

13 June 2011

Jacqui Dean, MP
Chairperson
Law and Order Committee
Parliament Buildings
WELLINGTON

By email to: edward.siebert@parliament.govt.nz

Dear Ms Dean

Further submission: Sentencing (Aggravating Factors) Amendment Bill

Thank you for the invitation to provide a further submission related to the above bill, addressing the question of whether the fact an assault was committed by a police officer or prison guard ought also to be considered an aggravating factor at sentencing.

I had the opportunity to listen to the submissions made by the Council for Civil Liberties (CCL) on 8 June 2011. These appeared essentially to reject any justification for introducing an aggravating factor based on the occupation of the victim; and then argued that if such was to be introduced, an equivalent aggravating factor applying to assault by members of that occupation must also be introduced in order to maintain 'balance' or 'even-handedness' in the criminal law.

Firstly, we would note that there can be no objection based on legal principle to the creation of aggravating factor applying only to victims belonging to a certain class or classes of person. The CCL appeared to mount such an objection. It is not novel for the criminal law to recognise the class of person to which a victim belongs. Most obviously relevant in this context, there already exist specific offence provisions of assault on a police, prison or traffic officer (section 10, Summary Offences Act 1981) and various other provisions in statutes such as section 198A of the Crimes Act 1961. There are also numerous other sections recognising the class of a victim based for example on age, mental impairment or gender. Even within the more narrow context of sentencing law, sections 9(1)(f), (g), and (h) of the Sentencing Act 2002 all describe aggravating factors based on the class of person to which the victim belongs and/or the relationship between the offender and victim. Introduction of a further class of victim for the purposes of weighing aggravating and mitigating factors is not therefore novel in the way the CCL appeared to argue that it is.

In respect of the CCL's specific objection to the bill's proposed new aggravating factor, the Police Association believes their argument is fundamentally flawed because it ignores the unique role of police officers in society. It is a police officer's duty to keep the peace and protect the public from criminal harm. That duty actually demands a police officer confront a violent situation to restore law and order. Failure to do so (when it is reasonably possible for them to do so safely) would be an abrogation of their duty. It is therefore inherent in the

occupation of policing that society requires police officers to place themselves in physical confrontations, if necessary, where the risk of being subjected to assaultive behaviour (such as credible threats, attempted or actual assault) is high.

Appreciating the fact that society imposes this duty uniquely on its police is important both in responding to CCL's objection to the bill's proposed aggravating factor for assault on a police officer, and also CCL's proposal to introduce a 'balancing' provision for assault by an officer.

In terms of the CCL's argument against the bill as drafted (as we understood it from their oral submission), they appeared to argue that assaults simply arise from confrontations between two individuals, and assaults on police are no different in that regard; and thus the fact the victim happened to be a police officer does not require particular recognition in sentencing law. This characterisation entirely ignores the capacity in which an officer is required to enter such a confrontation in carrying out their duty: they do so not as individuals, but as the coercive arm of the State, acting on behalf of society, in the public interest, to uphold the rule of law. They enter such situations at personal risk to themselves, but subordinate that personal consideration to performance of their public duty. An officer enters a confrontation to assert the rule of law and the authority of the State; an offender may submit to that authority or may choose to reject it and attack the officer. So the nature of the relationship within which the confrontation takes place immediately separates and elevates any assault committed on the officer above the seriousness of an assault occurring in a confrontation between two private individuals. For that reason creation of an aggravating factor solely on the basis of the policing occupation is clearly justifiable.

The unique duties society requires of its police are also key to responding to the CCL's call for a 'balancing' provision making assault by a police officer an aggravating factor.

It is accepted by our common and statute law that in carrying out their duty to society, police may be required to use force, for example to effect arrest or intervene to stop or prevent crime, and harm to people or property. Society not only accepts that police may have to use coercive force to protect the public and/or themselves in doing their duty to uphold the rule of law, but in fact expects and even requires officers to do so: since failure to act in many circumstances would amount to dereliction of duty.

The criminal law recognises this fact by offering appropriate defences for constables who use reasonable force in the course of performing their duty. Absent these defences, use of force by a constable would, *prima facie*, be an assault.

Where a complaint of assault is made against a police officer, regarding their on duty use of force, the issue to be determined is therefore usually whether the force used was *reasonable* in the circumstances. The test of 'reasonableness' is necessarily extremely subjective, and the officer's belief as to the degree of threat he or she was confronting and dealing with on behalf of society is key. That belief may be formed subject to the stresses and pressures inherent within a physical confrontation where threats to physical safety are perceived. On later review others may believe the force used was excessive. On very rare occasions, juries may reach that conclusion and find a constable guilty of assault in the course of their duties.

Where that happens, a judge is currently able to weigh all the aggravating and mitigating circumstances in which the excessive force was used. Aggravating factors might include for example that the suspect was restrained, not posing a threat and unable to defend themselves; or that the constable was not acting in a belief that they were doing their duty. In any such case we believe a judge would be inclined to view such factors very seriously. Conversely, mitigating factors might include that the officer only ever entered the confrontation in the first place because they believed they had to take action to protect innocent members of the public, and entering a criminal conviction against them for actions taken in good faith performance their perceived public duty might under those circumstances be considered unjust.

However, the important point is that any aggravation depends on the particular circumstances of the use of force, and the disposition and respective actions of the constable and suspect in the specific case. The mere fact that force was used against a suspect is not *of itself* an aggravating feature, unlike the inverse scenario of assault on police. Suspects are not therefore a special class of person requiring the blanket protection of the law against use of force against them in a way that is analogous to police officers. On the contrary, society expects and indeed demands that constables use (reasonable) force against suspects if and when it is necessary to do so in performance of their public duty. As such, the fact of assault on police is a clear, black-and-white aggravating feature which easily lends itself to creation of a statutory provision as proposed by the bill. In contrast, the necessary subjectivity involved in assessing whether any given use of force by a constable was reasonable or otherwise, and weighing aggravating and mitigating factors which may also be highly subjective, means assault by a constable in the course of their duties does not lend itself at all well to a statutory provision, but rather is best left in the hands of a sentencing judge.

Thank you again for the invitation to submit on this issue.

Yours sincerely

Greg O'Connor
PRESIDENT