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Dogma or data? Why sentencing reforms in NZ will annoy judges and clog the courts

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The Luxon government surely has little sense of irony.

Shortly after introducing the Parliament Bill, designed to reinforce the fundamental constitutional principle of the separation of powers, it has introduced the Sentencing Reform (Amendment) Bill, which seeks to constrain the judicial arm of the state.

Its purpose is to put more people into prison for longer. In its Regulatory Impact Statement, the Ministry of Justice estimates 1,350 people will be added to the current prison population. The ministry is also clear that most of the changes are unnecessary and rest on inadequate consultation, particularly with Māori.

The main change the bill makes is to cap reductions in a prison sentence for mitigating factors at “40% of the sentence”, unless that would be “manifestly unjust”.

Mitigating factors

To understand why this is a problem, we need to start with how the Sentencing Act 2002 works. First, the seriousness of an offence provides a starting point. Since the maximum sentence is for the worst example of the offence, the facts can be put on a scale.

Secondly, the judge considers aggravating factors, such as repeat offending, malicious motivations or the victim's vulnerability. The new bill specifies various additional aggravating factors, but the ministry notes these are already taken into account.

Finally, the judge looks at mitigating factors, such as youth, intellectual disability or mental illness, remorse and positive steps to remedy the cause of offending.

One important available reduction is for a guilty plea. The bill will cap this at 25% – the Supreme Court already decided this several years ago.

Sentence reductions based on these factors will regularly exceed the overall 40% cap proposed in the new bill. For example, impulsive offending by a young adult with ADHD who was in state care because of family abuse, and who pleads guilty early, would likely mean a considerable sentence reduction.

Similarly, offending by someone who both admits it, shows remorse and assists the police would qualify for considerable reductions.

Read more: [A last minute amendment to NZ's gang legislation risks making a bad law worse](#)

‘Moral and fiscal failure’

The New Zealand judiciary is not soft by world standards. Its rate of incarceration – currently 181 per 100,000 people – places the country 90th out of 223 jurisdictions.

This is well above Australia, England, Wales and Scotland, and double the rates in Northern Ireland, the Republic of Ireland and Canada. As Māori have long made up more than 50% of the prison population, their incarceration rate is at US levels. Do we really want to make this worse?

When former Finance Minister Bill English observed New Zealand's high prison population represented a “moral and fiscal failure”, he asked the chief science advisor to collate the evidence.

The resulting 2018 report, Using Evidence to Build a Better Justice System, concluded the prison population had grown because of “dogma not data”.

Prisoners are seven times more likely than the general population to have a mental health or substance abuse problem. Ninety percent have a history of mental health or addiction, with 60% still affected. Up to 70% have significant literacy problems.

The sentencing reform proposals rest on the notion people should take more personal responsibility. But they overlook the reality of most of the people in the system having a reduced capacity to do that. This looks more like dogma than data.

And since prisons train people in criminal ways and provide gangs with recruits, but do not deal with underlying causes of criminal behaviour, it is dogma that risks creating more victims.

Increased prisoner numbers: Paremoro Maximum Security Prison, Auckland. Getty Images

A stressed justice system

On top of this, the criminal justice system is creaking, without enough judges or courtrooms.

Complainants, defendants and witnesses already wait too long for trials.

Reductions in sentences for guilty pleas and other mitigating features are essential to preventing this from getting worse. Some of these factors only come to light at the sentencing hearing when pre-sentence reports (often including medical reports) are provided.

Also, the final preparation for a trial often leads the prosecution to accept a plea to a less serious offence. And the time waiting for a trial often means a defendant will have served all or much of their sentence already.

If a judge feels obliged to impose a higher sentence because of the new amendments, lawyers will have to advise defendants accordingly. Inevitably, more will decide to take their chances in a trial rather than plead guilty.

That means more complainants will have to give evidence, some defendants will be acquitted, and the criminal justice system will creak more.

Judges and rules

Judges will have to confront some dissonance in the law. The Sentencing Act requires judges to impose the “least restrictive” sentence. But a sentence that is longer than appropriate doesn’t meet that requirement.

A longer-than-necessary prison sentence is arguably arbitrary detention. But the New Zealand Bill of Rights Act requires judges to interpret other statutes to avoid breaching rights if possible, including the right not to be detained arbitrarily.

In addition, a fair trial should aim to secure the right sentence for the individual defendant.

Judges do not sign up to breach people’s rights. Nor do they like it when the executive branch of government uses its parliamentary majority to overstep the separation of powers. Quite properly, they will do what they can to secure individualised justice.

They might, for example, set a sentence at the low end of the available range to achieve the same outcome while appearing to abide by the new 40% cap. Or they might just decide a rehabilitative sentence, invariably non-custodial, is the better outcome.

Judges spend all their time dealing with rules. You can expect them to be creative in finding ways around restrictions that should not be imposed on them.