

Regulatory Impact Statement

Special aggravating factor for offences against police officers and prison officers

Agency disclosure statement

This Regulatory Impact Statement (RIS) was prepared by the Ministry of Justice.

In response to the increase in the number of assaults on police officers and prison officers over the past five years and a spate of serious incidents in recent months, the Government has decided that the Sentencing Act 2002 should be amended to ensure that the fact that an offence is committed against a law enforcement officer will be taken into account as an aggravating factor at sentencing.

The Sentencing Act currently provides that the court may take into account any aggravating or mitigating factor that it thinks fit in addition to the specific factors listed in section 9 of the Act. The proposed amendment will provide an element of certainty by requiring the court to take account of the fact that an offence is committed against a police officer or prison officer as an aggravating factor at sentencing.

The reasons for imposing a particular sentence are set out in the judge's sentencing notes. Individual judges have different styles in summarising the matters that they have taken into account, including the various aggravating and mitigating factors, in deciding the sentence to be imposed. This precludes an empirical analysis of the way the courts have taken the fact that an offence was committed against a law enforcement officer into account in the past.

The proposed amendment will not require the court to take any specific action in terms of the type or severity of sentence imposed. The court will be required to take this factor into account – along with other specified and unspecified aggravating factors – in arriving at the appropriate sentence to be imposed in a particular case.

Because judges' assessment of aggravating and mitigating factors are not amenable to empirical analysis and the proposed amendment does not entail specific action by the court, no monitoring or evaluation of the proposed amendment is possible.

As noted above, the Government has decided to undertake the proposed amendment to the Sentencing Act. The narrow and specific nature of the proposal has restricted the range of options that can reasonably be considered. In practical terms, the only alternative is to retain the status quo, which would not achieve the element of certainty that the Government wishes to achieve.

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Status quo and problem definition

The status quo

1. The current law includes a small number of offences that specifically apply when the victim is a police officer,¹ although there are no special offences for assaults on prison officers. For the most serious assaults, however, the accused is charged with generic offences that apply regardless of the victim's status, for example, attempted murder, wounding with intent or injuring with intent. In these cases, the Sentencing Act 2002 does not contain any direction to the court to approach cases where the victim is a law enforcement officer any differently from other cases. The exception to this approach is the murder of a constable or prison officer acting in the course of his or her duty, where the court must impose a minimum term of 17 years or more unless it would be manifestly unjust.
2. Section 9(1) of the Sentencing Act sets out a number of aggravating factors that must be taken into account when imposing sentence. These include factors such as the use of actual or threatened violence, that the offence involved unlawful entry into a dwelling place, or that the offence occurred while the offender was on bail or subject to a sentence. The list of aggravating factors also includes factors that reflect community values such as where the offender abused a position of trust or committed the offence due to hostility towards a particular group on the basis of race or religion.
3. The list of aggravating factors is not intended to be exhaustive. Section 9(4) states that the court may take any other aggravating or mitigating factor that it thinks fit into account. It also states that the fact that a particular factor is listed in the section does not imply that it should be given greater weight than any other factor taken into account by the court. This means that there is no impediment to the court regarding the fact that an offence is committed against a police officer or prison officer as an aggravating factor under the current law.
4. The courts have traditionally regarded assaults on law enforcement officers as serious. The High Court has described an attack on a police officer as "equivalent to an attack on the community because our police are the representatives of the community in the matter of law and order in society. They are society's frontline" (R v Tua [1985]). The Court of Appeal has emphasised the gravity of using serious violence against police officers and upheld deterrent sentences in a number of cases.

The problem

5. There has been a significant increase in the number of recorded assaults on police over the past five years as set out in Table 1 below. Total assaults increased by 33% over the 2004-09 period while serious assaults leading to charges under the Crimes Act increased by 38%. Taking into account the increase in the number of sworn police staff over this period, the rate of total assaults increased by 14% and serious assaults by nearly 19% during this period.

¹ For example, Using any firearm against law enforcement officer (Crimes Act, 1961, section 198A), Aggravated assault (Crimes Act, s 192 (2)) and Assault on police officer (Summary Offences Act 1981, s 10).

Table 1: Recorded assaults on police officers

Fiscal year	Total assaults	Serious assaults*	Sworn police officers at 30 June	Total assaults per 1,000 sworn staff	Serious assaults per 1,000 sworn staff
2004/05	1,869	298	7,527	248.3	39.6
2005/06	2,123	331	7,768	273.3	42.6
2006/07	2,248	393	8,113	277.1	48.4
2007/08	2,384	460	8,453	282.0	54.4
2008/09	2,481	412	8,774	282.8	46.9
Change	+32.7%	+38.3%	+16.6%	+13.9%	+18.6%

* Charges laid under Crimes Act.

6. The increase in the number and rate of assaults on prison staff over the 2004-09 period has been sharper than those on police officers. Total assaults and serious assaults both doubled during this period. There was also a sharper increase in the rate of assaults on prison staff compared to police officers although this rate is still much lower for prison officers (87.2 per 1,000 frontline staff in 2008-09) than sworn police officers (282.8).

Table 2: Recorded assaults on prison officers

Fiscal year	Total assaults	Serious assaults*	Frontline prison staff	Total assaults per 1,000 frontline staff	Serious assaults per 1,000 frontline staff
2004/05	151	34	2,708	55.8	12.6
2005/06	261	52	2,893	90.2	18.0
2006/07	263	31	3,360	78.3	9.2
2007/08	344	66	3,554	96.8	18.6
2008/09	304	75	3,485	87.2	21.5
Change	+101.3%	+120.6%	+28.7%	+56.3%	+71.4%

* Includes sexual assaults and assaults involving bodily harm requiring medical intervention.

Objectives

7. The Government's objective is ensure that the court takes the fact that an offence is committed against a police officer or prison officer acting in the course of his or her duty into account as an aggravating factor at sentencing.

Regulatory Impact Analysis

8. The current proposal is one of a number of measures being considered by the Government to demonstrate its commitment to providing robust state protection to law enforcement officers. The proposal is very narrow and there are no other ways of achieving the same result. The proposed amendment would mean that the courts are required to take account of this factor in every case where it is relevant. It would therefore provide an element of certainty. It does not, however, direct the court to take any specific action – for example, impose a particular sentence or increase the length of such a sentence – having taken this factor into account. The requirement to take this factor into account will not place any administrative burden on prosecution or defence counsel, or court staff.
9. The limited nature of the proposal means that it would serve little purpose to identify other options to achieve the same result for detailed analysis. The only practical alternative is the status quo, which would not achieve the Government's objective.
10. As noted above, the current law allows the courts to take a range of factors into account at sentencing and the fact that a particular factor is listed in the aggravating factors does not imply that it should be given greater weight than any other factor taken into account by the court. Section 9(4)(a) of the Sentencing Act provides that the court may take account of any other aggravating factor that it thinks fit, in addition to the listed aggravating factors.
11. Offending against law enforcement officers has long been taken into account as an aggravating factor in sentencing at common law. This suggests that the courts as a practical matter are likely to take account of the fact that an offence is committed against a police officer or prison officer as an aggravating factor at sentencing. The absence of this factor from the listed aggravating factors, however, means that one cannot be certain that this is the case.
12. Maintaining the status quo would not achieve the Government's purpose of ensuring that the fact that an offence is committed against a police officer or prison officer acting in the course of his or her duty is always taken into account as an aggravating factor at sentencing.

Consultation

13. The data on assaults on police officers and prison officers was provided by New Zealand Police and the Department of Corrections respectively. These agencies and other core government agencies were consulted in the drafting of the Cabinet paper concerning these proposals.
14. No other external consultation was conducted given the very narrow focus of the proposal and the fact that the Government has indicated that it intends to proceed with the proposal.
15. The proposal can only be given effect by legislation. The public will have an opportunity to comment on the proposal at Select Committee.

Conclusion

16. The Government wishes to mark its support for law enforcement personnel by ensuring that the court takes the fact that an offence is committed against a police officer or prison officer into account as an aggravating factor at sentencing.
17. The limited nature of the proposal means that attempting to identify other options to achieve the same result for detailed analysis would serve little purpose. The only practical alternative is the status quo, which would not achieve the Government's objective.

Implementation

18. The proposal requires a minor amendment to the Sentencing Act 2002. After the effective date, courts will be required to take into account the fact that an offence has been committed against a police officer or prison officer acting in the course of his or her duty as an aggravating factor in imposing sentence. No new administrative procedures are required for implementation. There are no compliance costs associated with the proposal. The proposal does not create any scope for the reduction or removal of existing provisions.
19. As with other sentencing cases, 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. The actual effect of the proposed amendment will therefore be influenced by the way it is interpreted by higher courts in appeals against sentence.

Monitoring, evaluation and review

20. Consideration has been given to ways of monitoring and evaluating the operation of the proposed amendment. The amendment will require the court to take account of the fact that an offence was committed against a police officer or prison officer acting in the course of his or her duty as an aggravating factor in imposing sentence. The court will continue to take other aggravating, as well as mitigating, factors into account in arriving at the appropriate sentence. Assessing the impact of the proposed amendment would require a formal record of the weight given to specific aggravating and mitigating factors at sentencing. The changes this would require to the ways judges impose sentence and the Ministry of Justice's recording systems are not seen as necessary or desirable in the circumstances.