistency with relevant laws and obligations	0	The proposed change is unlikely to engage the NZBORA given judicial discretion is maintained when determining sentencing outcomes. However, imposing a clear duty on courts to give special consideration to this type of offending would clarify expectations and contribute to consistency in sentencing outcomes. +
Overall assessment	0	+

Example key for qualitative judgements:

++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
- -	much worse than doing nothing/the status quo/counterfactual

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

98. The Ministry's preferred option is the status quo given that the current sentencing regime already accounts for victims who are vulnerable due to their occupation exposing them to a greater risk of violence during their work (i.e., taxi drivers, dairy operators) and can account for victims attacked while working in a workplace that is also their dwelling in appropriate cases. As these factors can already be considered at sentencing, Option 2 is unlikely to have a significant impact on sentencing outcomes. There are disadvantages to adding an increasing number of aggravating factors.

99. Option 2 (including the victim working sole-charge or adjacent to a dwelling as an aggravating factor in the Act) raises some potential issues. The addition of increasingly specific factors targeted at particular scenarios may implicitly exclude a range of other scenarios from being treated as an aggravating factor or see similar scenarios, with only slight differences, being treated differently at sentencing. For example, Option 2 would fail to apply where there are two workers working together in a dairy, although that may be more serious given there is more than one victim or they may be equally vulnerable in practice (e.g., a parent and their child operating a family business).

100. Option 2 may also complicate the sentencing process, potentially requiring additional court time to establish whether the aggravating factor applies and to what extent. Prescribing the aggravating factor into the Act may lend itself to debate at sentencing, particularly in borderline cases, around its elements such as what constitutes an *adjoining* dwelling, and the meaning of *sole charge.*

101. The limited nature of the Government commitment, and time constraints, mean that it would serve little purpose to identify other options for detailed analysis to achieve the same result. With more time, one such option would be to rationalise the existing aggravating factors. This could include capturing the Government commitment within a broader aggravating factor, like the United Kingdom's approach discussed above, and removing overlapping aggravating factors.

102. The only practical alternative is the status quo which, as stated above, would not deliver on the Government's commitment to explicitly include this factor within the Act.

103. Option 2, as opposed to the status quo, delivers the Government's commitment to specifically include a victim working sole charge or adjacent to a dwelling as an aggravating factor during sentencing. For this reason, we recommend progressing Option 2. The proposed amendment would mean that courts are required to consider this factor in every case where it is relevant, providing an element of certainty.

104. This proposal is expected to have a relatively low impact on sentencing outcomes, as the circumstances of offending, including the impact on, and vulnerability of, the victim are already considered. However, making consideration of these specific vulnerability an explicit requirement will send a strong signal to the court that criminal activity involving the proposed factor should be taken very seriously.

What are the marginal costs and benefits of the option?

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 factor	**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 victim was working "sole-charge". May also give rise to more appeals, especially with the proposal to cap discounts, the cost of which would be absorbed within the current system.	**Low to 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** – additional aggravating factor may result in small extension to sentence length, especially if the proposal to cap 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 set out in the Act	**Medium** – depending on nature of proceedings, substantial preparation, information gathering	**Low certainty** – no data about the use of the current law or the impact of this change.

	i.e. whether the victim was working “sole-charge”, and any overlap with other relevant factors. May give rise to more appeals, the cost of which would be absorbed within the current system.	and research by both prosecution and defence. This would likely involve legal fees and engagement in court proceedings.	
Total monetised costs	**Ongoing** – a broad range of monetised costs.	**Low certainty**	**Low certainty**
Non-monetised costs	*N/A*	*N/A*	*N/A*
Additional benefits of the preferred option compared to taking no action			
People who may be subject to the new aggravating factor	N/A	N/A	N/A
Victims of this particular offending	**Ongoing** – there may be a small impact for some victims who feel a factor that made the offending worse is recognised where it may not otherwise have been.	**Low** – possible that 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** – this option has the potential to have modest benefits for victims where the aggravating factor is taken into account at sentencing.	**Low**	**Low certainty**

Proposals 3, 4, 5 & 6: limiting sentencing discounts

Section A: Diagnosing the overarching policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The Coalition Government has committed to reducing sentence discounts

105. In *Real Consequences for Crime,* the National Party committed to amending the Sentencing Act to include two new limitations on sentence reductions:

    105.1. A maximum sentence discount of 40 per cent, ensuring that regardless of the number of discounts granted by the judge, the final sentence cannot be reduced by more than 40 per cent from the sentence starting point.

    105.2. A "use-it-and-lose-it" rule that prevents repeat offenders from receiving sentence discounts for youth or remorse more than once.

106. The objective is to ensure tougher sentences for convicted criminals that denounce the seriousness of the offending, acknowledge the harm caused to the victims and discourage others from engaging in criminal activities. It is predicated on the view that offenders should take greater responsibility for their offending by learning from their mistakes.

107. Separate to the Government's coalition agreements, the Minister of Justice has directed officials to provide advice on a sliding scale of discounts for guilty pleas. Sliding scales can be a mechanism for minimising unduly generous discounts being applied for late-stage guilty pleas, and incentivising early guilty pleas that so that unnecessary trials can be avoided, reducing court delays and reducing stress for victims.

The problem limiting sentencing discounts aims to address

108. Relevant political party manifestos cited criminal cases in which sentences had been reduced by more than 40 per cent as deviating "significantly from the intended punishment", as part of a more general concern about lenient sentencing.[36]

109. Due to data limitations, including that sentencing discounts are not routinely or systematically collected or monitored, officials have not been able to determine whether sentencing discounts have increased over time.

110. However, evidence shows that courts are generally imposing imprisonment less often. From 2019/20 to 2020/21, the imprisonment rate dropped from 13.2 per cent to 10.7 per cent and has remained at a similar rate over the last two years. In parallel, the proportion of convicted adults receiving a sentence of home detention or other more restrictive community-based sentence increased almost constantly between 2013/14 and 2020/21 from 12.7 per cent to 20.8 per cent with a very slight reduction over the last two years.

111. There has also been a decrease in the use of imprisonment for serious offences. For example:

    - the imprisonment rate for burglary offences with a maximum penalty of 10 years reduced from 50 per cent in 2016/17 to 39 per cent in 2022/23,
    - the imprisonment rate for robbery offences with a maximum penalty of 14 years

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[36] *Real Consequences for Crime*. National Party. 2003.

decreased from 74 per cent in 2016/17 to 58 per cent in 2022/23, and

- the average custodial sentence imposed for robbery reduced from 3.6 years in 2016/17 to 3 years in 2022/23.

112. In the time available, it has not been possible to analyse trends in Crown appeals on the grounds of manifestly inadequate sentences; however, it should be noted that this is a corrective mechanism in response to such concerns.[37]

Courts take research and evidence-based approaches to sentencing

113. Shifts in sentence outcomes could reflect the judiciary's use of scientific evidence and other relevant context to inform sentencing. For example, studies show that rates of employment are modestly higher and rates of benefit uptake lower for those who served home detention, relative to outcomes for those released after serving short sentences of imprisonment.[38]

114. There is also a greater understanding of the relationship between brain development and impulsive behaviour. The frontal lobe of a young person may not fully develop until the age of 25, which is linked to impulsive behaviour.[39]

115. Changing sentencing patterns may also be linked to the increased use of section 27 written reports, which have provided a range of information about offenders' backgrounds and rehabilitative prospects previously not available to the Courts. In 2016/ 2017 financial year there were fourteen section 27 reports funded by legal aid. In comparison, in 2022/2023 there were 2,538 reports.[40] In recent years, our analysis has shown that the Courts have applied average discounts of 10 per cent for mitigating factors canvassed in section 27 reports.

116. Sentencing trends may also have responded to growing pressure on the prison population. Since the mid-1980s, the prisoner population grew rapidly, to a peak of 10,800 in March 2018.[41] As prison systems get closer to capacity, access to rehabilitation programmes can be compromised, which can make the case for preferring community-based sentences.

117. Media accounts of sentences which have received substantial discounts do not always explain the court's rationale for the reductions, which can heighten concerns about leniency. Language such as "discounts" may create the perception that defendants are receiving rewards or unjust leniency for the offence committed.

Section B: Deciding upon options to address the policy problems

118. The options for the proposals will be discussed in the following order:

    a. Proposal 3 & 4: limiting discounts for youth and remorse

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37 The prosecution can also appeal to the first appeal court against a sentence imposed unless the sentence is fixed, under section 246 of the Criminal Procedure Act 2011.

38 Goodall, W. 2019. *Comparison of socio-economic and reconviction outcomes for offenders sentenced to home detention or a short sentence of imprisonment respectively.* Practice Journal Volume 7 issue 1.

39 Lambie, I. 2020. *DSCA Forum Member Report: What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand.* Office of the Prime Minister's Chief Science Advisor.

40 Government funding for section 27 reports ceased with the passing of the Legal Services Amendment Bill. This will contribute to the Government's objective to prevent sentence reductions for personal mitigating factors from exceeding 40 per cent.

41 *Justice Sector Long Term Insights Briefing: Focus on Imprisonment in New Zealand.* 2022. [At 27].

b. Proposal 5: 40 per cent cap on discounts for personal mitigating factors

c. Proposal 6: sliding scale of discounts for guilty pleas

119. The analysis for each proposal begins with an overall discussion about the status quo and the proposal, followed by an analysis of the design features of each proposal.

Proposal 3 & 4: limiting discounts for youth and remorse

120. The commitment to prevent the repeated use of youth and remorse discounts does not apply to offenders dealt with in the Youth Court. This is because the Youth Court does not convict or sentence offenders, but instead imposes alternative requirements, including residence orders.

121. Offenders under the age 18 can be transferred to the adult courts for sentencing where the offending is especially serious. Approximately 80 under 18-year-olds are sentenced in the adult jurisdiction every year.

What options are being considered for limiting youth and remorse discounts?

How the mitigating factors of youth and remorse currently apply in the Sentencing Act

122. Judges are required to take into account the age of the offender and any remorse shown by the offender under Section 9(2)(a) and 9(2)(f) of the Act respectively. This involves a determination of whether a defendant is eligible for a youth or remorse discount and if so, the size of the discount. Courts are also required to take into account the previous convictions of the offender under section 9(1)(i), which may have some bearing on an assessment of remorse.

123. Data is not routinely collected on sentencing discounts and therefore it is not possible to establish how often discounts are made for youth or remorse. Officials have estimated the average size of discounts for mitigating factors by analysing the sentencing notes of a sample of approximately 190 District and High Court criminal cases. Based on the sample data, the average discount for remorse is eight per cent and the average discount for youth is 11.5 per cent.[42] However, Courts have applied as much as 30 per cent for youth.[43]

The factors courts consider in determining discount eligibility

124. The appropriate use of discounts for youth and remorse has evolved with case law and emerging evidence. For example:

- the growing body of evidence of the age-related neurological differences between young people and adults has been the subject of judgments.[44]
- Courts have applied youth discounts to the sentencing of offenders in their twenties, potentially in response to the growing body of evidence about rates of brain development.[45]
- In *Moses* v *R* [2020] NZCA 296, the Court asserted that remorse need not be extraordinary to earn a discount but requires something more than the "bare

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[42] This analysis is drawn from a limited data set, and criminal cases where a section 27 discount is available are likely to result in smaller discounts for other mitigating factors.

[43] *Diaz* v *R* [2021] NZCA 426 [at 39].

[44] *Churchward* v *R* [2011] NZCA 531 [at 77].

[45] Professor Sir Gluckman, P. 2018. *It's never too early, never too late: a discussion paper on preventing youth offending in New Zealand.*

acceptance" of responsibility. Also, that a guilty plea is not synonymous with remorse but may evidence it.[46]

- The Supreme Court in *Hessell* v *R* [2010] stated that sentencing judges are "very much aware" that a defendant's expression of remorse may be no more than self-pity and will be sceptical of unsubstantiated claims of remorse.[47]

125. There has been some discussion about creating a special category for young persons in the Act. In *Dickey* v *R* [2023] NZCA, the New Zealand Court of Appeal stated that the Children's Commissioner and some appellant's counsels had made suggestions and submissions to that effect.[48]

The impact of limiting youth discounts on sentences

126. A limitation on the use of youth discounts would likely engage NZBORA, including freedom from discrimination (Art. 19), and may result in legal challenges on this ground. Concerns may be raised about the consistency of the planned law change with New Zealand's obligations under the Convention on the Rights of the Child (UNCRoC). The Ministry recommends that under 18-year-olds – a small number of whom are transferred to the adult courts for sentencing every year – are exempt from the policy, in accordance with UNCRoC's recognition of the particular vulnerability of this age group.

127. Limitations on youth and remorse discounts will inevitably impact Māori offenders. Based on sentencing patterns from 2019 to 2023, 52 percent of Māori young adults who received a prison or high-level community sentence would not be eligible for a youth discount. In the same time period, 75 per cent of Māori offenders who received either a prison or high-level community sentence would not be eligible for a discount for remorse compared to 62 percent of non-Māori.

128. Limiting youth discounts is more likely to result in longer sentences than limiting remorse discounts because discounts for youth can be substantial. The limitations on youth and remorse discounts are estimated to add an additional 150 prisoners to the prison population over ten years.

The Ministry's preferred approach is the status quo

129. The Ministry recognises that the current law has resulted in ambiguities in relation to the appropriate use of discounts for youth, which arise from the lack of a legal definition for this purpose. The Ministry considers that addressing this issue would provide for fairer and more evidence-based outcomes than a blanket limitation on the repeat use of discounts for youth.

130. A blanket limitation on youth and remorse discounts does not account for the differing circumstances in criminal cases, such as a significant amount of time passing between offences or where dissimilar offences were committed. To address this issue, we recommend that should this policy be adopted, a manifest injustice exception is built into the proposal. The threshold ensures the limitation will be adhered to but can enable judges to determine when the exemption applies. Such exceptions already exist in the Act. For example, manifest injustice is provided for section 102 of the Act – "presumption in favour of life imprisonment for murder" and is built into all steps of the three strikes regime.

131. The status quo also avoids a number of unintended consequences that may arise from limiting the repeat use of discounts. For example:

- encouraging defence counsel to 'stockpile' offences against their client and progress

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[46] *Moses* v *R* [2020] NZCA 296 [at 24].

[47] *Hessell* v *R* [2010] NZSC135 [at 64].

[48] *Dickey* v *R* [2023] NZCA 2 [at 169].

them through the court system at the same time to make the most of the discounts. This in turn could lead to court delays;

- an increase in discharges without conviction if disallowing a further discount for youth or remorse would lead to an unjust sentencing outcome; and
- disincentivising the offender showing remorse, which can support victims' recovery.[49]

Proposal 5: Capping sentencing discounts at 40 per cent

How the use of discounts currently works

132. Section 9 of the Act provides a non-exhaustive list of mitigating factors that the sentencing judge must consider when they are applicable to the case. There are no limits on how many mitigating factors might apply or the size of the discount that can result from their consideration. However, the end sentence is bound by the broader principles and purposes of sentencing in sections seven and eight of the Act, which, for example, provide for the victim's interests to be taken into account and relativity with offending of a similar level of seriousness.

133. Case law has also developed in way that guides judicial decision-making and helps to ensure that a consistent approach is taken to common discounts, such as early guilty pleas and time spent on electronically monitored bail. Sentencing notes capture the nature and size of discounts offered to provide transparency in relation to how the end sentence was calculated. However, because these are not searchable, it is not possible to measure how the use of discounts may have changed over time without undertaking large scale manual research.

134. In lieu of this data, officials reviewed 190 District and High Court cases that concluded in 2021 and 2022. This showed that 18 per cent of cases received a total discount greater than 40 per cent. The largest total discount was 69.4 per cent, which consisted of:

    - 11.1 per cent for the time spent on electronic bail;
    - 50 per cent for youth; and
    - 8.3 per cent for rehabilitation.

The impact of capping discounts at 40 per cent

Impacts on the sentencing process

135. As indicated above, there is limited information about the extent to which the Courts are discounting sentences from the sentence starting point. As a result, a 40 per cent cap is an arbitrary limitation, which appears to be based on what a reasonable person might consider to be the threshold of undue leniency.

136. A blanket limitation on judicial discretion of this kind raises the question of how the sentencing judge should fulfil the existing requirements of sentencing in light of a cap that curtails wider considerations. These include the application of the purposes and principles of sentencing and the requirement to take all relevant mitigating circumstances into account.

137. In terms of sentencing process, it is expected that the sentencing judge would sentence in accordance with the existing approach. This means establishing a starting point for the sentence with reference to case law – adjusted through consideration of the aggravating and mitigating circumstances of the offence – before applying the aggravating and mitigating factors that pertain to the offender. Should the resulting end sentence amount to more than a 40 per cent discount on the adjusted starting point, a

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[49] Maslen, H.E, 2015. *Remorse, penal theory and sentencing* [at 45 – 46].

final adjustment would be made to cap the sentence.

138. It will be important for the Judge's sentencing notes to capture both the capped and uncapped sentence as a reference point for any subsequent appeals. This approach should mean that the law change is workable from a process perspective. However, it is likely that overall sentencing will become significantly more complex, especially when consideration of whether any exceptions to the cap should apply is factored in, with resulting delays to court processes.

Potential for unintended consequences

139. One of the key purposes of the sentencing reforms is to provide reassurance to victims that the crimes committed against them are taken seriously. Targeted consultation with the Chief Victims Advisor endorses this approach, drawing attention to scenarios in which offenders receive discounts for 'otherwise good character', at odds with the serious sexual and violent offending for which they are being prosecuted. The Chief Victims Advisor also noted that reduced sentences may mean that offenders do not reach the seriousness threshold for rehabilitative support.

140. Other feedback received through targeted consultation identified consequences that could be unfavourable to victims. For example, NZLS and the Public Defence Service identified the potential chilling effect on engagement with rehabilitation, restorative justice and early guilty pleas that could result from the reduced impact of such steps on the sentence outcome.

141. Feedback from the judiciary raised other potential unintended consequences, including:

- prescribing the sentencing process in legislation creates the risk of more appeals based on incorrect procedure, which could lead to a need for additional court resources; and
- potential constitutional issues may arise from interfering with the exercise of judicial function in individual sentencing decisions.

142. It is also possible that the imposition of a cap on discounts could influence judicial decision-making in other areas. For example, should judges consider that the interests of justice cannot be served by applying the cap, other sentencing outcomes, such as discharge without conviction, may be preferred.

Resourcing impacts

143. As identified above, there are likely to be unquantifiable impacts on the courts arising from more complex sentencing processes. These will also have resourcing implications for agencies that service the courts, including Police prosecutors, a point raised through agency consultation.

144. The Ministry has modelled the potential impact on the prison population due to more and longer prison sentences that will result from the cap on sentence discounts. We estimate that 150 additional prisoners will be added to the prison population over the next 10 years. This estimate is adjusted to account for the related impacts to the prison population that have already been factored into the recent withdrawal of legal aid funding for section 27 reports (estimated at 420 people added to the prison population over the same period on the basis that discounts will no longer be applied for section 27 reports).

Population impacts

145. Māori will be impacted by the limitations on sentencing discounts. Māori are overrepresented at every stage of the criminal justice system and make up 52 per cent of the people in prison despite Māori only representing approximately 15 per cent of the total population.

The Ministry's preferred approach: maintain the status quo

146. The Ministry's preferred option is to maintain current settings due to:

- the lack of evidence for setting an arbitrary cap;
- the lack of a rational connection between the blanket limitation on discounts and offending of particular concern;
- incompatibilities between the wider purposes of sentencing and the use of a cap; and
- the significant risk of unintended consequences, as identified through targeted consultation with legal experts.

147. The Ministry recognises that inconsistent or outlier sentences are a source of concern, especially for victims of crime. However, other approaches could result in the regulation of sentencing decisions in a more evidence-based and workable way, for example a Law Commission review or the establishment of a Sentencing Council.

148. If the proposal is to proceed, officials recommend the cap specifically excludes section 9(2)(h) "that the offender spent time on bail with an EM [electronically monitored] condition as defined in section 3 of the Bail Act 2000".

149. This factor reflects the restrictive nature of time served, as opposed to the personal mitigating features of the offender. Generally, judges apply a sentence reduction of two days of EM bail for one day of imprisonment, but this varies between judges. Based on our data sample, the average discount for EM bail is nine per cent, and the largest discount applied for EM bail was 30 per cent.

150. Additionally, the length of EM bail is determined by how much time the offender spends on remand, which can be substantial due to court delays. Including EM bail could also lead to cases exceeding the cap without accounting for other mitigating factors.

151. The Cabinet paper does not recommend excluding EM bail from the 40 per cent discount cap.

Options for exceptions to the limitations on youth and remorse discounts, and the 40 per cent cap

152. This section describes and analyses the various thresholds that could be applied to the limitations on youth and remorse discounts, and the 40 per cent cap.

Option One – Low threshold (e.g., the rule does not apply if deemed inappropriate or will result in unjust sentencing outcomes)

153. The court may not exceed the cap or disapply the limitation on youth and remorse discounts unless circumstances relating to the offender make that inappropriate.

Option Two – disapply the rule under limited exceptions

154. The Court can exceed 40 per cent cap in limited exceptions, such as if the defendant displays specific mitigating factors such as a guilty plea and assisting the authorities.

155. Exceptions to limiting youth and remorse discounts could apply for specific reasons such as:

    a. a certain amount of time has passed between the last offence and the most recent offence;

    b. the offender has committed two or more dissimilar, unrelated crimes such as common assault and theft; and

    c. it is evident the offender has made attempts not to reoffend.

Option Three – high threshold (e.g. the rule does not apply if it will lead to manifestly unjust)

156. The Court can only disapply the rules to prevent manifestly injustice outcomes. How the exemption will apply in practice will evolve in case law, similarly to the application of manifest injustice exceptions for murder offences involving young offenders in *Dickey* v *R* [2023] NZCA.[50]

[50] *Dickey* v *R* [2023] NZCA 2 [at 167].

How do the options for exceptions compare to the counterfactual (i.e the proposals are implemented without exceptions?)

	Option One – low threshold (e.g., if inappropriate or unjust)	Option Two – specific exceptions	Option Three – higher threshold (e.g., manifestly injustice)
Reducing victimisation and acknowledging the needs of victims	- Dependent on the judicial application of the exception. Could be considered to prioritise the offender over the victim and community if applied too widely; and could lead to shorter terms of imprisonment.	- Dependent on whether the exceptions prioritise the victim and community impacts of the offence and the offender's subsequent actions.	- Difficult to determine the impact on victimisation as it is dependent on judicial application of the exception. It could be applied broadly or narrowly. Additionally, victims' views are mixed regarding whether longer sentences or more rehabilitative approaches are more appropriate.[51]
Appropriate consequences for offending	+ Enables judges to consider the balance of features of the offending and offender to reach an appropriate outcome.	0 Depends on the exceptions but not all defendants will receive a discount therefore some sentences will be longer than others, and not be an appropriate consequence.	0 Dependent upon judicial interpretation of the threshold. A threshold applied too narrowly or too widely can lead to inappropriate.
Workability and consistency with relevant laws and obligations	++ Provides courts with the discretion to consider the circumstances of the offender in determining the sentence.	+ Limits judicial discretion but the exceptions could be designed to be consistent with the Crown's obligations under NZBORA and the Treaty of Waitangi.	++ Dependent on judicial application of the exception but a manifest injustice exemption has precedence in the NZ legal system.
Overall assessment	+	0	+

+ better than doing nothing/the status quo/counterfactual. 0 about the same as doing nothing/the status quo/counterfactual.

++ better than doing nothing/the status quo/counterfactual. - worse than doing nothing/the status quo/counterfactual.

- - much worse than doing nothing/the status quo/counterfactual

[51] Chief Victims Advisor to Government. 2019. *Strengthening the Criminal Justice System for Victims* Survey Report [At 11 &12].

Ministry's preferred option for exceptions: Option Three – a higher threshold (e.g. manifest injustice)

157. The Ministry of Justice's preferred option is Option Three – establish a higher threshold for disapplying the rules, such as manifest injustice.

158. The interpretation and application of a manifest injustice exemption maintains some incentive for offenders to plead guilty earlier and engage in rehabilitation and restorative justice practice.

159. High thresholds such as manifest injustice exemptions exist in the Three Strikes regime and section 102 of the Sentencing Act – "presumption in favour of life imprisonment for murder", and therefore would not be significant departure from current sentencing practice.

160. The interpretation of manifest injustice in relating to sentencing discounts will also evolve through case law, similar to the application of manifest injustice exceptions for murder offences involving young offenders in *Dickey* v *R* [2023] NZCA and subsequent cases. This ensures the application of law remains pragmatic and compliant with NZBORA.

161. A lower threshold under Option One risks rendering the limitations on discounts redundant as it may be seldom applied. Under Option Two, there may be a number of instances in which an offender should receive a subsequent discount for youth or remorse, (such as where sentencing is on multiple offences committed at different times) that if included in the list of established exceptions, may create an overly prescriptive provision that becomes unworkable.

162. Applying different exemptions to related sentencing policies can lead to confusion and difficultly in applying them to sentencing outcomes.

Proposal 6: sliding scale discount for guilty pleas

163. A sliding scale prescribes the incremental discounts that can be applied for an early guilty plea, between a fixed minimum and maximum amount. Their purpose is to recognise that the earlier a guilty plea is entered the greater the benefit to victims and the courts, and to ensure a consistent approach is taken to a common sentence discount. Key considerations in the design of sliding scales are:
    - ensuring that incremental discounts align with points in the court process when a person could reasonably be expected to enter a guilty plea;
    - setting discounts at a level that adequately rewards early guilty pleas without amounting to coercion; and
    - ensuring that there remains some incentive for late-stage guilty pleas, given that there are still benefits to victims and the Courts from a trial avoided in its early stages.

How guilty plea discounts are currently determined

164. Under section 9 (2)(b) of the Sentencing Act, courts are required to consider "whether and when the offender pleaded guilty". The size of the discount has evolved through case law. The judiciary commonly apply the Supreme Court guideline judgment in *Hessell* v *R* [2010] NZSC 15, which held that discounts for guilty pleas should be no more than 25 per cent. They also consider relevant case law.

165. Defendants have received discounts of up to 25 per cent close to trial. In the sample of 190 cases, we identified of the 48 defendants that pleaded guilty while awaiting trial:
    - 50 per cent received a 25 per cent discount; and
    - 25 per cent received a discount between 20 per cent and 23 per cent.

166. Of the 13 that pleaded guilty at trial:

- One defendant did not receive a discount;
- Four defendants received a 20 per cent discount; and
- One defendant received a 25 per cent discount because they entered a guilty plea "almost immediately after a settlement proposal".

167. Maintaining the status quo enables the courts to consider all the relevant circumstances in which the plea was entered and mitigates the risk of engaging NZBORA, specifically section 25(d) "the right not to be compelled to be a witness or to confess guilt."

Sliding scales are used in other jurisdictions and have been adopted in New Zealand

168. Models adopted in other jurisdictions can provide a basis for a sliding scale in New Zealand. In the UK Sentencing Council's sliding scale, the last opportunity to receive a discount is on the day of trial and should be no more than ten percent. The court can depart from the sliding scale in the interests of justice.

169. New South Wales established a sliding scale with incremental discounts for court events from 25 per cent for a guilty plea entered at first appearance to five per cent for a plea entered during the course of the trial for specific court events.

170. The New Zealand Court of Appeal introduced a sliding scale through a guideline judgment in *Hessell* v *R* [2009] NZCA 450. The guideline judgment provided for 33 per cent discount if the guilty plea was entered, or the willingness to enter a guilty plea was communicated, at the first reasonable opportunity. This incorporated any reduction for remorse. A defendant could receive a discount of up to 60 per cent if the offender entered a guilty plea at the first reasonable opportunity and provided substantial assistance to the authorities.

171. The Supreme Court overturned this guideline judgment on the grounds of incompatibility with the requirement that Judges consider the full circumstances of a case when determining a guilty plea discount.[52] This new guideline judgment also held that discounts for remorse should be considered separately, and on this basis the maximum discount for early pleas should be 25 per cent.

Recommended approach to legislating for a sliding scale

172. The Ministry supports the introduction of sliding scale that can provide transparency and certainty of outcome for the offender and enable the defence counsel to provide early advice pertaining to entering a plea. Feedback from targeted consultation on this planned law change was broadly positive, with the Chief Victims Advisor and the Chair of the Parole Board both emphasising that avoiding the trauma of a trial is a great relief for victims, especially in cases that involve sexual violence.

173. At the same time, several implementation issues were raised that need to be considered further. For example, NZLS raised some concern that a Court-events based scale would be difficult to apply in a fair manner where, at times, delays or expedited hearings can be the result of many differing factors that defendants have no control over. The judiciary identified other scenarios in which a defendant's ability to enter an early guilty plea may be compromised, for example:

- the Crown could become persuaded at trial to reduce the charge to what it arguably should have always been. A full discount or similar is probably justified in those

[52] *Hessell v R* [2010] NZSC 135.

circumstances because the offender has pled guilty at the first reasonable opportunity to the appropriate charge; and

- 'Late' guilty pleas could be entered due to circumstances outside of the defendant's control. Disclosure is a big issue in this area, and it is reasonable for lawyers to want to receive and review evidence before advising client – including whether the charge is the appropriate charge or not.

174. A degree of flexibility in the operation of a sliding scale is therefore likely to be critical to ensuring just sentencing outcomes. On this basis, the Ministry recommends that a legislatively-based sliding scale should set a clear expectation that Judges will apply it, but allow it to be disapplied when it is in the interests of justice to do so.

175. The Ministry supports the recommendation in the Cabinet paper that:

- the maximum discount for an early guilty plea should be 25 per cent if the defendant pleads guilty or communicates a willingness to plead guilty at the first reasonable opportunity; and
- the minimum discount should be five per cent if the defendant pleads guilty or communicates a willingness to plead guilty during the course of the trial.

176. The analysis below assesses whether there should be fixed incremental discounts between these minimum and maximum thresholds. While we consider there is merit in a more prescriptive model, further work is needed to determine how these should link to specific court events. For this reason, we support the Cabinet paper's recommendation that the Minister of Justice should have delegated authority to take further decisions on this matter.

Impacts of a sliding scale model

177. Based on sample data, it appears that a significant number of offenders are receiving relatively large discounts for early guilty pleas well into the court process. This may be for the reasons given above – i.e. that offenders for a variety of reasons could not reasonably enter a guilty plea any earlier.

178. In the time available, The Ministry has only been able to do basic scenario modelling based on a hypothetical sliding scale, with no assumptions about how offenders may respond to incentives. On the basis that there is no behaviour change, we estimate the impacts on sentence lengths to be relatively large, as a significant number of offenders would get significantly smaller discounts.

179. It is estimated that the new and longer prison sentences will result in an addition of 780 to the prisoner population.

What sliding scale options are being considered?

Option One – Non-prescriptive sliding scale

180. The sliding scale could establish a maximum discount threshold and a minimum discount for a guilty plea entered or communicated at the first reasonable opportunity. The Court determines size of discount for intermediate court events.

Option Two – a prescriptive sliding scale

181. The sliding scale could set increments for specific court events, such as the case review hearing and trial callover, could be established. Under this option, the courts could deviate from the sliding scale if it is satisfied that is appropriate to do so given the circumstances of the offender, and must provide a rationale for awarding a guilty plea discount.

How do the options for a sliding scale compare?

	Option One – a non-prescriptive sliding scale	Option Two – a prescriptive sliding scale
Acknowledging the needs of victims	+ Encourages early guilty pleas, saving the victim from the distress of going to trial	+ Encourages early guilty pleas, saving the victim from the distress of going to trial
Impacts on the Courts and timeliness	- May incentivise defendants to plead guilty earlier, therefore expediting cases but more time may be required to determine incremental discounts	+ The clear increments may incentivise defendants to plead guilty earlier, therefore expediting cases
Workability and consistency with relevant laws and obligations	- Is a departure from current sentencing practices. However, it creates more consistency in sentencing, and appeals should lessen over time as guideline judgments are laid down.	- Is a departure from recent sentencing practice. May engage expose the Crown to legal risk as defendants challenge the application of the scale and exceptions. However, it creates more consistency and transparency in sentencing, and appeals should lessen over time as guideline judgments are laid down.
Overall assessment	0	+

+ better than doing nothing/the status quo/counterfactual. ++ better than doing nothing/the status quo/counterfactual.

0 about the same as doing nothing/the status quo/counterfactual. - worse than doing nothing/the status quo/counterfactual.

- - much worse than doing nothing/the status quo/counterfactual

The Ministry's preferred option: Option Two – a prescriptive sliding scale

182. The Ministry's preferred option is Option Two - a prescriptive sliding scale. It provides more transparency and certainty of outcome than a non-prescriptive sliding scale (Option One). The structured nature also reduces inconsistency in the application of guilty plea discounts.

What options are likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

183. The package of preferred options is as follows:
    a. Courts may not apply discounts for youth and remorse more than once unless to do so would be manifestly unjust;
    b. A prescriptive sliding scale of discounts for guilty pleas; and
    c. Courts may not reduce a sentence by more than 40 per cent than it otherwise would have imposed for the mitigating factors under section 9(2), including any guilty plea, unless to do so would be manifestly unjust. This option excludes time spent on EM bail under section 9(2)(h) from the 40 percent cap.

184. The package seeks to strike the balance between appropriate consequences for offending and retaining judicial discretion to enable fair and proportionate sentencing, therefore minimising the risk of litigation against the Crown.

Consistency with NZBORA and international obligations

185. The package of the preferred options should facilitate consistency with NZBORA and international obligations, particularly, the right not to be subjected severely disproportionate treatment under section 9, the right to be free from discrimination under section 19, and the right not to be compelled to be a witness or to confess guilt under section 25 (d) of NZBORA.

186. Excluding under 18-year-olds from the limitations on youth discounts aligns with our obligations under the UnCROC.

What are the marginal costs and benefits of the Ministry's preferred package of options?

187. The below tables are a costs and benefits analysis of the Ministry's package of preferred designed features for limiting sentencing discounts.

Affected groups *(identify)*	**Comment** *nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.*	**Impact** *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	**Evidence Certainty** *High, medium, or low, and explain reasoning in comment column.*
Additional costs of the preferred option compared to taking no action			
Offenders	**Ongoing** – some offenders will receive longer sentences as a result of the limitations on discounts.	**Medium** – Based on our sample of 190 cases, the average discount for youth is 11.5 per cent; remorse is seven per cent and guilty pleas are 20 per cent. This suggests sentences will be longer as a result of the proposals.	**Medium** – this determination is based on our analysis of 190 district and high court cases for which discounts for section 27 were available.
Māori	**Ongoing** - Māori will be impacted by the limitations on sentencing discounts. Māori are overrepresented at every stage of the criminal justice system and make up 52 per cent of the people in prison despite Māori only representing approximately 15 per cent of the total population	**High**	**High** – data is based on modelling.
Young people	**Ongoing** – Young people are likely to be disproportionately impacted by the limitations on discounts for youth and remorse. From 2019 to 2023, 50 per cent of adult offenders aged 18 plus who received either a prison or high-level community detention or intensive supervision had at least one previous sentence. Seventy-six of young adult	**High**	**Medium** – data is based on a limited sample.

	offenders had at least one previous sentence.		
Victims	**Ongoing –** limitations on discounts may disincentivise offenders from expressing remorse.	**High**	**High –** based on stakeholder feedback.
Frontline and implementation staff (Courts etc.)	**One-off** – changes to the courts case management systems and information and training costs. **Ongoing** – impacts court timeliness due to defendants appealing sentences.	**High** - $215,000 to modify the courts case management system and $50,000 to train court staff on youth and remorse discounts limitations this includes training staff on the three strikes regime). **Medium** – judges maintain a degree of discretion to deviate from the limitations.	**High** – the Budget bid for the changes has been approved.
Department of Corrections	**Ongoing –** existing prison capacity is likely to increase as offenders are sentenced to longer sentences as result of the limitations on discounts.	**High -** The addition to the prisoner population is estimated at 1,080 over ten years from the combination of establishing a sliding scale for guilty pleas, limiting the use of youth and remorse discounts and the 40 per cent cap on sentencing discounts. This amounts to a range of $95.4m to $122.5m over ten years.[53] These calculations do not account for discounts for EM bail being specially excluded.	**High** – the impacts have been modelled.

[53] Upper limit assumes that there would be no change in the timing of guilty pleas by offenders. Lower limit assumes that 30 per cent of offenders currently pleading guilty while awaiting trial or at trial would now plead guilty at admin or review stages if guilty plea discounts were capped post review stage.

New Zealand Police	**One-off –** Police will provide training, policy, and communications for prosecutors on the proposals. **Ongoing –** Potential Police prosecution resourcing needs, due to additional court events related to the proposals to limit sentencing discounts (as these may reduce the incentives on offenders to resolve cases early).	Unquantified costs	**Medium –** New Zealand Police have confirmed these are potential costs.
Legal professionals	**Ongoing -** Law firms will need to train solicitors and other legal staff on the changes to sentencing discounts	Unquantified costs	**Medium**– the limitations on sentencing discounts are a departure from current sentencing practice
Crown Law	**Ongoing** – training prosecutors and other legal staff on the regime and the judiciary's interpretation and application	Unquantified costs, may require future budget bid funding.	**Medium** – the changes are a departure from current sentencing practice
The Judiciary	**One-off** – costs to communicate sentencing changes	$150,000 (includes costs to communicate three strikes regime)	**High** – a Budget Bid has been submitted and approved.
Total monetised costs		$95.82m to $122.92m	
Non-monetised costs			
Additional benefits of the preferred option compared to taking no action			
Offenders	**Ongoing** – transparency of sentencing discounts and more certainty of outcome	**High** – offenders will receive a discount for a guilty plea.	**High** - based on the stakeholder feedback and academic research.
Victims	**Ongoing** – transparency of sentencing discounts and more certainty of outcome; and less likely to have to go to trial	**Medium –** higher thresholds for exemptions may deter offenders from showing remorse.	**High** – based on the stakeholder feedback and academic research.
Legal professionals	**Ongoing** – transparency of sentencing discounts and more certainty of outcome	**High**	**High** – based on stakeholder feedback.

Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits	Ongoing	High	High

Proposal 7: Limiting concurrent sentencing for those who offend on bail, parole and while in custody.

Section 7.1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The policy context

188. The Coalition agreement between the National Party and New Zealand First commits to various amendments to the Sentencing Act. Removing concurrent sentences for those who commit offences while on parole, on bail, or whilst in custody is one of these commitments.

189. The proposal seeks to limit the way in which concurrent sentencing is used for offending on bail, parole or in custody to denounce behaviour that indicates a disregard for the criminal process.

Cumulative and concurrent sentencing

How concurrent and cumulative sentencing works

190. Judges can impose multiple sentences cumulatively (one after the other) or concurrently (at the same time). Cumulative sentences are generally imposed because the offences were of a different kind or not connected. Concurrent sentences are usually imposed when the offences for which an offender is being sentenced are similar in kind, or part of a connected series of offences (e.g., a spree of burglaries).

191. When imposing a concurrent sentence, the court will identify a lead offence as a starting point. The sentence will then be uplifted based on the additional lesser offences with consideration of totality. This results in a longer sentence for the lead charge with the lesser sentences imposed concurrently.

192. The imposition of a cumulative sentence usually means the identification of the unique starting point for each offence, before considering whether the totality principle requires an adjustment of the initially identified starting points.

193. Whether concurrent or not, the final sentence imposed for multiple offences is subject to totality.[54] The principle of totality requires the court to ensure that the total period of imprisonment is not out of proportion to the gravity of offending. This can either result in

[54] Sentencing Act 2002, Section 85.

an increase or decrease the final sentence, to ensure the total period of imprisonment is reflective of the totality of offending.

194. An offence committed while the offender was on bail or still subject to a sentence is specified as an aggravating factor under section 9 of the Act. Aggravating factors may result in an uplift in the total sentence even if the sentence is not imposed cumulatively.

Offending while on bail, parole or in custody under the current settings

195. The Act 2002 does not provide specific direction on how to use concurrent and cumulative sentences for offences committed on bail, parole or while in custody. Instead, these decisions are currently informed by case law.

196. Under the current settings, it is generally appropriate to make a sentence cumulative if it was committed after bail was granted subject to the principal of totality. In practice, there are instances where offending committed while on bail is sentenced concurrently with the previous offending.[55]

197. Offending committed while in prison or on parole, generally requires the imposition of deterrent sentences. A person on parole is also liable to recall under the Parole Act 2002 for the sentence the original sentence they are serving. Offending in prison that is too serious to be punished by disciplinary procedures often attracts punishment in the interest of deterrence.[56]

198. When sentencing an offender for multiple offences, the judge must consider the totality of the sentence against the totality of offending. This means that any outstanding period of imprisonment, may be considered when imposing the final sentence of imprisonment.[57]

199. There may be instances where the imposition of shorter cumulative sentences fails to reflect the seriousness of the individual offences. In these circumstances the court can use a combination of concurrent and cumulative sentences.

Concurrent sentences are sometimes imposed for those who offend while subject to a sentence.

200. There have been calls that concurrent sentencing for offending while in custody is common and that this inadequately denounces this behaviour.[58] Not all assaults committed while in custody will make it to court, as incidences can be dealt with administratively. The more serious assaults are often the ones that end up being heard in court and concurrent sentences can be an insufficient response in some circumstances.

201. The Corrections Association of New Zealand (CANZ) has expressed the view that when staff members are assaulted, the sentence is often imposed concurrently meaning no time is added to the single notional sentence. CANZ has raised concerns regarding an increasing level of violent assaults on staff and sentences being absorbed within outstanding prison time.[59] While there is limited evidence that indicates that mandatory

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[55] For example, *R v Collins*, HC Auckland CRI-2007-090-5304, 3 March 2009.

[56] Halls (2024), Guidance on the use of cumulative and concurrent sentences of imprisonment.,

[57] Sentencing Act 2002, Section 85

[58] RNZ News, May 2019, NZ First calls for cumulative sentencing.

[59] CANZ Submission, (2020) Protection for First Responders and Prison Officers Bill, , www.parliament.nz.

minimum sentencing schemes deter future assaults against public officers, there may be a need to deliver stronger denunciation of offending while in custody.[60]

[60] Bond, Porter, van Felius & Mullholland, (2020) Assaults on Public Officers: a review of research evidence, sentencingcouncil.qld.gov.au.

Modelling the use concurrent sentencing for offending in custody

202. The Ministry of Justice undertook analysis of those sentenced in the year 2016, 2017 and 2018 – and were subsequently charged for further offences while in custody or on parole. The data indicated that of all offenders imprisoned in 2019, who offended while in custody or on parole and were imprisoned prior to the end of their first sentence, 63% were sentenced cumulatively for at least one offence (adding time to their notional single sentence).

203. The data set included 33 cases where the subsequent charges included assaulting a prison officer. Of the 33 sentences imposed in response to this offending, 20 were imposed concurrently, meaning no time was added to the notional single sentence.[61]

204. There are circumstances where the Act does not allow for the imposition of cumulative sentences. For example, when a person is already subject to an indeterminate sentence. In addition, a cumulative sentence cannot be imposed if a person is subject to a sentence, but at the time of sentencing, not detained under this sentence.[62] More information is required to determine the extent to which the identified cases are subject to these exceptions.

Completely removing concurrent sentencing is not a feasible option…

205. Completely removing concurrent sentences for offending on bail, custody or on parole and removing the principle of totality in relation to these offences would provide for lengthier sentences of imprisonment. However, this would require fundamental changes to sentencing practice, sentence calculation and represent a significant departure for New Zealand sentencing policy.

206. Modelling shows that if each individual offence committed on bail, custody or on parole was to be sentenced cumulatively, with no adjustment for totality, this would result in more than 10,000 additional people being sentenced to imprisonment, with most of these having committed only minor offences. Such an approach would result in unmanageable increases to the prison population, severely disproportionate sentencing outcomes, and almost certainly engage section 9 of the NZBORA.

..but there is international precedent for enabling the use of cumulative sentences under specific circumstances..

207. There is some precedent for requiring or enabling cumulative sentences for offending while on bail, parole or while in custody. For example, In Queensland, cumulative sentences are specifically required for certain offences, if they are committed while serving a term of imprisonment or while released on post-prison community-based release. The sentence of imprisonment must then be ordered (the Court has no discretion) to be served cumulatively with any other term of imprisonment the offender is liable to serve.[63]

208. In Victoria, every sentence of imprisonment is presumed to be served concurrently with any uncompleted term of imprisonment, unless this offence is committed while on bail,

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[61] For example, in one case a person was sentenced to a 1.17-year period of imprisonment with a sentence end date of 12 December 2019. On 12 May 2019, the person committed an assault on a prison officer and was sentenced to 0.15 years. The sentence is imposed concurrently with an end date of 29 August 2019 (prior to the end of the previously imposed sentence which ended on 12 December 2019).

[62] Sentencing Act 2002, Section 83 (2).

[63] The Queensland Sentencing Council illustrates how this works using the following example: Tyrell has been given a 2-year prison sentence for grievous bodily harm, which he committed while on parole for a previous sentence of 12 months' imprisonment for robbery. Tyrell had 3 months left on his sentence when he committed the offence of grievous bodily harm. As grievous bodily harm is a listed Schedule 1 offence, the judge must order his sentence to be served cumulatively to the prior sentence, which means Tyrell must serve 2 years on top of the remaining 3 months left on his sentence at the time of committing the new offence.

on parole, or considered a serious offence within their sentencing regime.[64] Conversely, Western Australia's legislation does not provide guidance on when a sentence should be imposed concurrently or cumulatively relying on case law instead.

209. Currently, New Zealand's sentencing regime is more closely aligned with the United Kingdom and Canada regarding the use of concurrent and cumulative sentences. However, the proposed amendments would shift the New Zealand approach towards that used in some Australian jurisdictions.

What is the policy problem or opportunity?

210. The current sentencing regime in New Zealand allows for judicial discretion in sentencing, including the option for concurrent sentencing for multiple offenses committed by an individual. However, concerns have arisen regarding the use of concurrent sentencing, particularly for offences committed while on bail, parole, or in custody. While in the 2015/16 year 35% of all sentences were cumulative, this gradually decreased to 19.5% in 2021/22.

211. Officials have assumed that while the policy seeks to achieve cumulative sentencing for subsequent offending, this does not mean each separate offence should be sentenced cumulatively, on top of an already outstanding sentence if the offending would currently allow for a concurrent sentence (for example, a spree of burglaries).[65]

Problem 1: subsequent offending while on bail.

212. There is a view that offending while on bail should be recognised as a separate event to any previous incidents of offending and sentencing outcomes should reflect this. For this reason, sentences for offences committed while on bail should not be imposed concurrently with any sentences for earlier offences if they are unrelated. Offending while on bail is a serious matter, and the offending is exacerbated by a breach of trust. The Act currently allows for the concurrent sentencing of offences committed before and after being granted bail.

Problem 2: offending while in custody or on parole

213. Cumulative sentences ensure additional time is imposed (extending the notional single sentence), to denounce behaviour that indicates a disregard for the criminal justice system, deter offending once sentenced and assure the safety of corrections staff. Currently, the Sentencing Act allows for the imposition of concurrent sentences of imprisonment, meaning no additional time is served for the offending committed while on parole or in custody. For example, this can result in a person serving their sentence at the same time as their outstanding period of imprisonment, meaning the time served disappears inside of the original sentence.

Cumulative sentences don't necessarily result in longer periods of imprisonment.

214. The totality principle ensures that whether the sentence is imposed cumulatively or concurrently, it should reflect the totality of offending. In theory, this means that a cumulative sentence does not necessarily result in a more punitive sentence. Instead, it's a different method of calculating the final sentence outcome. In practice, there are

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[64] Sentencing Advisory Council Victoria, 2023, Aggregate prison Sentences in Victoria.

[65] For example, a person is released on bail after committing a minor offence. Once released, the person commits 7 burglaries. If the offender was to be sentenced to 5 years imprisonment, for each of the 7 individual incidents of burglary – this would result in a total sentence of 35 years. Instead, the policy envisions that while the offender could receive a concurrent sentence that reflects the totality of the 7 burglaries subsequently committed, this incident should be treated separately to the previous offence and the sentence imposed cumulatively (in addition to the sentence for the previous offence).

circumstances where a cumulative sentence could ensure time is added to an existing sentence, as opposed to being absorbed within outstanding time.

215. If an offender is already subject to a sentence (whether in custody or on parole) and is sentenced to a cumulative sentence, the new sentence combines with the outstanding sentence – creating a single notional sentence. However, if a sentence is imposed concurrently, the offender will not get any time for pre-sentence detention. This can result in an offender having an earlier chance of release on parole if they are sentenced to a cumulative sentence over a concurrent sentence.

216. Stakeholders have raised some concerns about the way in which additional sentences for offending while subject to a sentence, interact with parole eligibility. However, due to time constraints officials have been unable to consider this issue within the scope of this work.

What objectives are sought in relation to the policy problem?

217. As noted in the overview section, the overarching objective is to strengthen the consequences of offending. In particular, this proposal seeks to denounce conduct that indicates a disregard of the criminal justice system and deter repeat offenders. In doing so the proposals seek to improve safety for people and communities.

Section 7.2: Deciding upon an option to address the policy problem

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

218. As discussed in the overview, the following criteria will be used to compare the options to the status quo:

    a. Prioritising victims and reducing victimisation

    b. Ensuring appropriate consequences for offending

    c. Impact on courts and the corrections system

    d. Workability and consistency with relevant laws and obligations

What scope will options be considered within?

219. The options seek to clarify the expectation, or make it a mandatory requirement, that cumulative sentences are imposed for offending while on bail, parole or in custody.

220. The proposal is limited to sentences of imprisonment only. For example, the proposed options therefore do not apply to community-based sentences. The Act currently does not allow for the imposition of cumulative sentences on any indeterminate sentence. The proposed options do not propose to change this. Likewise, under the current settings, the Court is unable to impose a sentence of imprisonment cumulatively on another sentence of imprisonment, if at the time of sentencing the offender is subject to a sentence but not detained under it.[66] Officials do not propose making changes to these

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[66] Sentencing Act 2002, section 83(2) and 83(3).

settings. The changes will only apply to the circumstances under which the Act currently allows for the imposition of cumulative sentences.

What options are being considered?

221. Three main options have been identified:

   a. **Option 1** – *Status quo – the Act does not specify whether cumulative sentences should be imposed or not (relying on case law).*

   b. **Option 2** – *A guidance provision clarifying that cumulative sentences should be imposed for offending while on bail, parole or in custody where the Act allows.*

   c. **Option 3A** – *A mandatory requirement to impose cumulative sentences for offending while on bail, parole or in custody.*

   d. **Option 3B** inserting an unless manifestly unjust exception to the requirement.

Option One – The status quo

222. **Option 1** is the status quo. The current legislative framework does not specify how concurrent sentences should be used for offences committed while on bail, parole, or while in custody. Instead, the current approach relies on case law and judicial discretion to ensure adequate sentencing outcomes.

223. While case law indicates that cumulative sentences are generally appropriate for offending under the prescribed circumstances, there is evidence of inconsistent application and concurrent sentences being imposed for offending while on bail, parole, or in custody.

224. Retaining the status quo will retain judicial discretion in relation to how concurrent sentencing is used for offending while on bail, parole and in custody. Retaining the status quo would not contribute to an increase in the prison population or negatively impact court timeliness.

Option Two – inserting a guidance provision into Section 84 (*Ministry of Justice's preferred option*)

225. **Option 2** would insert a guidance provision into the Act which clarifies that cumulative sentences are generally appropriate for offending while on bail, parole or in custody. Such a provision would be consistent with other guidance on the use of concurrent sentencing already contained in the Act.[67]

226. This approach would clarify the expectation that any sentence of imprisonment imposed for offending while in custody or on parole, is imposed in addition to any outstanding time of imprisonment. This approach would also clarify the expectation that subsequent offending while on bail, should not be sentenced concurrently with previous offending.

A guidance provision is likely to strengthen the consequences where most appropriate

227. A guidance provision would enable the courts to come to the most appropriate sentencing outcomes based on the individual circumstances of the case. Inserting a guidance provision may increase the likelihood sentences are imposed cumulatively (extending the notional single sentence) for offending when subject to a sentence.

228. As the change does not provide for a mandatory requirement, the Court maintains the discretion to disregard the direction if necessary to ensure the interest of justice is served. As mentioned, cumulative sentences do not always result in longer periods of

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[67] Sentencing Act 2002, Section 84.

imprisonment. As the guidance provision is not a mandatory requirement, the court can consider this factor – which would not be possible with option 3.

Option Three – inserting a mandatory requirement.

229. **Option 3A** is a mandatory requirement for the imposition of cumulative sentences for any offending while on bail, parole or while in custody. This would mean that the court must impose a sentence cumulatively, regardless of the individual circumstances of the case. The final sentence imposed would still be subject to the principle of totality. The court must therefore ensure that the final sentence imposed does not result in a total period of imprisonment wholly out of proportion to the gravity of the overall offending.[68]

230. A mandatory requirement to impose cumulative sentences with no exceptions removes judicial discretion. The absence of judicial discretion can lead to severely disproportionate punishment.[69] For this reason, a potential sub-option (**Option 3B**) is to accompany the requirement with an "unless manifestly unjust" exception clause. This clause will enable the court to consider not imposing a cumulative sentence if the court considers this would lead manifestly unjust sentencing outcomes. Even with such an exception it is difficult to determine what the impacts will be on sentencing outcomes if this approach is taken.

Mandatory cumulative sentences could slow down case disposal times, without resulting in longer periods of imprisonment.

231. This option would strengthen the consequences of offending under some circumstances. However, cumulative sentences can also result in an earlier parole eligibility as pre-sentence detention is not taken into consideration when imposing concurrent sentences.[70] A mandatory requirement could also result in disproportionately short individual sentences being imposed, to ensure the final sentence of imprisonment is not grossly disproportionate to the totality of offending.

232. A mandatory requirement may be impractical in some circumstances as sentencing becomes more time consuming and calculation becomes more complicated. While the final sentence length imposed would likely be similar to one imposed concurrently, the process becomes less efficient. The imposition of shorter individual sentences could lead to a perception that harm done is being inadequately recognised.

Overview of the options

233. The table on the following page compares option 2 (inserting a guidance provision) and option 3 (inserting a mandatory requirement). All options are subject to judicial discretion and therefore the ability to anticipate the specific impacts of each change is limited. Both options would ensure there is specific mention in the Act on how cumulative sentences should be used for offending while on bail, parole or in custody.

234. Option 2 would do this by clarifying what is generally appropriate, however, enabling the Court to decide how this is implemented. The impacts of this option would be indirect

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[68] Sentencing Act 2002, Section 85.

[69] For example, a requirement to complete the full remaining parole term before serving imprisonment for a subsequent offence could result in disproportionate outcomes. For instance, a scenario where a young adult convicted of murder serves a 10-year sentence, is released on parole, and later faces charges for a minor offence. In such cases, the individual might effectively need to serve a life sentence due to the obligation to fulfil the outstanding parole period.

[70] In *R v Yu* [2023] NZHC 1391, the defendant was to be sentenced to a nominal sentence of 15 years, with an eight-year minimum period of imprisonment, for murder while serving a sentence of imprisonment for drug charges. If sentenced cumulatively, this would form a single notional sentence meaning the start date of the sentence would be 16 August 2019 (the date the defendant was sentenced for the drug charges). The parole eligibility would then be 17 January 2029. Instead, if the defendant was sentenced concurrently, the start date would be the day of sentencing, providing a parole eligibility date of 2 June 2031.

and more dependent on judicial interpretation than option 3. This option would be more workable for the courts, corrections and within the current sentencing regime than option three. As this change retains more judicial discretion that option three, its less likely to result in an increase in case disposal times and disproportionate sentencing outcomes.

235. Option 3 would be more prescriptive and remove the ability to impose concurrent sentences for offending while on bail, parole or in custody. The impacts of this option would be more significant and direct, compared to option 2. The Ministry considers that this option is more likely to lead to inefficiencies in the court system and disproportionate sentencing outcomes, compared to option 3. However, some of these risks can be partially mitigated by adding in an exception clause for situations that the court deems manifestly unjust. Mandatory cumulative sentence may not result in longer periods of imprisonment, and in some cases could provide for earlier parole eligibility, while increasing case disposal times.

236. Officials also explored the option of targeting a mandatory requirement for cumulative sentences to violent and sexual offending only. This approach would reduce the impact on the prison population and negative implication for court timeline compared to option 3. However, this approach wouldn't address a large number of offences that the public are concerned about and was considered outside of the scope of feasible options within the given timeframes.

How do the options compare to the status quo/counterfactual?

	Option 1 – Status quo	Option 2 – Guidance provision	Option 3A – A mandatory requirement	Option 3B – A mandatory requirement, with exceptions
Prioritising victims and reducing victimisation	0	May ensure that sentences that were previously imposed concurrently, are now imposed cumulatively providing more recognition of the harm done to the victim. Where cumulative sentencing would result in many short individual sentences, the court retains the discretion to use concurrent sentencing instead. The clear signal to impose additional time of imprisonment for offending in custody may function as a deterrence for some offenders. The change acknowledges the concerns raised by Corrections staff, in response to an increase in assaults. The changes are unlikely to directly result in a measurable decrease in victimisation. +	Will ensure that sentences that were previously imposed concurrently, are now imposed cumulatively providing recognition of the harm done to the victim. It may be clearer in the final sentence which time of imprisonment is imposed in response to which incident of victimisation. Shorter individual sentences may need to be imposed to ensure the total sentence of imprisonment is not out wholly out of proportion with the totality of offending. This may have negative implications for victims, who may feel as though the individual sentence imposed inadequately reflects their individual harm. Stakeholders have indicated that a mandatory requirement would increase case disposal time and could result in more cases going to trial. This may negatively impact victims who will be subject to an increased risk of secondary victimisation – and ongoing stress from judicial proceedings. Under some circumstances, the imposition of cumulative sentences may result in an earlier parole eligibility and therefore release. This outcome may not always prioritise the needs of the victim. The changes are unlikely to directly result in a measurable decrease in victimisation. 0	
Ensuring appropriate consequences for offending	0	The amendments could strengthen the consequences of offending under some circumstances by ensuring the notional single sentence is extended for offending while subject to a sentence, due to a change in the way the sentence imposed – and ensure the judiciary consider imposing sentences cumulatively for subsequent offending on bail. The changes will likely have a signalling effect – signalling to the judiciary that stronger consequences are desired for repeat offenders. There may be situations where a concurrent sentence is more appropriate due to the impact on parole eligibility, and the judiciary will still have discretion to consider these factors.	The amendments could strengthen the consequences of offending by ensuring the notional single sentence is extended for offending while subject to a sentence. The amendment may also result in separate cumulative sentences for subsequent offending on bail, resulting in a longer final sentence of imprisonment. However, the consideration of totality may mean that shorter individual sentences are imposed, resulting in the same end sentence. There are some circumstances where the imposition of a cumulative sentence will result in a shorter period of imprisonment due to the person being eligible for parole at an earlier date – than if the sentence was imposed concurrently. Removing the ability for the court to consider these factors means that sentencing outcomes will be weakened under some circumstances. 0	

		The change is unlikely to result in disproportionate sentencing outcomes that engage NZBORA. +		
Impacts on the courts and the corrections system	0	Unlikely to cause significant delays in the court system. While the guidance may alter the imposition of some end sentences, the court maintains the necessary judicial discretion to impose sentences concurrently where this would be more efficient or effective. Unlikely to cause significant increases to the prison population. The guidance inserted into the Act will be largely reflective of current case law. However, exact implications are difficult to model as the guidance is subject to judicial discretion. Modelling suggests the guidance could add 270 additional prisoners over a 10-year period. This impact would result in an estimated cost for Corrections of $30.3m. There may be some impact on the courts due to the volume of offending while on bail, as cumulative sentences may be less efficient. 0	A mandatory requirement could lead to adverse outcomes in sentencing. The limitation on judicial discretion is more significant and could therefore result in inefficiencies in sentencing and make sentencing and sentence calculation more complicated. Concurrent sentences are often used as a method to sentence the more significant volume of offending committed on bail. Removing the ability for the courts to use this method may increase case disposal times. if all sentences for offending on bail, parole or in custody were sentenced cumulatively, and the sentence imposed at 10% of the maximum time, this would result in an addition of 300-400 to the prisoner population. The indicative costs of this impact would be between $33m - $44m. This approach may also reduce the number of cases that are resolved through plea negotiations resulting in further pressures. - -	A mandatory requirement that allows for exceptions, when manifestly unjust, will enable the court to adjust sentences if they are severely disproportionate. Such exceptions are likely to somewhat mitigate the risk of adverse outcomes. The policy change will likely have negative impacts on the efficiency of the court system. The exception is unlikely to completely mitigate the negative implications on the incentive to resolve cases through plea negotiations. -
Workability and consistency with relevant laws and obligations	0	The changes are unlikely to engage the New Zealand Bill of Rights given judicial discretion is maintained when determining sentencing outcomes. However, the changes would clarify expectations and could contribute to consistency in sentencing outcomes. +	A mandatory requirement would limit judicial discretion, which may result in adverse sentencing outcomes. Removing the ability to impose concurrent sentences is inconsistent with broader sentencing policy, which relies on judicial discretion and case law to determine adequate sentencing outcomes.	A mandatory requirement with exceptions, would enable some judicial discretion in response to adverse sentencing outcomes. While the mandatory requirement is inconsistent with broader sentencing policies, the use of exceptions will improve the workability of a mandatory requirement within the current sentencing regime compared to option 3A. -

			Such an approach, without exceptions for NZBORA considerations, may engage section 9 of the NZBORA. - -	
Overall assessment	0	+	- -	-

+ better than doing nothing/the status quo/counterfactual.

++ better than doing nothing/the status quo/counterfactual.

0 about the same as doing nothing/the status quo/counterfactual.

- worse than doing nothing/the status quo/counterfactual.

- - much worse than doing nothing/the status quo/counterfactual.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

237. To meet the Government's stated objectives, the Ministry's preferred option is to insert a guidance provision into the Act that clarifies the expectation that cumulative sentences are generally appropriate for offending while on bail, parole or whilst in custody where the Act provides for this.

238. While the other options may appear to strengthen the consequences of offending under some conditions, they come with a range of negative consequences:

    238.1. The impacts on court timeliness could be significant due to an increase in sentence calculation complexity. Concurrent sentencing is used as a tool for efficient sentencing for the large volume of offending while on bail. However, removing this possibility completely may negatively impact the courts' ability to deal with the volume of offending. Increasing sentencing complexity and limiting judicial discretion will likely increase case disposal times.

    238.2. The impacts on the prison population may be significant if a mandatory requirement is imposed. This is likely to be largely driven by the significant volume of offending while on bail. There is an added risk due to complications in modelling the specific impacts – due to the difficulty in anticipating the way in which the judiciary will operationalise the changes.

    238.3. Inserting a mandatory requirement and removing judicial discretion is a departure from sentencing policy more generally and may lead to unintended consequences. Officials have not been able to consult with relevant stakeholders to identify and mitigate the risks associated with such a prescriptive approach.

    238.4. The consequences of offending will only be strengthened under specific conditions. In some circumstances, a cumulative sentence imposed in addition to outstanding prison time (which forms a single notional sentence) may result in an earlier parole eligibility date. Completely removing the ability to impose a concurrent sentence will also remove the ability for the judiciary to consider these factors when imposing a sentence.

    238.5. Cumulative sentences do not always lead to longer sentences of imprisonment. When the Court assesses multiple offences, the totality of the final sentence imposed is considered against the totality of offending. This is the case whether the sentence is imposed concurrently, or cumulatively. In practice, this means that when there are multiple offences the sentence outcome could be the same, whether imposed concurrently or not. While cumulative sentences for offending while subject to a sentence will invariably result in an increase of the single notional sentence, the impacts are less clear when sentencing for multiple offences of which some were committed on bail.

What are the marginal costs and benefits of the option?

239. The below tables are a costs and benefits analysis of the Ministry's preferred option to limit the use of concurrent sentencing for those who offend while on bail, parole or whilst in custody.

Affected groups *(identify)*	**Comment** *nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.*	**Impact** *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	**Evidence Certainty** *High, medium, or low, and explain reasoning in comment column.*
Additional costs of the preferred option compared to taking no action			
Those who offend while on bail, parole or whilst in custody	**Ongoing –** Those who have sentences imposed cumulatively may be held in prison longer. Costs associated with additional legal fees.	**High –** Offenders subject to cumulative sentences may face longer sentences of imprisonment.	**Medium certainty –** The modelling undertaken indicates that there will be some increase to the prison population.
Victims	**NA**	**NA**	**NA**
Māori	**Ongoing** – the imposition of cumulative sentences may have a disproportionate impact on Māori.	**High -** Initial modelling indicates that 58% of those sentenced for offending while on bail, parole and in custody are Māori. Any increase in sentence lengths imposed may disproportionately impact Māori worsening existing inequities in the justice system.	**Medium certainty–** While modelling can be done based on the volumes of offending under the prescribed circumstances, it is not possible to accurately anticipate how the judiciary will use judicial discretion on a case-by-case basis.
Families and youth	**Ongoing** – any disruption caused to families due to increased sentence lengths imposed, may impact young people.	**Medium –** There will likely be some increase to the prison population, which has flow-on effects on families and their youth.	**Low certainty-** While some modelling determines the potential increases to the prison population, its difficult to anticipate the indirect consequences for young people and the wider family.

Courts	**Ongoing –** cost of court proceedings.	**Medium –** there will be an increase in the complexity of cases in relation to sentence calculation, particularly for offending while on bail. This may slow down court proceedings. There may be less motivation to resolve matters through plea negotiations.	**Medium certainty –** based on consultation with the judiciary and practitioners who have pointed out the importance of using concurrent sentencing for efficiency. However, officials are unable to model the impacts on court timeliness as the changes are subject to judicial discretion.
Department of Corrections	**Ongoing –** cost for any convicted offenders whose sentences are managed by Corrections.	**High –** There are complexities with modelling the impacts of a guidance provision as the changes are subject to judicial discretion. However, modelling suggests the guidance could add 270 additional prisoners within a 10-year period. This impact would result in an estimated cost for Corrections of $30.3m.	**Medium certainty -** based on targeted consultation and modelling undertaken by the Ministry of Justice. However, analysis is subject to judicial discretion limiting the ability to anticipate indirect impacts.
Legal professionals	**Ongoing** – cost of more complexity in proceedings and a lower likelihood of resolution through pleas.	**High –** More time will be required to consider cases and greater investigation of each charge will be necessary for sentence indications and post-conviction sentencing.	**Medium certainty –** Based on feedback provided during targeted consultation.
Total monetised costs	This option has the potential to have **medium ongoing** additional costs	**High impact: $30.3m**	**Medium certainty –** the changes are subject to judicial discretion and based on limited information.
Non-monetised costs	*N/A*	*N/A*	*N/A*
Additional benefits of the preferred option compared to taking no action			
Those who offend while on bail, parole or whilst in custody	**NA**	**NA**	**NA**

Victims	**Ongoing –** victims may be more satisfied with sentencing outcomes and feel as though any harm caused is better recognised in sentencing outcomes. There may be more transparency around sentencing practice for offending on bail, parole and while in custody.	**High –** victims of offending where the sentence was previously absorbed within existing time of imprisonment may be more satisfied with sentencing outcomes.	**Medium certainty –** based on targeted consultation.
Māori	**NA**	**NA**	**NA**
Young people	**NA**	**Medium**	**NA**.
Courts	**Ongoing –** there may be some benefit in clarifying how cumulative sentencing should be used for offending while on bail, custody or parole.	**Very low –** a minor benefit as the judiciary already has standard sentencing procedures based on the existing legislation and case law.	**Medium certainty –** based on consultation with the judiciary
Department of Corrections	**NA**	**NA**	**NA**
Legal professionals	**NA**	**NA**	
Total non-monetised benefits	This option has the potential to have some modest benefits to victims.	**Medium impact**	**Medium certainty**

Section 7.3: Delivering the options

How will the new arrangements be implemented?

240. This section covers the implementation of all the proposals discussed in this regulatory impact statement. We have analysed the package of options to include in the Sentencing Reform Bill. To deliver on the Government's commitments, the Ministry of Justice analysed the costs and benefits of the following options:

    240.1. **Prioritising victims** – amending the principles of sentencing to ensure 'the victims' needs' are taken into account when sentencing.

    240.2. **Victim working sole charge** – acknowledging the specific vulnerability of a victim working sole charge or adjacent to a dwelling, in the Act as an aggravating factor.

    240.3. **Limiting discounts for youth and remorse** – that courts may not apply discounts for youth and remorse more than once unless it would result in manifestly unjust sentencing outcomes.

    240.4. **Sliding scale for discounts for guilty pleas** - a sliding scale with a maximum threshold of 25 percent for a guilty plea entered or willingly communicated at the first reasonable opportunity, and a minimum setting of up to five per cent for a guilty plea entered or communicated during the course of the trial.

    240.5. **Capping discounts at 40 per cent** - courts may not reduce a sentence by more than 40 percent when considering the mitigating factors under section 9(2)(a) to (g), including any guilty plea, unless it unless it would result in manifestly unjust sentencing outcomes.

    240.6. **Removing concurrent sentencing** – inserting a guidance provision that states that cumulative sentences are generally appropriate for offending while on bail, parole or in custody where the Act allows for it.

241. The proposed changes will require amendments to the Sentencing Act. These changes will take effect when the legislation comes into force. The Bill is expected to pass in mid-2025. The commencement date is recommended to be delayed by six months to enable implementation activities, including changes to IT systems and communicating the changes to the judiciary and legal profession.

242. Officials recommend that the changes are applied from the commencement date and are not applied retrospectively. The general position of the Legislation Act 2019 and the Legislation Design and Advisory Committee Committee's Legislation Guidelines is that legislation should have a prospective effect. If the proposal was applied retrospectively, it would potentially engage NZBORA (specifically sections 25 and 26 (2)) and Article 3 of the Treaty.

Prioritising victims

243. The new arrangements will be implemented through a legislative change to the principles of sentencing that judges must consider when sentencing offenders. Guidance will develop over time through training for judges and lawyers (including prosecutors), and case law.

244. The proposed change aligns with victims' rights set out in the Victims' Rights Act 2002. Victim Support, Court Victim Advisors, victim advocates and others supporting victims

will inform victims of opportunities to express their views about their needs and safety so that this can be taken into account at sentencing.

Victim working sole charge

245. If the change is made, courts will be required to consider that the victim was working sole charge or adjacent to a dwelling. No new administrative procedures would be required for implementation. There are no compliance costs associated with this change.

246. It will remain the case that the prosecution or offender may appeal to a higher court where the sentence imposed in a particular case is considered to be either inadequate or excessive. Such appeals often hinge on whether a particular factor has been given undue weight and appeal decisions shape the way a particular factor is taken into account in subsequent cases. For this reason, the actual effect of the proposed amendment will be influenced by the way it is interpreted by higher courts in appeals against sentences. The judiciary will continue to be responsible for administering sentencing decisions, and the trials for any appeals, which would involve Crown Law prosecutors.

247. The Department of Corrections will continue to be responsible for managing sentences of any person who receives either a community-based sentence, or a sentence of imprisonment, as a result of the amendment.

Limiting discounts for youth and remorse

248. As sentencing notes are not currently searchable, the courts may not have information on whether an offender has previously received a relevant discount. The Ministry has secured funding through Budget 2024 to meet the costs of changes to CMS systems, which will enable these discounts to be recorded.

Implementation period for changes

249. An implementation period is likely to be needed before the new legislation comes into effect. Immediate commencement could mean the judiciary has insufficient time to interpret and implement the changes being made to the sentencing Act. Some process changes will be required, meaning the Ministry will need time to implement the required system and process changes.

250. A shorter implementation period could result in a range of risks due to limitations on the ability to update relevant stakeholders and update the needed systems. This could lead to inconsistent or incorrect application of the changes which could expose the Crown to legal challenge.

251. Responsibilities for ongoing operation and enforcement of the new arrangements and support for implementation.

252. The Ministry of Justice and Department of Corrections will be responsible for administering the legislation and associated changes contained in the proposals. The Courts will be responsible for applying the legislation and determining sentencing outcomes based on the changes to legislation.

253. The Ministry of Justice will provide operational support for the judiciary and the Courts, to implement the required system and process changes. The Ministry will also communicate the changes to wider stakeholders such as the legal profession.

What will the proposed changes cost?

254. The primary costs associated with the planned law changes arise from the need to accommodate more prisoners serving longer sentences. The Ministry has undertaken modelling using a 10-year horizon as this is the point at which the costs are projected to reach a steady state. The modelling has not been peer reviewed and should be viewed as indicative only.

255. Officials have used a high-level estimate of $120,000 per prisoner. This figure reflects the estimate of the direct costs of housing a prisoner within existing capacity. However,

this estimate does not consider the significant capital investment and other associated expenditure that would be required to provide additional capacity required to meet projected numbers. We have estimated the cumulative financial implications for the proposals contained in this regulatory impact statement as the following:

Proposal	**Estimated increase to the prisoner population over a 10-year period***	**Estimated cost impact over 10 years ($M)**
Prioritising victims	NA	NA
Sole charge aggravating factor	NA	NA
Capping discounts for guilty pleas[71]	780	$88.4m
Removing repeat discounts for remorse and youth	150	$17.4m
Capping total discounts at 40%	150	$16.7m
Removing concurrent sentencing	270	$30.3m
Total indicative cost	**1350**	**$152.7m**

**Calculated using an estimated cost of $120,000 per year per prisoner but removing the home detention costs of 124 per day for those who were previously serving home detention sentences.*

256. Some of the above modelling has been included in the Justice sector prison population forecasts that Corrections uses to inform budget bids. However, because this work has been done urgently and in stages, not all of the impacts have been included. As a result, there are likely to be impacts on the prison population that go beyond what the Corrections is currently funded for.

257. Additional costs (e.g., implementation costs) such as changes to operating systems are not included in the above table. Instead, these costs are included and analysed in the individual costs benefit analyses of each proposal.

258. There are also likely to be costs for front line agencies and others who service the Courts, including prosecutors. These costs will arise from more complex sentencing processes leading to additional Court events, delays and litigation. Because several of the planned law changes do not have a domestic or international precedent, these impacts cannot be reliably modelled.

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

259. The proposals will require amendments to the Sentencing Act 2002, which are periodically reviewed by the responsible policy functions. The Ministry of Justice administers the Sentencing Act jointly with the Department of Corrections.

260. The Ministry of Justice will monitor and review sentencing outcomes, appeals and other judicial decisions that relate to the amendments made. In doing so, it will monitor how

[71] Upper limit assumes that there would be no change in the timing of guilty pleas by offenders. Lower limit assumes that 30 per cent of offenders currently pleading guilty while awaiting trial or at trial would now plead guilty at admin or review stages if guilty plea discounts were capped post review stage.

the changes are being applied in practice and whether there are any issues with the changes that have been made. Further amendments could be progressed through other legislative vehicles if necessary.

261. While the Ministry will continue to monitor and analyse sentence outcomes and other related data as part of the standard work programme, stakeholders can also raise any identified concerns directly with the Ministry and the Department of Corrections.

262. There will also be ongoing monitoring of rates of offending. However, it will not be possible to determine whether the changes in offending rates are attributed to the change made to the Sentencing Act due to the many factors that can interact with offending activity.

Appendix 1

The separation of powers and judicial independence.

1. New Zealand has three separate branches of Government which include:
   a. **The Legislature** consists of Members of Parliament and the Governor General. The role of the Legislature is to make laws (legislation) and to scrutinize the executive.
   b. **The Executive** consists of Ministers (both inside and outside Cabinet) and Government departments. The role of the Executive is to decide policy, propose laws and administer the laws.
   c. **The Judiciary** consists of all judges. The role of the judiciary is to interpret and apply the law. The law is developed through the laws passed by Parliament and the 'common law'. The common law has been developed by judges of centuries and is altered by the courts in response to changing circumstances.
2. Importantly, judges are independent from the Executive and Legislature branch. This means that judges must be free to determine each case according to the law (including common law) and based on the specific evidence presented in court. Judicial discretion is a feature of the sentencing framework for several reasons, including:
   a. the need to balance a wide range of sometimes overlapping purposes, such as public safety and rehabilitation;
   b. the broad spectrum of conduct captured across different offence categories;
   c. the need for judges to assess the relative seriousness of offending; and
   d. the need to weigh information provided about the impact of the offending on victims, and outcomes from restorative justice processes which involve both the offender and the victim.
3. To maintain this independence, it is important that the judiciary is not influenced by Members of Parliament or Government officials. While the judiciary cannot interfere with decisions of Parliament, they can review the actions to determine whether they acted within the powers given to them by the relevant legislation.

The Sentencing Act 2002

4. The Sentencing Act (the Act) sets out the purposes for which offenders may be sentenced or otherwise dealt with. The Act provides a range of sentences and other means of dealing with offenders to provide for the interests of victims of crime. To provide transparency and consistency of sentencing outcomes, the sentencing legislation matches the type and severity of sentences to the seriousness of the offending and the culpability of the offender. The Act provides guidance intended to match the offender to the offending through the purposes of sentencing (section 7), the principles of sentencing (section 8), and what aggravating and mitigating factors to take into account when determining an appropriate sentence (section 9).
5. The Act also provides for a range of sentences and guidance about the appropriate use of each sentence type, and how these can be combined. For imprisonment, additional guidance is provided about minimum periods of imprisonment, preventative detention and life imprisonment. The multi-layered guidance included in the act promotes consistency and transparency in the sentencing process.
6. To provide for the sentencing for murder and high-risk offenders, the Act contains a flexible approach that is able to respond to a variety of factors that can arise in an individual case and provide the court the required tools to deal with the circumstances

presented. This seeks to provide a less prescriptive approach ensuring the court does not have to rely on rigid and arbitrary distinctions.

7. The Courts take a two-step approach to sentencing.[72] First, the Court calculates the adjusted starting point, incorporating the aggravating and mitigating features of the offence. Second, the Court incorporates the aggravating and mitigating factors personal to the offender, together with any early guilty plea discount. Aggravating and mitigating factors may result in uplifts or discounts to the sentence.

[72] Set out in the guideline judgment of *Moses v R* [2020] NZCA 296 at [46].