New Zealand Law Society
Te Kāhui Ture o Aotearoa

Ram Raid Offending and Related Measures Amendment Bill

19/10/2023

1. Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Ram Raid Offending and Related Measures Amendment Bill 2023 (**Bill**).

1.2 The Law Society opposes this Bill. It considers that:

(a) To the extent the new offence has been created specifically to capture 12- and 13-year-olds, such an aim is inappropriate and breaches the rights of children.

(b) The new offence also captures young people over the age of 14, and adults. This is unnecessary, as such offending can already be captured by existing law.

1.3 The Law Society acknowledges public concern about offending of this type and the significant harm it can cause. While there is a clear public interest in addressing any increase in ram raid offending, the Law Society is concerned with any new provisions that allow 12- and 13-year-olds to be prosecuted in the Youth Court, especially where they are a first-time offender. It strongly agrees with the Attorney General's report on the Bill (**Attorney General's Report**)[1] which concludes that the Bill is inconsistent with the right of children and young people to be dealt with in a manner that takes into account their age; the right to be secure against unreasonable search and seizure; and the right to freedom of expression.

1.4 The Bill has a broad policy aim to "reduce youth-dominated offending by increasing accountability for those who engage in the criminal behaviour covered by the Bill".[2] While this has a clear youth focus, we note at the outset the new ram-raid offence will also apply to adult offenders. Given this, the Law Society questions whether the underlying policy intent is not already achieved through existing law.

1.5 Further policy work is needed to address the significant legal and practical issues that will arise as a result of this Bill as currently drafted.

1.6 This submission has been prepared with input from the Law Society's Criminal Law Committee and Youth Justice Committee.[3]

1.7 The Law Society wishes to be heard on this submission.

2. The Bill's policy intent

General comments

2.1 The "General policy statement" in the Bill states:[4]

> This Bill responds in a practical and meaningful way to offending that is predominantly undertaken by young people. It will disincentivise that behaviour by better holding to account those young people and ensuring that there are greater interventions and consequences for their criminal behaviour. This

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1 Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Ram Raid Offending and Related Measures Amendment Bill, 23 August 2023.

2 Ram Raid Offending and Related Measures Amendment Bill, Explanatory Note, p 1.

3 See the Law Society's website for more information about these committees: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

4 Above n 2.

Bill will ensure that young offenders, as well as those who encourage or enable them to offend, face greater accountability for offending.

2.2 The Bill proposes to achieve this policy intent by:

(a) Introducing a new offence specifically criminalising ram-raiding;

(b) Allowing 12- and 13-year-olds to be prosecuted for a ram raid offence in the Youth Court without being a previous offender;

(c) Allowing bodily samples to be taken from 12- and 13-year-olds who have been charged with the new ram raid offence in the Youth Court;

(d) Introducing a new aggravating factor at sentencing where a young person has livestreamed the offending, posted a copy of that online, or distributed it via digital means; and

(e) Introducing new aggravating factors at sentencing where an adult aids, abets, incites, counsels or procures any child or young person to commit an offence, or for any person who livestreamed the offending, posted it online or otherwise digitally distributed it.

2.3 As noted above, the Law Society opposes the Bill on the basis that it creates a pathway for 12- and 13-year-olds to be prosecuted in the Youth Court, even where they are a first-time offender. By definition, 12- and 13-year-olds are children.[5] Further, the United Nations Convention on the Rights of the Child (**UNCROC**), which New Zealand is a signatory to, defines a child as a person who is under the age of 18 years old.[6] The proposed amendments breach the New Zealand Bill of Rights Act 1990 (**NZBORA**), international law and international best practice. We discuss this further below in section 3.

2.4 However, putting aside the Law Society's position in relation to 12- and 13-year-old offenders, it is also our view that serious consideration should be given to whether the policy intent behind the Bill is not already adequately achieved through existing law.

2.5 In a typical ram-raid scenario, multiple existing offences will be committed. For example:

(a) using a vehicle to damage a building is an offence under section 269(2) of the Crimes Act 1961 (intentional damage, maximum penalty seven years' imprisonment);

(b) entering the building with the intent of stealing property is an offence under section 231(1)(a) of the Crimes Act (burglary, maximum penalty 10 years' imprisonment); and

(c) actually stealing items is an offence under section 219 of the Crimes Act (theft, maximum penalty of up to seven years' imprisonment depending on the property stolen).

2.6 Where a person does not physically enter the building but provides some other kind of assistance (for example, keeping watch), they are a party to the offending under section 66 of the Crimes Act. The same applies to any person who encourages, incites, or commissions the ram-raid. As parties, they are subject to the same penalties as those who actually drive the vehicle and/or steal the items from the business.

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[5] Oranga Tamariki Act 1989, s 2 which defines children as those below the age of 14 years old. We note the Bill makes no corresponding amendments to this definition.

[6] United Nations Convention on the Rights of the Child, art 1.

2.7 In light of this, it is difficult to see what more the creation of an additional offence could achieve in terms of the likelihood of detection and prosecution, or sentencing aims including deterrence, denunciation, or community protection.

2.8 As noted above, the Law Society accepts that a particular motivation for the Bill is public concern about this kind of offending by children and young persons. The Law Society acknowledges that the youth justice pathways provided for by the OT Act do not currently allow for children to be prosecuted for the offences involved in a typical ram-raid. However, as discussed further below, we do not consider that creating a new offence for 12- and 13-year-old offenders is an age-appropriate response.

Regulatory Impact Analysis

2.9 Although the Bill is said to be a response, in a practical and meaningful way, to offending that is predominately undertaken by young people, there is currently no available Regulatory Impact Analysis and therefore no opportunity to assess the policy work behind the Bill, including the context of any increase in offending of this nature. There is also no supplementary evidence which outlines how, for example, the proposals will make a significant difference to stop repeat offending. According to the Bill's Explanatory Note, Treasury has agreed that any Regulatory Impact Analysis will be developed by the relevant agencies after the proposals have been introduced. In our view, this is unsatisfactory particularly where the Bill will introduce grave consequences to children and young people, who are not currently captured by the youth justice system, and in breach of their protected rights.

3. Extension of criminal liability to children aged 12 and 13

3.1 Clause 13 is at the core of the entire Bill. It creates the pathway under which children aged 12 and 13 can be prosecuted in the Youth Court for the proposed new ram raid offence in section 231B. The Law Society adopts and strongly supports the concerns expressed in the Attorney-General's Report in relation to clause 13 in that the Bill is inconsistent with fundamental human rights. We do not propose to traverse that report in detail but do wish to highlight some key concerns.

Minimum age of criminal responsibility

3.2 The Law Society submits that compelling evidence is required to justify the criminalisation of conduct by 12- and 13-year-olds, given the well-traversed scientific evidence about their reduced capacity for decision-making, and the well-known harms that accrue from involvement in the criminal justice system at a young age, including an increased chance of reoffending.

3.3 The Law Society submits that any "creep" downwards of the minimum age of criminal responsibility should be strongly resisted. There is no demonstrated basis for a belief that lowering the age at which children can be tried for this offence (whether as first offenders or as repeat offenders) is necessary as a "last resort". Further, without a Regulatory Impact Analysis, there is insufficient evidence to demonstrate that existing criminal measures, such as bail conditions or custody (as the Bill suggests), would produce greater deterrence or increased prospects for

rehabilitation for children and young people.[7] We also note that it is unclear what attempts have been made to investigate any alternative measures which might aim to reduce offending of this type.

3.4 The Law Society agrees with the Attorney General that the premise of the OT Act, relevant international law, and evidence regarding the neurological development of children and young people, all support the proposition that age-appropriate treatment of offenders under the age of 14 years requires a welfare-based response rather than a criminal justice one.[8]

3.5 Research consistently indicates that the adolescent brain does not fully develop until at least their mid-twenties, has highlighted the complex needs faced by youth offenders,[9] and that factors which increase the risk of offending behaviour are cumulative. Further, the experience of youth advocates and others who work in the youth justice jurisdiction is that children and young people who offend often come from very complex backgrounds, and typically present with a range of cognitive, communication, learning, and other difficulties (for example, communication disorders, post-traumatic stress disorder, foetal alcohol spectrum disorder, anxiety, brain injuries and substance disorders). Therefore, 12- and 13-year-old offenders charged with a criminal offence are unlikely to understand the impact of their actions or to comprehend the criminal proceedings they are about to face.

3.6 The number of young people appearing in the youth court with a neurodiversity, for example, is also increasing. Often, it is those young people who are highly over-represented in the criminal justice system. Offending by children and young people does not occur in a vacuum and is often symptomatic of wider care and protection issues,[10] which if dealt with through a traditionally adversarial criminal justice approach will most often be destructive. This is supported by the latest Youth Justice Indicators report which highlighted that in 2021/22, 92% of children and 88% of young people who were referred to a Family Group Conference (FGC) had previously been the subject of a report of concern to OT about their care and protection.[11]

3.7 UNCROC requires states to adopt a minimum age of criminal responsibility.[12] As noted above, in New Zealand this is currently set at 14 years of age. The Government has previously accepted a recommendation from the United Nations Human Rights Council in 2019 to increase our minimum

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7 We note the Attorney General's report indicates that in an earlier version of the same report, the "evidence casts doubt on the prospects of a significant deterrence effect on 12 and 13 year olds because, among other things, child offending often occurs in the heat of the moment, and children's decision-making and reasoning skills and abilitiies are not fully developed" (at [40]). It is not clear what 'evidence' is being referred to here with no supplementary regulatory analysis provided with the Bill.

8 Above n 1, at [15]-[16].

9 See for example Lambie, I. (2020). What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand. Auckland, NZ: Office of the Prime Minister's Chief Science Advisor. Available from www.pmcsa.ac.nz and Reil, J., Lambie, I., Becroft, A., & Allen, R. (2022). How we fail children who offend and what to do about it: 'A breakdown across the whole system'. Research and recommendations. Auckland, NZ: The Michael and Suzanne Borrin Foundation, the New Zealand Law Foundation & the University of Auckland.

10 Ministry of Justice. 2023. Youth Justice Indicators Summary Report, April 2023. Wellington: Ministry of Justice, at p 4

11 Ibid, at [YJI(1.6)].

12 Above n 6, art 40(3).

age of criminal responsibility (to preferably 15 or 16) but this is yet to be actioned. This has since been endorsed by the United Nations Committee on the Rights of the Child, where the Committee also indicated the minimum age of criminal responsibility should be raised to at least 14 years of age regardless of offence.[13] The Committee also said the age of criminal responsibility was offence-based rather than child-centered.[14]

3.8 Considering the above, the proposal to create a new pathway in the OT Act for 12- and 13-year-olds to be held criminally responsible, runs contrary to international law and established evidence on the neurological development of children and young people. Broader consideration of these impacts must occur before the Bill can proceed.

Proposed deterrent effect

3.9 Underpinning the proposals in the Bill is a concern to break the cycle of offending for a small cohort of repeat offenders for whom it is considered existing measures are not working. However, for 12- and 13-year-olds who have engaged in prior offending, and are then alleged to have committed the new offence, there is in theory already a pathway in the OT Act by which they may be subject to criminal proceedings. [15]

3.10 We agree with the Attorney General that notwithstanding any issues that currently exist in relation to using the existing repeat offender pathway in the OT Act,[16] questions remain over whether there is a rational connection between creating a new pathway for 12- and 13-year-olds to be charged, and the underlying objectives of the Bill. Of significant concern is that the new pathway can be used for first time offenders. It is well documented that early exposure to the criminal justice system can have detrimental, life-long effects.

3.11 Further, we acknowledge the latest Youth Justice Indicators Summary Report shows a small increase in police proceedings against children in 2021/22 compared to 2020/21. However, the Report also highlights a continued decline in youth offending over the past decade which is evidence that our youth justice system on the whole is continuing to work as intended for most children and young people, and for the safety of New Zealanders.[17]

Other considerations

3.12 Finally, the Law Society adds that:

(a) Clause 13 appears inconsistent with Rules 4.1 and 5.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the "**Beijing Rules**"). For the reasons given above, creating a general rule that children can be prosecuted for this

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13 United Nations Committee on the Rights of the Child, Concluding Observations on the 6th periodic report of NZ, CRC/C/NZL/CO/6 (28 Feb 2023) at [42(b)] and [43(b)].

14 Ibid, at [42].

15 Oranga Tamariki Act 1989, s 272(1)(c).

16 Above n 1, at [43]-[45].

17 The Attorney General's report similarly addresses this point by noting that "it is likely a court would consider the objective of addressing a rise in a particular type of youth criminal behaviour, which has become a matter of public concern, as a sufficiently important objective to justify curtailment of rights. This is despite statistics demonstrating that more generally child and youth crime has declined over time (at [37]).

offending is not a proportionate response to the offending and fixes the age of criminal responsibility too low.

(b) The detention of children and young people that will result from the Bill's enactment would also not meet the criteria set out in the United Nations Guidelines for the Prevention of Juvenile Delinquency (known as the "**Riyadh Guidelines**"), in that means other than incarceration have not been adequately explored as a way of controlling the danger posed by ram-raids.

(c) There is very real practical issue about whether Oranga Tamariki has capacity to suitably provide for any 12- or 13-year-old children held in custody while awaiting trial or sentenced to detention in youth facilities. Any shortfalls in resourcing would need to be addressed prior to any prosecutions being brought, or New Zealand would be in breach of various international conventions, including UNCROC (Articles 3, 19, 25, 27 and 40), the Beijing Rules (Rule 1.6) and the Riyadh Guidelines (Guideline 58).

4. Proposed new ram raid offence - section 231B

4.1 Clause 6 of the Bill inserts new section 231B, the primary new ram raid offence (by using a motor vehicle to damage a building and enter it with intent to commit an imprisonable offence).

4.2 If, despite the Law Society's considerable reservations set out above, the Bill does proceed, the Law Society submits the wording of proposed new section 231B is problematic and recommends that it be substantially redrafted.

Technical issues – section 231B(1)

4.3 In terms of subsection (1), the Law Society makes the following recommendations:

(a) The wording of subsection (1) imports the elements of the offence of burglary. Clause 5 of the Bill likewise imports the extended definition of "building" and "entry" that are used in the definition of the offence of burglary. It would streamline the wording of the offence, and avoid any doubt about how the elements should be interpreted, if this subsection explicitly adopted "burglary" as part of the elements of the offence.

(b) In a similar vein, the phrase "use a motor vehicle to damage a building and enter the building" contains multiple propositions and is liable to cause confusion. It is not clear whether a person in the motor vehicle that damaged the building but did not enter it would be covered by the offence. Nor is it clear whether the entry of the building needs to be simultaneous with the use of the motor vehicle to cause damage (particularly given that clause 5 of the Bill imports the extended definition of "entry"). Thus, if a driver drove their vehicle into a building's door and broke the lock, but did not enter the building themselves, it is not clear whether an offence has been committed.

(c) This could be remedied by amending clause 5 of the Bill so that section 231(2)(a) reads "entrance into a building or ship is made as soon as any part of the body of the person making the entrance, or any part of any instrument or vehicle used by that person, is within the building or ship".

4.4 The phrase "motor vehicle" is not used elsewhere in the Crimes Act. However, the term "vehicle" is used extensively. Especially with developments in vehicular technology, the inconsistent use of terms may cause confusion. The Law Society recommends that either the adjective "motor" should be deleted, or a definition of "motor vehicle" should be included in the Bill.

Substantive issues – section 231B(2)

4.5 Proposed new section 231B(2) creates what is essentially extended party liability for those involved in ram-raids. The Law Society's view is that this provision is too broad, unnecessary, and creates real risk of over-criminalisation and infringing protected NZBORA rights.

4.6 The Law Society considers that section 66 of the Crimes Act already creates an appropriate framework for imposing liability on parties to offences. As noted above at paragraph 2.6, anyone who assists with, encourages, incites, or commissions a ram-raid will already commit an offence under section 66(1). Moreover, section 66(2) creates extended party liability where a group joins together for one unlawful purpose but the commission of other offences is foreseeable. Thus, anyone who—for example—helps steal a vehicle will be liable if it was foreseeable that the stolen vehicle might be used in a ram-raid.

4.7 The Law Society considers that (by and large) the existing case law under section 66 strikes the correct balance between holding secondary offenders to account and minimising intrusions into the rights to freedom of expression and association.

4.8 Against that background, proposed new section 231B(2) is wholly disproportionate:

(a) New section 231B(2)(a) is unnecessary, as the driver of the vehicle would be either a principal offender or liable for aiding the principal(s) under section 66(1) of the Crimes Act.

(b) New section 231B(2)(b) would be unnecessary if the passenger was actively assisting or encouraging the principal offenders—again, that conduct would already be an offence by virtue of section 66(1). It therefore is only meaningful where the passenger does <u>nothing</u> to assist, encourage, or otherwise participate in the ram-raid. In those scenarios, the Law Society struggles to see any justification for the passenger being subject to prosecution. Indeed, there are multiple situations that would appear to be caught by section 231B(2)(b) and where any criminal prosecution would be manifestly unjust, such as:

i. where a friend or relative of the driver is told that they are to ride along during the ram-raid, but they take no active part and indeed do not wish to be there; or

ii. where a passenger gets into the vehicle not knowing that a ram-raid is planned, is then told about what is to happen, and wants to get out of the vehicle but cannot do so until the driver stops.

The Law Society considers that both scenarios are of particular concern given that the Bill will allow for prosecution of 12- and 13-year-old children, who may lack the assertiveness and maturity to extract themselves from these situations.

4.9 New section 23B(2)(c) causes similar problems. Again, it is not necessary in order to capture lookouts and others who are participating in or assisting the ram-raid. Its drafting only comes into play where a person is taking no active part in the ram-raid but knows that one is to occur. The

breadth of the section—particularly the fact that the key act is merely "waiting"—means that it is very likely to catch innocent bystanders. For example, a person who sees that a ram-raid is about to occur, and decides to wait nearby while they call the Police, will technically have committed an offence. Similarly, an associate of the principal offender who decided not to participate in the ram-raid, but waited nearby because they were worried about their friends or relatives being hurt for example, would also be captured. Such people could only escape liability by retreating an uncertain distance away from the building that was being ram raided.

4.10 For those reasons, the Law Society submits that section 231B(2)(b) and (c) are likely to represent unjustified limitations on sections 17 and 18(1) of NZBORA (freedom of association and movement). We note the Attorney-General's Report on the Bill did not identify or examine any rights issues arising from the proposed text of section 231B. In effect, a person who realises a ram raid will occur but has no connection to the offending or offenders, is forced to move away from the target building or they will commit an offence under the new section. It is impossible to see how this could be justified in a free and democratic society.

4.11 There is also an argument that as section 231B(1)(c) effectively compels persons to move away from a building, it may be an infringement of the section 16 and 17 rights to freedom of peaceful assembly and of association (buttressed as those sections are by Article 15 of the UNCROC).

Maximum penalty

4.12 As an aside, we note the maximum penalty of 10 years for the proposed offence will have an immediate impact on costs. That level of sentence automatically triggers the requirement for legal representation at any Family Group Conference convened by Oranga Tamariki.[18] The Bill's General Policy Statement refers to ensuring a better range of immediate responses to children and young people and to allow a greater range of interventions. However, presently resources are a major constraint on any available interventions. If the Bill proceeds, adequate resourcing will be required immediately to ensure the objectives of the Bill are achievable.

5. Amendments to take bodily samples

5.1 Clauses 7-10 of the Bill amend the Criminal Investigations (Bodily Samples) Act 1995 to create a regime for taking bodily samples from persons aged 12 or 13 who are charged with or convicted of an offence under proposed section 231B.

5.2 The Attorney-General's Report, at paragraphs 55 to 57, expresses the view that, as proposed section 231B is inconsistent with NZBORA, the subsequent amendments to the Criminal Investigations (Bodily Samples) Act 1995 are also inconsistent, namely with right to be free from unreasonable search and seizure under section 21.

5.3 We also note the amendments proposed in clauses 7-10 appear to be inconsistent with Article 40(2)(7) of UNCROC which provides that states parties shall ensure that children charged with offences shall have the right to "have his or her privacy fully respected at all stages of the proceedings".

[18] Oranga Tamariki Act 1989, s 248A.

5.4 The Law Society agrees with, and adopts, the Attorney General's reasoning and submits this part of the Bill should also not proceed.

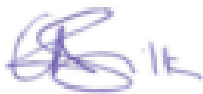
6. New aggravating factors at sentencing

6.1 Clause 23 of the Bill amends the Sentencing Act 2002 to include a new aggravating factor relating to an offender livestreaming or posting online their offending. This also includes corresponding amendments to the OT Act (clause 14) to apply in the context of criminal offending by children and young people.

6.2 The Law Society agrees with the Attorney-General's Report that clauses 14 and 23 of the Bill, as presently drafted, unjustifiably limit the right to freedom of expression and to disseminate and receive information (section 14 of NZBORA and Article 14 of UNCROC).[19]

6.3 The Attorney-General suggests the new aggravating factor could be amended to make explicit reference to 'glorifying' offending and/or 'inciting' offending as a way to ameliorate or remove the rights-inconsistency, coupled with adding an exclusion where the communication of the offending was in the public interest. The Law Society agrees these amendments may assist with ensuring the proposals are consistent with NZBORA.

6.4 Finally, the Law Society submits there has been insufficient consideration about whether stronger regulation (or enforcement of existing regulation) of social media organisations might be effective at limiting the opportunities for offenders to publicise their offending. Proactive restrictions on the dissemination of such publicity may be more likely to reduce their spread rather than post-fact punishments of offenders. Arguably, tighter controls on social media may be more effective at targeting the phenomenon of social media glorifying ram raid offending, than the proposed changes in the Bill. We invite the Committee to consider this issue further.



Caroline Silk
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[19] Above n 1, at [59]-[65].