



MAXIMUM PENALTIES FOR CRIMINAL OFFENCES





LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

September 2013, Wellington, New Zealand

MAXIMUM PENALTIES FOR CRIMINAL OFFENCES

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The Commissioners are:

Honourable Sir Grant Hammond KNZM – President

Dr Geoff McLay SJD; Mich

Honourable Dr Wayne Mapp Ph D; Cantab; QSO

Judge Peter Boshier

The General Manager of the Law Commission is Roland Daysh

The office of the Law Commission is at Level 19, 171 Featherston Street, Wellington

Postal address: PO Box 2590, Wellington 6140, New Zealand

Document Exchange Number: sp 23534

Telephone: (04) 473-3453, Facsimile: (04) 471-0959

Email: com@lawcom.govt.nz

Internet: www.lawcom.govt.nz

National Library of New Zealand Cataloguing-in-Publication Data

Maximum penalties for criminal offences.

(Law Commission study paper ; 21)

ISBN 978-1-877569-47-0 (PDF)

1. Sentences (Criminal procedure)—New Zealand.

2. Crime—New Zealand—Public opinion.

I. New Zealand. Law Commission.

II. Series: Study paper (New Zealand. Law Commission) ; 21.

ISSN 1177-7125 (Online)

This paper may be cited as NZLC SP21

Foreword

In 2006 the Law Commission produced a report, *Sentencing Guidelines and Parole Reform* (NZLC R94), which recommended the establishment of a Sentencing Council in New Zealand. Those recommendations were given effect to by the then administration, principally by the Sentencing Council Act 2007.

When the present administration took office after the 2008 General Election, it determined that it would not proceed with the establishment of a Sentencing Council. The relevant Act is still in force but the Council has not been constituted.

The Commission had, amongst other things, undertaken research into how maximum penalties might be conceptualised and dealt with. That subset of sentencing law has always been, and will continue to be, a difficult one. This research was conducted by Dr Warren Young, the then Deputy President of the Law Commission, and Yvette Tinsley, a Reader in Law at Victoria University of Wellington. The Commission is grateful to them for all the work they did.

The Commission itself does not make any recommendations on this Study Paper. However, the value of the research should not be lost. The Commission has thought it appropriate to publish this paper, for such assistance as it may provide to other researchers and advisers in the future.

A handwritten signature in blue ink, reading "Grant Hammond".

Sir Grant Hammond
President

Acknowledgements

We are grateful to all the people and organisations that provided input during this review. This includes the judiciary and academic commentators that we approached for comment. We particularly acknowledge the contribution of Dr Yvette Tinsley, Associate Professor at Victoria University, to the development of this paper.

Law Commissioner Dr Warren Young, assisted by Dr Ryan Malone, led this project.

Contents

Foreword	iii
Acknowledgements	iv
Chapter 1 Introduction	2
Background	2
Reasons for the review	2
The scope of the review	4
The structure of this report	5
Chapter 2 The nature and role of maximum penalties	6
Chapter 3 Methodology	8
Alternative approaches	8
Step 1: A quantitative tool for measuring harm	9
Step 2: Testing the tool on sample offences	12
Chapter 4 Determining harm and culpability	19
Overall provisional harm score	19
Adjusting for culpability	20
Comparing the provisional ranking with current maximum penalties and sentencing practice	25
Chapter 5 Devising and consulting on draft penalty categories	28
Determining penalty categories	28
Public consultation on penalty categories	29
Chapter 6 Conclusion: anomalies in the maximum penalty structure	32
Maxima that are out of line with those for other cognate offences	33
Maxima that do not appropriately reflect the range of interests harmed or put at risk by the offence	35
Maxima that do not reflect the appropriate balance between consequence and culpability	36
Maxima for offences that overlap with other offences	37
Maxima that are based on social conditions and mores of another era	38
Maxima that are based on an inconsistent approach to preparatory conduct	38
Maxima attaching to offences in the Arms Act 1983	40
Conclusion	41
Appendix A Sample offences for determining base values	43
Appendix B Calculation of harm caused by an offence	46
Appendix C Colmar Brunton – Maximum Penalties Report	48
Appendix D Final ranking of offences in penalty categories	118

Chapter 1

Introduction

BACKGROUND

- 1.1 In the Law Commission's report *Sentencing Guidelines and Parole Reform*,¹ it was recommended that a Sentencing Council be established to draft sentencing and parole guidelines that would be presumptively binding on the judiciary and the Parole Board respectively. The Law Commission also recommended substantial reform to the present parole arrangements, so that prisoners serving long-term determinate sentences (those with a prison term of more than 12 months) would serve at least two-thirds of their sentence, and those serving a short sentence (12 months or less) would not be eligible for parole at all and would serve their full term. The Law Commission's recommendations were given effect by the Sentencing Council Act 2007, the Sentencing Amendment Act 2007 and the Parole Amendment Act 2007.
- 1.2 The Law Commission noted in the same report that without any change to the existing legislative framework, the new Council would confront difficulty in developing guidelines in a coherent and consistent way. That is because s 8(c) and (d) of the Sentencing Act 2002 codify the presumptions (existing previously in case law) that the maximum penalty should be imposed for the most serious offending, and a penalty near to the maximum should be imposed for offending that is near to the most serious. The difficulty is that maximum penalties have a number of serious relativity problems and other anomalies. Thus, if the development of guidelines was based upon the existing structure of maximum penalties – as s 8(c) and (d) require – and if that structure remained untouched, the levels at which guidelines were set and the relativities between one offence and another would be likely to reflect the existing maximum penalty problems. This would create something of a dilemma for the Council: it could seek to draft guidelines that were coherent and defensible by reference to all of the other considerations relevant to its task, but it could then be seen to be acting contrary to law.
- 1.3 It was proposed that the Law Commission should be directed to review the role, format and structure of maximum penalties in parallel with the development of the inaugural sentencing and parole guidelines, and to recommend any changes required to correct existing anomalies and ensure consistency with the purposes and framework of a guidelines system. At the same time as it accepted the Law Commission's recommendations for sentencing and parole reform, the Government of the day agreed with the proposal for a review of maximum penalties and gave the Law Commission a reference accordingly.
- 1.4 However, when the National Government took office after the 2008 election, it announced that it did not intend to proceed with the establishment of a Sentencing Council. The Council is therefore now in abeyance (although the Act under which it was to be established has not been repealed and is still in force). Accordingly the particular context in which the Law Commission's proposal for a review of maximum penalties was made is no longer current.

REASONS FOR THE REVIEW

- 1.5 Notwithstanding this change in circumstances, we determined that the project was important and that we would persist with it. That is because the Law Commission's work on the development of sentencing guidelines in advance of the establishment of a Sentencing Council reinforced the view expressed in *Sentencing Guidelines and Parole Reform* that many maximum penalties are anomalous, do not reflect the relative seriousness of the offence and bear little or no relationship to current sentencing practice. This

¹ Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006).

- is regrettable because, as the Australian Law Reform Commission has observed, “in a rational system of punishment it is desirable that penalties prescribed by law correspond to offence seriousness in a consistent fashion”.²
- 1.6 There are a number of reasons for the anomalies identified between many maximum penalties and the disjunction between them and current sentencing practice.
 - 1.7 First, maximum penalties have historically been set in a fairly unsystematic way. There has been no rigorous and agreed methodology or approach for determining the relative seriousness of an offence when it is created. It would be going too far to say that maximum penalties are little more than figures plucked out of the air at the time of their creation; officials and legislators do generally make some attempt to compare the proposed maximum with maximum penalties elsewhere in the statute book, and for many years the Ministry of Justice (and before 1995, the Department of Justice) has performed a vetting function in relation to statutory provisions creating new offences or penalties. Nevertheless, in the end the selection of a quantum has been largely intuitive.
 - 1.8 Secondly, even if a maximum penalty does accurately indicate Parliament’s view as to the relative seriousness of an offence, it is an assertion of seriousness for that particular Parliament, and in light of the political and social circumstances of the day. It may therefore exist largely as a matter of historical accident. If it has not been reviewed over time, it may provide little guidance as to the legislature’s current view of the seriousness of the offence relative to other offences.
 - 1.9 To illustrate, s 18 of the District Courts Act 1947 creates an offence of assaulting an officer of a District Court, for which the maximum penalty is a fine of \$300. By comparison, s 30 of the Courts Security Act 1999 creates an offence of assaulting a court security officer, for which the maximum penalty is three months’ imprisonment. The differences in maximum penalties suggest that the latter offence is considerably more serious than the former. In fact, the offences are in substance the same, namely assaulting an official of the court acting in the execution of his or her duty. The problem is that the maximum penalty for the assault offence in the District Courts Act has not been revised since 1980 when the maximum fine limit was increased from \$40.³ The failure to update the maximum since that time has resulted in the development of quite different maxima for offences of equal seriousness.
 - 1.10 Difficulties with inconsistent maxima are not limited to the occasional pair of comparable offences. There are in fact a large number of offences of assaulting a person acting in an official capacity, in addition to the two just described, many of which carry widely varying maxima.⁴ Moreover, these offences are in addition to the main common assault offences in s 9 of the Summary Offences Act 1981 (maximum six months’ imprisonment) and s 196 of the Crimes Act 1961 (maximum one year’s imprisonment). This combination of offences and associated maximum penalties indicates how incoherent the statute book can become when very similar or even identical offences are created at particular times to meet particular political needs, and then left in place without subsequent review.
 - 1.11 Thirdly, the rules covering the automatic release of prisoners have been altered on a number of occasions over the years, thus changing the proportion of a nominal prison sentence actually served without any corresponding change in maximum penalties. Initially, s 31(1) of the Penal Institutions Act 1954 gave the Minister of Justice a discretion to remit the determinate sentence of a person on the grounds of “good conduct and industry” by no more than one quarter of their sentence. This changed with the Criminal Justice Act 1985 when offenders became eligible for remission (which was effectively automatic early release) after serving two-thirds of their sentence. In 1993, while remission remained at two-thirds for

2 Australian Law Reform Commission *Sentencing: Penalties* (ALRC DP30, 1987) at [89].

3 District Courts Amendment Act 1980, s 16.

4 These include maxima of: a fine of \$1,000 for assaulting an officer of a Tenancy Tribunal (Residential Tenancies Act 1986, s 112); a fine of \$5,000 for assaulting a member or officer of the Lawyers and Conveyancers Disciplinary Tribunal (Lawyers and Conveyancers Act 2006, s 251); a fine of \$50,000 for assaulting a wine officer (Wine Act 2003, s 101); 5 days’ imprisonment for assaulting a Supreme Court Justice (Supreme Court Act 2003, s 35); 10 days’ imprisonment for assaulting a member or officer of the Environment Court (Resource Management Act 1991, s 282); three months’ imprisonment for assaulting a person exercising statutory powers (Civil Defence Emergency Management Act 2002, s 98); six months’ imprisonment for assaulting a police, prison, or traffic officer (Summary Offences Act 1981, s 10); and 12 months’ imprisonment for assaulting a Customs Officer (Customs and Excise Act 1996, s 176).

long-term prisoners (those serving more than 12 months), it was reduced to one half for short-term prisoners (those serving 12 months or less). Under the Parole Act 2002, automatic release was abolished for long-term prisoners (now defined as those serving more than two years), but was retained at one half for short-term prisoners (those serving two years or less). The Parole Amendment Act 2007, as yet unimplemented, redefined a short-term prison sentence to mean a sentence of 12 months or less, and would require prisoners to serve the whole of that sentence.

- 1.12 Since maximum penalties remain the same despite these adjustments to the rules governing early release, offenders have over time been exposed to different levels of punishment for a particular offence, even though there has been no explicit legislative intent to achieve that result. For example, the worst class of case of conspiring to defeat the course of justice (s 116 of the Crimes Act) would be deserving of the maximum penalty of seven years. However, the actual length of sentence served could depend on the automatic release rules in place at the time. Under the Criminal Justice Act 1985 (as amended in 1993), an offender sentenced to seven years had to be released after two-thirds of that sentence. Conversely, following the enactment of the Sentencing Act an offender sentenced for seven years for the same offence could be required to serve the full seven years.⁵ For this reason, maximum penalties need to be reviewed in order to take into account the present automatic release requirements. This is important because offenders should not be liable to maximum penalties that make outdated assumptions about those requirements.

THE SCOPE OF THE REVIEW

- 1.13 There are in excess of 180 Acts in the New Zealand statute book that contain imprisonable offences. To make the task more manageable, this review is restricted to those imprisonable offences contained in the main criminal statutes, namely:
- Crimes Act 1961;
 - Misuse of Drugs Act 1975;
 - Land Transport Act 1998;
 - Arms Act 1983; and
 - Summary Offences Act 1981.
- 1.14 Limiting the review in the first instance to imprisonable offences contained in these five Acts has been purely pragmatic. A review of the whole of the statute book would have been a monumental task and would have encompassed a large number of offences that are only infrequently the subject of prosecution. Moreover, it would have required consideration of regulatory and corporate offending to which a range of different criteria might need to have been applied.
- 1.15 However, the fact that our review to this point has been confined to the five primary criminal statutes does not mean that the exercise should stop there. Indeed, if it did so there would be a risk of creating, in effect, two maximum penalty regimes, one that used the penalty category system outlined in this paper, and the other based on the traditional ad hoc approach to maximum penalties. If the penalty category system proposed here were to be implemented, therefore, we suggest that:
- offences in other statutes obviously inconsistent with the resulting maxima (such as the wide range of assault offences in other statutes listed in footnote 4 above) should be adjusted at the same time;

⁵ Of course, the offender may not have to serve the full seven years in prison given the possibility of parole. This raises the question as to whether changes to parole rules constitute a further reason for reviewing maximum penalties. The answer is that they do not, for two reasons. First, parole is discretionary. Automatic release, on the other hand, is mandatory, meaning that maximum penalties can be set in the knowledge that an offender's sentence will be completed at a definite point that is earlier than the sentence imposed by the court. Second, even if an offender is paroled, he or she is technically serving his or her sentence, and is subject to recall to prison to serve the remainder of his or her sentence if one or more of the conditions of parole are breached. By contrast, automatic release constitutes the completion of the sentence, without the possibility of recall to prison.

- maxima in other statutes should be reviewed on the basis of the new methodology as amendments to them are being made from time to time for other reasons; and
- a separate exercise should be undertaken to determine whether there are any offences (such as regulatory and corporate offences) for which a different methodology is required.

1.16 Although the review is confined to those offences currently subject to a maximum term of imprisonment, there is no presumption that any new recommended maximum penalty must be one of imprisonment.

THE STRUCTURE OF THIS REPORT

1.17 This report is interim. It describes the methodology that we have developed to determine what a maximum penalty should be; the work that we have undertaken to test and apply the methodology; the way in which we have grouped offences in the light of that work; and the offences that we have consequently identified as most glaringly at odds with a coherent maximum penalty structure. However, it does not attempt to assign maximum penalties to each set of grouped offences. That would require substantial work and further public consultation that we have not been able to undertake to date.

Chapter 2

The nature and role of maximum penalties

- 2.1 Maximum penalties are a near-ubiquitous feature of New Zealand's criminal law. Very few offences do not have a specific maximum penalty attached to them.⁶
- 2.2 It is a long-standing common law principle (now codified in s 8(c) of the Sentencing Act 2002) that the maximum penalty is to be imposed for the offence that is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender, such as the absence of a previous record, make that inappropriate.⁷ In setting a maximum penalty, Parliament is therefore stipulating the sentence that it regards as appropriate in such cases.
- 2.3 Parliament does not decree what the most serious case might be. Nor would it be practicable for it to do so. This is, rather, a matter for the courts to determine given the circumstances of the cases that come before them. In doing so, the courts have repeatedly emphasised that the maximum sentence is not to be reserved for the worst possible case imaginable. If that were the test, no one would ever be sentenced to the maximum penalty, since it is always possible to think hypothetically of a more serious case. Rather, the maximum penalty is to be imposed where the case comes within the worst class of offending of its type or (as s 8(c) puts it) "within the most serious of cases for which that penalty is prescribed".⁸
- 2.4 Of course, most offending does not fall within the bracket of the "worst class of case". Offences in New Zealand tend to be broadly defined, with widely varying degrees of seriousness encapsulated within one offence category. That is desirable as a means of ensuring that there are not unnecessary pleas of not guilty and defended trials because of denials or disputes about secondary matters that do not bear on core culpability and ought to be addressed at sentencing. But the result is that statutory maximum penalties tend to be set far above the sentences that would be appropriate for the ordinary run of offences of each type coming before the courts and provide a poor guide as to what the sentences for those offences ought to be. There is thus only an indirect and sometimes marginal relationship between the maximum penalty for an offence and the bulk of sentences imposed for that offence.⁹ The extent of the relationship will also vary from offence to offence, depending upon the breadth of the offence definition and the consequent spread of offending relative to the worst class of case.
- 2.5 In our view, this is as it should be. Parliament can and should give guidance as to the appropriate penalty for offending at the top end of the spectrum within a particular offence category, but realistically it is not able to prescribe sentence levels for day to day sentencing practice. To reiterate the conclusion the Law Commission reached in *Sentencing Guidelines and Parole Reform*, that can only sensibly be done through a system of sentencing guidelines developed in some other way.

6 Those offences that do not carry a specific maximum penalty are still covered by s 107 of the Crimes Act 1961, which provides a maximum penalty of one year's imprisonment for wilfully performing a prohibited act or failing to perform a statutory duty.

7 See for example: *R v Beri* [1987] 1 NZLR 46 (CA); *R v Donnelly and Fulcher* [1987] 2 NZLR 233 (CA); and *R v Xie* [2007] 2 NZLR 240 (CA).

8 See for example: *R v Chen* [2009] NZCA 445, [2010] 2 NZLR 158; *R v Rhodes and ORS* [2009] NZCA 486.

9 For example, conversion of a motor vehicle carries a maximum penalty of seven years' imprisonment (Crimes Act 1961, s 226). However, in 2003, only 26 per cent of convicted offenders were given a custodial sentence, and the average sentence length was at its highest point in a decade at 9.4 months, far below the maximum penalty. Even if the maximum penalty is set at the correct level (and we suggest below that it is not), the fact that day-to-day sentences are out of line with it would not necessarily indicate any problem with sentencing practice.

Offence seriousness as the basis for maximum penalties

- 2.6 Because the current maximum penalties regime is based on the worst class of case in a particular category, it is clearly based on relative offence seriousness. In general, the higher the maximum penalty that Parliament allocates to an offence, the more seriously it views the prohibited conduct. This approach is made clear in the Sentencing Act which provides that:

8 Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court—

...

(b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences.

- 2.7 This constitutes a direction from the legislature to the courts not only to take offence seriousness into account when passing sentence, but to determine offence seriousness by reference to the relevant maximum penalty.
- 2.8 Caution needs to be exercised in applying this relativity to less serious instances of offences, since one offence may encompass a much greater range of conduct than another. Nevertheless, the maximum penalty will often provide some guide as to appropriate differences between sentence levels for different offences across the range of conduct covered by them. For example, sentences for supply of a Class A drug¹⁰ (a maximum of life imprisonment) will almost invariably be much higher than those for possession of a Class C drug¹¹ (a maximum of either three months' imprisonment or a fine of \$500). The difference in sentence reflects the degree of seriousness with which Parliament views supply of a Class A drug as compared to possession of a Class C drug.
- 2.9 Again, we agree with the approach that underpins the current legislation in this respect. While s 7 of the Sentencing Act lists eight purposes of sentencing and states that nothing about the order in which the purposes appear in the section implies that any purpose is to be given any greater weight than any other purpose, the need to hold the offender accountable (purpose (a)) and denounce the conduct (purpose (e)), and therefore to determine the quantum of punishment by reference to the seriousness of the offence and the culpability of the offender, is almost invariably still the starting point in the calculation of sentence.¹²
- 2.10 We have therefore based our review of maximum penalties on a methodology that is designed to assess the relative seriousness of the worst class of case of each offence, moderated by any reduced culpability inherent in that offence. In the next chapter, we turn to consider the details of that methodology and how we have applied it.

¹⁰ Misuse of Drugs Act 1975, s 6(2)(a).

¹¹ Misuse of Drugs Act 1975, s 7(2)(b).

¹² See for example, *R v Taueki* [2005] 3 NZLR 372 (CA).

Chapter 3

Methodology

- 3.1 We began our undertaking by devising a process by which recommended maximum penalties could be arrived at. This entailed nine steps as follows:

Step 1: The development of a quantitative tool to determine the level of harm caused to one or more pre-defined interests by the worst class of case of an offence.

Step 2: The testing of the workability of that tool on a sample of 30 offences.

Step 3: The application of the tool to all imprisonable offences covered by the review, in order to give each offence a total harm score and arrive at a *provisional ranked list* of offences according to seriousness.

Step 4: Where necessary, the modification of the harm score of an offence to reflect particular culpability elements as expressed in statute.

Step 5: The identification of any discrepancies between the seriousness of offences, as indicated by the provisional ranked list, and (1) existing maximum penalties and (2) judicial views of offence seriousness using available sentencing data, with consequent adjustments where necessary to the provisional ranked list in order to produce an *adjusted ranked list* of offences according to seriousness.

Step 6: The assignment of all offences included in the review to *draft penalty categories* based on the adjusted ranked list of offences.

Step 7: Targeted public consultation on the draft penalty categories (at this stage without proposed maximum penalties), with a consequent review of, and where necessary adjustment to, those categories.

Step 8: The assignment of proposed maximum penalties to each draft penalty category.

Step 9: A second round of targeted public consultation on the proposed penalties for each of the categories, in order to produce recommended *maximum penalty categories and penalties*.

ALTERNATIVE APPROACHES

- 3.2 Several alternative approaches to determining offence seriousness and setting maxima were considered and rejected.

- 3.3 First, we considered the measure of offence seriousness developed by the Ministry of Justice in 1991.¹³

- 3.4 Under this system, the seriousness of an offence is measured by the average number of days of imprisonment imposed on each offender convicted for that offence over a five year period. The average figure covers both imprisoned and non-imprisoned offenders. For example:¹⁴

Between 1995 and 1999 there were 100 cases of offenders convicted of a particular offence. Of these cases, 50 resulted in a custodial sentence, and the average length of the custodial sentences imposed on these offenders was 30 days. The seriousness score for this offence is $(30 \times 50/100)$, or 15.

- 3.5 This model is not suitable for this review. Not only does it limit the determination of offence seriousness to sentencing data (thereby accepting the correctness of the status quo and ignoring other criteria), but it produces an index of offence seriousness based on *average* sentences of imprisonment. By contrast,

¹³ Phillip Spier *Conviction and Sentencing of Offenders in New Zealand 1991–2001* (Ministry of Justice, 2001) at 11–13.

¹⁴ At 11.

this review will be based on the *worst class of case* for each offence. So the average number of days of imprisonment (30 days in the above example) includes the whole spectrum of custodial sentences handed down for an offence, rather than focusing on sentences imposed at the top end.

- 3.6 Secondly, we examined the 1978 United Kingdom Advisory Council review of maximum penalties which proposed a more radical approach.¹⁵ The Council recommended that maxima for each offence be set so as to capture 90 per cent of the sentences currently imposed for each offence. Put differently, the maxima would be set lower than the highest 10 per cent of sentences handed down.¹⁶ This still suffers from the problem that it is based on current sentencing practice. In addition, it is subject to the major criticism that, in recommending maxima that could not capture the worst class of case, the Council effectively abandoned the rationale underpinning statutory maxima.¹⁷ Because we take the view that maximum penalties should be based on the seriousness of the worst class of case, we rejected this model.
- 3.7 Nevertheless, we are conscious that our own model has limitations. Inevitably, regardless of the method used, the ranking of offences according to seriousness inevitably involves a degree of subjectivity and personal value judgement. Reasonable people using the same guiding principles will inevitably disagree about which offences are more serious than others. For that reason, we have not focused on the minor discrepancies between the offence groupings that our methodology produced and current maximum penalties. Rather, we have highlighted and discussed substantial discrepancies that in our view clearly indicate that appropriate relativities between offences are not properly reflected in current law.
- 3.8 In the remainder of this chapter we consider the first two steps in our process (those directed towards the development of an appropriate quantitative tool for measuring harm) in more detail.

STEP 1: A QUANTITATIVE TOOL FOR MEASURING HARM

- 3.9 The development of a quantitative tool for measuring the harm caused or risked by an offence comprised four elements: (1) the identification of the interests harmed or put at risk; (2) the weighting of those interests in terms of their relative importance; (3) the development of a system for quantifying the level of injury to an interest; and (4) the development of a formula for identifying the overall harm score of each offence.

The identification of interests harmed by an offence

- 3.10 The first step in developing a quantitative tool to measure the level of harm caused by the worst class of case of an offence was to identify the interests capable of being harmed by criminal offending.
- 3.11 Harm may be defined as “the injury done or risked by the criminal act”.¹⁸ But what is it that is being injured, or is at risk of being injured? Based on the work of von Hirsch, Ashworth and Jareborg, we began by identifying three broad interests that can be affected by criminal offending:¹⁹
- physical integrity;
 - material support and amenity; and
 - privacy and freedom from humiliation or offensive behavior.

15 Advisory Council on the Penal System *Sentences of Imprisonment: A Review of Maximum Penalties* (HMSO, London, 1978).

16 Judges would have been able to exceed the maximum in exceptional cases (ie the estimated 10 per cent of cases that warranted a sentence above the new maximum) and would in that event have not been subject to any maximum.

17 One critic suggested “...the Council’s proposal amounts to an abolition of maximum penalties altogether. The new maxima would not be maxima at all; rather, they would amount to an efficiency bar on an unlimited incremental scale”: DA Thomas “Report of Committees, Sentences of Imprisonment – a Review of Maximum Penalties” (1979) 42 MLR 309 at 311.

18 Andrew von Hirsch *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester University Press, Manchester, 1985) at 64. See also Andrew Ashworth *Sentencing and Criminal Justice* (4th ed, Cambridge University Press, Cambridge, 2005) at 102–150.

19 Andrew von Hirsch, Andrew Ashworth and Nils Jareborg “Gauging Crime Seriousness: A ‘Living Standard’ Conception of Criminal Harm” in Andrew von Hirsch and Andrew Ashworth *Proportionate Sentencing: Exploring the Principles* (OUP, Oxford, 2005) 186 at 205–207.

- 3.12 Physical integrity covers the physical health and safety of the individual. This interest is harmed by offences such as assault or murder, and may be jeopardised by offences such as drunk driving or breaches of health and safety laws. Material interests can range from the necessities of life, ie food, shelter, and clothing, through to luxuries, such as an MP3 player or a sports car. People also have an interest in avoiding breaches of personal privacy, and from being subject to humiliation or offensive behaviour by the actions of others.
- 3.13 Yet not all values that the criminal law seeks to protect fit nicely into one of these three interests. It will not always be the case that the victim of an offence will be an identifiable natural person. Gross, in his seminal work on the concept of harm,²⁰ noted the need also to take into account offences against the state and offences against the public interest. Offences against the state include those offences where the state's interests are harmed or threatened, as for example with treason, tax evasion, and offences against the administration of justice. Offences that harm the public interest cover those offences where the collective welfare is harmed or threatened, as with environmental offences, bigamy, and offences against health and safety laws.
- 3.14 For the purposes of this review, therefore, we added these two interests to the three interests initially identified. This gave a total of five interests capable of being injured by an offence:
- physical integrity;
 - material support and amenity;
 - privacy and freedom from humiliation or offensive behavior;
 - governmental interest; and
 - collective welfare.
- 3.15 The omission of freedom from psychological harm as a stand-alone interest was deliberate. All forms of offending can generate emotional responses that differ greatly in type and intensity. Rather than trying to account for the various individual human reactions under a single generic concept of psychological harm, the emotional damage that is likely to result in the worst class of case was instead taken into account when assessing the harm score for each interest.²¹ For example, the on-going security fear that can be evoked following a domestic burglary was factored into the value ascribed to the level of injury caused to the privacy and freedom from humiliating or offensive behaviour interest.

Weighting interests according to their relative importance

- 3.16 The second step in developing a quantitative tool was to weight the five interests according to their relative importance.²² This weighting was designed to reflect the value which society generally places on certain values over others. For example, a person's physical integrity is generally considered more important than their material interests. This balance is reflected in existing maxima, in current sentencing practice and in public concern regarding violent crimes.
- 3.17 We originally attempted to weight the interests by simply ranking them in order of importance and giving them a base value from 1 to 5. However, we quickly realised that this did not reflect the relative differences between them in terms of importance. We therefore undertook a more elaborate exercise to ascribe values to each interest.
- 3.18 First, we devised three offence scenarios for each interest that in our judgement substantially harmed or risked harm only to that interest, and did so to a high, medium or low degree respectively (a total of 15 scenarios in all, which are attached as Appendix A). We did this because, as noted above, offences typically cover a broad spectrum of behaviour and can differ markedly in their range of seriousness. It

20 Hyman Gross *A Theory of Criminal Justice* (Oxford University Press, New York, 1979) at 119–122.

21 Von Hirsch, Ashworth and Jareborg, above n 19, at 208.

22 Gross, above n 20, at 118.

was therefore necessary to arrive at a weighting that properly reflected the relative significance of an interest across the full range of behaviour to which it related.

- 3.19 Secondly, the three people undertaking the project within the Law Commission ascribed numerical scores between one and 50 to each offence scenario depending upon the assessment of the harm caused or risked by the offence scenario by comparison with the other scenarios.
- 3.20 Thirdly, the offence scenarios were given to two individuals as a pilot, and (after some modification) to 21 other members of the public that we identified through personal contact. We asked those respondents to give each scenario a score between one and 50 on the same basis. Although the respondents were not a representative or random sample of the population, they did represent a fair cross-section of New Zealand society: nine were from Wellington; four from the main cities and eight from provincial towns or rural areas; 13 were New Zealand Europeans and eight were Maori, Pacific Islander or Asian; 13 were females and eight were males; and the ages ranged from 16 to 75.
- 3.21 Fourthly, four members of the "Sentencing Establishment Unit" (a Unit within the Law Commission established to draft sentencing guidelines for the inaugural Sentencing Council) were then asked to do the same exercise, giving a total of 25 respondents.
- 3.22 The combined scores of all respondents for the three scenarios representing each interest were then added, and averaged to provide a single score between one and 50. In the light of the findings from this exercise, the initial scores of the three people undertaking the project were modified and reduced to a point on a scale from 1 to 7, representing the base value (ie the relative weighting) attached to that interest. These scores were as follows:
- physical integrity: 7;
 - material support and amenity: 4;
 - privacy and freedom from humiliation or offensive behavior: 3.5;
 - governmental interest: 5.5; and
 - collective welfare: 1.5.

Quantifying the level of harm to each interest

- 3.23 Having determined the relevant interests and weighted their importance, we needed to decide how the level of harm that an offence caused or risked to an interest would be quantified.
- 3.24 We decided that it was sufficient simply to score the level of injury to an interest by a value from 1 to 10. A score of 1 out of 10 constituted a nominal injury to the interest, while a score of 10 out of 10 constituted the most serious harm possible.

Identifying the overall harm score

- 3.25 Finally, we selected the formula for identifying the overall harm score which represented the harm caused to a single interest by the offence. This formula can be represented as follows:

$$\text{base value} \times \text{level of injury} = \text{harm score}$$

If more than one interest was harmed by an offence, each harm score was added together to produce the *total harm score* for that particular offence. An example of how the tool worked is provided in Appendix B.

STEP 2: TESTING THE TOOL ON SAMPLE OFFENCES

- 3.26 We recognised that, having developed the tool, we needed to develop rules and principles to ensure that those applying it were as consistent as possible in the way in which they identified the interests harmed by an offence and determined the extent of that harm. In order to do so, we tested the tool on a sample of imprisonable offences (30 offences) drawn from the five Acts included in this review. We chose offences that covered all five interests; captured varying levels of injury to those interests; and ensured that the approach of discounting the level of injury for inchoate offences was satisfactory.
- 3.27 We formulated a hypothetical worst case scenario for each offence. Each of the three people working on the project then applied the tool to derive a harm score for that scenario; discussed how they had arrived at those scores; and agreed upon a set of protocols to ensure a common approach. The issues that required protocols fell into seven categories:
- The basis for formulating the worst case scenario.
 - How to avoid double counting harm when more than one interest was affected.
 - The extent to which indirect harms ought to be taken into account.
 - The extent to which self-harm ought to be taken into account.
 - The level of injury to the material support and amenity interest when loss of a particular dollar value was incurred.
 - The approach to be taken to offences posing potential rather than actual harm.
 - The approach to be taken to inchoate offences.

Issue 1: Formulating the worst case scenario

- 3.28 Four difficulties were encountered in devising the worst case scenario. The first difficulty concerned the extent to which secondary interests that might be harmed by the worst-case scenario should be identified in the description of the case and taken into account in arriving at the harm score.
- 3.29 For example, take two instances of armed robbery of a bank. Both involve a high degree of planning, multiple victims, weapons, shots fired, injuries and a large amount of money taken. In the first scenario, a police officer arrives at the bank and is shot at by the fleeing robbers. In the second scenario, the officer arrives at the bank only after the robbers have left. The addition of the police officer in the first scenario not only increases the level of injury to the physical integrity interest, but it also introduces an injury (and quite a significant one) to the governmental interest through the threatened injury to a police officer.
- 3.30 In the first scenario, it clearly makes sense to include the presence of the police officer within the depiction of the case, thus raising the harm score to a greater level than the second scenario where the officer arrives after the event. Ultimately, however, there is inevitably a measure of arbitrariness as to what secondary interests may be harmed by the worst case scenario. We could do no better than to review the cases that had resulted in the highest custodial sentences for that offence (where available – there had rarely been convictions for some offences in the last decade), and to engage in "capped imagination"; that is, to envisage the interests that could *realistically* be harmed given the nature of the offence in question and the kinds of circumstances in which it might be committed.
- 3.31 The second difficulty concerned the extent to which an injury should be regarded as risked or harmed when there is another more serious offence covering the same or similar behaviour. For example, a very serious assault on a person resulting in lasting injuries legally constitutes common assault (s 196 of the Crimes Act 1961, maximum one year's imprisonment), but it can also be charged as wounding with intent to cause grievous bodily harm (s 188 of the Crimes Act, maximum 14 years' imprisonment) or another of the serious assault offences. Another offence illustrating the same issue in a rather different way is that of

- abduction of a young person under the age of 16 years for the purposes of depriving a parent, guardian or caregiver of the possession of that young person (s 210 of the Crimes Act, maximum penalty seven years' imprisonment). If the abduction is committed for the purposes of marriage, sexual connection, ransom or imprisonment, it can be charged as a more serious offence under s 208 or s 209, both with current maxima of 14 years' imprisonment.
- 3.32 We took the view that, where such more serious offences existed, the worst case of the lesser offence should be set at the threshold point at which the lesser offence tips over into the more serious offence. Otherwise the offender is exposed to a maximum penalty designed for conduct that is essentially more serious than that with which he or she has been charged. The level of harm value for the worst case of common assault was therefore capped at the point below which an assault causes injury (thus exposing the offender to conviction on a more serious injuring charge). The level of harm value for the worst case of abduction under s 210 was similarly capped at the point below which marriage, sexual connection, ransom or imprisonment was the motive.
- 3.33 The third difficulty concerned the extent to which we should include in the worst-case scenario harm to an interest that is not caused directly by the offence in question but by more serious concurrent offending. For example, in practice disqualified driving is generally accompanied by other offending such as driving with excess blood alcohol or speeding; although the disqualified driving, which is fundamentally a challenge to a court order, does not in itself present a threat to physical integrity, the offending accompanying it will generally do so.
- 3.34 The approach we took was to exclude harm resulting from more serious concurrent offending unless that concurrent offending is also an ingredient of the offence in question. In other words, our view is that the maximum penalty for an offence should be set by reference to a worst case scenario involving that offence and any other less serious concurrent offending that will generally be recognised as an aggravating factor in sentencing for the lead offence. Other more serious offences that are committed at the same time should be recognised by way of concurrent or cumulative sentencing for those offences (according to the rules set out in ss 84 and 85 of the Sentencing Act 2002).
- 3.35 For example, we included violence within the worst case scenario for robbery and aggravated robbery because the actus reus of those offences (that is, the definition of the act constituting those offences) includes violence. However, we excluded any actual or potential injury to physical integrity from the worst-case scenario for disqualified driving, since that is not part of the actus reus of that offence.
- 3.36 The final difficulty concerned the extent to which specific offender characteristics that aggravate the offence should be included within the worst case scenario. We decided that all such characteristics (such as a substantial criminal record both for the offence in question and other offending, a breach of trust arising from the offender's occupation or position, premeditation, or the fact that the offender was on bail or subject to a sentence at the time of the offence) should be assumed to be part of the worst case scenario. To the extent that the maximum penalty for a particular offence excludes such characteristics, we reduced the harm score by taking into account the offender's lesser culpability in Step 4 of our methodology (see below at paragraph 4.15).²³
- 3.37 Our approach to this issue is essential to understanding our harm scores and ranking. At first sight, an offence description might suggest that our ranking is wrong, and that the offence does not belong with those placed alongside it. However, that is likely to be because the worst class of case devised under our approach excludes conduct that is covered by a more serious offence.

²³ For example, the maximum penalty for a first or second offence of driving while disqualified (Land Transport Act, s32(3)) is three months' imprisonment or a fine not exceeding \$4500. Those who commit a third or subsequent offence are liable to two years' imprisonment or a fine not exceeding \$6000 (s 32(4)). We therefore reduced by 50 per cent the harm score for the offence under s 32(3) to recognise the substantially lower culpability.

Issue 2: Double counting

- 3.38 As outlined above, our methodology involved scoring the level of injury to both the primary interest and the secondary interests affected by the offence, and aggregating them to produce the final harm score.
- 3.39 This is, of course, unproblematic when the injuries to the various interests are independent of each other. For example, in the case of burglary one of the primary interests affected is the material interest, but there will also be other injuries to the privacy and freedom from humiliation interest (through invasion of the home, the accessing of personal items/documents etc) which arise independently of the material loss. There is therefore no difficulty in simply aggregating the harm scores in relation to each of the interests in order to arrive at a total harm score.
- 3.40 However, sometimes different interests are affected by the same sort of harm, so that a simple aggregation would double count the harm and result in an unjustifiably inflated harm score.
- 3.41 For example, an offender who assaults a police officer attempting to make an arrest substantially affects two interests: the physical integrity interest and the governmental interest. However, the level of injury to the governmental interest should not take into account the violence inflicted on the police officer, the violence is captured by the physical integrity interest. Rather, the level of injury to the governmental interest should focus on the obstruction of a police officer acting in the execution of his or her duty and the attempt to defeat justice by evading arrest.
- 3.42 We therefore decided that injuries to secondary interests ought to be added into the total harm score only when they could be regarded as independent (as opposed to an integral component) of the harm caused to the primary interest.

Issue 3: Indirect harms

- 3.43 In deciding what interests were affected, we also needed to determine the approach to be taken to so-called “indirect harms” that can be consequential upon certain types of offending, notwithstanding that those harms might be far removed (in time or circumstance) from the prohibited conduct. For example, the supply of Class A drugs presents a danger/harm to those that use the drugs (physical integrity), but can also have an adverse effect on social relationships, cohesion and productivity.
- 3.44 In general, we took the view that such indirect harms were relevant in assessing the seriousness of an offence and ought to be taken into account in measuring the level of injury to the various interests. For example, we regarded the supply of Class A drugs as not only affecting the physical integrity interest but also having an indirect but very high impact upon collective welfare.
- 3.45 Sometimes, of course, the interest affected by the indirect harm was the same as the interest affected by the direct harm. The overall level of injury to the interest therefore needed to reflect both sorts of harms.

Issue 4: Self-inflicted harm

- 3.46 We did not have regard to self-inflicted injury for the purposes of determining the harm score for the physical integrity interest. For example, we did not regard possession of a Class A drug as causing or risking injury to the physical integrity interest, notwithstanding its potential to cause harm to the person; the offence was scored as harming only the collective welfare interest. That is because we do not think that the criminal law should be used to protect one from oneself. In any event, if self-harm had been included, it would have required the creation of an entirely new interest, since it would self-evidently have required a much lower weighting than harm to others.

Issue 5: Level of injury for material support and amenity interest

- 3.47 The following table provides the level of harm score for the material support and amenity interest based on the dollar value of the loss incurred. This was the only such interest where it was possible to provide a table of this sort because of the quantifiable nature of the harm.

10	>\$1M
9	>\$750,000 but <\$1M
8	>\$500,000 but <\$750,000
7	>\$200,000 but <\$500,000
6	>\$100,000 but <\$200,000
5	>\$50,000 but <\$100,000
4	>\$10,000 but <\$50,000
3	>\$1,000 but <\$10,000
2	>\$500 but <\$1,000
1	<\$500

Issue 6: Offences posing potential rather than actual harm

- 3.48 We needed to develop a protocol to score the level of injury to one or more interests caused by offences that posed potential rather than actual harm.
- 3.49 In these cases, the level of injury was calculated by way of a two-step process.²⁴ The first step was to determine the level of harm that would have resulted had the full offence been completed. The second step was to make an appropriate discount to the injury value to recognise that the harm did not eventuate, but was risked.
- 3.50 The extent of the discount to the injury value therefore depended on the nature of the offence and the contingency of the risk of harm. The following chart was used to determine the harm score, depending on (a) the level of consequence from the prohibited conduct relating to the full offence (including type of consequence and severity), and (b) the immediacy or remoteness of the risk of that harm arising.

	Low risk of harm	Medium risk of harm	High risk of harm	Harm is near certain
Low consequence	1	1.5	2	2.5
Medium consequence	2	2.5	3	3.5
High consequence	3	3.5	4	4.5

- 3.51 For example, the offence of possession of a knife under s 13A of the Summary Offences Act 1957 is complete upon possession; it does not require an intent to commit any other offence and does not in itself cause any harm. It therefore poses only a risk to the physical integrity interest, and at a necessarily lower level than would an attempted assault. We determined that it posed a low risk to that interest, but with a medium consequence, thus justifying a harm factor under the above chart of 2.

²⁴ A similar process is suggested by von Hirsch, Ashworth and Jareborg, above n 19, at 214.

Issue 7: Inchoate offences

- 3.52 As a related issue, we also needed to develop a protocol to score the level of injury to one or more interests caused by inchoate offences (that is, offences that represent other uncompleted offences).
- 3.53 Attempts and conspiracies are the two main categories of inchoate offences.
- 3.54 Attempts are dealt with in s 311(1) of the Crimes Act, which provides that everyone who attempts to commit an offence when no punishment for the attempt is expressly prescribed, is liable to imprisonment for not more than 10 years if the maximum penalty for the completed offence is life imprisonment, and in any other case to not more than half the maximum penalty for the completed offence.
- 3.55 Conspiracies are dealt with in s 310 of the Crimes Act, which provides that everyone who conspires with any other person to commit an offence is liable to imprisonment for not more than seven years if the maximum penalty for the offence itself exceeds seven years, and in any other case is liable to the same maximum penalty as that provided for the offence itself.
- 3.56 A number of attempts or conspiracies are expressly provided for as specific offences. These are as follows:

Crimes Act 1961

- Attempted treason (s 74(3)).
- Attempted piracy (s 95).
- Conspiring to commit piracy (s 96).
- Conspiring to bring false accusation (s 115).
- Conspiring to defeat justice (s 116).
- Attempt to obstruct, prevent, pervert, or defeat the course of justice (s117(e)).
- Attempted sexual violation (s 129).
- Attempted sexual connection with dependent family member (s 131(2)).
- Attempted sexual connection with young person under 16 (s 134(2)).
- Attempted exploitative sexual connection with person with significant impairment (s 138(2)).
- Attempted murder (s 173).
- Conspiracy to murder (s 175).
- Attempted conversion of the vehicle or other conveyance (s 226(2)).
- Attempted arson (s 268).
- Conspiring to prevent the collection of tax or rates through force or intimidation (s 309).

Misuse of Drugs Act 1975

- Conspiring to deal with controlled drugs (s 6(2A)).
- 3.57 A number of the specific attempt offences exist because in the worst class of case the attempt itself causes substantial harm. For example, all of the attempted sexual offences may cause harm that falls little short of the completed offence, since all that may be required to complete the offence is the final act of penetration. A separate offence, with a higher maximum penalty than that available under the generic attempt offence, is therefore justified to recognise the gravity of the conduct. There is a similar need for a separate offence of attempted murder and attempted piracy, since both may comprise very serious injury accompanied by an intent to kill. Moreover, the extent of the harm caused by these attempts arises partly from the attempt to commit the completed offence, so that the intent to do so is captured by the harm

- score without the need to enhance culpability and without the need to adjust for any additional element of risk. We therefore scored and ranked these offences simply by reference to the extent of harm to the relevant interests in the usual way.
- 3.58 The reason for the existence of some of the other attempt and conspiracy offences is also obvious: there is no completed offence to which they precisely relate. The offences in ss 115, 116, 117(e) and 309 of the Crimes Act fall into this category. In this case, the offences were scored and ranked by reference to our approach to risk described above (paragraphs 3.48-3.51).
- 3.59 However, it is difficult to discern the reason for the existence of the remaining attempt and conspiracy offences, given the generic regimes governing attempts and conspiracies in ss 310 and 311 of the Crimes Act. None of them seem to justify a different approach from that taken in relation to attempts and conspiracies more generally. For example, we do not know why attempted treason is explicitly addressed in s 74, nor why it has a maximum penalty that is the same as that for the completed offence. Similarly, we do not know why attempted conversion of a vehicle or other conveyance is explicitly addressed in s 226, nor why it has a maximum penalty of only two years in comparison with the maximum penalty of seven years for the completed offence.
- 3.60 We therefore decided not to include these offences in our ranked list (see further below at paragraph 4.40). We think that these offences ought to be repealed, but if they remain they should have a maximum penalty that is in line with the generic approach taken in ss 310 and 311.
- 3.61 That gives rise to the question as to what the maximum penalties under ss 310 and 311 ought to be.
- 3.62 Attempts under s 311(1) can be assumed to result in either the mere risk of harm or at the most a level of harm substantially below that caused by the completed offence. When a harm score is developed on this basis, it ends up placing the offence in a penalty category that is, on current penalty levels, roughly half the penalty category for the completed offence. For example, the score for the offence of burglary placed it in Category F, alongside offences that predominantly have current maximum penalties of 10 years' imprisonment. Our scoring on the risk rules placed attempted burglary in Category K, alongside offences with maximum penalties ranging from two to seven years' imprisonment, and an average of a little under five years. We therefore do not think that any change to the approach in s 311(1) is required.
- 3.63 The same cannot be said for the approach to conspiracies under s 310. The maximum penalty for conspiracies should be set on the basis that the plan is not carried through to fruition. An offender convicted of a conspiracy should therefore be subject to a maximum penalty that is substantially lower than that available for the completed offence. It follows that in our view the maximum penalty in s 310 is inappropriate.
- 3.64 We wonder whether the maximum penalty for conspiracies relating to offences punishable by seven years or less was originally set on the basis that a conspiracy might be charged even when the offence to which the conspiracy relates is actually carried out. In our view, however, the appropriate charge in such circumstances is the offence itself, with the fact of the conspiracy taken into account as an aggravating factor.
- 3.65 We are also mystified as to the rationale for the approach to conspiracies relating to offences punishable by more than seven years. A single maximum penalty for a conspiracy to commit sexual violation and a conspiracy to commit, say, forgery, cannot be justified.
- 3.66 Since a conspiracy is further removed from the actual offence than an attempt, it could be argued that it should have a lower score, in accordance with the overall approach we have taken to risk. However, the culpability associated with a conspiracy is enhanced by the fact that there is a common purpose to commit a particular crime by two or more persons. On balance, these factors more or less weigh each other out. A conspiracy should therefore have the same maximum penalty for a particular offence as an attempt – that is, half the maximum penalty that is prescribed for the completed offence.

- 3.67 In addition to attempts and conspiracies, there is a further category of inchoate offence that is dealt with under s 311(2): inciting, counselling or attempting to procure any person to commit an offence, when that offence is not in fact committed. This offence is treated in the same way as an attempt, with the same maximum penalty. Although the activity is further removed from the completed offence than an attempt, it has the added culpability arising from the attempt to involve others in offending. In our view, it should therefore be treated in the same way as a conspiracy. We therefore do not think that any change to the current approach in s 311(2) is required.
- 3.68 We note that inciting, counselling or attempting to procure murder is expressly provided for as a separate offence in s 174 of the Crimes Act, with a maximum penalty of 10 years. We do not see any need for the existence of this offence. It is adequately covered by s 311(2), which provides for the equivalent maximum penalty of 10 years when the completed offence carries life imprisonment. We therefore think that s 174 should be repealed. We have not scored or ranked it.
- 3.69 The remaining category of inchoate offence is preparatory conduct that precedes an attempt and does not, in itself, cause any of the harms arising from the completed offence. In broad terms, we again scored these offences simply by applying the risk rules (set out above at paragraph 3.50). Our approach to s 55 of the Arms Act 1983 illustrates how this was done. Under that section, it is an offence to carry a firearm or other weapon with intent to commit an offence punishable by three years' imprisonment or more. There is, of course, a risk associated with the mere carriage or possession of firearms. Hence s 45(1) of the Arms Act makes it an offence to possess any firearm except for some lawful, proper and sufficient purpose. We scored the latter offence on the basis of a low risk, but high consequence, to physical integrity. In relation to s 55, we took that as a starting point. However, we recognised that the intent to commit an offence (which in the worst class of case would involve an intent to kill) elevated the risk and introduced a risk to other interests as well (such as material support), and we developed a harm score on that basis. Thus, rather than the intent to commit an offence being recognised by way of an enhancement to culpability in Step 4 of our process, it was recognised by way of an increase in the harm score under the risk rules set out above.

Chapter 4

Determining harm and culpability

OVERALL PROVISIONAL HARM SCORE

- 4.1 Steps 1 and 2 of our methodology provided us with a tool for arriving at total harm scores for the imprisonable offences contained in the five Acts subject to the review. We achieved that by applying Step 3 of our process in the following way:
- We constructed a worst case scenario for each offence, applying the principles discussed in paragraphs 3.28–3.37 above.
 - We identified which interests were harmed under that scenario.
 - We then determined the extent of the harm to each interest in order to arrive at a harm score for that interest, and added the harm scores together to provide a total harm score.
- 4.2 This exercise produced a provisional ranked list of offences according to their respective total harm scores, which represented the harm caused by the worst class of case of each offence relative to other offences.
- 4.3 There were a number of offences that we put to one side and excluded from our provisional ranking. These fell into three categories.
- 4.4 First, as noted above at paragraph 3.60, we excluded a number of specific attempt and conspiracy offences that in our view ought to be repealed and dealt with instead under the generic conspiracy and attempt provisions in ss 310 and 311 of the Crimes Act 1961.
- 4.5 Secondly, again as noted above at paragraph 3.68, we excluded the offence of counselling or attempting to procure murder under s 174 of the Crimes Act, since that is fully covered by the procurement offence in s 311(2), and with the same maximum penalty.
- 4.6 Thirdly, we excluded the offence under s 249(2) of the Crimes Act of dishonestly accessing a computer system *with intent to obtain* an advantage or cause a loss that carries a maximum penalty of five years' imprisonment. The offence under s 249(1) involves dishonestly accessing any computer system and *thereby obtaining* an advantage or causing a loss, and carries a maximum penalty of seven years' imprisonment. The difference between the two sections lies in the italicised wording. Section 249(2) therefore appears to be an attempt to commit the offence under s 249(1). We can therefore see no reason why it should not be dealt with under the generic attempt provision and suggest that it should be repealed. However, if it were to be retained as a separate offence, we think that it should have half the maximum penalty of the completed offence in accordance with the general approach to attempts. Accordingly, the present maximum penalty of five years' imprisonment is too high.
- 4.7 Finally, we excluded five other offences that we found it difficult to score, either because they are fully covered by another offence on the statute book and therefore redundant, or because they are outdated.
- 4.8 The Law Commission recommended the repeal of two of these offences in the report *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person*:²⁵ s 153(2) of the Crimes Act (failure by an employer to provide necessaries to a servant or apprentice under the age of 16 years), and s 199 of the Crimes Act (acid throwing with intent to injure or disfigure).

25 Law Commission *Review of Part 8 of the Crimes Act: Offences Against the Person* (NZLC R111, 2009).

- 4.9 The Law Commission recommended the repeal of the third offence in the report *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975*:²⁶ s 21 of the Misuse of Drugs Act 1975 (publishing information likely to lead to the identification of a drug in contravention of an order from the court or coroner prohibiting such publication). We assume that the rationale of this provision, which dates back to the Narcotics Act 1961, was concern that publication of the name of a controlled drug would encourage others to use or deal in it and, by doing so, cause harm to themselves or others. However, we are not aware of an order being made under this provision in recent times. It is also in conflict with modern social attitudes and principles. This includes, for example, the view that, wherever possible, it is preferable to make information available to enable individuals to make their own assessment about what is in their best interests. In short, we do not think that it is in the public interest to prohibit publication of the name of a drug.
- 4.10 The other two offences (blasphemous libel and administering an oath to commit an offence under ss 80 and 123 of the Crimes Act respectively) have not been the subject of a prosecution for many years and it is hard to imagine circumstances in modern society when they would be. They should also be repealed.
- 4.11 Finally, we excluded three offences in the Summary Offences Act 1981 that have direct counterparts (with a more severe maximum penalty) in the Crimes Act: common assault (s 9), wilful damage (s 11) and seeking donations by a false pretense (s 15). It has always been difficult to justify these offences, since they have enabled the prosecution, in respect of the same conduct, to lay different charges with essentially identical offence components but different trial procedures and different maximum penalties, depending upon whether the charge is laid under the Summary Offences Act or the Crimes Act.
- 4.12 The only possible benefit arising from this duplication lies in the fact that the offences under the Crimes Act have been eligible for jury trial, but not the offences under the Summary Offences Act. In relation to common assault, the raising of the jury trial threshold in the Criminal Procedure Act 2011 to offences carrying a maximum penalty of two years or more will mean that even this possible benefit will disappear. In any event, we do not think that such a benefit justifies the current offence structure.
- 4.13 It is difficult to see why a charge under the Summary Offences Act should be available for a trivial form of intentional damage, while an equally trivial offence of shoplifting or other petty theft or of unlawful interference with a motor vehicle can only be charged under the Crimes Act. More significantly, we think that the offence structure leaves too much unguided discretion in the hands of the police, effectively allowing them to select the maximum penalty to which the offender will be exposed. If offences are to be laid on the grounds of relative seriousness, the features that distinguish them on that basis (for example, the value of the property damage) ought to be incorporated into the substantive offences themselves and not left to prosecutorial discretion.
- 4.14 Accordingly we think that these three offences in the Summary Offences Act ought to be repealed, and for that reason we have not ranked them. If they were to remain, they would have the same ranking as the equivalent offences in the Crimes Act and thus attract the same maximum penalty, which would destroy the rationale for their existence.

ADJUSTING FOR CULPABILITY

- 4.15 Having done our provisional ranking, we then applied Step 4 of our process. This involved consideration of the extent to which any harm scores, and the consequent ranking of the offence to which they related, needed to be adjusted to reflect any particular culpability features inherent in the offence that either increased or reduced its seriousness in the worst class of case.
- 4.16 A harm score on its own is not sufficient to provide an appropriate ranking of offences according to seriousness. That is because, as noted above at paragraphs 2.6–2.10, there are two components to the seriousness of an offence: the harm it causes, and the culpability of the offender in relation to it. The

²⁶ Law Commission *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975* (NZLC R122, 2011).

- harm score therefore required modification to reflect any differences in culpability between one offence and another.
- 4.17 There is, of course, a wide range of aggravating and mitigating factors, common to a number of offences that affect the culpability of an offender in an individual case, and will be taken into account by the court in determining the appropriate sentence. However, such factors are not our concern here, since the worst class of case assumes the entry of a guilty verdict after a defended trial, the presence of aggravating factors at the highest level possible for that offence and a corresponding absence of mitigating factors. Rather, our concern is with any culpability element intrinsic in the offence as expressed in the statute that increases or reduces the culpability that would otherwise be assumed to attach to the worst class of case.
- 4.18 How then does intrinsic culpability vary from one offence to another? It does so primarily by reference to differences in the mental element required for the offence. As noted by von Hirsch, “the gravity of conduct varies with whether the actor’s behaviour was purposeful, knowing, reckless, or negligent”.²⁷ On this basis, an offence that requires the offender to have acted purposefully (that is, intentionally) indicates greater culpability than an offence committed negligently.
- 4.19 However, the fact that the mental element (termed the *mens rea*) of a particular offence is lower than intent (for example, recklessness or negligence) does not in itself mean that the harm score should be modified to reflect reduced culpability. That is because, even in relation to an offence that does not require proof of intention or knowledge, such a mental element will generally be integral to the worst instance of that offence. For example, the *mens rea* of the offence of sexual violation by rape under s 128 of the Crimes Act is negligence: an offender who has no reasonable grounds for believing that the victim consented to the sexual intercourse is guilty of the offence. However, the most serious instance of the offence clearly entails an intent to have sexual intercourse in the knowledge that the victim is not consenting, which is the reason why the maximum penalty is currently set at 20 years’ imprisonment.
- 4.20 It follows that, regardless of the express or implied *mens rea* of an offence, its intrinsic culpability is therefore generally equivalent to other offences. Notwithstanding this, there were a number of adjustments that needed to be made to harm scores to recognise a particular level of culpability intrinsic to an offence.

Existence of two or more offences differentiated only by mental element

- 4.21 Most of the offences requiring adjustment to reflect culpability have the same *actus reus* (the physical element) and are differentiated only by the *mens rea*, so that they necessarily vary in culpability. The Victoria Crimes Act 1958 demonstrates a gradation of offences on this basis well. The offences of causing serious injury are categorised as follows (emphasis added):

16. Causing serious injury intentionally

A person who, without lawful excuse, *intentionally* causes serious injury to another person is guilty of an indictable offence.

Penalty: Level 3 imprisonment (20 years maximum).

17. Causing serious injury recklessly

A person who, without lawful excuse, *recklessly* causes serious injury to another person is guilty of an indictable offence.

Penalty: Level 4 imprisonment (15 years maximum).

24. Negligently causing serious injury

A person who by *negligently* doing or omitting to do an act causes serious injury to another person is guilty of an indictable offence.

Penalty: Level 6 imprisonment (five years maximum).

²⁷ Von Hirsch, above n 18, at 71.

- 4.22 This creates separate offences for the same prohibited conduct based solely on different mental states. It is therefore culpability rather than harm that makes one offence more serious than another. While the harm caused by each is the same, the harm *score* for the offences of recklessness and negligence would require adjustment downwards to reflect their lower culpability.
- 4.23 In New Zealand, the offences requiring adjustment because they differ from another more serious offence only in their mental element are categorised below.

Offences where there is an intent to cause a lesser consequence than materialises

- 4.24 There are offences that involve an intent to cause a lesser consequence than materialises. Where that lesser intent involves a high level of culpability, the approach we took was to make only a small adjustment:
- Manslaughter and murder are both offences of culpable homicide. By definition, manslaughter (s 171 of the Crimes Act) is culpable homicide where the offender's mens rea is below that required for murder (as listed in ss 167 and 168 of the Crimes Act). In the worst class of case of murder, there is an intent to kill. In the worst class of case of manslaughter, there can be no more than an intent to inflict grievous bodily harm without appreciation of the risk of death. However, this represents a high level of culpability, so that the harm score for manslaughter was reduced by only 20 per cent.
 - Similarly, the offence of wounding with intent to injure under s 188(2) of the Crimes Act entails an intent to cause a lesser consequence (injury) than actually materialises; an intent to cause grievous bodily harm is captured by the offence in s 188(1). The high level of culpability again justified a reduction of only 20 per cent in the harm score.
- 4.25 There are some offences in this category that have an intent as to a much lesser consequence. In these cases, the culpability is small and the adjustment required accordingly more substantial. For example, the offence of poisoning with intent to cause annoyance under s 200(2) of the Crimes Act entails an intent to inflict a very low level of harm by comparison with the potential consequences of the act itself (since an intent to cause any injury would amount to the offence of injuring with intent to injure). A reduction in the harm score of 67 per cent was therefore made.

Offences that involve an intent as to an unlawful act but a lesser mental state as to consequence

- 4.26 There are a number of offences that involve an intent to engage in unlawful conduct, but no intent to cause any harmful consequence as a result of that conduct.
- 4.27 Where there is recklessness as to the consequence, we decided that a reduction of 25 per cent is appropriate. For example, the worst instance of an offence of driving with excess blood or breath alcohol, under s 56 of the Land Transport Act 1998, or of driving under the influence of drink or drugs so as to be incapable of having proper control of the vehicle under s 58, will involve significant damage to property as a result of an accident. However, if there were intention as to the damage, it would give rise to the offence of intentional damage under s 269(2) of the Crimes Act. The harm score was therefore reduced by 25 per cent to recognise that the most culpable mental element in relation to that harm is recklessness.
- 4.28 A similar, but less obvious, example in this category is the offence of disorderly assembly under s 5A of the Summary Offences Act. In the worst class of case, the harm caused by that offence will be identical to that caused by the offence of unlawful assembly under s 86 of the Crimes Act. However, the latter offence requires a "common purpose" between the co-offenders (ie an intent to cause that harm). The absence of such a purpose by the co-offenders involved in an offence under s 5A again necessitated a reduction of 25 per cent in the harm score to reflect the fact that the most culpable mental element is recklessness.
- 4.29 Where there is only negligence as to the consequence, we determined that a much greater reduction of 50 per cent is required. For example, the worst instance of the offence of injuring by an unlawful act (s 190 of the Crimes Act) comprises a mens rea of negligence. So too does the worst class of case of allowing a dangerous trap to remain in place. That is because in both cases intentionally or recklessly injuring falls within s 189(2). Similarly, the worst class of case of importing a precursor substance under s 12AC(1) of

the Misuse of Drugs Act is negligence as to illegal supply and the harm resulting from it, since an intent in that respect would engage the more serious offence under s 12AB(1). In all cases, the harm score was reduced by 50 per cent to reflect the lesser culpability.

Offences that do not involve an intended unlawful act and have a lesser mental state as to consequence

- 4.30 A number of offences have no intent as to unlawful conduct, and a lesser mental state than intent as to the consequence that ensues from that conduct. In these cases, we took the view that culpability is relatively low, that offenders carry much less responsibility for the consequence, and that a substantial adjustment to the harm score is therefore required.
- 4.31 The offences of driving dangerously or recklessly causing injury or death under s 36 of the Land Transport Act, and of driving with excess blood or breath alcohol causing injury or death under s 61, at first sight do not appear to fall into this category because, in the worst class of case, there is an intent to engage in the unlawful conduct (dangerous, reckless or drunk driving) and a consequence of death or serious injury. But a discount of only 25 per cent in the harm score to reflect the recklessness as to consequence (as in paragraph 4.27) would have placed these offences alongside others with current maximum penalties of 10-14 years. That seems to us inappropriate, because the most serious instances of these cases can (and should) be charged with manslaughter, or wounding or injuring with reckless disregard. The Land Transport Act offences exist because of a perceived reluctance by juries to convict people on these more serious charges in anything other than the most egregious of cases. We therefore adjusted ss 36 and 61 for culpability on the basis that the mental element in the worst class of case is recklessness as to both conduct and consequence, and reduced the harm score by 50 per cent.
- 4.32 Where there is negligence as to the consequence, an even greater adjustment of approximately 75 per cent is justified. For example, in the worst class of case of the offences of careless driving causing injury or death under s 38(2) of the Land Transport Act, the mental element is negligence rather than intent. The same applies to the offence of causing bodily injury or death through the careless use of a firearm under s 53(1) of the Arms Act 1983. In both cases, a reduction of about 75 per cent was made.
- 4.33 A range of offences under the Misuse of Drugs Act fall into the same category. For example, the offence under s 22(2) of failing to comply with a ministerial notice regarding the importation or supply of a controlled drug comprises a mens rea of negligence. That is because other offences (such as the intentional or reckless importation or supply of a controlled drug in s 6 of the Act) are available for offences involving an intent to import or supply unlawfully. Again, the harm score was reduced by 75 per cent to recognise the entirely different character of the conduct from intentional or reckless importation or supply.

Offences that have an ulterior intent as to a consequence that does not materialise

- 4.34 There are some offences with the same actus reus and basic mens rea, but one of the offences additionally has an ulterior intent that enhances culpability. Generally, the increase in the harm score that is required to reflect the additional culpability is small. That is because the offence already entails a harmful consequence, and the more serious intended consequence that does not materialise is a matter of degree rather than kind. For example, the offence of injuring with intent to cause grievous bodily harm under s 189(1) of the Crimes Act is distinguished from the offence of injuring with intent to injure under s 189(2) only by the ulterior intent as to grievous bodily harm. However, the distinction in terms of intent is a fine one and is often difficult to apply in practice. We therefore determined that an upwards adjustment of only 20 per cent in the initial harm score for the former offence was justified (ie the equivalent of a 10 per cent reduction when culpability is reduced).
- 4.35 We took the same approach to the offence of doing an indecent act with intent to insult or offend under s 126 of the Crimes Act. That can be distinguished from the related offence of doing an indecent act in a public place under s 125 only by the ulterior intent to insult or offend, since the worst class of case under s 126 will also be in a public place. An upwards adjustment of about 20 per cent in the initial harm score was again made.

- 4.36 The offence of assault with intent to injure under s 193 of the Crimes Act did not fit this general approach. Both that offence and a common assault under s 196 of the Crimes Act require an assault (the *actus reus*) and an intention to inflict force (the basic *mens rea*), but the former offence has an additional *mens rea* requirement of intending to injure when committing the assault. The difference between the culpability associated with the intentional application of force that does not cause injury (and therefore inflicts only minor harm) and the culpability associated with an intent to inflict significant injury is substantial. We therefore decided that it required a different approach from other offences in this category, and we doubled the harm score (ie the equivalent of a 50 per cent reduction when culpability is reduced).

Offences where the offender is only indirectly responsible for the harm that is intended

- 4.37 There are some offences that require adjustment for culpability because the offence is one or more steps removed from the direct infliction of the harm itself, so that the offender, while intending the harm caused, is only indirectly responsible for it. For example:
- An offender who commits an offence by impeding rescue under s 204 of the Crimes Act will, in the worst class of case, contribute to the death of the person whose rescue is impeded. However, because he or she is not directly responsible for the injuries causing the death, some small reduction of 10 per cent in the harm score was made to recognise the indirect nature of the offender's involvement.
 - An offender who abducts another for the purposes of marriage or sexual connection and thus commits an offence under s 208 of the Crimes Act does not actually commit sexual violation himself or herself, since he or she would in that event be charged with it. While sexual violation by a third party will occur in the worst class of case, and harm arising from it will be inflicted, a 10 per cent reduction in the harm score was again made for the same reason.
- 4.38 In a few cases, the harm is even more remote from the offence, with a number of intermediate steps by others being required before it can materialise. For example, a person who commits the offence under s 12AB(1) of the Misuse of Drugs Act of importing any precursor substance knowing that it will be used to produce or manufacture any controlled drug, is only indirectly responsible for subsequent harmful drug use. The precursor substance is not in itself harmful and must undergo a subsequent manufacturing process, followed by distribution and use before that harm arises. A greater reduction of 50 per cent to reflect that diminished culpability was therefore required.

Omissions

- 4.39 There are a few offences that, in the worst class of case, cause harm through the offender's omission rather than a deliberate act. This justifies some small reduction in recognition of the fact that an omission to act carries somewhat less culpability than a deliberate act. These offences fall into two categories.
- 4.40 First, there are those where, in the worst class of case, the omission is deliberate and directly causes the harm. For example, in the worst class of case of the offence of allowing a dangerous trap to remain in place under s 202(2) of the Crimes Act, injury is caused as a result of a negligent omission (since intentional or reckless injury is covered by s 189(2)). The harm score was reduced by 50 per cent to reflect the negligence component (see paragraph 4.29 above). A further reduction of 25 per cent was then made to reflect the fact that the harm is caused by an omission rather than an act.
- 4.41 Secondly, there are offences where the offender's role is purely passive and indirectly contributes to a harm that is inflicted by another. In such cases, a much greater discount than 50 per cent is justified. For example, the worst class of case of being a party to treason under s 76 of the Crimes Act entails an offender who, knowing that someone else is about to commit treason, fails without reasonable excuse to use reasonable efforts to prevent it when he or she is in a position to do so. The harm score was reduced by a further reduction of 50 per cent to recognise that the offender's contribution to the harm caused by the offence is purely passive.
- 4.42 Similarly, under the recently created s 195A of the Crimes Act it is an offence if a person who lives in the same household as a child or vulnerable person, or is the staff member of an institution in which such a

person resides, knows that the victim is at risk of death, grievous bodily harm or sexual assault and fails to take action to prevent that. In the worst class of such a case, the victim will have died and the offender will have known that the harm was being inflicted and have done nothing to prevent it, although without being a party to it. While there can therefore be no reduction in the harm score on account of a lesser mens rea, the fact that the actual violence is inflicted by another justifies a reduction of 50 per cent in recognition of the offender's limited contribution to the harm.

Offences that incorporate some element of mitigation

4.43 Finally, there are some offences that require adjustment on account of culpability because their statutory definition, expressly or by implication, incorporates some elements of mitigation which will accordingly be present in the worst class of case. These did not lend themselves to a standard approach. The extent of the adjustment depended upon an assessment of the degree of mitigation in each case. For example:

- The offence of infanticide under s 178(1) of the Crimes Act is committed by a woman who causes the death of any child of hers under the age of 10 years, where at the time of the offence the balance of her mind was disturbed by reason of giving birth, by reason of the effect of lactation or by reason of a disorder consequent upon childbirth or lactation. The harm score was reduced by one third to recognise the mental impairment inherent in the offence.
- The offence of homicide as part of a suicide pact under s 180(1) of the Crimes Act incorporates a factor that is, presumably, regarded by the legislature as mitigating: the fact that the offender killed with the agreement of the victim and intended to commit suicide thereafter, indicating the existence of some mental impairment. However, in this case the reduced culpability is arguably small; we determined that it justified only a 10 per cent reduction in the harm score.
- The offence under s 256(2) of the Crimes Act of forging a document, knowing it to be false, with the intent that it be used or acted upon as genuine, does not involve any personal benefit to the offender, since that is covered by the more serious offences in ss 256(1) and 257. The harm score was accordingly reduced by 20 per cent.
- The offence of driving while disqualified as a first or second such offence, under s 32(3) of the Land Transport Act, includes the inherent mitigation attaching to an offender with only a short relevant criminal history and the harm score was accordingly reduced by 50 per cent. Offenders with a longer criminal history are captured by the offence of driving while disqualified as a third or subsequent such offence under s 32(4) of the Land Transport Act, with a higher maximum penalty.

COMPARING THE PROVISIONAL RANKING WITH CURRENT MAXIMUM PENALTIES AND SENTENCING PRACTICE

4.44 Our provisional ranking was only the starting point for determining where offences should sit relative to each other. In recognition of the necessarily blunt nature of our scoring tool, we needed to consider the outcome of its application in the light of existing statutory maxima and recent sentencing practice. We envisaged that these comparisons would require adjustments to be made to the provisional ranked list.

4.45 If one of the reasons for undertaking a review of maximum penalties is because they may be outdated and inconsistent, it may seem incongruous to take into account existing maxima and current sentencing practice that stems from those maxima, when considering offence seriousness. Such concerns are not without merit. To rely too much on current maxima and sentencing practice would risk repeating some of the anomalies that already exist in the maximum penalties regime.

4.46 However, current maximum penalties do represent, at least in theory, the legislature's view of the relative seriousness of the prohibited conduct at the time of their enactment. Any obvious discrepancies between those penalties and our provisional ranking therefore required review as a check on the way in which we had scored those offences. Similarly, to the extent that recent sentences reflect the worst class of case and indicate judicial views of relative seriousness, they provide an additional check on our scoring.

- 4.47 It transpired that we were able to make relatively little use of data on current sentencing practice. We had intended that, drawing on data made available to the Sentencing Establishment Unit within the Law Commission, two forms of sentencing data would be collated:
- the highest individual sentence imposed on an offender for each offence during 2004, 2005 and 2006; and
 - the highest five per cent of sentences imposed for each offence during 2004, 2005 and 2006.
- 4.48 In the event, however, we identified a number of difficulties in making use of this data.
- 4.49 First and most obviously, since the Sentencing Act 2002 requires that the maximum penalty be reserved for the worst class of case, it might be expected that sentencing practice would reflect that penalty, whether or not it is correctly set. The fact that sentences close to the current maximum are sometimes imposed is therefore not enough to conclude that it is appropriate.
- 4.50 Secondly, because almost all sentences below the maximum either do not represent the worst class of case in terms of offence seriousness or have significant mitigating factors relating to the offender, limited weight can be placed upon them in determining the harm score for maximum penalty purposes. The absence of any sentences at or near the maximum may be a function of the low frequency of worst class cases, since the frequency will vary from one offence to another.
- 4.51 Thirdly, a proper assessment of current sentencing practice against the maximum needs to take into account the deduction for a guilty plea (present in more than 80 per cent of sentencing decisions) which may amount to as much as 25 per cent.²⁸ Thus the fact that the worst class of case does not receive the maximum does not necessarily indicate that there is anything wrong with the maximum, since the judge's starting point may well have been the maximum.
- 4.52 Fourthly, the worst class of case of some serious offences (particularly sex offences) results in the imposition of the indeterminate sentence of preventive detention, so that the use of finite sentences cannot readily be positioned against the determinate maximum sentence.
- 4.53 It follows that current judicial sentencing practice is of limited utility in identifying anomalies in current maximum penalties. It is useful in that respect primarily when there is a substantial gap between the most severe sentence recently imposed for an offence and the maximum penalty provided for it (potentially indicating a judicial view that the maximum is too high), or there is a clustering of sentences near to the maximum (potentially indicating a judicial view that the maximum is too low). Some examples of the former can be identified, and we discuss those later (see below at paragraphs 6.31-6.36).
- 4.54 However, the comparison between our provisional ranking and current maximum penalties did lead to some adjustments in our ranking.
- 4.55 First, we determined that our score for murder, which in the worst class of case would involve multiple victims, under-weighted the harm to the relevant interests and did not sufficiently recognise the overriding value of the sanctity of life. We adjusted it to have the highest ranking, consistent with the current maximum penalty. For the same reason, we adjusted the ranking of manslaughter (s 177 of the Crimes Act), killing an unborn child (s 182), failure to protect a child or vulnerable adult (s 195A), and homicide as part of a suicide pact (s 180(1)).

²⁸ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

- 4.56 Secondly, as noted above at paragraph 3.57, the offences of attempted sexual violation and assault with intent to commit sexual violation did not lend themselves to scoring on the usual attempt rules because, in the worst class of case, they may well inflict on the victim almost all of the harm that results from a completed offence of sexual violation. Even though we took this into account in scoring these offences, we found that our scores did not adequately reflect the reality of the conduct and instead ranked the offences as equivalent to, for example, injuring with intent to cause grievous bodily harm. We adjusted the ranking so that the offences were placed alongside offences such as robbery and dealing in Class A drugs.

Chapter 5

Devising and consulting on draft penalty categories

DETERMINING PENALTY CATEGORIES

- 5.1 Having finalised our ranking, we then turned to Step 6 of our methodology: the development of draft penalty categories. The adjusted ranked list from Step 5 was divided into a number of categories using natural breaks that appeared between clusters of offences. The result grouped offences of similar seriousness together in the same penalty category. The categories that we developed for this purpose (after the adjustments described in this chapter) are set out in Appendix D.
- 5.2 We found that our scoring tool was not always sensitive enough to make the necessary distinctions between one offence and another and that there was a need to shift some offences to a higher or lower penalty category in order to adequately distinguish them from other cognate offences. For example:
- Under s 267(3) of the Crimes Act 1961, it is an offence punishable by five years' imprisonment intentionally to damage any property by fire or explosive, with reckless disregard for the safety of any other property. Because damage to property belonging to others is covered by the offences in s 267(1) and (2), the actual damage under this offence is limited to the offender's own property; there is no more than a risk of damage to the property of others. Although the harm score placed the offence in Category I, we moved it to the bottom of Category J, in order to distinguish it from, for example, the offence of intentionally or recklessly destroying the property of others (by means other than fire) under s 269(2).
 - The offence of supplying a Class C controlled drug to a person under 18 under s 6(2)(d) of the Misuse of Drugs Act 1975, or selling it to an adult under s 6(2)(e), was moved down one category (from Category G to Category H) so that it was less far removed from the cognate offence of supplying a Class C drug under s 7(2)(b). While the former offence is clearly more serious, in that it is characterised by supply to a young person and/or for profit, that difference did not seem to justify a separation of five penalty categories.
 - The offence of aggravated careless use of a motor vehicle causing injury or death under s 39(1) of the Land Transport 1998 – that is, careless use combined with some other traffic infringement – was moved down one category (from Category K to Category L) in order to ensure that it was only one penalty category above careless use causing injury or death, since in practice there is very little difference between aggravated careless use and careless use.
 - Under s 14 of the Summary Offences Act 1981 it is an offence to possess burglary tools in circumstances that show a *prima facie* intent to use them for burglary, punishable by three months' imprisonment. This is to be distinguished from the offence of possession of burglary tools with intent to use them under s 233 of the Crimes Act, currently punishable by three years' imprisonment. On our scoring, they were ranked only one penalty category apart. However, since the latter offence requires proof of intent while the former requires no more than proof of possession in suspicious circumstances, we thought that this did not adequately differentiate between the two. We therefore shifted s 14 down one penalty category (from Category M to N).

- 5.3 We also found that some offences that were close to the cusp between penalty categories needed to be shifted to a higher or lower category in order to ensure that cognate offences that on their face belong together were not being placed in different categories. For example:
- Sections 188(1), 200(1) and 201 of the Crimes Act were shifted to Category C from Category D; and
 - Sections 39(1) and 62 of the Land Transport Act were shifted to Category K from Category L.

PUBLIC CONSULTATION ON PENALTY CATEGORIES

- 5.4 Once the draft penalty categories from Step 6 had been finalised, we engaged the market research firm Colmar Brunton to undertake some targeted public consultation. Our aim was to ascertain whether the approach taken by members of the public in assessing offence seriousness and offender culpability was in line with our methodology, and, if not, the nature of any discrepancies.
- 5.5 In order to do this, we gave Colmar Brunton 28 scenarios that we considered fell within the worst class of case for a range of selected offence categories. Colmar Brunton then circulated those scenarios to 62 people who had agreed to participate in eight focus groups. They were asked to rank the scenarios in order of seriousness and return the results to Colmar Brunton before the focus groups were held.
- 5.6 The composition and location of the focus groups are set out on page 7 of the Colmar Brunton report, which is attached as Appendix C. Although discussions amongst the participants were lengthy and wide ranging, they were essentially taken through the following steps:
- They were asked a set of general questions about the extent to which they had found the exercise difficult and the sorts of factors that they had taken into account in ranking the scenarios.
 - They received a spreadsheet setting out the overall rankings of all group participants.
 - Where there were large discrepancies in the way in which individual scenarios were ranked, the facilitator probed for the reasons underlying the individual rankings and generated group discussion about the validity of those reasons.
 - Individual participants were then given the opportunity to change their initial ranking in the light of the discussion.
- 5.7 The results of the exercise are set out in full in the report. Of most relevance to us is the dispersal in rankings that is demonstrated by the diagram on page 49 of the report, and the discrepancies between our ranking and the group post-discussion ranking that is set out in the table on page 47.
- 5.8 Perhaps the most significant finding was that, even after the group discussion, there was a very wide dispersal of views around the median ranking in respect of all of the offences in the middle range of seriousness. In respect of a couple of offences (scenarios 16 (Nikolas) and 18 (Angela)), there was very little agreement at all. Moreover, in this middle range, focus group participants not only frequently disagreed with each other, but also often ended up with a median ranking substantially at odds with our own.
- 5.9 This is perhaps not surprising. Views about the seriousness of offending are heavily value-laden and significantly influenced by a person's upbringing, culture and individual experience. It demonstrates, if nothing else, the need for a systematic methodology in assessing what maximum penalty should attach to particular offences. There may end up being little common agreement about the basis for that methodology, but at the least it would mean that all offences were being approached in the same way.
- 5.10 However, there were some systematic differences between the approach taken by the focus group participants and our own approach. We reviewed our scoring in the light of those differences.

Physical integrity

- 5.11 In line with our methodology, participants generally saw physical integrity as the most important factor in assessing seriousness. However, there were two respects in which their approach to physical integrity somewhat differed from our own. In neither case did we think that they justified a change in our approach.
- 5.12 First, participants sometimes had a natural emotional response when confronted with scenarios that involved victims with whom they could identify, perhaps because the harm was immediate and obvious or because they felt that “it might be them one day”. They were therefore likely to rank the crimes in those scenarios as more serious than others that inflicted as much or even greater harm. However, in our view this is not an appropriate basis for determining relative seriousness. We assessed the level of harm on a more objective basis, which accounted for some of the discrepancies between our ranking and theirs.
- 5.13 An example of this can be found in the comparative rankings of scenarios 11 (Ted) and 12 (Tony). We ranked the former 11th and the latter 12th, while the focus group participants ranked them 22nd and 3rd respectively. The former was a scenario comprising the offence of making threats of widespread harm to people or property under s 307A of the Crimes Act, and entailed a hoax that animals on a particular farm had been deliberately infected with foot and mouth disease and that other farms would be similarly infected. The harm, though diffused, was widespread and substantially affected the livelihood of a large number of farmers and the economy as a whole. The latter was a scenario comprising the offence of ill-treatment or neglect of a child or vulnerable adult under s 195 of the Crimes Act, which entailed ongoing low level violence against the offender’s eight year old son combined with other forms of abuse and serious neglect. Clearly the focus group participants more readily related to the harm caused by the latter than the former. However, our scoring of the former took into account the substantial actual or potential aggregate harm to the variety of interests affected by it and hence placed the two offences at an equivalent level. We note that this is more or less consistent with their current maximum penalties. We therefore saw no need to change our scoring in the light of the focus group results.
- 5.14 Secondly, participants tended to attach a great deal of weight to the vulnerability of a victim (which is often an aggravating feature underlying the worst class of case), and therefore regarded cases with young or elderly victims as more serious because of this than we did. Perhaps the most obvious example of this was scenario 25 (Dominik), which involved an assault on an elderly person in a rest home that did not cause any significant injury. While we ranked it 25th, their median ranking was 13, putting it ahead of an offence involving the presentation of a loaded sawn-off shotgun at police officers in order to evade arrest.

Material support and amenity interest

- 5.15 In relation to the material support and amenity interest, focus group participants regarded financial loss as serious, and at least in that respect were in agreement with our own approach. However, they again differed from us in two significant ways, and again we saw no need to change our approach after a review of it.
- 5.16 First, at least by comparison with physical integrity, most participants tended to give it a somewhat lower weighting than we did. Indeed, they tended to regard physical harm as more serious than any kind of financial harm, regardless of the amount of financial loss incurred. For example, we gave scenario 6 (Peter), that comprised both blackmail involving the payment of \$1 million in cash and the threat of physical harm to the victim’s son, a ranking of six out of 28, whereas focus group participants ranked it 18th. Their ranking meant the offence was regarded as less serious than scenario 25 mentioned above (assault on an elderly patient in a rest home involving some slapping and punching, but without any significant injury). While these differences between the median ranking and our ranking might suggest the weight we attached to the material support and amenity interest was too high, we think our approach to that interest is not significantly at odds with either the current legislative approach to offences involving property loss or damage, or current sentencing practice. None of the glaring anomalies in current maximum penalties we draw attention to in the next chapter can be attributed to our methodology placing insufficient weight on the material support and amenity interest. After consideration, therefore, we did not make any change to our approach in this respect.

- 5.17 Secondly, as with physical integrity, participants tended to take into account not only the dollar value involved in offences involving property loss or damage but also the nature of the victim and the extent to which they could relate to him or her.
- 5.18 They were likely to see a crime against a corporation or business entity as less serious than a crime against an individual victim. For example, they gave scenario 9 (Tevita) a ranking of 21. This was presumably on the basis that, although it involved an arson causing \$1.2 million in loss and damage, it involved containers in a shipping yard. In contrast, we gave it a ranking of nine because of the dollar value of the loss and the large number of victims potentially affected.
- 5.19 They were also likely to see a crime as less serious when the harm it caused was diffused. For example, we ranked scenario 1 (John), that involved contamination of food products causing widespread and serious food poisoning amongst the population and \$300 million in lost exports, at the top of the scale of seriousness. In contrast, participants ranked it ninth, at least in part because the economic harm was less individualised and more diffused than more moderate harm perpetrated against one individual, so they could more easily “gloss over” the aggregate effects.

Actual versus intended consequence

- 5.20 Participants took much the same approach to culpability as we did. In particular, they saw offences committed with intention, malice and premeditation as much more serious than those that constitute dangerous or negligent behaviour with unintended consequences. In general terms, therefore, our adjustments to the harm score on account of culpability seemed to be supported.
- 5.21 However, they viewed much more seriously than we did conduct where there was an intention to cause more serious harm than eventuated. For example, they gave scenario 20 (Roger), which comprised conduct causing relatively minor injury where there was an intent to cause grievous bodily harm, a ranking of 10 by comparison with our ranking of 20.
- 5.22 Similarly, they viewed preparatory conduct and conduct that only indirectly contributed to the eventual harm as somewhat more serious than we did. For example, in scenario 16 (Nikolas) the offender had put together a highly detailed document explaining how to make a bomb, which he placed on the Internet in the knowledge that it would probably be used by a terrorist group. That document was subsequently used to make a bomb that killed 120 people. Although the offender had no idea which group might use the document and no intent to kill anyone, the focus group participants nevertheless ranked it 10th, six places above us.
- 5.23 In light of these findings, we reviewed our scoring for preparatory conduct and conduct indirectly causing harm. While we did not change our protocol for scoring risk, we decided that in some cases we had underestimated the intensity of the risk and changed the scoring accordingly.
- 5.24 We should note that, as discussed below at paragraph 6.41, a number of the anomalies we identified in current maximum penalties appear to derive from the fact they understate the seriousness of the harm the preparatory conduct would cause if carried through to fruition. In that respect, the findings from the focus group discussions show, in the view of participants, the anomalies are even greater than we have suggested.

Chapter 6

Conclusion: anomalies in the maximum penalty structure

- 6.1 Following revisions at Step 6, we arrived a final ranking of the offences in the five main criminal statutes that were the subject of the review, and the penalty categories into which they have been placed. This is set out in detail in Appendix D.
- 6.2 The ranking can be no more than a rough guide to anomalies in current maximum penalties. There are several reasons for that.
- 6.3 In the first place, when we were ranking and grouping offences, it became apparent that our methodology did not work particularly well in differentiating between offences at the bottom end of the spectrum of seriousness or, to put it another way, did not provide what we intuitively regarded as correct rankings. That is undoubtedly because the scores on various interests affected by those offences were all low, the overall scores were accordingly also low, and the differences between the scores were therefore a poor guide to the relative seriousness of the offences to which they related. The methodology we employed did serve to show whether the offences rightly belonged in the bottom two penalty categories – and, as we shall see, did point to one or two obvious anomalies – but was not sufficiently sensitive to determine into which of those categories the offences should be placed.
- 6.4 Secondly, our methodology, and in particular the relative weighting we gave to particular interests, was inevitably somewhat crude. It was not precise enough to reflect public views of relative seriousness at the margins, and may not have made sufficient adjustment for the overlapping nature of a number of offences.
- 6.5 Thirdly, our worst case scenarios, which were generally hypothetical, may not always have captured the most serious conduct to which the particular offences are directed.
- 6.6 It would therefore be premature simply to conclude all of the offences we have grouped together should have the same maximum penalty ascribed to them. Much more work is required before firm conclusions can be drawn about the appropriate placement of offences within the hierarchy of seriousness. In particular, it would be desirable to have more detailed data on: recent sentencing patterns in relation to each offence; the types of cases in which the most severe sentence has been imposed, and whether this equates to, or approaches, the seriousness of the worst case scenario upon which our penalty categorisation has been based; and the extent to which sentences near to the maximum have been imposed.
- 6.7 Of course, as discussed above at paragraphs 4.48–4.53, current sentencing data would not in itself determine whether change is required. Nevertheless, as we have said, at a minimum current sentencing data may directly demonstrate a potential problem in two ways. If sentences close to the maximum are never being imposed for offences that appear to be amongst the worst of their kind, or if there is a very large gap between the most severe sentence recently imposed and the maximum penalty, that is a strong indicator judges find the current maximum, in relativity terms, too high. Conversely, if there is a clustering of sentences near to the maximum, that is a strong indicator judges do not think that the current maximum allows sufficient room to differentiate between one offence and another, and therefore find it too low. In either case, this would point to the need for reform.
- 6.8 Until this type of analysis is done, any conclusions drawn from our analysis to date must necessarily be tentative.

- 6.9 Nevertheless, at a general level our findings do strongly suggest the likelihood there are substantial anomalies in current maximum penalties: some, relative to others, are too high or too low; like cases are not being treated alike; and cases differing significantly in terms of seriousness are not being sufficiently differentiated. In our view, this demonstrates more work is needed, and a wholesale revision of maximum penalties to ensure fairness in sentencing practice is required.
- 6.10 In addition to this general conclusion, a number of maximum penalties for specific offences in our list in Appendix D are so far out of line with the penalty category in which our methodology has placed them that, even at this stage, it is safe to conclude that they need to be changed.
- 6.11 These maximum penalties fall into a number of discrete categories. We discuss some of them below, but emphasise that they are merely illustrative. Many other offences in the list are clearly out of line with those around them, and some categories (such as Categories J and K) have such a wide dispersal of current maximum penalties they clearly demonstrate the need for a fundamental overhaul.

MAXIMA THAT ARE OUT OF LINE WITH THOSE FOR OTHER COGNATE OFFENCES

- 6.12 Some offences have maximum penalties so inconsistent with those attaching to other cognate offences that the rationale for the maximum is difficult to comprehend.
- 6.13 First, there are a number of similar and overlapping offences under the broad umbrella of perverting the course of justice in ss 108-117 of the Crimes Act 1961 and s 24 of the Summary Offences Act 1981. While in most instances the maximum penalties seem to be aligned well, there are a couple of glaring exceptions:
- Section 115 comprises the offence of conspiring to prosecute any person for an alleged offence, knowing the person to be innocent of that offence. A person commits the offence if he or she conspires with another person or persons to accuse a third person of an offence, with knowledge that the accusation is false: *Conteh v Police*.²⁹ If the alleged offence is punishable by imprisonment for three years or more, the maximum penalty for the s 115 offence is 14 years' imprisonment; if it is punishable by imprisonment for less than three years, the maximum penalty is seven years' imprisonment. This is difficult to reconcile with the maximum penalty of three months' imprisonment for the offence of making a false allegation to the police under s 24 of the Summary Offences Act, which in the worst class of case involves making a false complaint of an offence punishable by more than three years in the knowledge that the alleged offender is innocent. While the s 115 offence has the added culpability of a common purpose amongst conspirators, that justifies only a small increase in the maximum; it cannot explain a difference between 14 years and three months. Moreover, s 24 would seem to cover all of the conduct to which the conspiracy under s 115 relates; our approach to conspiracy, discussed above at paragraph 3.63, would therefore confine the latter to situations in which the offence is not completed. Accordingly, the maximum penalty for the offence under s 24 ought to be greatly increased (and relocated), and the maximum penalty for the conspiracy offence should be greatly reduced.
 - The offences of fabricating evidence under s 113 of the Crimes Act (by any means other than perjury), and of conspiring to obstruct, prevent, pervert or defeat the course of justice under s 116, are closely aligned. In both cases, they would in the worst class of case involve the conviction of an innocent person for an offence punishable by three years' imprisonment or more. The only substantive difference in seriousness between the two is that the latter requires some small enhancement to recognise the additional culpability arising from the conspiracy. Currently, both offences have the same maximum penalty of seven years. This can be contrasted with the maximum penalty of 14 years' imprisonment for the offence of perjury that is committed in order to procure the conviction of a person for an offence punishable by three years' imprisonment or more. While there may be some small additional harm arising from the fact that the perjured evidence is given under oath (and therefore in the worst class of case by way of oral evidence in court), it is difficult to see why this justifies a maximum penalty that is double that available under ss 113 and 116. We suggest

29 *Conteh v Police* [1956] AC 158 (PC).

that there should be little difference between the two. In the light of our penalty categorisation, we think that, relatively speaking, the penalty under s 109(2) is too high, and the penalties under ss 113 and 116 too low.

- 6.14 Secondly, the offences of attempted sexual exploitation of a person with a significant impairment in s 138(2) of the Crimes Act, and of attempted sexual connection with a young person under 16 in s 134(2), carry maximum penalties of 10 years, the same as that available for the completed offence under s 138(1). Similarly, the offence of attempting to have sexual connection with a dependent family member under the age of 18 years under s 131(2) of the Crimes Act carries a maximum penalty of seven years, the same as that for the completed offence under s 131(1). For the reasons outlined above at paragraph 3.57, we do not think that these offences should be treated in accordance with the usual attempt rules. As with attempted sexual violation, the maximum penalty should recognise that much of the harm that would be inflicted by the completed offence will also arise in the course of an attempt. Nevertheless, we cannot discern any rationale for setting a maximum penalty at the same level. Our scoring placed the completed offence in s 138(1) in Category G in our ranking; the completed offence in s 134(1) in Category F; and the completed offence under s 131(2) in Category H. In contrast, the attempts were placed in Categories J, H and K respectively. Given the other offences that appear in each category on the ranking, the maximum penalties for these attempt offences are, relatively speaking, currently set too high.
- 6.15 Thirdly, the offences of intentionally damaging one's own property with reckless disregard for the safety of other property under ss 267(3) and 269(3) of the Crimes Act are punishable by five years' imprisonment and seven years' imprisonment respectively. Both of these maximum penalties seem to be substantially too high, since it is not an offence to damage one's own property and the worst class of case accordingly involves either recklessness without damage to other property or the negligent damage of other property. We placed the offences in categories N and M respectively, alongside offences that (with the exception of the Arms Act 1983 offences) largely have maximum penalties between three years and three months. More significantly, the only difference between the two offences is that s 267(3) involves damage by fire, while s 269(3) involves damage by other means. Given that damage by fire is an inherently more dangerous activity than damage by other means, the fact that s 267(3) has a lower maximum penalty is mystifying; the converse ought to apply.
- 6.16 Fourthly, the offence under s 242 of the Crimes Act involves knowingly or recklessly making a false statement (for example, in a prospectus) with an intent to deceive or to induce any person to make an investment. If the deception or inducement causes loss to another person, that will amount to the offence of obtaining by deception or causing loss by deception under s 241, which would seem to be a more appropriate charge in such a circumstance. Section 242 should arguably therefore be confined to cases where the full statement is made but no other person has yet suffered loss. Yet s 242 carries a maximum penalty of 10 years' imprisonment, while s 241 carries a maximum penalty of only seven years. Even if s 242 were appropriate to deal with cases of actual loss, it is difficult to see why a deception by means of a false statement is more culpable than a deception by other means. If the loss caused by the deception is the same, then the penalty ought to be the same. The relativities between s 241 and s 242 do not make sense.
- 6.17 Fifthly, the offence under s 20A of the Summary Offences Act involves the communication of official information knowing that there is no proper authority to do so and that the communication is likely (among other things) to endanger safety, prejudice law enforcement or seriously damage the economy of New Zealand. It is punishable by a maximum of three months' imprisonment. There is a corresponding offence under s 78A of the Crimes Act that involves the communication of official information, knowing that there is no proper authority to do so and that the communication is likely to prejudice the security or defence of New Zealand. It is punishable by a maximum of three years' imprisonment. The difference between the two offences is that the former requires a risk to personal safety, law enforcement or the economy of New Zealand, while the latter requires a risk to security and defence. Otherwise the offences are in essence identical. While an attack on security and defence may be regarded as a little more serious than an attack on the national economy, it must be doubted whether this could possibly justify the

difference between the two maximum penalties. Relatively speaking, we think that the former is too low and the latter is too high.

- 6.18 Finally, the offence of doing an act in a public place that is likely to cause injury under s 12 of the Summary Offences Act, and of doing anything with a thing in a public place that is likely to cause injury under s 13, both carry a maximum penalty of three months' imprisonment. However, the maximum culpability associated with the former offence is negligence, while the worst instance of the latter offence comprises recklessness (ie knowledge of the risk and an unreasonable decision to take the risk). The substantial difference in culpability ought obviously to be reflected in a different maximum penalty.

MAXIMA THAT DO NOT APPROPRIATELY REFLECT THE RANGE OF INTERESTS HARMED OR PUT AT RISK BY THE OFFENCE

- 6.19 A number of offences have current maximum penalties that are so substantially at odds with the maximum penalties provided for the other offences with which they have been placed in our ranking that it seems apparent that they do not properly reflect the extent to which the interests affected by them are harmed or put at risk.
- 6.20 First, the offences of driving with excess breath or blood alcohol, and of driving under the influence of alcohol or drugs so as to be incapable of having proper control of the vehicle, under ss 56 and 58 of the Land Transport Act 1998 respectively, carry a maximum penalty of two years' imprisonment when the offender has two or more previous convictions for the offence. In the worst class of case, the offence will involve a very high level of intoxication, a very high risk to other motorists and substantial damage to other property, committed by an offender with a very long record of similar offending. When the harms caused or risked were properly weighed up, their scores under our methodology placed them in Category J, alongside other offences with maximum penalties that are generally substantially higher than two years.
- 6.21 Secondly, the offence of unauthorised disclosure of official information under s 20A of the Summary Offences Act carries a maximum penalty of three months' imprisonment. It is committed in circumstances where the offender not only knows that he or she does not have authority to pass on the information but also knows that it is likely to endanger safety; prejudice the prevention, investigation, or detection of offences; prejudice the safe custody of offenders or defendants; or seriously damage the national economy. In the worst class of case, it may indirectly result in serious physical harm to an individual or widespread and significant financial loss. Our scoring placed it in Category K alongside offences that as a group should, in our view, (and currently generally do) attract maximum penalties substantially in excess of three months.
- 6.22 Thirdly, the offence of contaminating food, crops, water or other products under s 298B of the Crimes Act carries a maximum penalty of 10 years, the same as that provided for the offence of causing disease or sickness in animals under s 298A. The former offence requires that the offender either intend to harm a person or cause major economic loss or major damage to the national economy, or at least be reckless as to one of those consequences. The latter, in contrast, requires that the offender intends only to pose a serious risk to the health or safety of an animal population that is likely to cause major damage to the national economy, or at least be reckless as to that consequence. In the worst class of case, therefore, the offence under s 298B will not only cause major economic harm to the community as a whole but will also pose a significant and widespread risk to public health and safety. While the maximum penalty should not be set on the basis that serious harm to public health actually materialises (since that would then comprise the offence of wounding with intent or with reckless disregard under s 188), it nevertheless needs to take into account the risk of such harm. The fact that it has the same maximum penalty as s 298A strongly suggests that it has not done so. The combination of both harm to the economy and widespread risk to public health led to a score under our methodology that placed this in the highest category of seriousness.
- 6.23 Fourthly, the offence of dealing in a Class A drug under s 6(2)(a) of the Misuse of Drugs Act 1975 carries a maximum penalty of life imprisonment. We think that the harm to collective welfare arising from such an offence is at the highest level, and that there is also an extremely high risk of serious harm to physical

integrity. However, in our view it does not warrant the maximum penalty that is otherwise reserved only for murder, manslaughter, treason and piracy involving murder (and, as we note below in paragraph 6.26, should in any case be removed from manslaughter as well). On our methodology, it was placed alongside offences with current maxima of 14 years' imprisonment.

- 6.24 Finally, the offence of sabotage under s 79 of the Crimes Act carries a maximum penalty of 10 years' imprisonment. However, in the worst class of case the offender will have caused enormous destruction of, or damage to, property that is necessary for the safety or health of the public or for the safety or security of New Zealand, with enormous consequences for the national interest. In terms of relativity, therefore, it does not make sense that the maximum penalty for such an offence places it alongside burglary and forgery. Our scoring placed it alongside offences with current maxima of 14 years' imprisonment.

MAXIMA THAT DO NOT REFLECT THE APPROPRIATE BALANCE BETWEEN CONSEQUENCE AND CULPABILITY

- 6.25 A few offences seem to place undue weight upon the serious consequence arising from the offence, and fail adequately to take into account the reduced culpability inherent in the definition of the offence.
- 6.26 Perhaps the most glaring example is manslaughter, which currently carries a maximum penalty of life imprisonment. Since the repeal in 2009 of the partial defence of provocation under s 169 of the Crimes Act, the offence of manslaughter never involves an intent to kill. Given the extended definition of murder in s 167(b)–(d), it also excludes cases where the offender means to cause bodily injury, or does any act with an unlawful object that is known to be likely to cause death and is reckless whether death ensues or not. Accordingly, it ought not to carry the same maximum penalty as murder. Our methodology placed it in Category C, alongside offences such as attempted murder, aggravated wounding and wounding with intent to cause grievous bodily harm.
- 6.27 In contrast, some other offences seem to place too much emphasis upon the culpability inherent in the offence, and give insufficient recognition to the fact that little or no harm actually materialises. An example can be found in s 131B of the Crimes Act (meeting a young person under the age of 16 years following sexual grooming with the intent of committing a sexual offence), which carries a maximum penalty of seven years' imprisonment. The offender does not get to the stage of an attempt, and the harm score is derived solely from the risk that he or she presents. The resulting ranking placed the offence in Category K, alongside offences that, while varying widely, are mostly in the three to five year range.
- 6.28 A second example of this undue emphasis on culpability appears in s 198A of the Crimes Act. Subsection (1) comprises an offence of using a firearm against a police officer or prison officer, acting in the course of his or her duty, knowing that the person is a police officer or traffic officer; it carries a maximum penalty of 14 years' imprisonment. Subsection (2) comprises an offence of using a firearm with intent to resist lawful arrest or detention; it carries a maximum penalty of 10 years' imprisonment. In both cases, the worst class of case must assume that no injury, or at least no serious injury, results, since that should more appropriately be charged as wounding with intent to injure or cause grievous bodily harm. The harm caused by the s 198A offences, while serious, should therefore be based primarily on risk. On this basis, the maximum penalties are, relatively speaking, much too high. We placed them in Category H, alongside offences with current maxima primarily in the five to seven year range.
- 6.29 In some instances, the comparative weight placed on consequence and culpability between one offence and another is anomalous. For example, the offence of wounding with intent to injure under s 188(2) of the Crimes Act carries a maximum penalty of seven years' imprisonment, while the offence of injuring with intent to cause grievous bodily harm under s 189(1) carries a maximum penalty of 10 years' imprisonment. The reduced culpability inherent in the former offence has therefore been given greater weight than the reduced consequence inherent in the latter offence. In the worst class of case, we think that the marginal effect of a reduction in consequence and culpability should be the same. The difference in maximum penalties between the two offences therefore does not seem intuitively right.

- 6.30 We note, however, it is often difficult on the evidence to draw a clear dividing line between "intent to cause grievous bodily harm" and "intent to injure". It is for that reason, following judicial feedback, the Law Commission recommended in *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person*,³⁰ the level of intended injury should be treated as a sentencing factor, rather than as a substantive element of the offences. If that were done, there would be two offences: wounding (or, as we would prefer to term it, causing serious injury) with intent to injure; and injuring with intent to injure. We support the Law Commission recommendation.

MAXIMA FOR OFFENCES THAT OVERLAP WITH OTHER OFFENCES

- 6.31 A number of offences are framed in such a way that they encompass conduct captured by other more serious offences. As noted above at paragraph 3.32, our approach in these cases has been to exclude conduct covered by the more serious offence, so the worst case scenario for the lesser offence is set at the threshold point at which the lesser offence tips over into the more serious offence.
- 6.32 However, it seems likely that many maximum penalties for these offences have been set at a high enough level to capture the more serious conduct, even if it has not been charged as such. In our view, this is inappropriate. If the prosecution wishes to allege more serious conduct, it should charge the offender with that conduct. The offender should not effectively be tried and sentenced for conduct covered by a more serious charge than that alleged against him or her.
- 6.33 Perhaps the most obvious offence falling into this category is conversion of a vehicle or other conveyance under s 226 of the Crimes Act. The offence applies only when there is no intention to permanently deprive the owner, but instead the vehicle or conveyance is taken for a period with an intent to later return or abandon it. If there is an intention to permanently deprive the owner, the offence of theft is available as the appropriate charge. Yet the conversion offence carries a maximum penalty of seven years' imprisonment, the same as that available for theft. It therefore appears to have been set at a level enabling an offender to be punished as if he or she were guilty of theft, even though the intent to permanently deprive has not been proved at trial. In our view, this is inappropriate. If the prosecution wishes to allege an intent to permanently deprive the owner of the vehicle, it should lay the charge that reflects that intent. If not, it should proceed on the basis there was no such intent and the offender should be liable to a maximum penalty commensurate with that. If there is doubt about whether such an intent can be proved, charges can be laid in the alternative. There is accordingly no justification for the seven year maximum penalty.
- 6.34 There is a similar problem with the offence of disabling (stupefying or rendering unconscious) any other person in s 197 of the Crimes Act, which carries a maximum penalty of five years' imprisonment. As the Law Commission noted in the report *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person*,³¹ where stupefying facilitates more serious offending – sexual violation or wounding or injuring with reckless disregard, for example – the more serious offending ought to be charged, with the stupefaction element an aggravating factor to be taken into account on sentence. This offence ought therefore to apply only to cases that do not cause any injury and fall short of an attempt to commit some other more serious offence. For that reason, the Law Commission recommended the maximum penalty be reduced from five years' to two years' imprisonment. The ranking produced by our methodology placed it in Category K, alongside offences with substantially varying maxima but an average of a little under four years' imprisonment.
- 6.35 The offences of bestiality and indecency with animals in ss 143 and 144 of the Crimes Act, carrying maximum penalties of seven years' imprisonment and three years' imprisonment respectively, also appear to have been set on the implicit basis that they cause harm to animals. But if there is manifest harm, the appropriate charge is one of the various offences involving ill treatment of animals in the Animal Welfare Act 1999. Looked at in this light, the maximum penalties for bestiality and indecency

30 Law Commission, above n 25.

31 Law Commission, above n 25.

with animals are, relatively speaking, simply too high. By comparison, the offence of wilful ill-treatment of an animal causing death, serious injury or permanent disability under s 28 of that Act carries a maximum penalty of only five years' imprisonment, while reckless treatment causing one of those consequences carries a maximum of three years. Our ranking in fact placed bestiality and indecency with animals in the lowest penalty category.

- 6.36 Finally, there are also a number of sex offences in the Crimes Act that appear to have been set so as to capture conduct that properly falls into a more serious offence category involving lack of consent. The offences in s 129A(1) of having sexual connection with another person, and in s 129A(2) of doing an indecent act on another person, knowing that the other person has been induced to consent by threat, carry maximum penalties of 14 years' imprisonment and five years' imprisonment respectively. These offences do not involve force or threats that are sufficient to negate consent, since that would then constitute sexual violation or indecent assault. Yet they appear to have been set on the basis that they do. That can be the only explanation for the fact that the difference in maximum penalties – 14 years compared with 20 years and five years compared with seven years – is not greater than it is. When we approached the offences in s 129A(1) and (2) on the basis that consent was not negated, our methodology placed them in Categories I and L, alongside offences with current maximum penalties of five to seven years and two to three years respectively.

MAXIMA THAT ARE BASED ON SOCIAL CONDITIONS AND MORES OF ANOTHER ERA

- 6.37 The maximum penalties for several offences are arguably based on the social conditions and mores of another era. While the offences can still be justified by the actual or potential harm they pose, their maximum penalties exaggerate the importance of the interests being protected in modern society. In our view, two offences clearly fall into this category:
- The offence of bigamy in s 206 of the Crimes Act normally carries a maximum penalty of seven years. We ranked the offence in the second to lowest penalty category on our methodology, alongside offences in the three month to two year range.
 - If the person with whom the offender went through the form of marriage, or with whom the offender entered into the civil union, knew at the time of the commission of the bigamy that the marriage or civil union would be void, the maximum penalty is two years. We ranked the offence in this case in the lowest penalty category, alongside penalties that are generally in the three to six month range (although we doubt that it should be imprisonable at all).
- 6.38 The maximum penalty of two years' imprisonment for the offence of concealing the dead body of a child in s 181 of the Crimes Act, with intent to conceal the fact of its birth, is arguably also outdated, particularly given that the offence almost always involves either significant mental impairment at the time of its commission or other substantial mitigation. Our ranking placed it in Category O, the lowest penalty category.

MAXIMA THAT ARE BASED ON AN INCONSISTENT APPROACH TO PREPARATORY CONDUCT

- 6.39 We have already noted, at paragraphs 3.59–3.60 above, that a number of attempt and conspiracy offences specifically provided for ought to be repealed and dealt with under the generic attempt and conspiracy provisions contained in ss 310 and 311 of the Crimes Act. We have also argued, at paragraph 6.13–6.18 above, some that do need to remain as specific offences have maximum penalties that are out of alignment with the harm they cause or risk. For example, the maximum penalties for attempted sexual exploitation of a person with a significant impairment under s 138(2) of the Crimes Act, and of attempted sexual connection with a dependent family member under the age of 18 years under s 131(2) of the Crimes Act, are too high because they draw no distinction between the attempt and the completed offence.
- 6.40 In addition, there are other offences that are essentially preparatory in nature. As noted above at paragraph 3.69, we ranked these on the basis of their potential to cause harm rather than their infliction

- of actual harm, and in doing so, identified a number of glaring anomalies in the maximum penalties attaching to some of them.
- 6.41 Some of these appear to place undue emphasis upon the diminution in culpability arising from the fact the offending conduct is at an early stage and give insufficient recognition to the seriousness of the intended conduct and its consequences. Three offences fall into this category:
- The offence under s 28 of the Summary Offences Act of being found in a public place preparing to commit a crime carries a maximum penalty of only three months' imprisonment. Yet the worst class of case would involve a person, acting alone, who is planning to commit mass murder or an offence causing catastrophic economic consequences to the country, but has not yet reached the stage of an attempt. This offence was scored on our methodology so as to place it in Category G, but we placed it in Category I alongside offences with current maximum penalties of five to seven years' imprisonment, in order to properly distinguish it from s 272 of the Crimes Act and s 55 of the Arms Act (see below).
 - The offence under s 272 of the Crimes Act of possessing or making an explosive device with intent to commit a crime carries a maximum penalty of two years' imprisonment, notwithstanding the fact that in the worst class of case the person committing the offence will possess an explosive, again with the intent of committing mass murder or an offence causing catastrophic economic consequences, although not having reached the stage of an attempt. We placed this offence in Category G, alongside offences that predominantly have current maximum penalties of seven to 10 years' imprisonment. We note in passing that this puts it alongside the almost identical offence in s 55 of the Arms Act of possessing a firearm or explosive device with intent to commit an offence punishable by imprisonment for three years or more. This offence has a current maximum of five years. The difference between the two has no possible justification.
 - The offence under s 8 of the Summary Offences Act of publishing a document explaining the manufacture of explosives for the purposes of sale or distribution to the public carries a maximum penalty of three months' imprisonment. Yet again the worst class of case would appear to involve conduct with significantly more serious potential consequences and higher culpability than this maximum penalty suggests. In the worst class of case, for example, it may involve a detailed guide on how to build a suicide bomb or how to remotely detonate a powerful explosive device in a public place. We again placed it in Category I, alongside offences with current maximum penalties of five to seven years' imprisonment.
- 6.42 In contrast, the offence under s 264 of the Crimes Act (possessing an instrument that is capable of being used to forge a document, without lawful authority or reasonable excuse and with intent to use it for such a purpose) appears to place undue weight upon the intended conduct, without having sufficient regard to the fact that it will not have reached the stage of an attempt. It is punishable by up to 10 years' imprisonment, the same maximum penalty as that available for forgery itself. This takes no account of the fact that, even in the worst class of case, no forgery will actually have taken place. We placed the offence in Category J, alongside offences predominantly carrying a current maximum of between five and seven years' imprisonment.
- 6.43 The same may be said of counterfeiting public seals under s 261 of the Crimes Act. This offence is currently punishable by up to 10 years' imprisonment. It does not in itself cause significant harm; instead, it is conduct preparatory to the use of those seals for an unlawful purpose. We accordingly scored it on a risk basis and placed it together with the s 264 offence. As with that offence, its current maximum, in relativity terms, is therefore substantially too high.
- 6.44 The equivalent offences in relation to documents created for private purposes in ss 262 and 265 of the Crimes Act have similar problems. The s 262 offence (counterfeiting corporate seals) is committed by a person who unlawfully makes or counterfeits any seal or stamp used by a company or other corporate body (other than a public body), or uses any such seal or stamp knowing it to be counterfeit. It is punishable by a maximum penalty of five years' imprisonment. In an age of electronic registers and electronically authenticated documents, we are unsure of the circumstances in which this offence would

now be used and think that, if it were committed, the harm caused by it would be minimal unless it tipped over into a more serious offence such as forgery of a document for advantage under s 256(1) or altering a document with intent to deceive under s 258. The same may be said of the offence of imitating customary marks under s 265, also punishable a maximum of five years' imprisonment. For this reason, we have placed them in Category M, alongside offences that (with the exception of the Arms Act offences) largely have current maximum penalties between three months and three years.

- 6.45 Leaving aside whether the maximum penalties are too high or too low, the relativities between some of these offences are also inexplicable. For example, while the maximum penalties for the offences in s 55 of the Arms Act and s 272 of the Crimes Act are five years' and two years' imprisonment respectively, the offences of being armed with a weapon with intent to commit burglary under s 232(2) of the Crimes Act, and of possessing an instrument with intent to use it to commit burglary under s 233, carry maxima of five years' imprisonment and three years' imprisonment respectively. Given that, in the worst class of case under ss 55 and 272 the intended offence will be murder, it is obvious that the maximum penalties under both ss 232(2) and 233 should be substantially lower. They are not.
- 6.46 Finally, we should draw attention to the offence in s 12AB(2) of the Misuse of Drugs Act of importing a precursor substance knowing that it will be used to produce or manufacture a controlled drug. Essentially this too is preparatory conduct. The Law Commission noted in its report *Controlling and Regulating Drugs*,³² precursor substances also have legitimate industrial or medical purposes. Where they are themselves a psychoactive substance, they should be classified as a controlled drug and treated accordingly. Otherwise the maximum penalty attached to offences relating to them should be set on the basis that the harm they cause is indirect and contingent on the use to which they are put. In order to give effect to that, the Law Commission recommended that each precursor substance should be separately scheduled as an A, B or C precursor, depending upon the classification of the most harmful drug it is potentially used to produce, and the maximum penalty should be set at approximately half the maximum for the offences relating to the appropriate class of the controlled drug itself.
- 6.47 In relation to Class A and Class B precursors, the current maximum penalty of seven years' imprisonment for the offence in s 12AB(1) is more or less consistent with this. Furthermore, our methodology, which used Class A precursors as the worst class of case, placed the offence at the bottom of Category J, alongside offences predominantly in the three to seven year range.
- 6.48 However, the current maximum penalty is, relatively speaking, clearly too high for precursors of Class C drugs and does not take sufficient account of the fact that it is merely preparatory conduct. We reiterate the view that, if the statute is to draw a distinction between Class A, B and C drugs themselves, it should also draw a distinction between the precursors to those substances and set different maximum penalties for offences relating to each.

MAXIMA ATTACHING TO OFFENCES IN THE ARMS ACT 1983

- 6.49 On our methodology, many of the offences in the Arms Act were given a ranking at odds with the current maximum penalty.
- 6.50 Some have a maximum penalty that seems to be directed towards much more serious conduct than that covered by the scope of the offence as drafted, primarily because they overlap with a more serious offence. For example, the offence of unlawful possession of a pistol or restricted weapon under s 50(1) carries a maximum penalty of three years' imprisonment. It is difficult to understand how a maximum penalty at that level can be justified, given that there are a range of other offences covering unlawful carriage or use. It is also difficult to reconcile the maximum penalty with that provided for the offence under s 36 of carrying a pistol or restricted weapon in any place beyond the curtilage of a dwelling except in accordance with the conditions of a firearms licence, which is punishable by only three months' imprisonment. Given that the former offence entails only unlawful possession while the latter entails unlawful carriage, the difference between the two does not make sense.

³² Law Commission, above n 26.

- 6.51 The maximum penalty of two years' imprisonment for the offence of unlawful carriage of an imitation firearm under s 46(1) is equally anomalous. If the imitation firearm is used to commit some other offence, it will be an aggravating feature of that offence and taken into account in the sentence imposed. The maximum penalty for this offence should therefore be based on a worst class of case that involves unlawful carriage alone. Since an imitation firearm is capable only of frightening, the harm inflicted by the offence is relatively small. We accordingly placed the offence in the lowest penalty category.
- 6.52 In contrast, other offences have a maximum penalty much lower than the seriousness of the conduct covered by the worst class of case. For example, the offence under s 48 of discharging a firearm in or near a public place or dwelling house without reasonable cause, so as to endanger property or to endanger, annoy or frighten any person, carries a maximum penalty of only three months' imprisonment. Yet the very similar offence under s 53(3) of discharging a firearm without reasonable cause, in a manner likely to injure or endanger the safety of any person or with reckless disregard for the safety of others, carries a maximum penalty of three years' imprisonment. In the worst class of case, the only substantive difference between the two offences is that the s 48 offence must occur in or near a public place or dwelling house, while the s 53(3) offence may occur, for example, on privately owned farmland. That would suggest that, if anything, the s 48 offence is the more serious of the two. Given that the endangerment to public safety will, in the worst class of case, involve recklessness (ie knowledge of the risk), a maximum penalty of only three months' imprisonment seems, relatively speaking, much too low. We gave both offences the same harm score and placed them in Category J, alongside offences carrying maximum penalties predominantly in the three to seven year bracket.
- 6.53 These examples demonstrate a more fundamental problem with the Arms Act: there is no coherent offence structure with systematically graduated levels of seriousness, but instead overlapping offences with seemingly arbitrary maximum penalties attaching to them. This conclusion was also reached by the Sentencing Establishment Unit within the Law Commission when it was attempting to draft sentencing guidelines for offences under the Arms Act. It found the task extremely difficult simply because the nature of the conduct that each offence was directed towards, by comparison with other offences in the Act and indeed with parallel offences in the Crimes Act, was difficult to discern.
- 6.54 We therefore think the anomalies in the maximum penalties we have identified in the Arms Act cannot be addressed simply by a review of penalty levels. A fundamental overhaul of the Arms Act is long overdue.

CONCLUSION

- 6.55 The particular examples of anomalies in the current maximum penalty structure we have highlighted in this chapter are merely an illustration of what is clearly a more general problem. The way in which maximum penalties have been developed has resulted in a large number of manifestly irrational and unjustified penalties that are, relatively speaking, both too high and too low. They provide very poor guidance to the courts as to the appropriate level of punishment in the worst class of case and, to the extent they guide day to day sentencing practice, may well be resulting in injustice.
- 6.56 However, as we said at the beginning of this chapter, while we have done enough to enable us to draw the clear conclusion major reform is required, we have not done enough work to recommend the appropriate placement of offences within the hierarchy of seriousness. Among other things, that requires much more detailed analysis of recent sentencing patterns than we have been able to undertake. In order for appropriate penalty values to be attached to each penalty category, there is also a need for much wider public consultation.
- 6.57 Once that work has been done, there are at least three options for incorporating proposed maxima into statute.

- 6.58 First, the maximum penalty value for each offence could be placed within the offence statute and also within a separate penalty statute.³³ This would allow for greater accessibility, since the penalty for an offence could be ascertained either by referring to the penalty statute, or by looking at the relevant clause in the principal statute. The drawback to this approach is that any future amendments to the maximum penalty for an offence will require amendment to two separate statutes.
- 6.59 Secondly, an alternative approach would be to have penalty values set out solely in a separate penalty statute. The advantage of this approach is that legislative change to maximum penalties would become easier. In addition, debate would be less focussed only on the individual offences under consideration. However, accessibility of the law would be compromised in so far as reference to two statutes would be required in order to ascertain the maximum penalty for an offence.
- 6.60 The third option would be to retain the status quo, ie to forgo a separate penalty statute and simply list the maximum penalty alongside the offence in the principal statute. The pros and cons of all three approaches would need to be weighed, together with a review of relevant overseas experiences.

33 For something similar, see the Victorian legislation: Crimes Act 1958 (Vic) and Sentencing Act 1991 (Vic).

Appendix A

Sample offences for determining base values

Physical integrity

Range	Section & Act	Description	Max	Worst class of case
Top	172 CA	Murder	Life	Act of terrorism causing multiple deaths, eg placing a suitcase bomb on board a domestic flight killing 40 crew and passengers.
Middle	189(2) CA	Injuring with intent to injure	5 yrs	The offender had been drinking for a sustained period at a bar and was asked to leave by the duty manager. The offender refused and had to be forcibly removed from the premises. The offender then hid outside and waited for the manager to lock up. The offender grabbed the victim from behind and subjected him to a sustained physical attack, inflicting serious injuries to his right leg. Victim unable to work for three months.
Low	48 AA	Discharging firearm in public place	3 mths	The offender was a licensed gun owner who took part in a street protest. The offender took a rifle with him to the protest and kept it inside his jacket. Once the protestors were assembled outside Parliament, and during a particularly noisy point in the protest, he withdrew and discharged his rifle three times into the air. No one was injured as a result of the shots, although the shots did cause panic amongst some protestors.

Violation of a governmental interest

Range	Section & Act	Description	Max	Worst class of case
Top	74 CA	Treason	Life	Coup in which the New Zealand government is overthrown through violent means. Several members of the cabinet, including the Prime Minister, and a number of government officials detained at gunpoint. Coup causes civil unrest and lawlessness. Overseas governments refuse to recognise the new administration. New Zealand becomes isolated in the international community.
Middle	109(2) CA	Perjury	14 yrs	The offender gave evidence at his brother's trial on two counts of the rape and murder of two children. The offender gave evidence that the accused had spent two days tramping in dense bush at the time the murders took place. The evidence was crucial in the accused's acquittal. CCTV evidence subsequently revealed that the accused was guilty, whereupon the offender was convicted of perjury.
Low	23 SOA	Resisting constable acting in duty	3 mths	The offender, a newspaper photographer, took photos of a vehicle accident in which a male celebrity was injured. The offender was asked to move from scene by the emergency services. The offender refused and was arrested by police. He vigorously resisted the arrest, necessitating the involvement of 3 officers.

Privacy and freedom from humiliation or offensive behaviour

Range	Section & Act	Description	Max	Worst class of case
Top	98 CA	Dealing in slaves	14 yrs	The offender arranged for the victim to be bought to New Zealand from Thailand to work as a prostitute. For three years the offender used the victim as a physical and sexual slave. She was regularly subject to physical assaults and degrading acts by the offender and a number of his associates. The offender attempted to sell the victim to an undercover police officer for \$35,000, telling the officer that he would acquire full property rights over the victim.
Middle	216J(1) CA	Publishing an intimate visual recording	3 yrs	The victim voluntarily engaged in full sexual intercourse with the offender. Unbeknown to the victim, the offender had set up multiple video cameras in his bedroom. The offender used footage from the cameras to put together a two minute video clip of the intercourse which he then uploaded to several internet websites. He then made postings on a variety of websites directing people to the sites hosting the video footage.
Low	27 SOA	Indecent exposure	3 mths	Offender was part of a street parade promoting a new strip club and was situated on top of a moving float. She and others on the float were topless, but on several occasions the offender indecently exposed herself. Many in the crowd were school children under 16 years of age.

Material support and amenity

Range	Section & Act	Description	Max	Worst class of case
Top	260 CA	False accounting	10 yrs	The offender was the Managing Director of an investment company. Over the course of three years she arranged for the company to draw down loans from a United States lender to the value of \$6.3M. None of the loans were included in the annual company accounts. This allowed the company to show a healthy annual profit. In fact the company was running at a large loss and remained solvent only because of the unaccounted loans. Investors in the company collectively lost \$11M.
Middle	271CA	Diversion of water	5 yrs	Two neighbouring farmers opposed each other over the construction of a new milking facility on one of the farmer's land. As a result of this dispute the two farmers took a serious dislike of one another. In retaliation for a perceived slight, the offender illegally dammed and then diverted a stream which passed through both properties. The victim's farm was wholly reliant on the stream for water supply for irrigation and animal water supplies. Despite continued requests from the victim to release the water, the offender refused to do so. As a result the victim's farm suffered vast crop damage and caused distress and the death of large numbers of cattle. The total financial loss to the victim was \$118,000.
Low	11 SOA	Wilful damage	3 mths	The offender is a member of a religious affiliation. He and his associate approached a house in order to interact with the occupants and provide books advocating their beliefs. At the scene of the offence, the offender became involved in a heated discussion with a male occupant. The discussion soon became a rowdy argument, and culminated with the offender kicking the occupant's door as it was being closed, causing significant damage. The offender then threw his bag at the window of the house causing a crack in the window which had to be replaced. The repair bills for the damage was \$487.

Impairment of collective welfare

Range	Section & Act	Description	Max	Worst class of case
Top	143 CA	Bestiality	7 yrs	The offender had sexual intercourse with sheep and goats over the course of two years. Evidence that many of the animals were physically assaulted and were distressed during the intercourse.
Middle	206 CA	Bigamy	7 yrs	The offender was convicted of five counts of bigamy. Over four years he married a total of six women. Only the first marriage was legally undertaken. The offender believes in a right to practice polygamy irrespective of the law. All women married to the offender (excluding the first) did so knowing that the offender was already married.
Low	123 CA	Blasphemous libel	1 yr	The offender wrote statements that were highly critical of the Christian faith. Some of the comments were of a derogatory nature directed at core Christian beliefs. The offender distributed flyers upon which he had written his comments to those assembled for the funeral of a Catholic Bishop. The police arrested the offender. In their view, the leaflets were likely to lead to a breach of the peace.

Appendix B

Calculation of harm caused by an offence

The following example provides an illustration of the way in which the harm caused by an offence (step 3) will be calculated based on the worst class of case. The formula for the quantitative tool is as follows:

$$\text{base value} \times \text{level of injury} = \text{harm score}$$

Note that the base values do not yet have a numerical value allocated. These will be confirmed following external consultation:

Offence: Arson: s 267(1) Crimes Act 1961

Current maximum penalty: 14 years' imprisonment

Aggravating factors

- High value of property damaged or destroyed
- Offender knew that life would be endangered
- Offence was well planned and organised
- Deliberate intention to destroy rather than mere recklessness
- Previous convictions for offences involving damage to property
- Use of explosives or incendiary devices

Worst class of case

The offender was a former employee of a manufacturing business who had been fired by the owner for theft two weeks earlier. The offender returned to the plant at night and deliberately started a fire. The fire destroyed the plant. Four people inside were hospitalised for smoke inhalation. One suffered minor burns.

The fire also spread to a neighbouring rest-home, causing the mass evacuation of the home's residents. Three units were destroyed and all contents lost. Seven other units suffered damage. Two elderly residents were fortunate to escape the fire that engulfed the unit. A total of 30 residents had to be treated for smoke inhalation.

The offender acted out of malice. He was upset at being fired and had told the owner that he would regret firing him. The offender planned the fire in advance, securing accelerants from a number of stores in order to evade detection. He used a key still in his possession to enter a shed on the premises to secure a further accelerant. Being a former employee, the offender was also aware that it was likely that several people would be inside the factory when he started the fire.

The offender has seven convictions, three of which are for offences involving damage to property. He also has one conviction for arson, relating to a fire the offender deliberately set to his neighbour's woodshed following a dispute.

The financial cost of the fire was significant. The loss of the factory and business was totalled at \$1,600,000. The destruction of the three rest-home units, their contents, and the damage done to the seven other units totalled \$420,000.

Level of harm

Interests affected

Interest	Value	Affected
physical integrity	<i>a</i>	✓
material support and amenity	<i>b</i>	✓
privacy and freedom from humiliation or offensive behaviour	<i>c</i>	✗
governmental interest	<i>d</i>	✗
collective welfare	<i>e</i>	✗

Harm scale

Interest	Affected	Base value	Harm factor (out of 10)	Harm
physical integrity	<ul style="list-style-type: none"> serious threat to life one victim suffered burns significant number of victims suffered smoke inhalation 	<i>a</i>	7	$\frac{a(BV)}{\times 7(HF)} = y$
material support	<ul style="list-style-type: none"> destruction of plant and stock business set back, causing inconvenience, loss of profits, and loss of wages for employees destruction of rest-home units and contents damage to seven other rest-home units 	<i>b</i>	10	$\frac{b(BV)}{\times 10(HF)} = z$
TOTAL HARM				= <i>y</i> + <i>z</i>

Appendix C

Colmar Brunton – Maximum Penalties Report



Review of Maximum Penalties Project:
Consultation to Understand Public Reasoning for Ranking Crimes

PREPARED FOR	The New Zealand Law Commission
ATTENTION	Warren Young
ISSUE DATE	8 June 2009
CONTACT[S]	Venise Comfort, Céline Yockney and Ian Binnie

dream a little FlyBuys

Colmar Brunton Confidential

Table of Contents

Acknowledgements.....	1
Executive summary.....	2
Purpose of this document.....	2
Research methodology.....	2
Key findings.....	2
Background and research objectives.....	6
Why the research was conducted	6
Purpose of the research	6
Objectives of the research.....	6
Research methodology	7
A combined methodological approach.....	7
Focus group discussions.....	7
Notes to this report.....	9
Terminology	9
Verbatims.....	9
Detailed findings.....	10
Summary of the factors that determine seriousness	11
Introduction.....	11
1 – Level and type of physical harm	13
Introduction.....	13
Physical harm is a key criterion for evaluating a crime’s seriousness... 13	
Serious physical harm to an identifiable victim is seen as most serious 14	
Conclusions	18
2 – Level and type of financial harm	19
Introduction.....	19
Financial harm to one person versus corporate financial harm	19
Motive and amount interplay to determine seriousness level	20
Crimes than involve a combination of physical and financial harm are complex to rank	21
A combination of amount, victim and intent determine the seriousness of financial crimes	21
Theft and financial loss from damage are viewed differently.....	22
Māori and Pacific perspectives	23
Conclusions	23
3 – Vulnerability and age of the victim.....	25
Introduction.....	25
The more vulnerable the victim, the more serious the crime.....	25
The age of the perpetrator is sometimes a consideration	27
Māori and Pacific differentiation	27
Conclusions	27
4 – Intention and culpability	29

Introduction.....	29
Intention is strongly related to how seriously a crime is ranked	29
People clearly link blame with intention.....	31
Conclusions	31
5 – Abuse of positions of trust.....	32
Introduction.....	32
Crimes committed by people in positions of trust are perceived seriously.....	32
Conclusions	33
6 – Scale and number of victims.....	34
Introduction.....	34
Harm to entities is difficult for people to visualise.....	34
Conclusions	35
Perceptions of ranking the crimes	36
The process of ranking the crimes.....	36
People tend not to consider the penalties that crimes might incur	36
Ranking the scenarios is a complex exercise	37
Viewpoints influence rankings	38
Comment on Māori and Pacific perspectives	39
Quantitative analysis of ranking.....	42
Method used to create the aggregate ranking.....	42
Pre-group ranking	42
Explanation of box and whisker diagram above.....	45
Post-group ranking.....	46
Possible reasons behind the spread of answers.....	50
Appendix I – Topic guide	51
Appendix II – Scenarios	60
Appendix III – Example of using the median vs. using the mean to provide an aggregate ranking	67
If the mean was used to create an aggregate ranking	67
If the median was used to create an aggregate ranking.....	67

Acknowledgements

We would like to thank the people in the five centres who gave their time for us to conduct this research. Not only did they attend a two-hour group discussion, but many spent hours thinking about and conducting the ranking exercise prior to the groups. Without their participation and efforts this research would not have been possible.

Executive summary

Purpose of this document

This document presents the findings from research conducted in January and February 2009 for the Law Commission (the Commission) exploring public perceptions of the relative seriousness of selected crime scenarios.

Research methodology

The findings from this research are from eight group discussions with the general public, including Māori and Pacific people, conducted in Auckland, Wellington, New Plymouth, Christchurch and Ashburton. A total of 62 people took part in the discussions. Prior to discussions, people were asked to rank 28 selected crime scenarios. They were also asked to re-rank the scenarios following the focus group. The text for these scenarios was provided by the Law Commission. The data were then analysed to provide a total ranking across the eight focus groups.

Key findings

Overall comments on the ranking as a whole

The level of seriousness of a crime relates to a range of factors, but is mainly influenced by people's emotive reaction to crimes that involve physical harm to individual victims with whom they can identify with and feel compassion for.

People have ranked as most serious any crimes that have long-term or serious physical (and emotional or psychological) consequences on an identifiable victim. The most serious crimes are perceived to be those perpetrated against vulnerable victims, involving a high level of physical harm and involving a breach of trust. The least serious crimes are perceived to be those that do not involve any physical harm to a victim, do not have an apparent victim, have little or low financial harm and/or do not involve serious breaches of trust.

The scale of a crime is also a factor and is inter-connected with the issues identified above. So, if two crimes involving similar levels of harm are compared, then the number of victims or factors, such as damage to the nation or our economy, are often used to decide which crime is most serious. However, it should be noted that people tended to be more affected and shocked when a crime had a high impact on a small number of people, therefore considering this a more serious crime. So, a large-scale crime (in terms of number of victims or affected people) with a small level of harm is perceived to be less serious than a small-scale crime (in terms of number of victims) with a larger level of physical harm.

Crimes that involve physical harm are perceived seriously

As stated above, crimes that involve physical harm to a vulnerable victim tend to be viewed as most serious. The extent of harm is the key differentiating factor (e.g. short-term or long-term, severe and permanent or minor and temporary). People consider the impact of physical harm (which also includes emotional/psychological harm as a consequence of physical harm) to be the main criterion in evaluating the seriousness of a crime. The impact on the victim is deemed to be greater if this factor is present. The intent and degree of malice of the perpetrator are also relevant considerations.

Crimes that involve vulnerable victims are perceived more seriously than ones that involve less vulnerable victims

People take into account not only the type of and level of harm, but also the characteristics of the victim. Crimes are perceived to be more serious if the victim is particularly young or particularly old and especially if they are women or children. People consider crimes that affect these types of victims to be more serious than where the victim is perceived to be less vulnerable or in some way to have contributed to the crime being committed against them (e.g. where a victim is seen as having done something to encourage the crime). Children are deemed particularly vulnerable, and any crime committed against them is perceived to be serious. Women are also deemed more vulnerable (particularly to crimes of a sexual nature) and crimes of this nature tend to be perceived as more serious if women are victimised.

Crimes that involve financial crime are perceived less seriously than crimes that involve physical harm

People consider that crimes that involve physical harm are generally viewed more seriously than crimes that involve financial harm. However there are also a range of factors within financial harm that help people evaluate the seriousness.

People evaluate financial harm, such as the amount of a theft or damage to property, whether financial harm is inflicted on an individual or an institution and whether theft is deliberate and pre-meditated or one-off and opportunistic. The amount of damage or loss, coupled with who/what the victim is (e.g. an individual or a corporation/organisation), determines how seriously this type of crime is ranked. A financial crime against an individual tends to be viewed more seriously than a financial crime against an organisation. The dollar amount involved and the intent or motivation of the perpetrator are also relevant considerations. Overall people rank property and financial crimes as less serious than physical crimes, because they perceive the impact of these crimes to be less serious than crimes that inflict physical harm (the latter are associated with lasting emotional, physical or psychological harm).

Crimes that involve intent and premeditation are perceived more seriously than those that do not

People consider the motivation and intent of the perpetrator to be important in evaluating the seriousness of a crime. They consider crimes that are malicious, premeditated and intended to harm others to be more serious than those crimes where carelessness or neglect has resulted in loss, damage or harm. People also take into account whether perpetrators intended to do more harm than was actually inflicted in order to evaluate if a crime is more serious than one where a perpetrator did not intend to cause harm, loss or damage. Other factors that are relevant include the level of loss and the degree of physical harm incurred on any victim/s. This indicates that people rank a crime based on the intent of the perpetrator, which is an important factor to take into account.

Crimes that involve breaches of trust are perceived seriously

People take into account if the perpetrator has been placed in a position of trust within society, and where society should reasonably expect or demand trustworthy behaviour from the perpetrator. Where this trust is breached, people rank these crimes seriously. Trust is also a consideration in relation to perpetrators who commit crimes based on their position of trust over others, such as family members. This type of crime also takes advantage of a position of trust over others, and of their vulnerability due to age, for example. People consider trust a foundation of civil and moral society, and any crime that breaches this trust is therefore considered serious. Again, other factors come into play: what type of crime has been committed, what are its consequences and what is the impact on the victim.

Crimes that have large-scale implications and multiple effects are perceived seriously

People consider the scale and the number of victims in evaluating the seriousness of a crime. They not only look at how many people have been affected by a perpetrator, but they also look at how the economy and/or any particular industry has been affected, as well as our reputation or security as a nation. People evaluate how this harm will impact on the nation or economy as a whole, but also on individuals. Again, people also consider any breaches of trust and the intent of the perpetrator in evaluating the seriousness of these types of crimes. The scale of a crime also interplays with other factors, such as the level of impact on any victim.

Variability of opinion is more obvious in the middle rankings

The ranking exercise demonstrates that there is a degree of consensus around the most and least serious crimes. The crimes ranked at the most serious level all involve a high level of physical harm, vulnerable or young victims, serious emotional consequences and are likely to have a long lasting impact. A degree of consensus is also apparent among the crimes ranked as less serious. This is because people feel the crimes at the lower end of the scale have limited impact on a victim (if they have an identified victim at all) and do not involve a high level of either physical or financial harm, a serious breach of trust or any of the other factors that might rank a crime as being more serious. Within each group discussion, people did not feel a need to argue or debate with each other about the ranking of these crimes.

However, there is a high degree of variability within the middle ranking crimes – i.e. those that were not viewed as very serious or not serious. People find it difficult to differentiate the seriousness of these crimes, primarily because many such crimes are perceived to be similar in effect and impact. Although it was clear what criteria were used to evaluate the most serious crimes and the least serious crimes, people had less obvious criteria to draw from to evaluate these middle ranking crimes. This tended to result in greater variability in the rankings for these mid-ranking crimes.

Background and research objectives

Why the research was conducted

In February 2006, the Law Commission was asked to consider whether improvements could be made to existing sentencing and parole structures. As part of the *Sentencing Guidelines and Parole Reform* report (2006) prepared by the Law Commission, it was recommended that a review of existing maximum penalties be undertaken.

In New Zealand sentencing and parole arrangements have been highly discretionary in nature. As a result, there is an inconsistency of many maximum penalties across a number of statutes. Maximum penalties have emerged historically in an ad hoc fashion. Offences of apparently similar seriousness can have significantly different maxima. Conversely, the same maxima have been applied to offences which are clearly different in terms of seriousness. Until now maxima have been left largely untouched despite significant changes to the sentencing structure, including changes in remission and parole eligibility.

As part of the review, the Law Commission engaged Colmar Brunton to undertake targeted public consultation on the draft penalty categories, at this stage without proposed maximum penalties (known as the 'Round One' consultation).

Colmar Brunton was commissioned on 12 November 2008 to undertake this research.

Purpose of the research

The overall purpose of the research is to consult with the public on their perceptions of the relative seriousness of selected crimes in order to inform the Law Commission in reviewing existing maximum penalties

Objectives of the research

The objectives of the research are:

- to determine how participants rank selected offences in terms of their seriousness
- to gain a qualitative understanding of participants' reasons for their individual rankings
- to assess the extent to which individuals adjust their own rankings in the light of discussion
- to test the extent to which there is common agreement about the ways that offences form natural groupings, in terms of their relative seriousness, following their rankings through discussion.

Research methodology

A combined methodological approach

The Commission required data that provided an understanding of how the general public rank the selected scenarios across the eight focus groups (i.e. 62 people), as well as an understanding of why people rank the scenarios in this way. Therefore, we decided on a combined methodological approach that would elicit this information.

The bulk of the information from this report is from qualitative analysis of the group discussions and is not intended to be statistically extrapolated out to the general population. Qualitative research methods rely on a small but selected sample of the target population (in this case New Zealanders in general) to provide in-depth insight into perceptions and opinions.

The research was designed to elicit both quantitative data (numerical and statistical) and qualitative data (narratives around why people perceive one crime to be more or less serious than another). The following section details the process for data collection.

Focus group discussions

The Commission required a spread of general population across the North and South Islands and a combination of people who live in both provincial and urban areas. Five locations were selected to ensure a good spread across these variables. The table below shows the spread of eight focus groups.

Sample total

GROUP CRITERIA	LOCATION	NUMBER OF PARTICIPANTS	NUMBER OF GROUPS
Māori	Auckland	7	1
Pacific peoples	Auckland	5	1
General population	Auckland	8	1
General population	Wellington	17	2
General population	Christchurch	8	1
General population	Ashburton	8	1
General population	New Plymouth	9	1
TOTAL		62	8

Process

Participants for the focus groups were recruited from Colmar Brunton's qualitative panel of people who have pre-agreed to take part in further research. People were screened over the telephone to ensure they met the criteria for the group (in this research sample, ethnicity was the only variable by which we segmented the groups). We excluded any people who worked in the criminal justice system, for example a lawyer, or for New Zealand Police, as these people would be considered too intimately involved in the subject matter to provide a 'general population perspective' on the research objectives.

Once people had agreed to take part, they were emailed or posted a letter setting out the date and time of the group, instructions for completing the scenarios, and a copy of the scenarios themselves. The scenarios are found in Appendix II. They are presented here in order to reflect the Law Commission's ranking, but a separate document was provided to respondents with the scenarios presented in no particular order.

Participants were given at least a week to complete their ranking and were asked to email or post their ranking back to us for data entry and analysis prior to the groups. Colmar Brunton analysed each group's collective ranking prior to each group taking place in order to determine:

- where there was a great degree of divergence in the ranking between participants
- where there was a great degree of divergence between the participants as a whole and the Law Commission's own ranking.

This information was then used to lead the group discussion and to draw out the reasons for these divergences.

Participants then attended the groups and took part in the discussion. A semi-structured topic guide was drafted to guide the discussion around why they had ranked the scenarios in the way they had. This topic guide is found in Appendix I. A copy of their original ranking and the group's combined ranking was provided to the participants during the group.

At the conclusion of the group, each participant was given the opportunity to revise their ranking based on the discussion that had just taken place. These final rankings were data entered after the groups and compared to participants' original ranking. The post-group rankings are the rankings on which our analysis is based.

The analysis methodology for the quantitative data is explained in our section on the quantitative ranking.

Notes to this report

Terminology

Throughout this report, we have used the word people to describe the general population of New Zealanders with whom we spoke. These included Māori and Pacific peoples. Where it is important to differentiate between ethnicities, we have provided this detail. Otherwise, the reader should assume our comments refer to all the people with whom we spoke.

We have assumed the reader of the report is reasonably familiar with the Commission's 28 scenarios so we have not described them in detail within the text. Where we have referred to a scenario which people have used to discuss a particular crime, we have referred to it by the name of the perpetrator and the ranking number assigned to it by the Commission, for example Perez (scenario 21). At no point during the groups was the actual name for any of the crimes used and we have avoided using the legal terms for them in this report.

The overall research participants' rankings of the crimes within the groups differs from the Commission's rankings, so we have referred to the Commission's number to identify the scenario. Where we refer to the research participants' ranking of a scenario, this is described as follows: people ranked Nickolas (scenario 16) as number nine overall.

Verbatims

Verbatims are provided to give further evidence to our findings and to add richness to the report. These are attributed by group location and ethnicity (i.e. General, Māori and Pacific).

Detailed findings

Summary of the factors that determine seriousness

Introduction

The qualitative discussions of people's rankings determined that there are a range of factors that influence how seriously a crime is ranked. There is rarely just one factor at play: more often there are a range of factors that people take into account when assessing the seriousness (or otherwise) of a crime. The following list briefly explains the six overall factors. Full discussion of each of these factors is found in the qualitative reporting that follows.

1 – Level and type of physical harm – People take into consideration the type of harm that is inflicted on the victim and differentiate between physical and financial harm. They then evaluate the level of harm (e.g. short-term or long-term, severe and permanent or minor and impermanent). People consider physical harm (which also includes the emotional/psychological harm as a consequence of physical harm) to be the main criterion in evaluating the seriousness of a crime, as the impact on the victim is deemed to be greater if this factor is present. The intent and degree of malice of the perpetrator are also relevant considerations.

2 – Level and type of financial harm – People evaluate financial harm according to factors, such as the amount of a theft or damage to property, whether financial harm is inflicted on an individual or an institution and whether theft is deliberate and pre-meditated or one-off and opportunistic. The amount of damage or loss, coupled with who/what the victim is (e.g. an individual or a corporation/organisation), determines how seriously this type of crime is ranked. The dollar amount involved and the intent or motivation of the perpetrator are also relevant considerations.

3 – Vulnerability and age of the victim – People take into account the relationship between the perpetrator and the victim. If the victim/s is/are seen as particularly vulnerable due to their age (very young or very old), this increases the seriousness of the crime for people. If perpetrators commit crimes against young or old people in their care, this is viewed very seriously. Any crime where people are expected to care for and respect others, yet do not, has an increased level of seriousness. Other relevant factors include a breach of trust, as well as any ongoing and premeditated behaviour.

4 – Intention and culpability – People consider the motivation and intent of the perpetrator to be important in evaluating the seriousness of a crime. They consider crimes that are malicious, premeditated and intended to harm others to be more serious than those crimes where carelessness or neglect has resulted in loss, damage or harm. People also take into account whether perpetrators intended to do more harm than was actually inflicted in order to evaluate if a crime is considered more serious than one where a perpetrator does not intend to cause harm, loss or damage. Other factors that are relevant include the level of loss and the degree of physical harm incurred on any victim/s.

5 – Positions of trust – People take into account if the perpetrator has been placed in a position of trust within society and where society should reasonably expect or demand trustworthy behaviour from the perpetrator. Where this trust is breached, people rank these crimes seriously. Trust is also a consideration in relation to perpetrators who commit crimes based on their position of trust over others, such as family members. This type of crime also takes advantage of a position of trust over others, and of their vulnerability due to age, for example.

6 – Scale and volume – People consider the scale and the number of victims in evaluating the seriousness of a crime. They not only look at how many people have been affected by a perpetrator, but they also look at how the country's economy and/or any particular industry has been affected (e.g. white collar crime), as well as our reputation or security as a nation. People evaluate how this harm will impact on the nation or economy as a whole, but also on individuals as a result of the crime. Again, people also evaluate any breaches of trust and the intent of the perpetrator in evaluating the seriousness of these types of crimes.

Each of the following sections provides details and examples of scenarios that people consider more or less serious, based on the factors above. We discuss how people completed the rankings and what they see as the influences on their rankings of the crimes after we discuss the scenarios themselves.

1 – Level and type of physical harm

Introduction

This section provides discussion and examples of the ways that people evaluate the perceived harm of a criminal act. We provide discussion of what people take into consideration when ranking the seriousness of crimes that result in physical harm or injury, which also includes the consequent emotional or psychological harm, as well as examples from the scenarios.

The scenarios relevant to this section are listed in the following table. The first number is the Law Commission's positioning of each of the scenarios, and the second number is the overall ranking from all the people in the research.

Law Commission ranking	Research ranking
Neil (scenario 3)	1
Tom, Sam and Ben (scenario 2)	2
Tony (scenario 12)	3
Nickolas (scenario 16)	8
Peter and Charles (scenario 6)	18
Peter (scenario 26)	25
Hayden (scenario 23)	26
Amelia (scenario 28)	28

Physical harm is a key criterion for evaluating a crime's seriousness

For most people, the first differentiation they make between any of the crime scenarios is to evaluate what 'type' of harm is achieved by the criminal act and what level of harm. Type of harm is divided into two main areas: physical (and emotional) harm and financial harm. Physical harm is discussed in this section. As part of physical harm, people also consider that some crimes can inflict psychological or emotional harm on victims.

People also take other factors, such as number of victims, age of victims, gender, accidental versus intentional harm and culpability of the victim into account. However, physical harm is the main criterion for ranking a crime as more serious.

People consider both physical harm and financial harm to be relevant to evaluating crimes, but they consider in all cases that crimes that cause physical harm, whether it is one person or more, to be more serious than financial crimes. Of course, the level of harm also comes into it, so that people evaluate both the level of physical harm and the level of financial harm to determine which of two crimes might be more serious. For example, people consider the physical harm inflicted on Tom, Sam and Ben's victim to be substantially more serious than the harm inflicted on Charles (scenario 6 – ranked number 18), as the harm to Charles is financial rather than physical.

Overall, of the 28 scenarios, people consider all the crimes that resulted in physical (and emotional) harm to people to be more serious than crimes that result in financial harm.

Serious physical harm to an identifiable victim is seen as most serious

If personal physical harm is considered the main factor in determining that a crime is serious, the type of harm is also relevant, as is the number of people physically harmed. People tend to consider the crimes where one person is injured or harmed physically (and emotionally) to be more serious than crimes where people suffer financial harm.

There is some indication from people's rankings that they find it easier to identify with a physical harm perpetrated on one identified victim than they do where harm (either physical or financial) is perpetrated on many nameless victims. As one person said, 'it's easier to feel for one person you know, than hundreds of people you don't'. This is important, as people consider these crimes to be 'closer to home' and therefore more serious than other crimes that might, by virtue of being perpetrated on unknown victims, be deemed to be less serious. This indicates to us that people rank crimes more seriously if they can identify more closely with the victim.

For example, Tom, Sam and Ben's crime is rated second overall. This is for a range of reasons, but the main concern for people is that the victim is harmed both physically and psychologically. People rate this crime as highly serious because:

- The victim is a female
- The victim is innocent – she does not contribute to the crime
- There is more than one perpetrator
- She suffers both physical and psychological injuries
- The crime lasts over a long period of time (16 hours)
- The victim is relatively young
- The acts of degradation such as urinating on her/violation with the bottle show lack of regard and malicious/deliberate intent from the perpetrators.

All these factors, as well as the high level of personal harm, combine to elevate this crime to this serious level.

"They [the offenders] had ample time to change their minds about what they were doing." General, Auckland

"[Tom, Sam and Ben are] number one because of the effect on the victim. Anyone who goes out and does this is not something they think we'll just go out and do it, they will generally plan it. They should be shot. This person has to live with it for the rest of their lives; it affects everything they do for the rest of their lives." General, New Plymouth

While most people agree that the victim is innocent, a few people in the groups consider that the victim should not have been out walking alone. They consider this a somewhat mitigating factor in the crime. The scenario does not indicate what time of day the crime was committed and if the victim contributed to the crime by walking her dog at night. Overall however, this crime is seen as very serious by all the people in the groups.

"It is also the way some of these young girls act. You go out on a Saturday night and at about 2am you see these young girls with hardly any clothes on walking by themselves, drunk as. If it was my daughter she would get a boot up the behind for even thinking about walking out the door like that."

General, New Plymouth.

Other crimes, where the level and type of personal harm were discussed, are Neil and Tony. The perpetrators commit crimes against a woman (and her unborn twins) and a child. Most people find these crimes both abhorrent and serious, which is why they are ranked first and third respectively.

Neil's crime is ranked number one because the level of physical harm included the death of unborn children. Their deaths were included in the victim tally along with Neil's former partner's injuries. Neil's crime is both physically and psychologically serious to people, because he directly contributes to the death of the unborn children, and he seriously injures the woman. People also take into account that Neil used to be the partner of the woman and is the father of the unborn children. Because his behaviour as a father and partner is so far removed from acceptable, his crime is rated seriously by people. It is unknown what the impact on the level of seriousness would be if Neil was not the father and former partner of the woman (e.g. would this make his crime more or less serious)? In comparison with the other crimes however, Neil's crime is seen as deliberate, malicious and involves a great deal of harm.

Tony's crime is ranked less seriously than Neil's, although both involve children. The latter was committed against unborn children and the former against an eight-year old boy. Some people in the groups who were asked directly to compare the seriousness of Tony and Neil's crimes said they consider Neil's crime very marginally less serious than Tony's crime. This is because Tony's crime is perceived to be ongoing, while Neil's crime is considered to be a one-off and involves unborn victims. One woman in a group was extremely reluctant to make this comparison between the two scenarios, stating that she wanted to put both crimes on first equal footing, and did not like having to decrease the seriousness of Neil's crime over Tony's.

"It was terrible, that she was pregnant, and those kids didn't stand a chance. And it's premeditated. And there are children involved..." General, Ashburton

[Neil: If babies were born when assault took place] "Still not make it right, but not quite so serious because the babies would still be alive. Life is the ultimate."

General, New Plymouth.

Tony's crime of abusing and neglecting his son is rated highly by people at number three¹. Similar to other crimes, where physical and psychological harm are inflicted on others, people rated Tony's crime as serious because:

- He perpetrates the crime over a long period of time (although the scenario does not state how long Tony has abused his son, people assume it is more than a one-off event)
- His son suffers permanent damage to his hearing
- The injuries inflicted are cruel, deliberate, malicious and debasing.

Similar to other crimes, Tony is related to his victim, which also increases the seriousness.

"It's ongoing torture, it's not something he decided to do on a whim, it was deliberate. That is what makes him worse than Neil." General, Ashburton

"That went on [Tony's crime] for years and years and years. And it could affect the son's children down the line. It's bad to do it once, but for it to go on and on and on." General, Christchurch

Physical and emotional/psychological harm, as discussed in the groups, are the key indicator to people that a crime is serious. People report that a crime needs to have a victim, and this victim must have suffered an identifiable harm for them to consider the crime serious.

So, the reverse of this is also true: where people do not consider anyone has suffered a physical or emotional harm, they consider the crime to be less serious. For example, scenarios that are ranked near the bottom, such as Amelia, Hayden and Peter.

These crimes are ranked as less serious, as people struggle to identify a victim and therefore any real personal or emotional/psychological harm. For example, Peter, who marries two women, is more commonly referred to as 'an idiot' than a criminal. While people do not consider it legally or morally right to have more than one wife (not in New Zealand anyway, but perhaps in parts of Utah), they consider Peter's crime to be less serious because no physical harm comes to either of his wives. However, they acknowledge that these women (as well as his children from both marriages) would have experienced some emotional harm. In relation to the other crimes, most people consider this crime to be of low level of seriousness.

"It's kind of what your grandparents used to do, jump the fence."
General, Auckland

"I put Peter down the bottom. He's either pretty game or a bloody fool. He'll have two mother-in-laws, what an idiot." General, New Plymouth

¹ In our pilot group, Tony had two sons whom he abused and neglected in the same way. However, this scenario was changed for subsequent groups. None of the people we spoke to considered the number of victims Tony abused and neglected to change their views on the seriousness of the crime. In other words, Tony's crime is ranked the same for people, whether he has one son or two.

Similarly, in the case of Amelia who buries her stillborn child in her backyard, people struggle to identify a victim. It is certainly not considered to be the child, as Amelia is not generally held responsible for it being stillborn. Many people consider Amelia to be the victim in this scenario and feel sorry for her not being able to talk to her parents about being pregnant. A few people did consider that Amelia should have gone to hospital to have the baby, and this might have saved it from being stillborn. However, overall, people rate this crime as less serious than others because of the lack of victim and the lack of physical harm to others.

"With Amelia and the baby that was born stillborn - well what is going on in her head at the time? You're thinking well that poor girl, she's obviously going through something quite traumatic. I know having given birth as a mature person, but as a child you just wonder what is going through their heads and so they need help sort of thing." General, Wellington

"The girl who had the stillborn baby. I was looking at the wider perspective, thinking of her mental state and how that related. And thinking I can understand why she did what she did. I felt sorry for her." General, New Plymouth

One of the crimes where people diverged in their views about physical harm relate to Nickolas's crime. Some people felt Nickolas was not directly culpable for the deaths of the 120 people, as he had only put the bomb making instructions up on the internet rather than actually create a bomb himself or detonate it. Others felt Nickolas was just as culpable as the people who did actually create and detonate the bomb. These people considered Nickolas to have directly caused physical harm and death to the 120 victims, and therefore ranked his crime as very serious. Others, who consider that Nickolas's only crime is to have been making the instructions available to others, ranked his crime much less highly. These people also believe that there are ample instructions on the internet about how to create a bomb and that Nickolas was only providing information that is already available to terrorists.

"He kills 120 innocent people. If that happened in your country you wouldn't dare get on a train again. It's intentional, terrible. Even if he didn't realise that people were going to use it, to have the idea in your head like that..."
General, Ashburton

"If people want information they can get it. He put it on the internet, sure, what he did was wrong, but he is not the only source of information. People will find out that kind of thing." General, Ashburton

There was a discussion in the Māori group, as well as in other groups, about victims taking some personal responsibility to avoid crimes being committed against them. Some people feel some of the victims could have taken more action to prevent what happened to them. This discussion was in relation to Tom, Sam and Ben. Some older males in the Māori group feel people should not be walking around town and 'asking for trouble'. Other younger Māori in the group consider New Zealanders should be safe to walk the streets.

This view is not restricted to Māori, as participants in all the other groups also consider that people who can take some responsibility for themselves should do so and those that cannot should be protected. This concept is discussed in more detail in our section on how age and vulnerability of the victim affects the perceived seriousness of a criminal act.

Conclusions

As we have discussed above, people tend to use physical harm (and the consequent emotional harm) to an identifiable victim as the first differentiator in determining how seriously they perceive a crime. Many other factors then play a part. Given the list of 28 scenarios, people use a combination of emotional reactions to the crimes, as well as thinking about all aspects of the crime to determine how serious they consider it to be. Few were thinking further about how these crimes should be punished.

We consider people are strongly influenced by the media, their own perceptions of how likely they are to have this crime committed against them or someone they know and by their own emotive reactions to unpleasant details and acts. People are much more likely to rate a crime as serious if they can identify with the victim of the crime and if they feel 'it might be them one day'.

Level and type of physical harm are also relatively easy for people to visualise: they can imagine being punched or kicked, as well as how it would feel to be hurt physically in some way, even if they have never experienced it. This makes a crime more vivid in their minds and therefore, more likely to be considered close to them, and subsequently serious. Conversely, as we discuss in later sections, crimes that people can only vaguely visualise or those they cannot imagine being perpetrated on them or someone they know tend to be viewed less seriously.

Crimes where there is no identifiable victim and/or no-one who has suffered loss, pain or injury as a result of a criminal act are therefore ranked less seriously than those where people can clearly identify a victim (or victims).

2 – Level and type of financial harm

Introduction

This section provides discussion and examples of the ways people evaluate the perceived harm of a criminal act involving financial loss or theft. We provide discussion of the differentiating factors between types of financial harm, as well as examples from the scenarios.

The scenarios relevant to this section are listed in the following table. The first number is the Law Commission's positioning of each of the scenarios and the second number is the overall ranking from all the people in the research.

Law Commission ranking	Research ranking
John (scenario 1)	9
Judge (scenario 7)	12
Sandra (scenario 13)	16
Peter and Charles (scenario 6)	18
Frankie (scenario 19)	19
Tevita (scenario 9)	21
Brad (scenario 24)	23
Tui (scenario 27)	27

Financial harm to one person versus corporate financial harm

When people discuss financial harm, they have already differentiated this from physical and emotional harm. In almost all cases, people consider physical harm to be more serious than any kind of financial harm, regardless of the amount of financial loss incurred. They consider people are harmed less by financial harm than they are by physical and emotional harm. So they view financial losses and white-collar crimes as generally less serious than physical harms and losses. However, some people recognise that, while the impact of financial harm is not physical, it can be devastating nonetheless.

People also tend to weigh up the amount of financial losses incurred from a crime. Those people who lose 'a lot' of money, for example their life savings (as in the case of Sandra's crime), were seen as more seriously perpetrated against by the crime rather than people who might lose less money.

People also tend to weigh up if individual people or a corporate entity or organisation has suffered a financial loss. A person or individual who suffers a financial loss is seen as more seriously perpetrated against than an organisation that suffers a financial loss. An organisation or corporate entity also needs to suffer a larger and more substantial loss in dollar amounts before people will consider the crime to be as serious as that suffered by an individual.

"I did take into account dollar amounts and who it was against because I saw the one stealing from ma and pa type investors [Sandra] as more devastating than someone who was stealing from a big corporation in general."

General, Wellington

This is best illustrated when people discuss crimes of theft, such as Sandra and Tui. Both these crimes relate to financial loss. People rank Sandra as 16 and Tui well down the list at number 27. Sandra's crime is ranked more seriously than Tui's for several reasons:

- She commits her crime over a long period of time
- She steals a large amount of money (\$2.4 million)
- She deliberately, systematically and maliciously sets out to steal money from a large number of victims
- She uses the money for luxuries
- She steals money from 'mum and dad' investors (who are perceived to be less wealthy and perhaps also elderly or retired).

Sandra's crime is ranked more seriously because of these factors. Tui's crime is however ranked less seriously by people, because it is a relatively small amount of money (\$479), her crime is not significantly premeditated and she does not steal from any one individual.

People consider Tui to have stolen from the community group, but because the money had not reached the SPCA, the organisation had not actually suffered a loss. Some also consider the crime less serious, because the SPCA is helping animals in need, not humans. Most people feel Tui's crime is morally offensive, but that given there are other worse crimes on the list, it is ranked as a lower level of seriousness.

Motive and amount interplay to determine seriousness level

Some people also feel that Tui's motive to steal might be hunger or necessity rather than a desire for luxury goods (as in Sandra's motive). They feel if Tui's motive is more moral than Sandra's, then her crime is less serious. The motive for Tui's crime is not stated, but some people feel her crime would be less serious if, for example, she was stealing money for food to feed her children.

"I tried to think about it the motivation behind the theft. If you've got someone who is stealing \$400 from a stand, they are probably doing it for quite different reasons than someone embezzling millions of dollars from a company. It doesn't mitigate the crime but the motivation behind it is that person stealing \$400 probably has quite a desperate circumstance, whereas the person who is embezzling however much money from a company likely has a very different personal circumstance." General, Wellington

Crimes that involve a combination of physical and financial harm are complex to rank

People comment that where a crime combines both financial harm and physical harm to people, they struggle to rank it. They feel that the combination of harms makes it difficult to weigh up the range of factors. This was not as straightforward as crimes that describe either physical harm or financial harm. This was particularly true of John whose crime is ranked ninth overall.

John's crime was discussed mainly in terms of its impact on the dairy industry and the high level of lost sales (\$300 million). Most people are concerned about New Zealand's global export reputation being damaged as the first and foremost evaluating factor. They are then concerned about the harm caused to the people who consume the tainted product. This is interesting, as the physical harm to people is perceived to be less for this scenario than in others. People consider the food poisoning to be relatively non-permanent. It is also possible that because the crime is not described in terms of the impact on one particular victim who suffers as a result of John's crime, that the impact of the physical harm is lessened. People therefore rank the crime first on its financial harm.

Most people rank this crime the way they do because of its financial impact on New Zealand as a whole. Some also empathise with individual dairy farmers and their families who might be financially affected by John's actions.

A combination of amount, victim and intent determine the seriousness of financial crimes

People rank crimes involving money by three criteria:

- What is the amount of the loss incurred (a smaller or a larger dollar amount)
- By whom (a person or an organisation)
- And to a lesser extent, what the criminal's intent is for spending the money.

A similar dilemma relating to the combination of physical and financial harms is presented by the scenario involving Peter and Charles, ranked at number 18. A large sum of money is involved, and a small child's physical wellbeing is threatened. However, people rank this crime relatively less seriously, because the child is unharmed and no physical harm is inflicted on the victim (Charles). He does suffer financial harm, as he pays \$1 million to Peter. People consider that, because he suffers no physical harm and can afford the ransom/blackmail costs, he is 'less victimised' than other victims who are physically harmed. Also, as Charles has acted fraudulently in the first place, people consider he has contributed in some way to the crime committed against him and is not entirely without blame.

"It's not as serious until the child is involved, then it is more serious."

General, Auckland

A crime where a small amount of money is involved is perceived as being less serious than a crime where a larger amount of money is involved. A crime where an individual loses money is perceived as more serious than a crime where a corporation or organisation loses money. A crime committed by a perpetrator who does not need the money is perceived as more serious than one committed by a perpetrator who is perceived to need the money (within limits). This is related to the amount stolen. For example, the amount of money Tui steals is a realistic amount – people can imagine spending that amount relatively quickly. However, Sandra's haul of \$2.4 million is less realistic and therefore, people cannot easily picture needing that amount of money. Sandra's crime is perceived to be motivated by greed rather than actual need and is therefore perceived to be more serious.

One scenario where money is involved, yet people rank the crime based on other criteria, is the Judge (ranked at number 12). This idea of being in a position of trust is discussed later on in this report, but because there is a financial component, it is also relevant here.

Most people consider the judge's actions to be serious, because he or she takes money to influence a case. However, some feel the crime is mitigated because the case being influenced by the bribe is one of corporate fraud and does not appear to be about physical or financial loss or harm to one particular person. For some people, this mitigates the seriousness of this crime. However, for most people, the loss of trust and the abuse of the High Court Judge's position of power is the main reason for ranking this crime as serious. The amount of the bribe is less relevant here, although it is a significant amount.

Tevita's crime, ranked overall at number 21, is mitigated and ranked less seriously by people, because she 'only' damages property, and no people were harmed by her actions. People consider her crime to be less serious than others for this reason, even though she causes a relatively high level worth of damage (\$1.2 million).

"Well, I guess she didn't hurt anyone, but I wonder if she knew nobody was near the container. I suppose I might have ranked it differently [higher] if it was my stuff in the container." Christchurch, General

Theft and financial loss from damage are viewed differently

Other crimes, where financial loss is incurred due to damage to property, are Brad (ranking number 23) and Frankie (ranking number 19). Both of these crimes involve people acting without premeditation and are relatively closely aligned in their level of seriousness for people. As we discuss later in this report, premeditation and intent are an important consideration in determining how seriously a crime is ranked. However, if we just look at the financial aspect of these two crimes, people do not take into account the level of damage and the cost as much as they do with other crimes where theft is involved. For example, people have ranked Sandra (scenario 13) as number 16 overall, which is higher than both Brad and Frankie.

Deliberately stealing money from people or organisations is perceived differently to causing damage to property. There are a couple of reasons for this. Some people consider the damage Frankie and Brad cause to be covered by insurance. If this is the case, they consider there is no victim, as 'no-one loses out'. They also consider the council, or at least not an individual, would have to pay for the damage caused. Again, the loss is not suffered by any one individual, and no actual physical harm befalls any victim.

Both these scenarios are also discussed in the section describing the perceptions of actual versus intended harm.

Māori and Pacific perspectives

People in the Pacific group were particularly strong in their moral condemnation of any type of theft. This is perhaps due to a stronger sense of Christian values held by people in this group. They consider theft to be serious regardless of the amount. However, a more in-depth discussion did find that they consider Sandra's crime (scenario 13) to be more serious in comparison to Tui's crime (scenario 27) because of the number of people affected by Sandra's actions. The relative difference between the amounts of the two thefts (\$2,4 million and \$479) was less important to the ranking for this group.

Conclusions

People tend to rank financial harm to individuals higher than they do to corporations or organisations. Similar to the discussion on physical and emotional/psychological harms, people tend to infer more significant harm (and therefore a higher level of seriousness) to crimes where actual individual people suffer financial loss from theft or damage to their property.

We consider this is influenced by people's perceptions of how this type of crime might impact on them or someone they know, as well as the likelihood of it happening to them. Because they are not corporations or organisations, they cannot visualise as accurately the impact of, for example, corporate fraud. To the public, stealing from an organisation is less serious than stealing from a person.

Where does the amount of financial loss fit into this? The amount of loss is a significant dimension in ascertaining the level of seriousness, but it is also coupled with who the victim is perceived to be. So, stealing \$479 from the SPCA might be seen as less serious than stealing \$479 from an individual. Motivation for theft also plays a part: if people consider someone needs the money they may rank a crime less seriously than if they consider the perpetrator is 'just' stealing money for luxury goods. The amount of the theft plays a part in this evaluation.

In the two scenarios where financial loss is suffered from damage to property rather than deliberate theft, people take into account the actions that caused the loss more so than they do the loss itself. There is also a perception among some people that loss from damage is 'less' of a loss than loss from deliberate theft. Some considered the emotional impact of loss from theft to be greater than the loss from accidental damage, regardless (to a certain extent) to the level of financial loss.

Some people might consider that drink-driving is more serious than speeding, therefore will have ranked one scenario higher based on this opinion rather than solely on the amount of damage from the loss. This is because the potential for physical harm from both drink-driving and speeding is perceived to be greater than the financial harm could ever be.

3 – Vulnerability and age of the victim

Introduction

This section discusses the impact of the age or perceived vulnerability of the victim on the level of seriousness of that crime.

The scenarios relevant to this section are listed in the following table. The first number is the Law Commission's positioning of each of the scenarios and the second number is the overall ranking from all the people in the research.

Law Commission ranking	Research ranking
Neil (scenario 3)	1
Tom, Sam and Ben (scenario 2)	2
Tony (scenario 12)	3
Abraham (scenario 10)	5
Max (scenario 4)	6
Louis (scenario 22)	11
Judge (scenario 7)	12
Dominik (scenario 25)	13
Paul (scenario 17)	17
Brad (scenario 24)	23

The more vulnerable the victim, the more serious the crime

One of the key factors people take into account in evaluating how serious a crime is, apart from the level of type of physical harm, is the relationship of the perpetrator to the victim. Vulnerable victims are perceived generally to be children and young people (and particularly children whose guardians or caregivers commit crimes against them), as well as women and people who are offended against by someone who is supposed to be caring for or protecting them (such as an elderly person in a rest home). For example, while Dominik's crime is ranked number 13, overall people perceive his actions against a defenceless old person to be serious. The main reason his crime is not ranked higher is because people consider other crimes to be more serious due to their ongoing nature and the level of harm involved. In saying this, people consider Dominik's actions are likely to be ongoing (e.g. this incident is unlikely to be a one-off). Some also mitigate the seriousness of his crime by inferring that staff and management at the rest home could observe and report Dominik's behaviour, whereas other crimes are committed in private where the likelihood of being caught is lower.

"He's [the victim] is defenceless. He can't do anything to defend himself. You teach your children to respect their elders." General, Ashburton

People consider the perpetrator's position in relation to the victim. As discussed earlier, Neil and Tony's actions are seen as particularly serious crimes because they know and are expected to love, respect and look after the very people whom they are harming. This is why they are ranked highly at one and three overall. People also react emotively to the descriptions of these crimes, as the impact on both victims is clearly stated and visible.

Similarly, crimes are seen as serious where the victim is young or otherwise vulnerable and unable to 'walk away' from a perpetrator or harmful situation. For example, most people consider Abraham's crime (ranked number five) to be serious, as he takes advantage of his position of trust as a babysitter to have sex with an under-aged girl. Similarly, people consider the crime of Paul the employer (ranked number 17) to be serious, as he takes advantage of his position of power over his victim and employee. She is afraid her immigration status will be revoked and so capitulates to his demands. Others that fit this category include Louis, although for some people his crime is mitigated by the fact that he is thwarted and does not have sex with his victim. His crime is ranked 11 overall. In relation to the age and vulnerability of Paul's victim, some people rank his crime lower than those committed against children. This is because an adult woman is seen as less vulnerable than a child.

"She could have said no several times. She might have had other avenues to get help, and while it was terrible, it was different to rape. It was about that power situation, he had control over her." General, Ashburton

People consider Abraham's crime the most serious of these three crimes because he commits the crime on more than one occasion and because his victim is under-aged. Paul's is considered less serious than Abraham's because his victim is older and could potentially 'walk away' from the perpetrator. People consider that Louis's crime, had he committed it, would have been more serious.

People consider adults and people who take advantage of a victim's age and vulnerability to be particularly vile and serious. An example of this is in Abraham's case, as his age difference as a babysitter is used as a way to gain access to the young victim. This is similar to Louis, where the difference in the age he pretends to be and his actual age is used as a way to gain access to a younger, vulnerable victim.

"I put Abraham higher [than Louis] because he did it four times, and he was going to continue to do it until someone stopped him." General, Christchurch

People consider that women are more vulnerable than men, particularly in relation to violent sexual crimes. They therefore perceive Tom, Sam and Ben (scenario 2) to be similarly serious because the three of them overcome a defenceless woman. The fact that there are three of them compounds the victim's vulnerability and increases the level of seriousness accordingly. This level of seriousness was very strongly expressed across the research groups, and is reflective of people's views that women are more vulnerable to crimes of this nature.

People also perceive Tony's crime to be particularly serious and heinous, as his victim is young, supposed to be under his care and the abuse and neglect continue for a long period of time.

"Children are innocent. Children are helpless." General, Auckland

Max's crime (scenario 4) is ranked highly at number six. This is related to the deliberate, malicious and knowing nature of his actions. People consider him to have potentially murdered his victims. They consider his crime serious because of these two main factors. Some feel his crime is mitigated by his victims being adults rather than children, but only somewhat. They perceived that Max had rendered his victims vulnerable by getting them drunk and taking advantage of them (although this is not specified in the scenario, people had read some similar stories in the media where this was the case).

The age of the perpetrator is sometimes a consideration

While this section is primarily concerned with how the age of the victim impacts on the seriousness of a crime, there was some discussion in the groups regarding the impact of the perpetrator's age.

The perpetrator's age is considered relevant in some types of crimes. For example in Brad's case, people think of him as a 'boy racer', although his age is not specified. Some feel his crime was youthful naivety rather than malicious intent, therefore it should be treated less seriously than someone who 'should know better' and is older and more responsible. For some, the seriousness with which a crime is viewed is linked to the age of the perpetrator. If a perpetrator is young, it is a first offence and they have not committed a crime like rape or murder, then some people consider they should be treated with more leniency than an older person who may also have committed the same crime. Not everyone is of this view, as many feel 'a crime is a crime' no matter who commits it or what their age.

Māori and Pacific differentiation

People in both the Māori and Pacific groups indicated that they see crimes against women and children as the most serious types of crime. Crimes against children are less tolerated and ranked highly by both Pacific and Māori groups, which is similar to the other groups.

Despite this view, some Pacific women rank the Judge's actions highly, as well as some crimes that affect us as a nation. They feel that, because they had personally experienced some forms of violence and abuse in previous relationships, but had subsequently recovered, they consider these types of crimes to be less serious. Or at least, that the effects of these crimes can fade with time. For this reason, the women feel that crimes like the judge's can affect someone's whole destiny. They therefore rank the crimes that affect women and children less seriously. This finding is interesting, as we have earlier stated that people rank crimes more highly if they perceive them to be likely to affect them. These Pacific women have survived personal and domestic violence, and because of their experiences of escaping it, rank it less seriously.

Conclusions

The age and vulnerability of the victim is strongly associated with ranking a crime more seriously. If the victim is young and vulnerable or older and vulnerable, people consider the crimes committed against them to be more serious. This is also linked with people being in positions of trust, where they have a duty of care to protect younger or older people in their care.

Some people also consider that in some cases, the age of the perpetrator is also relevant in terms of how a crime is punished and whether it should be perceived more seriously.

The more vulnerable a victim is perceived to be, by dint of their age, relationship to the perpetrator or their gender, the more serious a crime against them it is perceived to be.

4 – Intention and culpability

Introduction

This section discusses the impact of the perpetrator's intent and culpability on people's rankings of the level of seriousness.

The scenarios relevant to this section are listed in the following table. The first number is the Law Commission's positioning of each of the scenarios and the second number is the overall ranking from all the people in the research.

Law Commission ranking	Research ranking
Andrea (scenario 5)	4
Roger (scenario 20)	10
Louis (scenario 22)	11
Frankie (scenario 19)	19
Tevita (scenario 9)	21
Ted (scenario 11)	22
Brad (scenario 24)	23
Tui (scenario 27)	27

Intention is strongly related to how seriously a crime is ranked

For all the people we spoke with, the intention (where known) of the perpetrator was a factor in considering how seriously a crime is ranked.

If people know that a perpetrator intends to do harm to others (e.g. steal, rape, injure, abuse or hurt them), they will rank a crime scenario more seriously. If it is clear that a perpetrator does not intend to injure or harm someone, people tend to rank their crimes as less serious.

Where it gets harder and more complex for people is when perpetrators do not intend to injure people or damage property, yet do so anyway by their actions and behaviour. An example of this is Brad (ranked at number 23). Some people feel had he injured the pedestrians he narrowly misses his crime might have ranked higher. He damages property unintentionally, which people consider serious, but not as serious as if he had maliciously set out to damage property or injure people.

Where it also gets difficult for people is when perpetrators do intend to cause harm or damage, but actually do not. There are a couple of examples of this: Louis (ranked at number 11) and Roger (ranked at number 10). People find it difficult to rank these crimes because they find it hard to 'draw the line' between the crime that has been committed and the actual intentions of the perpetrator. In both cases, the perpetrators are caught and commit a lesser crime than they originally intended.

Louis intended to have sex with an under-aged girl, and Roger intended to seriously injure a woman at a bus stop. Both are caught before they commit their crime (or in Roger's case, fail in the execution). This is a relevant factor when considering where to rank these crimes, although people struggle in deciding if they are ranking the actual or the intended crime. People report they have tried to rank the actual crime committed, but take into account the intent.

Given that intention, malice and premeditation are important considerations for ranking a crime more seriously than if these elements are not present, people tend to rank crimes of this nature higher than crimes where these elements are not present. Some people rank Louis and Roger's crimes highly seriously, based on the fact that they intended to commit them. Others rank Louis and Roger's crimes less seriously, because they do not actually take place.

"I judged him [Roger] on what he intended to do." General, Ashburton

"I also looked at Louis and what he intended to do – because of the potential, of what he would have done next." General, Ashburton

Some people also categorise Andrea's as a crime where the intent is taken into account, as she intends to distribute the pure methamphetamine, but does not. However, she is ranked overall at number 4, because of the potential physical harm that her actions are viewed as causing directly.

Where the intention of a perpetrator is not discussed, such as in the scenarios involving Tevita, Ted and Tui, most people do not infer an intention. They evaluate the scenarios based on the crime and the outcome. However, where an intention is provided, and particularly where the perpetrator states they have malicious or injurious intent, people tend to rank these crimes more seriously.

An unintended incident in our methodology highlights the impact of this. One of the scenarios (Angela's) ranked overall as number 20 and was later amended by the Commission after the pilot group was conducted in order to include an additional sentence explaining her reason for leaving her baby in a park. Some people therefore received this scenario twice (the first version without a motive and then the second with the motive added). Many considered the addition of a motive, particularly a negative one², and consequently ranked the scenario more seriously than before (i.e. when they did not have any idea what her motive may have been).

Indeed, some people 'excused' Angela's actions after reading the first version of the scenario because they thought she might have post-natal depression. These people ranked Angela's actions as relatively less serious, until they read that she had actually wanted to get rid of the baby rather than she suffered a mental illness.

"She must have wanted the baby to be found, because she took it to a public place. Why would she do that if she didn't care about it, she could have just put it somewhere people wouldn't have found it." General, Wellington

² The sentence added reads 'Angela told the police she was sick of the baby crying all the time, wanted to be rid of him, and didn't care what happened to him'

People clearly link blame with intention

Related to the concept of intention is the concept of blame. For many people, if a perpetrator intends to do harm to others, is premeditated in their actions and shows clear intent to carry out their actions, their crime is more serious than if someone does not intend to cause harm, but by their actions does so. Someone who intends to do harm is more to blame/culpable, than someone who does not intend to cause harm. Good examples of where intention and blame arise are in the cases of Frankie and Brad.

Neither perpetrator deliberately sets out in their car to do damage to property or persons. However, by speeding and driving drunk, both do so. People's perceptions of these crimes differed markedly. Some people feel speeding is more dangerous and therefore more serious than drink driving, and therefore rank Brad as more serious than Frankie. Others consider drink driving to be far worse than speeding, and therefore rank Frankie as more serious. What they did agree on, however, was that both did not intend to cause harm. Which of the two was 'more' to blame was not always clear from the discussions. In addition, these two scenarios tended to be ranked lower than scenarios where malicious intent is signaled. This indicates that crimes that are intended are considered to be more serious than crimes that are unintended. What is not clear from the discussions, but is clarified by the quantitative data, is that people consider intended crimes that are not committed to be more serious than unintended crimes that are committed and result in physical harm or damage to property.

Conclusions

As discussed above, it is evident there is a relationship between intent and seriousness. People rank crimes more highly and as more serious where the perpetrator intends to do harm to people. This is particularly true if they signal their intent clearly and without remorse and if they perpetrate a crime over a long period of time. This shows premeditation, which is strongly linked to a high level of seriousness. Those crimes that are not intended, but are the consequence of dangerous or negligent behaviour are still perceived as serious, but less serious than those committed by someone who intends to cause harm.

People also take into account intent if a crime is not necessarily carried out. However, it is not always clear if people are evaluating a crime based on what actually happens or what the perpetrator intends to see happen. People report trying hard to make this rational differentiation in order to accurately rank the scenarios. People find knowing the intent of the perpetrator greatly assists them to evaluate the seriousness of a crime.

5 – Abuse of positions of trust

Introduction

This section discusses the impact of breaches of trust on people's rankings of the level of seriousness.

The scenarios relevant to this section are listed in the following table. The first number is the Law Commission's positioning of each of the scenarios and the second number is the overall ranking from all the people in the research.

Law Commission ranking	Research ranking
Tony (scenario 12)	3
James (scenario 8)	7
Judge (scenario 7)	12
Perez (scenario 21)	14

Crimes committed by people in positions of trust are perceived seriously

People consider that members of society who have been entrusted with public positions of power, trust and respect should be expected to uphold and honour this trust. Likewise, they consider parents, family members and partners should not be victimising people with whom they have a trusting relationship. This does not mean it is acceptable to victimise people with whom one does not have a relationship, just that the nature of these types of relationships implies a mutual respect.

People therefore find the crimes where someone has abused their position of trust to be particularly abhorrent and serious. For example, the Judge (ranked number 12) and James (ranked number 7) have been placed in senior positions of societal trust. People consider it serious for them to break this trust in return for money. In both cases, while they do not inflict personal harm on any one victim, it is this breach of trust that makes their crimes particularly serious.

"For me it was because you know he is in one of the highest positions of trust that he could possibly be in and he is corrupt - the ramifications of that are endless." General, Wellington

Similarly, Tony's crime (ranked as number 3), where he abuses and neglects his own son, is viewed as particularly serious because of this reason.

Perez (ranked number 14) is also in a position where his employer should be able to expect to trust him with confidential and high-risk information. He breaches this trust by revealing it to a third party and causes an injustice to be committed. He also lets a murderer back into society with the risk they will offend again.

"We rely on trust in society." General, Ashburton

Conclusions

Trust is a strong foundation on which societal and familial expectations rest. To breach this is not only considered morally reprehensible, but criminally so in the cases we discuss above. Where people consider an implied trust relationship has been broken in order to commit a crime, they rank that crime seriously. They value socially bestowed trust, such as in the case of senior judicial and military positions, as well as cases where a perpetrator's employment involves maintaining trust and high security documents. They also value trust relationships between people who know each other, such as between a father and his son or between a babysitter and his or her charges.

6 – Scale and number of victims

Introduction

This section discusses the impact of scale and number of victims on people's rankings of the level of seriousness.

The scenarios relevant to this section are listed in the following table. The first number is the Law Commission's positioning of each of the scenarios and the second number is the overall ranking from all the people in the research.

Law Commission ranking	Research ranking
James (scenario 8)	7
John (scenario 1)	9
Ted (scenario 11)	22

Harm to entities is difficult for people to visualise

While people have managed to rank the three scenarios relating to crimes that affect more than one or two victims, these three scenarios relate to crimes against New Zealand and our industry as a whole presented a challenge to people. They are ranked as number 7 (James), number 9 (John) and number 22 (Ted), and the discussion around these crimes revolve around the number of victims and the perceived level of harm. Most people recognise all three of these crimes as serious (although Ted, less so). They identified James's actions as treason, which they know to be taken seriously in all countries. However, while they perceive these crimes as serious, many found themselves placing them lower down the ranking hierarchy than violent crimes involving physical harm against one person.

How is it that crimes against one person can be ranked higher than crimes against the nation? For most people, this relates back to their perception of 'who is the victim here?' It is easier for them to identify with one person who is perpetrated against, than it is for them to identify with our whole nation being perpetrated against. The impact of James's action, while considered serious, is amorphous and intangible, compared to Tom, Sam and Ben's actions. People note this, even as they note that James's crime is, hypothetically, against themselves as New Zealand citizens.

People consider these crimes to be serious, but they struggle to see the impact of them. We do not live in times when treason is perceived to be a serious risk to the nation (for example, in the same way it might have been more relevant during the Second World War). People do not know what the impact of James's actions might be. While they can understand that his actions place Defence Force staff in Afghanistan at risk, and the potential risk is as high as being killed, many are not aware of the overall impact of his actions. Some mitigate the seriousness of the crime by saying "it's only soldiers, and they know what they are getting in for when they go off to fight". They are saying that the risk of civilian or innocent lives being lost is low, and therefore rank this crime less seriously. The total number of 'victims' is also unspecified, and the implications and impact of James's actions feel indirect.

Others consider James' actions unconscionable. They regard his position of trust and his senior position to be an important consideration in ranking the crime seriously. They also take into account that James took large cash bribes and committed his crime over a long time (18-month period), which indicates that it was considered, deliberate and ongoing and places many people's lives at risk (civilian and military alike). They rank his crime seriously accordingly.

John's actions, in tainting dairy products with toxic substances, was particularly relevant to people in the groups, as the Chinese and Fonterra milk tainting scandal had recently featured widely in the media. People could relate to the idea of their own children getting sick. Most people did not take into account the motive for John's actions (revenge). The main factor people considered in ranking this crime was the level of injury to people, which was perceived to be lower than in other crimes, such as Tom, Sam and Ben's. While more people are harmed by John's crime, people perceive the harm to be less permanent than other types of harms. Or it is possible that, because the crime does not detail the effect on one person, people can 'gloss over' the effect. The conversations around this scenario related more to the effect on New Zealand's reputation and export industry. People also note the high cost of the loss (\$3 million).

Ted's motivation for telling the media that he had spread foot and mouth disease in the Waikato is unknown. But people perceive this crime as less serious than John's, because no people are harmed (in contrast to John's actions above), and Ted has not actually spread foot and mouth. Ted's actions impact negatively on one region's dairy industry, although the actual financial loss is not specified. There are no human victims in this scenario either, although people recognise some farmers will have been affected by the disruption. This is why people consider Ted's crime to be relatively less serious.

"I don't know what he is doing that for – why did he write a letter? What was he trying to do?" Christchurch, General

"He's just a nuisance and a time waster." General, Wellington

Conclusions

The scale and potential for harm to hundreds, if not thousands of people, has an impact on how seriously people rank a crime. Potential for harm or risk to our national interests, whether as a nation or to our exports and economy, is taken seriously by people, particularly if criminal actions are deliberate and malicious. However, people find it harder to assess the impact of these crimes or to clearly identify a victim or victims. While they can relate strongly to harm against one person, they may rank a crime less seriously if a crime is committed against 'faceless hordes' of people. The closer a crime is to being personally affecting, the more likely people are to consider it serious. People may find it easier to rank the scenarios that involve mass victims or loss to the economy lower, because in these three scenarios, the victims are not described or are not perceived as being 'like us'.

The scale and number of potential victims are two factors in assessing the seriousness of these crimes. However, some people find it difficult to clearly visualise the threat from some of these widespread and intangible crimes and to identify a clear victim or loss.

Perceptions of ranking the crimes

The process of ranking the crimes

As described in the methodology, people were provided with the list of scenarios prior to their group discussion and asked to rank the crimes in order of seriousness. Most people report that this exercise took them over two hours (although some did it more quickly and instinctively and did not revisit their thinking). Others took much longer. As some of the people received the scenarios over a week before their group discussion, they sorted and thought about their rankings and revisited them over the course of several evenings.

"The middle section was the hardest. It would've taken me a couple of weeks, because I thought about it, went away, read them again, thought about it some more, cut it out, moved it round, put it away, came back to it again. Not something you could do overnight. Also, some of them you rate them on how they've personally affected you as well." General, New Plymouth

People tend not to consider the penalties that crimes might incur

Very few of the people were thinking beyond their own perceptions and views on the seriousness of the crimes, so they ranked them according to their own personal opinions and values. One or two people took into account the sentencing or potential penalties and jail terms for some of the crimes and factored this into their overall ranking. But it is evident that most people use their own perceptions to rank the crimes. These perceptions are formed by a range of factors such as:

- Their experiences of crime (or the experiences of those close to them)
- The likelihood they perceive of being at the receiving end/a victim of any of the crimes
- The media, including what was current in the media at the time of the fieldwork³
- Their own values.

³ The media was mentioned in relation to several crimes, but most notably in the case of John (scenario 1) because of the Chinese/Sanlu/Fonterra milk tainting incident. The media was also mentioned in relation to the case of Tevita (scenario 9) because the Australian bush fires were in the media at the time. People consider that if a case is in the media and is relatively recent, they tend to rank a crime more seriously than they might do if the crimes were not 'top of mind'.

Ranking the scenarios is a complex exercise

People found ranking the 28 scenarios a challenging exercise, both intellectually and emotionally. Many tackled it by first grouping the scenarios into three categories as a first stage in the ranking process. This initial grouping helped them to refine their rankings. Most people used 'very serious', 'quite serious' and 'not very serious' as their first three groupings. They would then rank within these groupings and then pull the three groupings together into a cohesive whole. They report finding it easier to think first about the most/very serious crimes and then to think about the crimes they consider well down the list overall. All the people in the groups reported finding the ranking exercise very difficult. Many wanted to put more than one or two scenarios at the very top of the list and found that the evaluation process in selecting between them raised concerns in their minds about 'devaluing' the impact of a serious crime if they ranked it less serious than another one.

"I put them into four piles, and then I went through. One was property, one was life, one was money and the other was 'yes it's against the law but I'd think who gives a shit'. I think I went with my gut feeling more than anything." General, New Plymouth

Some people felt we were asking them to compare 'apples with oranges' because of the overall range and scope of the crimes. These people also tended to first group the crimes by 'type' such as property crimes, crimes against people and theft. They then found it difficult to rank these categories in terms of seriousness, as many felt the crimes (particularly those that fell in the 'middle ranges' of their rankings) were similar overall in level of seriousness. That is, they felt many of the crimes in the middle range overlap and are similar in level of seriousness.

"I found that I could easily identify the ones that I thought were the least serious. I had trouble with the most serious one because the types of crimes are quite different - but the impact was a lot of them had really, really serious impacts. But some of them were personal, some of them were national, some of them were against children..." General, Wellington

People said they regard their pre-group ranking as a good reflection of their overall perception of the seriousness of the crimes. They consider their pre-group ranking to reflect their views well. Many felt comfortable enough with their this ranking to change very little of the crimes' positions in the ranking order when they completed their ranking in the group. However, they also consider that the positions of the mid-level ranked crimes were likely to be more fluid and flexible than the top and bottom ranked crimes. While they may have changed two or three scenarios' rankings in their post group ranking, people did not substantially amend their entire ranking.

In our view, the number of scenarios and the range of crimes people were asked to rank was a complex and difficult task. People had to consider a wide range of factors in order to provide an accurately ranked list that best reflected their views.

"I printed them all out and cut them up into bits and then first I categorised them into different types of crimes, like sex crimes and violence and drink driving, white collar stuff. Then I ordered those ones and then picked the top ones of each and tried to do it that way." General, Wellington

Viewpoints influence rankings

People's perspectives on the seriousness of crime, as we discuss above, are reflective of a range of their experiences, values and perceptions. In the groups, the most robust discussions occurred around crimes where people had strongly divergent views. For example, in the case of the two drugs cases, Andrea (scenario 5) and Hayden (scenario 23), people either feel drugs in any form are serious and harmful or they make a distinction between the pure methamphetamine dealer and the cannabis user.

Some consider the pure methamphetamine dealer to be far more serious, because the drug is dangerous, has damaging implications for users and others around them and the level and distribution component of Andrea's crime all combine to make this more serious. They also consider there is more potential for harm from Andrea's actions than Hayden's. Hayden's crime on the other hand is seen as less serious, because they do not consider cannabis to be as harmful as pure methamphetamine, and Hayden does not intend to profit from or distribute the drug.

People's views on the drugs issue influence how seriously they consider each of the crimes. Some people consider cannabis to be a serious drug that impacts negatively on users and others around them and can be a precursor to using harder drugs. They therefore ranked Hayden's crime more highly than others who consider 'dope is no worse than alcohol' and who consequently ranked Hayden's crime as having a low level of seriousness. Everyone in the groups considers methamphetamine to be a 'serious' drug, but people range widely in their views on cannabis, which is why views on Hayden's crime are so divergent.

Some people comment that if they perceive a crime might conceivably happen to them or to someone they know, they tend to perceive it as more serious than one that they cannot imagine or perceive happening to them. For example, a couple of the people in the groups who are mothers felt they judged crimes against children more seriously than they might have before they had children. Similarly, if people had experienced a crime or knew someone who might have experienced a crime, they feel they might judge it as more seriously than if they had not. For example, one woman had lost money in a finance company collapse and could identify with the financial loss suffered by Sandra's victims (scenario 13). She felt she had ranked this crime more highly than others in the same group for this reason.

"I found when I was struggling with some. That's where your personal part comes into it. I tended to I think because I have children I tended to gravitate more towards if I was having to make a decision [about where to rank it] a crime that was actually affecting children because they were like the young innocent party." General, Wellington

"Although one of the crimes was it is quite horrendous on a world scale [Nickolas's scenario] but in New Zealand you think 'oh yeah, we're not going to get bombed, we're not going to get blown up.'" General, Wellington

"Did anyone feel desensitised by the 120 people? When I looked at that I thought that was less personal because it seemed like it would not happen in little old New Zealand. I felt desensitised. It seemed far away and we've never experienced terrorists here in New Zealand" General, New Plymouth

"If you know someone or you have experienced a crime yourself, it has to impact on you more than some of the crimes you haven't experienced."
General, Christchurch

"What has happened in your life will impact heavily on the outcomes you get. My ex-wife, she was molested as a kid and has tried to kill herself hundreds of times, so for me sex crimes were at the top. You don't even need to think about it." General, New Plymouth

Conversely some people also feel the media has influenced how the public perceive crimes. Some people feel seeing crimes or hearing about them time and time again in the media inures them to seeing them as serious because they 'happen all the time'. This is probably particularly true of lower level crimes such as 'boy racer' crimes than it is of higher level ones like murders.

On the other hand, some people felt that seeing a crime in the media 'brought it home to them' about the impact (seeing the Victoria bush fire victims is a good example of this as it occurred around the time of the fieldwork). These people ranked high profile crime stories in the media as more serious.

There is probably a correlation between the type of crime as well as media coverage that is impacting on how seriously people rank a crime. It should be noted that there are some inconsistencies in how people feel about the impact of seeing or hearing about crime in the media. On one hand people feel constant media coverage can make them consider a crime to be less serious, but on the other hand, seeing the impact of a crime on a victim in the media can make them consider a crime to be more serious. In other words, media coverage has the capacity to both increase *and* decrease the perceived seriousness of a crime.

Comment on Māori and Pacific perspectives

While Māori and Pacific peoples were separated out in our total sample, these ethnicities' views did not significantly vary from those of the general population except for a few points. Māori and Pacific men tended to rank crimes against women and children more seriously than other general population groups and tended to rank crimes committed against the nation and those committed by those in positions of responsibility lower.

Some of the people in the Māori and Pacific groups discussed the degree to which they could relate to the crimes listed in the scenarios. For example, people in the Māori group did not think they would ever place their elderly relatives in a rest home, and therefore could not relate fully to the scenario involving Dominik (scenario 25). Subsequently, some people in this group felt a degree of detachment from this crime.

Another example discussed in the Māori group was Hayden's drug crime (scenario 23). There was a definite demarcation between the older group members and some of the younger group members. The younger group members were of the opinion that marijuana is harmless, and therefore the crime is perceived to be less serious. People in this group also discussed the relationship between marijuana users and marijuana use and the degree to which users are still 'good people'. Subsequently, they viewed the crime as less serious. Older group members clearly articulated a low tolerance level for marijuana users with the view that drugs were illegal and usage leads to more serious crimes. This was also similar for general population groups.

In the Pacific group, one older male also considered Frankie's crime (scenario 19) to be something some people had 'all done when we were younger'. This person had a higher level of social acceptance for drinking at the local pub and then driving home than others in the group. This may be more relevant to his age (he was older than others in the group). Younger Pacific people are as intolerant of this crime as general population groups.

"We've all done something like that when we were younger." Pacific, Auckland

Quantitative analysis of ranking

Method used to create the aggregate ranking

In order to provide an aggregate ranking representing all 62 research participants, the median was used to create an aggregate ranking score for each scenario. The median is a 'middle point' whereby half the participants rank higher than this point, and half the participants rank lower than this point.

For this project (which involves a relatively low number of research participants), the median is preferable to the 'mean' (which takes the total ranking score for each scenario and divides by the number of participants). This is because the former is less subject to one or two extreme view points affecting the measure of central tendency for the whole group. An example of using the two calculations can be found in Appendix III.

When two or more scenarios had the same exact median score, the average score was used to sort out which was the most serious.

By using this method we were able to create an aggregate ranking score (representing all 62 research participants) for all 28 scenarios (from most serious to least serious).

Pre-group ranking

Prior to group discussions, Colmar Brunton sent the 28 Law Commission scenarios to participants' homes and asked them to rank the scenarios from most serious to least serious.

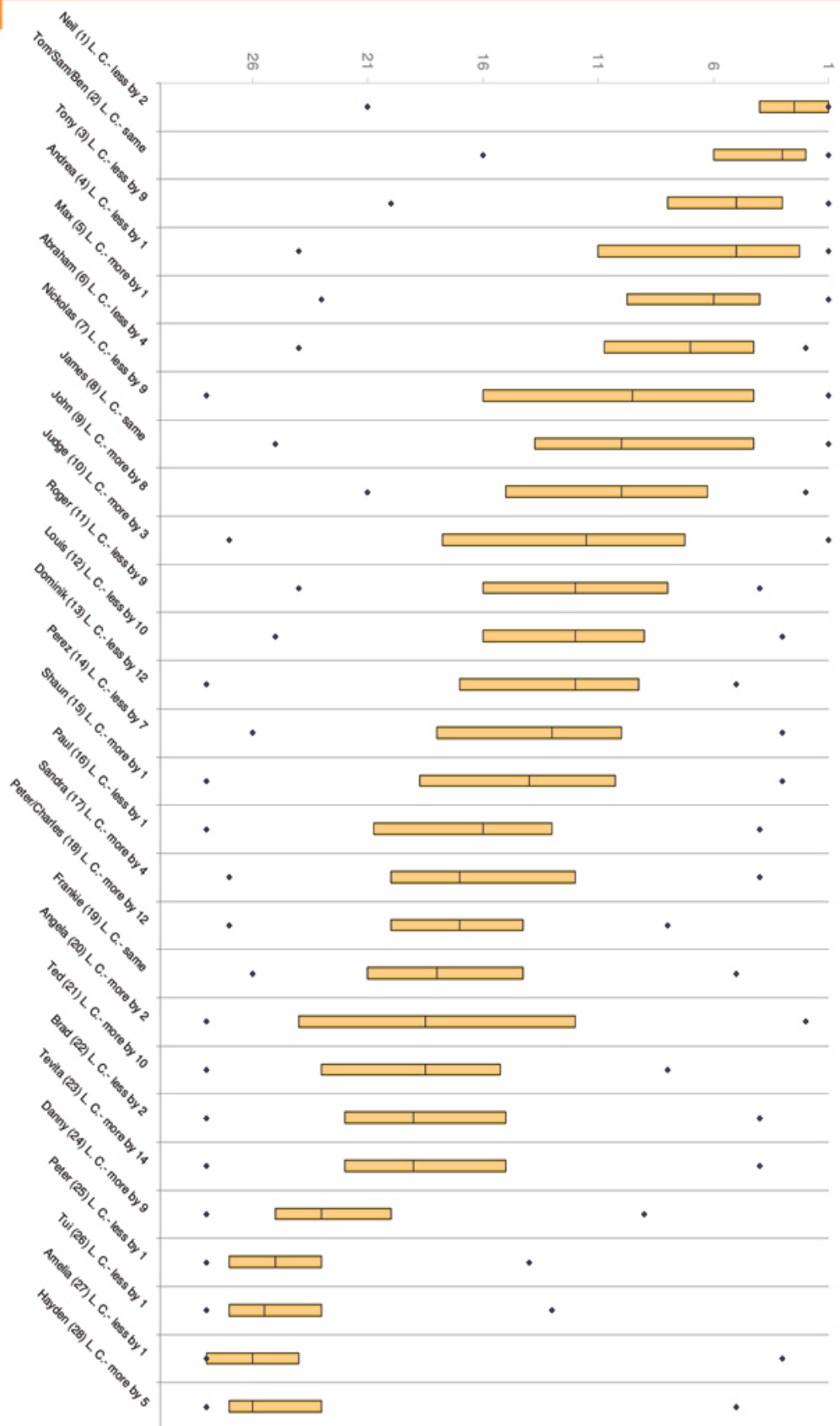
Overleaf we tabulate the results. The first two columns illustrate how the 62 research participants ranked the scenarios (from most serious to least serious). The next columns represent how the Law Commission ranked each scenario, and the difference in ranking between the Law Commission and the 62 research participants. The last column represents the median score given by the research participants for that scenario.

It should be noted that there was disagreement within participants about the seriousness of certain scenarios. The level of disagreement tended to be higher for those crimes viewed as having a 'middling' level of seriousness (whereas there was more agreement on the 'most' and 'least' serious crimes). The level of variation around the ranking scores is illustrated later, however in the table overleaf we highlight **[in bold]** the six scenarios that created the most disagreement among research participants.⁴

⁴ All of these scenarios had a range of at least 8.75 ranks between the first quartile score and third quartile score within the aggregate ranking.

Scenario	Group pre-ranking	Law Commission ranking	Law Commission ranked this less or more serious than the group by...	[Median score given for this scenario by the group]
Neil	1	3	Less by 2	[2.5]
Tom/Sam/Ben	2	2	Same	[3]
Tony	3	12	Less by 9	[5]
Andrea	4	5	Less by 1	[5]
Max	5	4	More by 1	[6]
Abraham	6	10	Less by 4	[7]
Nickolas	7	16	Less by 9	[9.5]
James	8	8	Same	[10]
John	9	1	More by 8	[10]
Judge	10	7	More by 3	[11.5]
Roger	11	20	Less by 9	[12]
Louis	12	22	Less by 10	[12]
Dominik	13	25	Less by 12	[12]
Perez	14	21	Less by 7	[13]
Shaun	15	14	More by 1	[14]
Paul	16	17	Less by 1	[16]
Sandra	17	13	More by 4	[17]
Peter/Charles	18	6	More by 12	[17]
Frankie	19	19	Same	[18]
Angela	20	18	More by 2	[18.5]
Ted	21	11	More by 10	[18.5]
Brad	22	24	Less by 2	[19]
Tevita	23	9	More by 14	[19]
Danny	24	15	More by 9	[23]
Peter	25	26	Less by 1	[25]
Tui	26	27	Less by 1	[25.5]
Amelia	27	28	Less by 1	[26]
Hayden	28	23	More by 5	[26]

To illustrate the spread of answers given for each scenario in more detail, we present a 'box and whisker' diagram overleaf (this is explained on the following page).



Explanation of box and whisker diagram above

This diagram is useful for illustrating the spread of answers given for each scenario. We explain how to read the diagram below.

Horizontal axis

The crimes on the left were ranked the most serious, and the crimes on the right were viewed as less serious. The aggregate ranking is presented in parenthesis. Beside this is an indication of whether the Law Commission viewed this crime as more or less serious than the participants (and to what extent).

Vertical axis

The vertical axis shows where a crime's grouped ranking scored from the most serious (at the top=1), to least serious (at the bottom=28).

Maximum (blue diamond at top)

The small blue diamonds along the top represent the highest score given by any participant for that scenario. For example, not one participant rated the 'Peter' as being any more serious than 14, whereas one person rated 'Amelia' as the third most serious crime, despite the fact most people thought the 'Amelia' scenario was not serious.

Interquartile range (size of the yellow box)

The size of the yellow box represents how much variability there was for a particular scenario (sometimes known as the 'interquartile range'). A long box signifies disagreement within participants, whereas a small box represents consensus. The top of each box is calculated by taking the first quartile found within the rankings for that scenario⁵, the bottom of the box is calculated by taking the third quartile⁶.

Median score (the short black horizontal line in the middle of each box)

The median is a 'middle point' whereby half the participants rank higher than this point, and half the participants rank lower than this point. This is an important score because it was used to calculate the aggregate ranking given for all 62 participants (described above).

The median is illustrated as a short black line which crosses the centre of the yellow box approximately half way down (although the point at which this crosses the box varies depending on the score of the median for each scenario).

⁵ The first quartile is found by taking all 62 participants rankings for a particular scenario, putting them in a pile in order from least serious to most serious, and taking the ranking score that is found one quarter of the way through this pile.

⁶ The third quartile is found by the same process as above, but is taken at the point three-quarters of the way through the pile of rankings.

Minimum (blue diamond at bottom)

The small blue diamonds along the bottom represent the lowest score given by any participant for that scenario.

Later we discuss some reasons for the spread of answers given. First, we discuss the post-group ranking.

Post-group ranking

Following group discussions participants were asked to re-rank the scenarios. This exercise was conducted in order to assess the extent to which individuals adjust their own rankings in the light of discussion.

As before we tabulate the post-group rankings in a table and a box and whisker diagram. The table overleaf shows the total post-group rankings (from most serious to least serious). This is shown against how the Law Commission ranked each scenario, and the difference in ranking between the Law Commission and the 62 research participants. The second last column represents the median post-group score given by the research participants for that scenario.

The final column represents how far that scenario travelled between the pre-and-post ranking. In general, there was very little change within the pre and post rankings overall, although the aggregate hides some variation in how individuals changed their views (discussed below).

Similar to the pre-group ranking, the post-group ranking revealed a level of disagreement within participants about the seriousness of certain scenarios. In the table overleaf we highlight **[in bold]** the six scenarios that created the most disagreement among research participants.⁷ With the exception of 'Andrea', the top six most variably rated crimes after the group discussions were the same as the top six prior to group discussion.

⁷ All of these scenarios had a range of at least 9 ranks between the first quartile score and third quartile score within the aggregate ranking.

Scenario	Group post-ranking	Law Commission ranking	Law Commission ranked this less or more serious than the group by...	[Median score given for this scenario by the group]	Post group vs. pre group – this scenario became more or less serious by
Neil	1	3	Less by 2	[2.5]	Same
Tom/Sam/Ben	2	2	Same	[3]	Same
Tony	3	12	Less by 9	[4]	Same
Andrea	4	5	Less by 1	[6]	Same
Abraham	5	10	Less by 5	[6.5]	More serious by 1
Max	6	4	More by 2	[7]	Less serious by 1
James	7	8	Less by 1	[10]	More serious by 1
Nickolas	8	16	Less by 8	[10]	Less serious by 1
John	9	1	More by 8	[10.5]	Same
Roger	10	20	Less by 10	[11.5]	More serious by 1
Louis	11	22	Less by 11	[11.5]	More serious by 1
Judge	12	7	More by 5	[12]	Less serious by 2
Dominik	13	25	Less by 12	[12]	Same
Perez	14	21	Less by 7	[13]	Same
Shaun	15	14	More by 1	[14]	Same
Sandra	16	13	More by 3	[16]	More serious by 1
Paul	17	17	Same	[16]	Less serious by 1
Peter/Charles	18	6	More by 12	[17.5]	Same
Frankie	19	19	Same	[18]	Same
Angela	20	18	More by 2	[18.5]	Same
Tevita	21	9	More by 12	[18.5]	More serious by 2
Ted	22	11	More by 11	[19]	Less serious by 1
Brad	23	24	Less by 1	[19.5]	Less serious by 1
Danny	24	15	More by 9	[23]	Same
Peter	25	26	Less by 1	[25]	Same
Hayden	26	23	More by 3	[26]	More serious by 2
Tui	27	27	Same	[26]	Less serious by 1
Amelia	28	28	Same	[27]	Less serious by 1

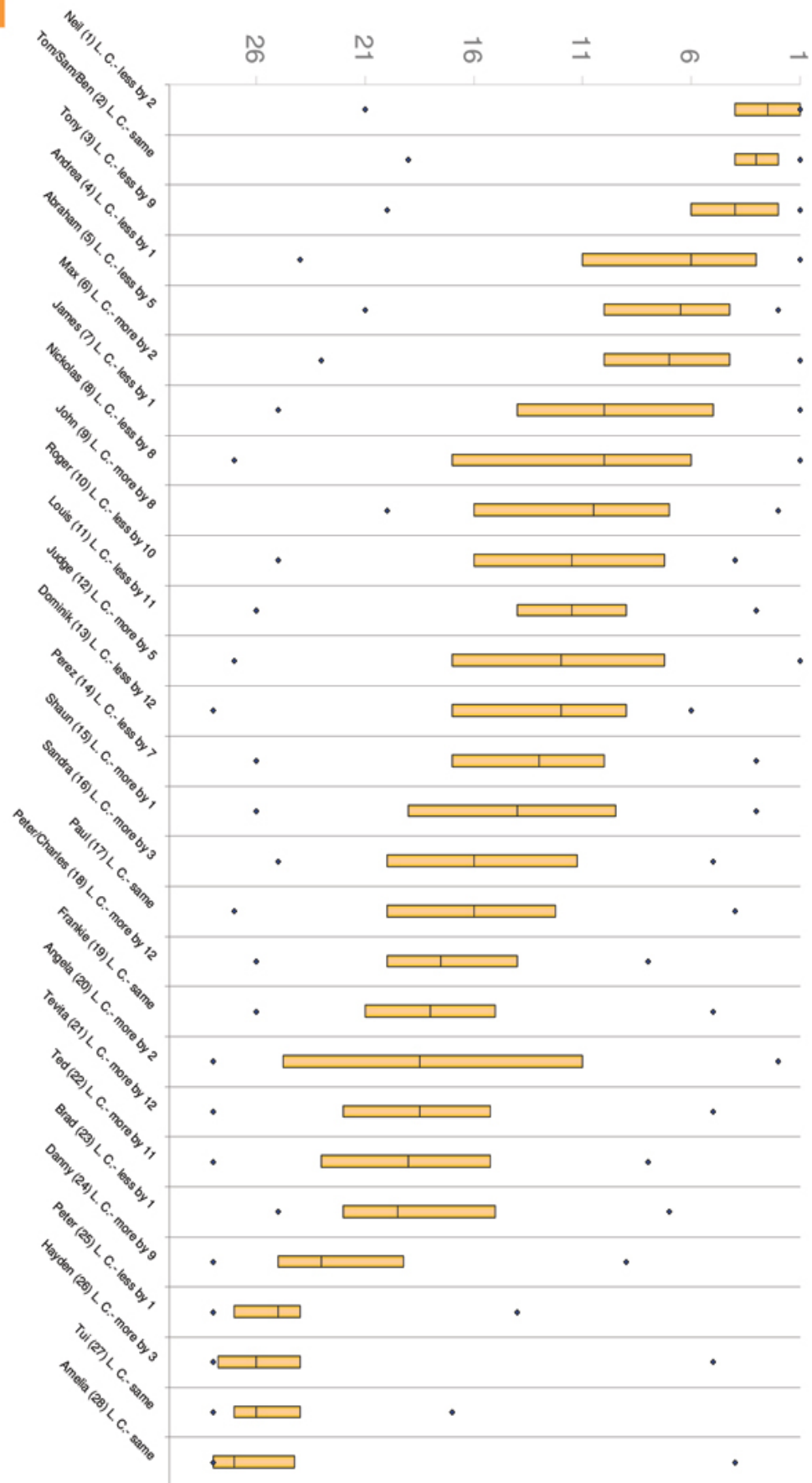
In general the discussion did not significantly alter the rankings. Some groups changed their scores more than others, for example, Wellington and New Plymouth groups changed their rankings more significantly than the Auckland, Māori and Pacific groups.

Some individuals significantly changed their pre-and-post rankings following discussion. This had a particular impact on the 'Angela' and 'Nickolas' scenarios which were changed at least two ranks by the average participant. On the other hand, some scenarios remained untouched by participants. This was particularly the case for 'Neil', but this also occurred with 'Tui', 'Danny', 'Amelia', and 'Tom/Sam/Ben' (all of which changed less than one rank for the average participant).

Although some scenarios experienced fluctuation, the direction of travel varied between participants. For example, some people rated Nickolas as far more serious after the discussion, and some rated Nickolas as far less serious. The net effect of these individual differences effectively cancels out the occurrence of any significant movements in the overall rankings. For example, on aggregate, Nickolas only dropped one point on the serious rank (from 7th most serious to 8th most serious) and Angela remained the same (20th most serious).

In general, the group discussion did not move participants any closer towards the Law Commission's pre-allocated rankings.

To illustrate the spread of answers given for each post-discussion ranked scenario in more detail, we present a 'box and whisker' diagram overleaf (the format of the diagram has been described above).



Possible reasons behind the spread of answers

The ranking exercise demonstrates that there is a degree of consensus around the most and least serious crimes. The crimes ranked at the most serious level all involve a high level of physical harm, vulnerable or young victims, serious emotional consequences and are likely to have a long lasting impact. A degree of consensus is also apparent among the crimes ranked as less serious. This is because people feel the crimes at the lower end of the scale have limited impact on a victim (if they have an identified victim at all) and do not involve a high level of either physical or financial harm, a serious breach of trust or any of the other factors that might rank a crime as being more serious.

However, there is a high degree of variability within the middle ranking crimes – i.e. those that were not viewed as very serious or not serious. People find it difficult to differentiate the seriousness of these crimes, primarily because many such crimes are perceived to be similar in effect and impact. Although it was clear what criteria were used to evaluate the most serious crimes and the least serious crimes, it is apparent from the group discussions that people had less obvious criteria to draw upon to evaluate these middle ranking crimes. We conclude that this resulted in a greater degree of variability in how participants ranked crimes.

Peoples' views on individual crime scenarios are discussed in more detail earlier in this report. However, it should be noted that a methodology change following the pilot may explain the variance for one particular scenario – 'Angela'. In the Angela scenario she left her one year old baby in the park alone, but words 'she didn't care what happened to him [the baby]' were added to the scenario after the pilot group. This effectively means that some participants saw those words, and some did not. This may explain some of the variation observed for that particular scenario.

Appendix I – Topic guide

Research objectives

The aim of the research is to provide qualitative public feedback on the ranking of offences on the basis of seriousness and feedback on the categorisation of offences. Specifically the project should also deliver:

- a qualitative understanding of participants' reasons for their individual rankings
- to assess the extent to which individuals adjust their own rankings in the light of the discussion
- to test the extent to which there is common agreement about the extent to which offences in the rankings that emerge from the discussion form natural groupings in terms of their relative seriousness.

Note to the Law Commission

This topic guide is intended to answer the Law Commission's research objectives, although the flow and order may not be the same for each group. If you are viewing the groups please be assured the topic will be covered, but each group will not be asked each question verbatim and the flow of the group is to a certain extent determined by the participants' responses.

Introduction and warm up - 15 minutes

To explain the purpose of the discussion, warm up the group, and explain confidentiality and viewing.

- We are here tonight to talk about how you have all ranked the crime scenarios we asked to you to do at home before the group tonight.
- The purpose of tonight is to have a look at any differences or similarities in how each of us has ranked the 28 crimes, because we are interested in understanding what it is about some crimes that makes people rank some as more serious than others.
- Why people have ranked some crimes differently to other people is really interesting to us, so the discussion is a way for us, and the Law Commission (who are responsible for developing and reviewing the law in New Zealand) to understand what kinds of crimes are seen as more serious than others, and why. *If anyone asks why the research is being conducted, see explanation at the end, and tell them we can tell them at the end of the group,*
- We are interested in all views; there are no right or wrong answers, each of you will have ranked the scenarios your own way and that is great, we didn't expect them to be all the same.
- The discussion is confidential. Some of our clients are viewing, but they don't have any details about you – it helps them to hear first hand what people say rather than just reading the report at the end.
- We are also making a recording of the discussion to help us capture all the information. Only people directly involved in the research will be able to view the tape.
- *Explain and ask for digital recording and notetaker permission (if relevant). Check everyone is comfortable with this.*

- *We will go for about two hours. Help yourselves to food. If you need to use the bathroom, they are (directions).*

Warm up exercise – 10 minutes

Let's talk to the person sitting next to us, and find out what part of (location) they live in, their family and work situation, and what they love most about living in (location), or, how they went about doing the ranking and how long it took them.

Go around the room getting people to introduce themselves and answer questions as above.

Context and thinking about the exercise (20 minutes)

To understand experiences and perceptions of the exercise as well as unload any issues with crime.

Great, we are going to go through your rankings shortly, but let's start by thinking a bit more about how we felt about doing this exercise and what we were asking you to do in coming here tonight.

- What was easy about doing the exercise? How come? (probe on 'easy' conceptually, and also 'easy' in terms of methodology i.e. how did they physically go about completing the ranking)?
- What was not so easy? How come? (probe again on what was hard conceptually versus what was hard about physically completing the exercise)?
- What kinds of things went through your mind as you were doing it?
- What did you find yourself thinking about or feeling? (probe on what kinds of factors they took into account i.e. age, gender and note on whiteboard)
- What sort of things were we using to decide how and where to rank the scenarios (probe as appropriate i.e. if they say intention of the person, or age of the victim, probe to understand what these factors are and how they apply them, also get a sense of blameworthiness i.e. did they intend to cause harm or was it a consequence of their actions?).
- What information was missing to help you rank these scenarios?
- What else would you have wanted to know to help you decide (probe on whether it is the first time it happened or multiple times, what the intent of the criminal is etc).

Discussion of their rankings and re-ranking exercise (1.5 hours)

To understand reasons for the rankings and what criteria people are using to evaluate and rank the crimes.

Let's have a look at the rankings – *pass out the copies of their rankings (one each with all the group participants rankings on it – just the spreadsheet not the charts from Ian I think they are too complicated to explain to people and they just need to see the spreadsheet).* As we can see, there are a range of rankings here. The way we thought about doing this was to go through them in order, from most serious (1) to least serious (28).

Give them a copy of everyone's ranking – tell them this is to help them think about the discussion but not introducing the idea of a re-ranking at the end of this stage, we want to focus them on the rationale for their original rank rather than asking them to re-think it at this stage.

When it occurs – mention the two scenarios that have changed and check reaction/different rankings based on this (see Angela and Tony below).

Note – some people will have been given the correct scenarios and some will need updating based on these new ones. Best to read out to check that everyone is on the same page.

REASON FOR ABANDONMENT IS EXPLAINED HERE.

Angela took her 12 month old baby to a local park. She left the baby underneath a park bench and drove away. The baby was later discovered by a group of children. It was suffering from mild hypothermia, but was otherwise unharmed. Angela told the police that she was sick of the baby crying all the time, wanted to be rid him, and didn't care what happened to him.

CHANGED FROM TWO SONS TO ONE SON

Tony - Tony was the father of a boy aged 8. He was convicted of ill-treating his son. The boy had been regularly punched and kicked by the offender and locked in a small cupboard for long periods without food or water as punishment for misbehaviour. He was also punished by being forced to drink his own urine. He was often forced to sleep outside in a dog kennel at night. His general health was poor. He was severely anaemic, had badly decayed teeth, and suffered from untreated ear infections that had caused a partial loss of hearing. He also had scars on his arms and lower back from cigarette burns.

HIGHEST - Starting with number 1...

To discuss this, we will have to look at the rankings and decide how to play it (i.e. if most people have ranked them the same, or different, we will just have to modify the discussion based on what the results are – for example, if there is general consensus, we will say this, otherwise we will probe for different people's reasoning. We will adjust the discussion for each of the scenarios based on the results of each ranking in each group).

The discussion needs to be focused, based on any pre-analysis. Rather than e.g. asking what made us rank this one the highest? The facilitator needs to say something along the lines 'Interestingly, five people put X as their number one. Could one of you please tell me why you put X at the top? ... I see, two people put X further down their list. Could one of you please tell me your reasoning?' etc.

For each of the rankings 1 - 5...

- What made us rank this one the highest? (probe on factors such as age of victim, number of victims, property versus personal type crimes, and any other indicators or factors that people are using to evaluate the seriousness of each crime)?
- What about others? Who has a different one ranked at number 1?
- What might make this crime lower down in the ranking (i.e. what would have moderated it? Or what might have made it worse?) How come?

- What information is missing (if any) from this scenario to help you rank it? How come?
- What difference might this information have made to your ranking? How come?
- How do we evaluate how blameworthy the person is? What determines this? What difference does this make to how seriously we rank the crime?

Proceed to next one... up to number 5

- If we ask you where the cut off was for the most serious crimes, would this be it? If not, what might be? How come? *(get an idea of where the cut off point is from each group).*

Then go to lowest ranking 28.

LOWEST - For each of the rankings 28 – 20...

Same probes as above, what makes this one the lowest one? How come?

- Who had a different one as their lowest? How come?
- What might have made this crime more serious? How come?
- What might have moved it up/down the ranking for you?
- What information is missing (if any) from this scenario to help you rank it? How come?
- What difference might this information have made to your ranking? How come?
- How do we evaluate how blameworthy the person is? What determines this? What difference does this make to how seriously we rank the crime?
- If we ask you where the cut off was for the least serious crimes, would this be it? If not, what might be? How come? *(get an idea of where the cut off point is from each group).*

MID-RANGE (6-20)

Same probes as above, what makes this one number x? How come?

- Who had a different one as their number x? How come?
- What might have made this crime more serious? How come?
- What might have moved it up/down the ranking for you?
- What information is missing (if any) from this scenario to help you rank it? How come?
- What difference might this information have made to your ranking? How come?
- How do we evaluate how blameworthy the person is? What determines this? What difference does this make to how seriously we rank the crime?

We are wanting to understand if people have strong feelings or are relatively ambivalent about the scenarios here – try to get a reading from the group about whether these are all 'much of a muchness' in terms of seriousness, or whether there are strong views either way and then confirm by checking in with the group.

Once we have done the first 'sweep' as above – note which scenarios are the most divergent from your list (Ian's analysis) - the participants will only have the spreadsheet ranking, but you will have the analysis chart. The ones that are more divergent have the longest bar/box. Before the group you should make a list of the scenarios that differ from each other in the group, and from the Law Commission ranking and ensure there are covered.

It looks like from this that there is some differences between [x] and [x] scenario (noted names/scenarios from earlier) – lets discuss that,

- What makes these ones different do you think?
- What factors are we taking into account?
- What is accounting for the differences do we think (probe on whether people are thinking about different factors when ranking).

Note- there may be some overlap with the scenarios below, in which case just ask the questions about that scenario once – see probes for each scenario above it.

Once we have covered off the group's divergent scenarios, and the ones that diverge from the Law Commission's ranking, if not already compared, cover off the following pairs of scenarios (if not covered earlier).

Note – here we are trying to get a handle on their reasoning: intent to cause harm (meant to discipline vs. meant to cause serious injury) from action taken (slap vs. punch to head and attempt to kick in back) from harm caused (severe bruising vs. minor bruising) . etc

Dominic (rank 25) versus Roger (rank 20)

(looking to understand actual harm versus intended harm/degree of harm)

- What is the difference here do we think? (probe on intended harm versus actual harm – and how does this impact on the degree of seriousness or ranking of this scenario in comparison with the other one?)

Dominik - Dominik worked at a rest-home. His primary role in the rest-home was to feed and bathe elderly patients. Dominik was seen slapping one elderly male around the head and punching him in the back and arms. He told police that he did so in order to discipline the patient because he would not follow instructions.

Roger - Roger attended a 21st birthday function at a nightclub. In the early evening he got into an argument with a woman who he saw push into line at the bar. Roger remained angry for several hours after the argument. Near the end of the evening he saw the woman leave the nightclub and walk to a bus stop. Roger waited for the woman's friend to leave before approaching her. He punched her twice in the head causing her to fall to the ground. Roger then attempted to kick the woman hard in the back as she lay on the ground but missed altogether. She was left with only minor bruising. Roger told police that he had intended to cause a serious injury to her and that he was disappointed that he had not.

Frankie (rank 19) versus Brad (rank 24)

(looking to understand actual versus intended harm, as well as culpability (blameworthiness))

- What is the difference here do we think (probe on intended harm versus actual harm – and how does this impact on the degree of seriousness or ranking of this scenario in comparison with the other one?)

Frankie - On a Saturday afternoon, Frankie drove to his local pub where he spent the day drinking. At 11pm he decided to drive himself home. Driving over the speed limit, Frankie lost control of his car, hit a power line, and crashed into the side of a house. No-one was injured. However, the accident caused \$72,000 worth of damage to council property and the house. Frankie had four times the legal breath alcohol limit.

Brad - Brad took part in a drag race with other cars. The cars raced down a busy city street in the early hours of Sunday morning, reaching speeds in excess of 200 kph. Brad lost control of his car and narrowly missed hitting two pedestrians crossing at a set of traffic lights. The vehicle then crashed into the front of a shop causing significant damage.

Sandra (rank 13) versus Tui (27)

(looking to understand levels of theft and intent)

- What is the difference here do we think (probe on how the amount of money involved influences the degree of seriousness, and also how they feel about Sandra spending the money on luxuries, i.e. what the stolen money was used for and if this makes a difference)?

Sandra - Sandra was the managing director of an investment company. After experiencing personal financial difficulties, she stole \$2.4 million of client funds and used the money to repay personal loans, take overseas holidays and buy luxury cars. Most of the company's clients (mainly 'mum and dad' investors) lost all the money they had entrusted to Sandra.

Tui - A community group sold homemade cakes, biscuits and jams at a fair to raise money for the local SPCA. They made \$479 in cash sales. Tui waited until the stall had no one at it and stole the tin containing all the cash.

Sandra (rank 13) versus Peter/Charles (rank 6)

(looking to understand differences between intent, revenge and greed)

- What do we think about the motivations here (i.e. why the committed the crime? (probe on intent such as revenge and greed and check if either of these factors increases or decreases the degree of seriousness)

Sandra - Sandra was the managing director of an investment company. After experiencing personal financial difficulties, she stole \$2.4 million of client funds and used the money to repay personal loans, take overseas holidays and buy luxury cars. Most of the company's clients (mainly 'mum and dad' investors) lost all the money they had entrusted to Sandra.

Peter - Peter and Charles were business partners who fell out with each other over a failed property development. Peter became bankrupt as a result of the development, while Charles suffered only a small financial loss. Peter became bitter towards Charles. Peter told Charles that unless he gave him \$1 million in cash he would release documents to the media which clearly showed that the collapse of the property development was because of fraudulent conduct by Charles. When Charles refused to pay, Peter threatened that Charles's 9 year old son would be harmed. Peter arranged for photos to be sent to Charles of his son walking home from school alone with the words "Pay up now!" written across the top. Charles then paid Peter the money.

Tony (rank 12)

(looking to understand the impact of the ongoing nature of the crime versus a one off event)

- What does the ongoing nature of Tony's action do to your perception of how serious this scenario is? How come? (probe on whether ongoing is more serious than one-off events and why)

Tony - Tony was the father of a boy aged 8. He was convicted of ill-treating his son. The boy had been regularly punched and kicked by the offender and locked in a small cupboard for long periods without food or water as punishment for misbehaviour. He was also punished by being forced to drink his own urine. He was often forced to sleep outside in a dog kennel at night. His general health was poor. He was severely anaemic, had badly decayed teeth, and suffered from untreated ear infections that had caused a partial loss of hearing. He also had scars on his arms and lower back from cigarette burns.

Neil (looking to understand what mitigates this crime)

- What makes this scenario serious? What would make it less serious (i.e. if the twins had lived)
- What might make this crime more serious? (i.e. what if the twins had been born before the assault (looking to understand if 'unborn' makes this crime more or less serious)

Neil - A woman was pregnant with twins and was three weeks from the expected date of birth. The father, Neil, arranged to meet her at her house. Once inside he physically assaulted her. As she lay on the ground, Neil kicked her many times in the stomach with steel capped boots in an attempt to cause the death of the two unborn children. Labour was induced in the mother, but the babies were stillborn as a result of the attack.

John (rank 1) versus Ted (rank 11)

(CHECK IF THESE ARE RANKED CLOSER TOGETHER THAN ABOVE BY YOUR GROUP – if ranked close together, ask what makes them similar – i.e. the economic loss is about the same but in Ted's case there is widespread, albeit temporary, harm).

- What makes these scenarios similar?
- What makes them different?
- What makes them mostly ranked [x] and [x] – why so far apart (if so)
- Why so close together (if so)? Probe on what pulls them apart, and what makes them closer together/similar)

Ted - Australia experienced an outbreak of 'foot and mouth' disease, resulting in the slaughter of millions of cattle and sheep. In New Zealand three cows died on a Morrisonville farm. Ted wrote to a newspaper claiming that he had spread foot and mouth disease on the affected farm, and that he planned to introduce the disease on to other farms in the Waikato. The threats caused widespread disruption in the Waikato and caused the temporary suspension of meat exports from the North Island. Ted later confessed to police that the claim was a hoax. Tests revealed that the cows had died of natural causes.

John - John was told that he was to be made redundant from his job at a large dairy processing plant. As an act of revenge, John contaminated large amounts of butter and cheese products with a toxic substance. Those who consumed the contaminated products suffered serious food poisoning. As a result, all exports of New Zealand dairy products had to be suspended for 5 weeks, resulting in \$300 million in lost export sales.

Once we have gone through the entire list do an overview.

- Where do you think our perceptions and thoughts about these kinds of crimes comes from? What influences us? (probe on media, friends and family, political influences, personal experiences, people we know on either side of the law...)

Re-ranking exercise

Now that we have had this discussion, I would like us to do the ranking exercise again. I have copies of the scenarios here and another form for you to fill in. We would like you to do it again, and then we will have a quick discussion around the final ranking before we finish off.

Leave them with their original ranking but remind them the exercise is to see if they make any changes to their ranking in light of everything we have talked about tonight – but it is important to emphasise that people can choose to change or not – it is up to them.

Remember then to put your name on the form so we can collect this information at the end. It's not to identify you, just so we can keep track.

Give them 15 – 20 minutes to do the exercise. Ask them to draw a couple of lines through it at the cut off point between most serious and least serious, i.e. to divide the 28 rankings into three groups – most, middling, and least serious.

So, now you have had a chance to do the ranking again...

- Has anyone got any major changes or surprises? How come?
- What kinds of crimes have moved up or down your list? How come (probe on what factors prompted them to move them up or down, and what might have influenced them).
- Has this discussion changed your views on any of the crimes we have talked about today? In what way? (probe on whether it has moderated or increased their perceptions of whether a crime is more serious or not)? What kinds of things has this discussion made you think about?

Discuss any changes that are significant

- So, as a final session, let's just go around the room and get a sense of how people feel about their first and second rankings, what changed (if anything) for you, and what you might take away from tonight.

Thank and close and collect first and second ranking and provide incentive.

Reason of research if anyone asks

The Law Commission is reviewing the maximum penalties set out in all the major statutes such as the Crimes Act and the Arms Act. As the first step in that work, it is determining how offences should be ranked in terms of their seriousness. The Commission is asking the public for its views on a selection of those offences to assist it in determining what the ranking should be.

Appendix II – Scenarios

Law Commission Rank	
1	John
2	Tom/Sam/Ben
3	Neil
4	Max
5	Andrea
6	Peter/Charles
7	Judge
8	James
9	Tevita
10	Abraham
11	Ted
12	Tony
13	Sandra
14	Shaun
15	Danny
16	Nikolas
17	Paul
18	Angela
19	Frankie
20	Roger
21	Perez
22	Louis
23	Hayden
24	Brad
25	Dominik
26	Peter
27	Tui
28	Amelia

SCENARIO 1

John - John was told that he was to be made redundant from his job at a large dairy processing plant. As an act of revenge, John contaminated large amounts of butter and cheese products with a toxic substance. Those who consumed the contaminated products suffered serious food poisoning. As a result, all exports of New Zealand dairy products had to be suspended for 5 weeks, resulting in \$300 million in lost export sales.

SCENARIO 2

Tom, Sam and Ben – A 19 year-old woman was abducted by three men – Tom, Sam and Ben - while taking her dog for a walk. She was taken to a building in an industrial area. There the three men repeatedly raped her over the course of 16 hours. The sexual violation included vaginal and anal intercourse, as well as being violated with a bottle. All of the men urinated on her. The woman was also punched and kicked. She suffered multiple bruises, lacerations and some moderate internal injuries.

SCENARIO 3

Neil - A woman was pregnant with twins and was three weeks from the expected date of birth. The father, Neil, arranged to meet her at her house. Once inside he physically assaulted her. As she lay on the ground, Neil kicked her many times in the stomach with steel capped boots in an attempt to cause the death of the two unborn children. Labour was induced in the mother, but the babies were stillborn as a result of the attack.

SCENARIO 4

Max - Max had been diagnosed with the HIV virus. He was aware of the diagnosis and of the risks of having unprotected sex for his sexual partners. Despite this Max had unprotected sex with numerous people over the course of 3 years. As a result, 10 people contracted the HIV virus. Max was angry that he had contracted the virus. He said that he had intentionally sought to infect as many people as possible

SCENARIO 5

Andrea - Andrea was the ringleader of a drug dealing network. She coordinated the illegal importation of 52 kilos of pure methamphetamine (known as 'P'). The drug had been hidden inside television sets imported into New Zealand. After a combined operation by Police and Customs Andrea and the other members of the network were arrested as the drugs were being sold to suppliers. The estimated street value of the drugs was \$52 million.

SCENARIO 6

Peter - Peter and Charles were business partners who fell out with each other over a failed property development. Peter became bankrupt as a result of the development, while Charles suffered only a small financial loss. Peter became bitter towards Charles. Peter told Charles that unless he gave him \$1 million in cash he would release documents to the media which clearly showed that the collapse of the property development was because of fraudulent conduct by Charles. When Charles refused to pay, Peter threatened that Charles's 9 year old son would be harmed. Peter arranged for photos to be sent to Charles of his son walking home from school alone with the words "Pay up now!" written across the top. Charles then paid Peter the money.

SCENARIO 7

Judge - A High Court judge was convicted of receiving a \$350,000 bribe for the trial of two men accused of corporate fraud. The case was complex and did not involve a jury. In return for taking the bribe, the judge agreed to find both men not guilty. Despite strong prosecution evidence, and the absence of defence evidence, the judge acquitted both of the accused men.

SCENARIO 8

James - James was a senior member of the New Zealand Defence Force. He took large cash bribes from an overseas group to provide secret information on SAS operations in Afghanistan. Over the course of 18 months he made copies of documents outlining the SAS's weapons specifications, tactics, and planned movements. The information was used by an insurgency group that fought against the SAS in Afghanistan.

SCENARIO 9

Tevita - Tevita intentionally set fire to a storage container at a shipping yard. The fire spread and destroyed 10 other containers. The contents of each container were destroyed, including antique furniture, artworks, and computer equipment. The total cost of the fire was \$1.2 million. No one else was present in the shipping yard.

SCENARIO 10

Abraham - Abraham, a 42 year old man, often acted as a babysitter for a 12 year old girl who lived next door. On four occasions Abraham had sexual intercourse with the girl in her bedroom. She did not resist his advances because she wanted to please him.

SCENARIO 11

Ted - Australia experienced an outbreak of 'foot and mouth' disease, resulting in the slaughter of millions of cattle and sheep. In New Zealand three cows died on a Morrisonville farm. Ted wrote to a newspaper claiming that he had spread foot and mouth disease on the affected farm, and that he planned to introduce the disease on to other farms in the Waikato. The threats caused widespread disruption in the Waikato and caused the temporary suspension of meat exports from the North Island. Ted later confessed to police that the claim was a hoax. Tests revealed that the cows had died of natural causes.

SCENARIO 12

Tony - Tony was the father of a boy aged 8. He was convicted of ill-treating his son. The boy had been regularly punched and kicked by the offender and locked in a small cupboard for long periods without food or water as punishment for misbehaviour. He was also punished by being forced to drink his own urine. He was often forced to sleep outside in a dog kennel at night. His general health was poor. He was severely anaemic, had badly decayed teeth, and suffered from untreated ear infections that had caused a partial loss of hearing. He also had scars on his arms and lower back from cigarette burns.

SCENARIO 13

Sandra - Sandra was the managing director of an investment company. After experiencing personal financial difficulties, she stole \$2.4 million of client funds and used the money to repay personal loans, take overseas holidays and buy luxury cars. Most of the company's clients (mainly 'mum and dad' investors) lost all the money they had entrusted to Sandra.

SCENARIO 14

Shaun - A court issued a warrant for Shaun's arrest. The police learnt that he was staying at a friend's house. Two police officers drove to the house and knocked on the door to arrest Shaun. The door opened and Shaun came out holding a loaded sawn-off shotgun. He pointed the gun directly at one of the officers and told them to "get the hell out of here". The officers ran for cover. Shaun escaped through the back of the house but was later captured by police.

SCENARIO 15

Danny - Danny was pulled over by a police car for speeding. The police officer asked if Danny would consent to a search of his car. Danny agreed. In the boot of the car the officer found three briefcases. Each briefcase contained \$300,000 in forged \$50 banknotes. Danny was not the person responsible for forging the banknotes, but he confessed that he was using them to buy some things he wanted.

SCENARIO 16

Nickolas - Nickolas put together a highly detailed document explaining how to make a powerful bomb. He placed the document on the internet. Nickolas said that he thought it would probably be used by a terrorist group to make a bomb. However he did not know exactly which group would use the document or where or when a bomb would be detonated. One terrorist group used the document to bomb a train station killing 120 people.

SCENARIO 17

Paul - Georgina was a recently arrived immigrant into New Zealand. Paul was a businessman who employed Georgina three days a week to manage the company accounts. Paul often asked Georgina to have sex with him. She always declined and made it clear to him that she was not interested in him. But after Paul told her that she would be fired from her job unless she agreed to his demands, Georgina had sex with him. She did so because she feared that she may not be able to find another job and that she would lose her immigration status.

SCENARIO 18

Angela - Angela took her 12 month old baby to a local park. She left the baby underneath a park bench and drove away. The baby was later discovered by a group of children. It was suffering from mild hypothermia, but was otherwise unharmed. Angela told the police that she was sick of the baby crying all the time, wanted to be rid him, and didn't care what happened to him.

SCENARIO 19

Frankie - On a Saturday afternoon, Frankie drove to his local pub where he spent the day drinking. At 11pm he decided to drive himself home. Driving over the speed limit, Frankie lost control of his car, hit a power line, and crashed into the side of a house. No-one was injured. However, the accident caused \$72,000 worth of damage to council property and the house. Frankie had four times the legal breath alcohol limit.

SCENARIO 20

Roger - Roger attended a 21st birthday function at a nightclub. In the early evening he got into an argument with a woman who he saw push into line at the bar. Roger remained angry for several hours after the argument. Near the end of the evening he saw the woman leave the nightclub and walk to a bus stop. Roger waited for the woman's friend to leave before approaching her. He punched her twice in the head causing her to fall to the ground. Roger then attempted to kick the woman hard in the back as she lay on the ground but missed altogether. She was left with only minor bruising. Roger told police that he had intended to cause a serious injury to her and that he was disappointed that he had not.

SCENARIO 21

Perez - Perez was employed by the police to manage police files and documentation. He read a file that revealed the secret location of a witness in a high-profile murder trial that was about to begin. Perez was friends with the accused. He told the accused where the witness was hiding out. A relative of the accused then approached the witness about the trial. The witness fled and the case against the accused collapsed.

SCENARIO 22

Louis - Louis was a 42 year old man. He posed as a 19 year old male on internet chat rooms. In one chat room, Louis met Julia, a 13 year old girl. Louis and Julia spent 2 weeks communicating with each other. Louis sent Julia hoax photos of himself. Some of the photos showed a nude male. Julia sent Louis a photo of herself partially dressed. Louis persuaded Julia to meet in person. When she arrived at his house, Louis pretended to be the 19 year old man's father. Louis intended to have sexual intercourse with Julia. However before he could try anything the police arrived at the house after one of Julia's friends told her parents about her meeting with Louis.

SCENARIO 23

Hayden - The police were called to a party at a house by neighbours angry about the noise. The police spoke with Hayden who was the owner of the house. The officers smelt cannabis on Hayden. A subsequent search revealed a large bag of cannabis sitting on the kitchen table. Hayden admitted to the police that he had bought the cannabis for the party and that he had freely supplied it to his guests. He also said that he intended to use the cannabis left in the bag for future parties.

SCENARIO 24

Brad - Brad took part in a drag race with other cars. The cars raced down a busy city street in the early hours of Sunday morning, reaching speeds in excess of 200 kph. Brad lost control of his car and narrowly missed hitting two pedestrians crossing at a set of traffic lights. The vehicle then crashed into the front of a shop causing significant damage.

SCENARIO 25

Dominik - Dominik worked at a rest-home. His primary role in the rest-home was to feed and bathe elderly patients. Dominik was seen slapping one elderly male around the head and punching him in the back and arms. He told police that he did so in order to discipline the patient because he would not follow instructions.

SCENARIO 26

Peter - Peter drove long-haul trucks between Auckland and Christchurch. He and his first wife lived in Auckland and had three children together. Peter then had an affair with another woman who lived in Christchurch. While still married to his first wife, Peter married his second wife and they had two children. Peter lived separate lives with both families for a decade. However Peter was convicted of bigamy after his two wives meet each other by chance.

SCENARIO 27

Tui - A community group sold homemade cakes, biscuits and jams at a fair to raise money for the local SPCA. They made \$479 in cash sales. Tui waited until the stall had no one at it and stole the tin containing all the cash.

SCENARIO 28

Amelia - Amelia gave birth to a baby in her flat. The baby was stillborn. She buried the baby in her backyard so that her family would not find out that she had been pregnant.

Appendix III – Example of using the median vs. using the mean to provide an aggregate ranking

Below we use an illustrative example to show the difference that using the median vs. using the mean makes when forming an aggregate ranking for a group of research participants. Either approach can be used to create a measure of central tendency. Although for this project (which involves a relatively low number of research participants), the median is preferable to the 'mean' (which takes the total ranking score for each scenario and divides by the number of participants). This is because the former is less subject to one or two extreme view points affecting the measure of central tendency for the whole group.

A focus group has 7 research participants, and they decide to give Peter the following rankings:

- 23rd most serious
- 20th most serious
- 25th most serious
- 22nd most serious
- 23rd most serious
- 2nd most serious
- 18th most serious

If the mean was used to create an aggregate ranking

If the mean was used to create an aggregate ranking for the group, then Peter would be given an aggregate ranking of $(23+20+25+22+23+2+18) / 7$ (representing the number of participants). This creates an aggregate ranking of 19th most serious.

If the median was used to create an aggregate ranking

If the median was used to create an aggregate ranking for the group, then Peter would be given an aggregate ranking of 22nd most serious. This is because the rankings within the group would be sorted out from least serious to most serious (i.e. 2, 18, 20, **22**, 23, 23, 25) and the middle point of 22 would be selected as the median.

Appendix D

Final ranking of offences in penalty categories

Ctgy	Rank	Section	Act	Offence	Current max
A	1	172	Crimes	Murder	Life
A	2	74(1)	Crimes	Treason	Life
A	3	92(1)(a)	Crimes	Piracy (with murder, attempted murder, or endangering life)	Life
A	4	94(1)(a)	Crimes	Piratical act (with murder, attempted murder, or endangering life)	Life
B	1	98D	Crimes	Trafficking people by means of coercion or deception	20 years
B	2	298B	Crimes	Contaminating food, crops, water	10 years
B	3	98AA	Crimes	Dealing in people under 18 for sexual exploitation, body parts, forced labour	14 years
B	4	98	Crimes	Dealing in slaves	14 years
B	5	128B	Crimes	Sexual violation	20 years
B	6	235	Crimes	Aggravated robbery	14 years
C	1	98C	Crimes	Smuggling migrants	20 years
C	2	177	Crimes	Manslaughter	Life
C	3	180(1)	Crimes	Homicide as part of suicide pact	Life
C	4	173	Crimes	Attempted murder	14 years
C	5	182	Crimes	Killing unborn child	14 years
C	6	79	Crimes	Sabotage	10 years
C	7	191(1)	Crimes	Aggravated wounding	14 years
C	8	188(1)	Crimes	Wounding with intent to cause grievous bodily harm	14 years
C	9	200(1)	Crimes	Poisoning with intent to cause grievous bodily harm	14 years
C	10	201	Crimes	Infecting with disease	14 years
C	11	208	Crimes	Abducting for purposes of marriage or sexual connection	14 years
C	12	209	Crimes	Kidnapping	14 years
C	13	92(1)(b)	Crimes	Piracy (without murder, attempted murder, or endangering life)	14 years

C	14	94(1)(b)	Crimes	Piratical act (without murder, attempted murder, or endangering life)	14 years
D	1	232(1)	Crimes	Aggravated burglary	14 years
D	2	6(2)(a)	Misuse of Drugs	Import, export, manufacture, supply etc of Class A drug	Life
D	3	132(1)	Crimes	Sexual connection with child under 12	14 years
D	4	144A(1)(a) Part 1	Crimes	Sexual connection with child under 12 outside New Zealand	14 years
D	5	129(1)	Crimes	Attempted sexual violation	10 years
D	6	129(2)	Crimes	Assault with intent to commit sexual violation	10 years
D	7	234	Crimes	Robbery	10 years
D	8	236(1)	Crimes	Causing gbh with intent to rob	14 years
D	9	238	Crimes	Blackmail	14 years
D	10	142A	Crimes	Compelling indecent act with animal	14 years
D	11	109(2)	Crimes	Perjury for offence three years	14 years
D	12	183	Crimes	Procuring abortion by any means	14 years
E	1	267(1)	Crimes	Arson causing danger to life, damages immovable property or aircraft, ship etc.	14 years
E	2	269(1)	Crimes	Destroying property knowing danger to life	10 years
E	3	250(1)	Crimes	Destruction or interfering with computer system resulting in danger to life	10 years
E	4	116	Crimes	Conspiring to defeat justice	7 years
E	5	100(1)	Crimes	Judicial corruption in judicial capacity	14 years
E	6	113	Crimes	Fabricating evidence	7 years
E	7	239(1)	Crimes	Using force or threats to execute documents	14 years
E	8	298A	Crimes	Causing disease or sickness in animals	10 years
E	9	188(2)	Crimes	Wounding with intent to injure, or with reckless disregard	7 years
E	10	199	Crimes	Acid throwing with intent to injure	14 years
E	11	189(1)	Crimes	Injuring with intent to cause grievous bodily harm	10 years
E	12	6(2)(b)	Misuse of Drugs	Import, export, manufacture, supply etc of Class B drug	14 years
E	13	132(3)	Crimes	Indecent act on child under 12	10 years
E	14	144A(1)(a) Part 3	Crimes	Indecent act on child under 12 outside New Zealand	10 years
E	15	179	Crimes	Aiding and abetting suicide	14 years
E	16	78	Crimes	Espionage	14 years
E	17	77	Crimes	Inciting mutiny	10 years

E	18	76	Crimes	Party to treason	7 years
F	1	256(1)	Crimes	Forgery of document for advantage	10 years
F	2	267(2)	Crimes	Arson (property other than s267(1))	7 years
F	3	191(2)	Crimes	Aggravated injury	7 years
F	4	130	Crimes	Incest	10 years
F	5	10(2)(a)	Misuse of Drugs	Aiding offence against corresponding law in another country (section 6)	14 years
F	6	132(2)	Crimes	Attempt to have sexual connection with child under 12	10 years
F	7	144A(1)(a) Part 2	Crimes	Attempted sexual connection with child under 12 outside New Zealand	10 years
F	8	134(1)	Crimes	Sexual connection with young person under 16	10 years
F	9	144A(1)(b) Part 1	Crimes	Sexual connection with young person under 16 outside New Zealand	10 years
F	10	144C	Crimes	Organising or promoting child sex tours	7 years
F	11	204A	Crimes	Female genital mutilation	7 years
F	12	231	Crimes	Burglary	10 years
F	13	195A	Crimes	Failure to protect child or vulnerable adult	10 years
G	1	95	Crimes	Attempted Piracy	14 years
G	2	307A	Crimes	Threats of widespread harm to people or property	7 years
G	3	117	Crimes	Corrupting juries and witnesses	7 years
G	4	98A	Crimes	Participation in organised criminal group	10 years
G	5	102(1)	Crimes	Corruption by Minister	14 years
G	6	104(1)	Crimes	Corruption by law enforcement officer	7 years
G	7	119	Crimes	Prison break	7 years
G	8	195	Crimes	Ill treatment/neglect of child or vulnerable adult	10 years
G	9	236(2)	Crimes	Assault with intent to rob	7 years
G	10	257	Crimes	Knowingly using a forged document	10 years
G	11	258	Crimes	Altering documents with intent to deceive	10 years
G	12	100(2)	Crimes	Judicial corruption in official capacity	7 years
G	13	101(1)	Crimes	Bribery of judicial official in judicial capacity	7 years
G	14	134(3)	Crimes	Indecent act on young person under 16	7 years
G	15	144A(1)(b) Part 3	Crimes	Indecent act on young person under 16 outside New Zealand	7 years
G	16	272	Crimes	Possessing or making an explosive to commit crime	2 years

G	17	55	Arms	Carrying of firearm etc with criminal intent	5 years
G	18	109(1)	Crimes	Perjury	7 years
G	19	11	Mse Drugs	Stealing/receiving controlled drugs	7 years
G	20	223(a)	Crimes	Theft by person in special relationship	7 years (s223(a))
G	21	229	Crimes	Criminal breach of trust	7 years
G	22	260	Crimes	False accounting	10 years
G	23	266(3)	Crimes	Making counterfeit coins	10 years
G	24	138(1)	Crimes	Sexual exploitation of a person with significant impairment	10 years
G	25	198B	Crimes	Commission of crime with possession of firearm showing prima facie intent	10 years
G	26	186	Crimes	Supplying means of procuring abortion	7 years
G	27	189(2)	Crimes	Injuring with intent to injure, or with reckless disregard	5 years
G	28	204B(1)	Crimes	Sending child overseas for genital mutilation	7 years
G	29	204B(2)	Crimes	Aiding overseas act of genital mutilation	7 years
G	30	204B(3)	Crimes	Inducing person to submit to genital mutilation outside New Zealand	7 years

H	1	105(1)	Crimes	Corruption by official	7 years
H	2	54(1)	Arms	Makes or attempts to make use of any firearm etc with intent to resist lawful arrest	7 years
H	3	198A(1)	Crimes	Use of firearm against law enforcement officer	14 years
H	4	134(2)	Crimes	Attempt to have sexual connection with young person under 16	10 years
H	5	144A(1)(b) Part 2	Crimes	Attempted sexual connection with young person under 16 outside New Zealand	10 years
H	6	131(1)	Crimes	Sexual connection with dependent family member under 18 years	7 years
H	7	6(2)(c)	Misuse of Drugs	Import, export, manufacture, supply etc of other controlled drug	8 years
H	8	36AA	Land Transport	Offence against s 7 (driving recklessly or dangerously) or s 22 (failing to stop and ascertain injury) – causing death.	10 years
H	9	36A(3)	Land Transport	Unauthorised street or drag racing causing death	10 years
H	10	61(3AA)	Land Transport	Person in charge of motor vehicle causing death with EBA/EBA or under influence of drink and/or drugs so as to be incapable of having proper control of the vehicle	5 years
H	11	178(1)	Crimes	Infanticide	3 years
H	12	259	Crimes	Using altered document to deceive	10 years
H	13	90	Crimes	Riotous damage	7 years
H	14	78A	Crimes	Wrongful communication, retention, or copying of official information	3 years
H	15	118	Crimes	Assisting escape of POWs or Internees	7 years

H	16	198A(2)	Crimes	Use of firearm to evade lawful arrest	10 years
H	17	54(2)	Crimes	Possessing a firearm, explosive etc while committing offence of three years imprisonment	5 years
H	18	263	Crimes	Possessing forged bank notes	7 years
H	19	10(2)(b)	Misuse of Drugs	Aiding offence against corresponding law in another country (other than s 6)	7 years
H	20	102(2)	Crimes	Bribery of Minister	7 years

I	1	8	Summary	Publishing document or thing explaining manufacture of explosives	3 months
I	2	101(2)	Crimes	Bribery of judicial official in official capacity	7 years
I	3	103(1)	Crimes	Corruption by Member of Parliament	7 years
I	4	105A	Crimes	Corrupt use of official information by an official	7 years
I	5	223(b)	Crimes	Theft exceeding \$1,000	7 years
I	6	228	Crimes	Dishonestly taking or using document	7 years
I	7	230	Crimes	Taking, obtaining, or copying trade secrets	5 years
I	8	239(2)	Crimes	Use of menace or threats to steal property	7 years
I	9	241(a)	Crimes	Obtaining by deception exceeding \$1,000	7 years
I	10	247(a)	Crimes	Receiving more than \$1,000	7 years
I	11	249(1)	Crimes	Obtaining property or causing loss from dishonest access to a computer system.	7 years
I	12	250(2)	Crimes	Damaging a computer system	7 years
I	13	269(2)	Crimes	Destroying property	7 years
I	14	232(2)	Crimes	Armed with weapon with intent to commit burglary	5 years
I	15	28	Summary	Being found in public place preparing to commit crime	3 months
I	16	129A(1)	Crimes	Sexual connection induced by threat	14 years
I	17	135	Crimes	Indecent assault	7 years
I	18	121(2)	Crimes	Law enforcement officer permitting escape	7 years
I	19	122	Crimes	Assisting escape of mentally impaired person detained for offence	5 years

J	1	154	Crimes	Abandoning child under 6	7 years
J	2	192(1)	Crimes	Aggravated assault	3 years
J	3	192(2)	Crimes	Assault obstructing discharge of duty	3 years
J	4	16	Arms	Import firearms without permit	1 year
J	5	138(2)	Crimes	Attempted sexual exploitation of a person with significant impairment	10 years

J	6	138(4)	Crimes	Indecent assault on of a person with significant impairment	5 years
J	7	105(2)	Crimes	Bribery of official	7 years
J	8	105C(2)	Crimes	Bribery of foreign public official	7 years
J	9	105D	Crimes	Bribery outside New Zealand of foreign public official	7 years (same as s105C)
J	10	120	Crimes	Escaping from lawful custody	5 years
J	11	12A(3)(a)	Misuse of Drugs	Supply or manufacture of equipment or material for offence against s 6(1)(b) or s 9	7 years
J	12	12A(3)(b)	Misuse of Drugs	Possession of equipment or material for offence against s 6(1)(b) or s 9	5 years
J	13	53(3)	Arms	Discharges firearm etc in a manner likely to injure or endanger the safety of any person or with reckless disregard	3 years
J	14	48	Arms	Discharging firearm in or near a public place or dwelling	3 months
J	15	115(a)	Crimes	Conspiracy to false accusation for offence three years	14 years
J	16	24	Summary	False allegation or report to police	3 months
J	17	264	Crimes	Possession of instruments for forgery	10 years
J	18	261	Crimes	Counterfeiting public seals	10 years
J	19	176	Crimes	Accessory after the fact to murder	7 years
J	20	97	Crimes	Accessory after the fact to piracy	7 years
J	21	256(2)	Crimes	Forgery of document to be acted upon	3 years
J	22	110	Crimes	False oaths	5 years
J	23	12AB(2)	Misuse of Drugs	Section 12AB(2) MDA (Knowingly importing or exporting precursor substance)	7 years

K	1	308	Crimes	Damage with intent to intimidate or annoy	3 years
K	2	144A(1)(c)	Crimes	Sexual connection with young person under 18 outside New Zealand	7 years (see s23(1) Prostitution Reform Act 2003
K	3	131B	Crimes	Meeting young person under 16 following sexual grooming	7 years
K	4	131(2)	Crimes	Attempt to have sexual connection with dependent family member under 18 years	7 years
K	5	131(3)	Crimes	Indecent act on a dependent family member under 18 years	3 years
K	6	193	Crimes	Assault with intent to injure	3 years
K	7	202C	Crimes	Assault with a weapon	5 years
K	8	210	Crimes	Abduction of young person under 16	7 years
K	9	197	Crimes	Stupefying	5 years

K	10	216J	Crimes	Exporting, importing, selling intimate visual recording	3 years
K	11	216F	Crimes	Unlawful disclosure	2 years
K	12	87	Crimes	Riot	2 years
K	13	9(2)	Misuse of Drugs	Cultivation of prohibited plants	7 years
K	14	12(2)(a)	Misuse of Drugs	Use of premises or vehicle for the commission of any offence involving Class A drug	10 years
K	15	105B	Crimes	Use or disclosure of personal information disclosed under s 105A	7 years
K	16	49(1)	Arms	Carrying or discharging a variety of non-weapon firearms (such as bolt gun, tranquiliser gun, flare pistol etc)	3 months
K	17	52(1)	Arms	Presenting a firearm at another person	3 months
K	18	115(b)	Crimes	Conspiracy to false accusation for offence involving imprisonment of three years or more	7 years
K	19	266(5)	Crimes	Using or attempting to use counterfeit coins	3 years
K	20	43(1)	Arms	Sells a firearm (of limited capacity) to an unlicensed person	3 months
K	21	190	Crimes	Injuring by unlawful act	3 years
K	22	202(1)	Crimes	Setting trap with intent to injure	5 years
K	23	204	Crimes	Impeding rescue	10 years
K	24	306	Crimes	Threatening to kill or cause grievous bodily harm	7 years
K	25	20A	Summary	Unauthorised disclosure of certain official information	3 months
K	26	309	Crimes	Conspiracy to prevent collection of rates or tax by force or intimidation	2 years
K	27	51(1)	Arms	Unlawful possession in public place of pistol, firearm, explosive etc	3 years
K	28	202A(4)	Crimes	Possession of offensive weapon or disabling substances	3 years
K	29	103(2)	Crimes	Bribery of Member of Parliament	7 years

L	1	7(2)(b) part two	Misuse of Drugs	Supply of Class C drug	3 months
L	2	39(1)	Land Transport	Aggravated careless use of vehicle causing injury or death	3 years
L	3	62	Land Transport	Causing injury or death in situation where s61 does not apply.	3 years
L	4	129A(2)	Crimes	Indecent act induced by threat	5 years
L	5	47	Arms	Under influence of drink/drug to be incapable of having proper control of firearm etc	3 months
L	6	15	Misuse of Drugs	Making false statement in furtherance of licence	1 year
L	7	21	Summary	Intimidation	3 months
L	8	145	Crimes	Criminal nuisance	1 year
L	9	216I(1)	Crimes	Possessing an intimate visual recording to publish, export, or sell	3 years

L	10	56(4)	Land Transport	Driving with excess breath or blood alcohol (third or subsequent)	2 years
L	11	58(3)	Land Transport	Driving under the influence of alcohol and/or drugs so as to be incapable of having proper control of the vehicle (third or subsequent offence)	2 years
L	12	60(3)	Land Transport	Failure etc (third or subsequent offence)	
L	13	57A(3)	Land Transport	Driving etc (third or subsequent offence)	
L	14	45(1)	Arms	Unlawfully carry firearm or explosive	4 years
L	15	242	Crimes	False statement by promoter	10 years
L	16	233	Crimes	Possession of burglary instrument or disguised with intent to commit crime	3 years
L	17	401	Crimes	Contempt of Court	3 months
L	18	32(4)	Land Transport	Driving while disqualified (third or subsequent)	2 years
L	19	150	Crimes	Misconduct in respect of human remains	2 years
L	20	12(2)(b)	Misuse of Drugs	Use of premises or vehicle for the commission of any offence involving Class B drug	7 years
L	21	194(a)	Crimes	Assault on a child under 14	2 years
L	22	12B(3)	Misuse of Drugs	Being in possession of property that is the proceeds of drug offences	5 years
L	23	180(2)	Crimes	Party to a death from a suicide pact	5 years
L	24	216C	Crimes	Disclosure of private communication intercepted with device	2 years
L	25	243(3)	Crimes	Possession of property for money laundering or proceeds of crime	5 years
L	26	251(1)	Crimes	Sale of software for improperly accessing computer system	2 years
L	27	251(2)	Crimes	Possession of software for improperly accessing computer system	2 years

M	1	35	Land Transport	Offence against s 7 (driving recklessly or dangerously) or s 22 (failing to stop and ascertain injury) – no injury or death involved	3 months
M	2	36A(4)	Land Transport	Unauthorised street or drag racing - no injury or death caused	3 months
M	3	57(3)	Land Transport	Person younger than 20 driving with excess breath or blood alcohol	3 months
M	4	86	Crimes	Unlawful assembly	1 year
M	5	38(2)	Land Transport	Careless driving causing injury/death	3 months
M	6	53(1)	Arms	Causing bodily injury or death through careless use of a firearm	3 years
M	7	12AC(5)	Misuse of Drugs	Importing or exporting precursor substance without reasonable excuse	1 year
M	8	202(2)	Crimes	Allowing dangerous trap to remain in place	3 years
M	9	226(1)	Crimes	Conversion of vehicle or other conveyance	7 years
M	10	271	Crimes	Waste or diversion of electricity, gas, or water	5 years
M	11	267(3)	Crimes	Arson causing damage with disregard for safety of other property	5 years
M	12	15	Arms	Licensed gun dealer continuing business after revocation of licence	3 months

M	13	28	Arms	Person fails to surrender weapons to police on revocation or surrender of licence	3 months
M	14	114	Crimes	Signing/Use of purported affidavit or declaration	3 years
M	15	216H	Crimes	Making intimate visual recording	3 years
M	16	200(2)	Crimes	Poisoning with intent to cause annoyance	3 years
M	17	36	Arms	Carrying pistol or weapon without authority	3 months
M	18	262	Crimes	Counterfeiting corporate seals	5 years
M	19	265	Crimes	Dishonestly imitating authorised or customary mark	5 years
M	20	42(1)	Arms	Offences in respect of licences	3 months
M	21	49A	Arms	Unlawful possession of firearm or airgun when licence has been revoked	1 year
M	22	111	Crimes	False statements or declaration	3 years
M	23	143	Crimes	Bestiality	7 years
M	24	41	Arms	Failure to surrender airguns or antique weapons following written notification by police	3 months
M	25	5A	Summary	Disorderly assembly	3 months
M	26	5	Summary	Disorderly behaviour on private premises	3 months
M	27	307	Crimes	Threatening to destroy property or injure animal	3 years
M	28	50(1)	Arms	Unlawful possession of pistol or restricted weapon	3 years
M	29	13A	Summary	Possession of knives	3 months
M	30	12(2)(c)	Misuse of Drugs	Use of premises or vehicle for the commission of any offence involving a controlled drug	3 years
M	31	20	Arms	Possession of firearm without licence	3 months
M	32	10	Summary	Assault on police, prison, or traffic officer	6 months
M	33	194(b)	Crimes	Assault of female by male	2 years
M	34	196	Crimes	Common assault	1 year

N	1	22(2)	Misuse of Drugs	Failure to comply with ministerial notice regarding controlled drug	3 months (s27)
N	2	23(6)(a)	Misuse of Drugs	Prescribing Class A or B drug in breach of ministerial notice	6 months (not s27)
N	3	23(7)	Misuse of Drugs	Midwife prescribing pethidine in breach of ministerial notice	6 months (not s27)
N	4	25(2)	Misuse of Drugs	Prescribing, procuring, or attempting to procure controlled drug to/by a restricted person	3 months (s27)
N	5	24(1)	Misuse of Drugs	Medical Practitioner prescribing controlled drugs to dependent person	3 months
N	6	24(1)(a)	Misuse of Drugs	Medical or designated prescriber prescribing controlled drug to dependent person	3 months
N	7	22(4)	Misuse of Drugs	Failure to comply with ministerial notice regarding utensil or pipe	3 months (not s27)
N	8	22(5)	Misuse of Drugs	Failure to comply with ministerial notice regarding controlled drug (Managing director of body corporate) (not s 27)	3 months
N	9	23(6)(b)	Misuse of Drugs	Prescribing controlled drug in breach of ministerial notice	3 months (not s27)
N	10	33(2)	Land Transport	Applying for or obtaining a drivers license while disqualified	3 months
N	11	91	Crimes	Forcible entry and detainer	1 year
N	12	126	Crimes	Indecent act with intent to insult or offend	2 years
N	13	269(3)	Crimes	Destroying property with disregard for other property	7 years
N	14	53(2)	Arms	Leaving loaded firearm in circumstances so as to endanger life	3 years
N	15	13	Summary	Things endangering safety	3 months
N	16	21	Arms	Illegal possession of airgun	3 months
N	17	56(3)	Land Transport	Driving with excess breath or blood alcohol (first or second offence)	3 months
N	18	58(2)	Land Transport	Driving under the influence of drink and/or drugs so as to be incapable of having proper control of the vehicle (first or second offence)	3 months
N	19	14	Summary	Possession of burglary tools	3 months
N	20	60(2)	Land Transport	Failure or refusal to permit blood specimen to be taken or to undergo compulsory impairment test (first or second offence)	
N	21	57a(2)	Land Transport	Driving while impaired with blood evidence of X offence (first or second offence)	
N	22	206 Part 1	Crimes	Bigamy	7 years
N	23	207	Crimes	Feigned marriage or civil union	7 years
N	24	223(c)	Crimes	Theft exceeding \$500 but less than \$1,000	1 year
N	25	241(b)	Crimes	Obtaining by deception exceeding \$500 but less than \$1,000	1 year
N	26	247(b)	Crimes	Receiving exceeding \$500 but less than \$1,000	1 year

N	27	216D	Crimes	Prohibition on dealing in interception devices	2 years
N	28	58	Arms	Failing to report bodily injuries or death by person responsible for shooting	3 months
N	29	56	Arms	Obstruction of police officer exercising duties in Act	3 months
N	30	16	Misuse of Drugs	Obstruction of officers	3 months
N	31	23	Summary	Resisting police, prison, or traffic officer	3 months
N	32	32(3)	Land Transport	Driving while disqualified (first or second offence)	3 months
N	33	19	Misuse of Drugs	Failure to comply with demand to produce records or inspect stocks of controlled drugs.	3 months (s27)
N	34	124	Crimes	Distribution or exhibition of indecent matter	2 years
N	35	125	Crimes	Indecent act in a public place	2 years
N	36	216B	Crimes	Using interception device to intercept private communication	2 years
N	37	216I(2)	Crimes	Possessing an intimate visual recording	1 year
N	38	252	Crimes	Accessing computer system without authorisation	2 years
N	39	13(1)(b)	Misuse of Drugs	Possession of unauthorised seed or fruit	1 years
N	40	227	Crimes	Being in possession of an instrument for conversion	1 year
N	41	52(2)	Arms	Presenting anything that causes a person to believe that it is a firearm etc	3 months
N	42	12	Summary	Acts endangering safety	3 months
N	43	46(1)	Arms	Unlawfully in possession of imitation firearm	2 years
N	44	223(d)	Crimes	Theft not exceeding \$500	3 months
N	45	241(c)	Crimes	Obtaining by deception not exceeding \$500	3 months
N	46	247(c)	Crimes	Receiving not exceeding \$500	3 months

O	1	3	Summary	Disorderly behaviour	3 months
O	2	121(3)	Crimes	Failure to perform legal duty resulting in escape	1 year
O	3	181	Crimes	Concealing dead body of a child	2 years
O	4	144	Crimes	Indecency with animal	3 years
O	5	206 Part 2	Crimes	Bigamy (person knew marriage/civil union would be void)	2 years
O	6	207	Crimes	Feigned marriage or civil union (person knew marriage/civil union would be void)	2 years
O	7	27	Summary	Indecent exposure	3 months
O	8	40	Arms	Person in possession of firearm etc fails to provide details to police	3 months
O	9	7(2)(a) part one	Misuse of Drugs	Possession or use of Class A drug	6 months
O	10	6A	Summary	Associating with violent offenders	3 months

O	11	6B	Summary	Associating with serious drug offenders	3 months
O	12	29	Summary	Being found on property, etc, without reasonable excuse	3 months
O	13	7(2)(b) part one	Misuse of Drugs	Possession or use of controlled drug (other than Class A)	3 months
O	14	13(1)(a)	Misuse of Drugs	Possession of utensil	1 year
O	15	13(1)(aa)	Misuse of Drugs	Possession of needle or syringe	1 year
O	16	6	Summary	Associating with convicted thieves	3 months