Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Ram Raid Offending and Related Measures Amendment Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 269 of the Standing Orders of the House of Representatives

1. I have considered this Bill for consistency with the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**). I conclude it appears to be inconsistent with the right of a child, in determination of a charge, to be dealt with in a manner that takes account of the child's age (section 25(i)), the right to be secure against unreasonable search or seizure (section 21), and the right to freedom of expression (section 14).

2. I bring these inconsistencies to the attention of the House under section 7 of the Bill of Rights Act and Standing Order 269.

Summary

3. I have concluded that the Bill, by creating a new pathway by which 12 and 13 year olds can be subject to criminal proceedings in the Youth Court in respect of first-time offending, is inconsistent with section 25(i) of the Bill of Rights Act.

4. In light of this conclusion, the proposed consequential amendments to enable court-ordered taking of bodily samples from 12 and 13 year olds, are inconsistent with section 21 of the Bill of Rights Act.

5. The Bill, by creating new aggravating factors relating to posting offending online, is inconsistent with section 14 of the Bill of Rights Act.

The Bill

6. The Bill is an omnibus Bill which amends the Crimes Act 1961 (**Crimes Act**), Criminal Investigations (Bodily Samples) Act 1995 (**Bodily Samples Act**), the Oranga Tamariki Act 1989 (**OTA**), and the Sentencing Act 2002 (**Sentencing Act**).

7. The Explanatory Note to the Bill explains that these amendments are united in addressing the topic of 'youth-dominated offending', and by the 'single broad policy' of 'reduc[ing] youth-dominated offending by increasing accountability for those who engage in the criminal behaviour covered by the Bill'.

8. The key measures introduced by the Bill are:

8.1 Amendment of the Crimes Act to criminalise what are colloquially known as 'ram raids' by introducing a new offence of 'Using a motor vehicle to damage building and enter it with intent to commit an imprisonable offence', which carries a maximum term of imprisonment of 10 years (**the new offence**).

8.2 Amendment of the Bodily Samples Act to enable the making of an application for, and grant by a judge of, an order that a bodily sample be given by a suspect who was 12 or 13 years old at the time they are alleged to have committed the new offence.

8.3 Amendment of the OTA to:

8.3.1 Enable the Youth Court to hear proceedings under the Criminal Procedure Act 2011 against a child aged 12 or 13 years old, where the child is alleged to have committed the new offence.

8.3.2 Introduce a new factor to be taken into account in sentencing a child or young person in proceedings before the Youth Court. That is, that the child or young person livestreamed, posted online a record of, or shared by digital communication a record of, the offending in respect of which they are being sentenced.

8.4 Amendment of the Sentencing Act to introduce two aggravating factors:

8.4.1 That the offender (being over 18 years old) was convicted as a party to an offence committed by a child or young person.

8.4.2 That the offender livestreamed, posted online a record of, or shared by digital communication a record of, the offending in respect of which they are being sentenced.

Section 25(i) of the Bill of Rights Act

Policy Background

9. The amendment to OTA to allow for 12 and 13 year olds to proceed via criminal proceedings in the Youth Court where alleged to have committed the new offence is a response to the recent rise in ram raid offending by children and young people. This new pathway to the Youth Court is designed to give police greater tools to respond to such offending, and in particular to address a small group of child offenders who are said to be stuck in a cycle of offending, so as to break the cycle.[1] The Youth Court pathway opens up more intensive options to address child offending, including affording the police the ability to apply for bail conditions and for offenders to be held in custody by Oranga Tamariki.[2]

Summary – Consistency with Bill of Rights

10. The new pathway to the Youth Court for 12 and 13 year olds who are alleged to have committed the new offence engages the right in section 25(i) of the Bill of Rights Act, as it involves application of criminal proceedings to children.

11. While acknowledging that there is a clear public interest in addressing the rise in ram raid offending, including by those under 14 years old, and in particular seeking to break the cycle of offending for a small cohort of repeat offenders, I conclude that the measure does not appear to constitute a justified limitation under section 5 of the Bill of Rights.

Limitation of Right

12. Section 25(i) of the Bill of Rights Act provides:

> 25 Minimum standards of criminal procedure
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

---

1 Rt Hon Chris Hipkins and Hon Kiritapu Allan, 'New offence for ram raiding, young offenders to face more accountability', Press Release (19 July 2023) Available at: <https://www.beehive.govt.nz/release/new-offence-ram-raiding-young-offenders-face-more-accountability>.

2 Ibid.

> …
>
> (i) the right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

13. This right is based on article 14(4) of the International Covenant on Civil and Political Rights (**ICCPR**), article 14 addressing the minimum criminal procedure requirements in determination of a criminal charge:

> In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

14. Those who are 12 and 13 years old are, on any view, children. The OTA defines children as those below the age of 14 years old,[3] and the United Nations Convention on the Rights of the Child (**UNCROC**) defines a child as a person under the age of 18 years old.[4]

15. Based on prior case law a court, in determining the content of the right in section 25(i), and whether it is engaged, is likely to place weight on three matters in particular:

    15.1 The OTA and predecessor legislation, on the basis that that Act 'is a specific expression of the policy expressed' in section 25(i).[5] This reflects that enduring features of a legal system may inform the content of basic norms, especially where those features are the product of democratic will.[6] The OTA and its former iterations have been in place since 1989.

    15.2 International material, including article 14(4) of the ICCPR. In the context of section 25(i), and in relation to matters pertaining to children more generally, the courts have been heavily influenced by the demands of UNCROC and material produced by the UN Committee on the Rights of

---

3 OTA, s 2.

4 UNCROC, art 1.

5 *R v Hamilton* HC WHA T.030025 (16 September 2003) Baragwanath J, [47].

6 See eg *Murphy v Electoral Commissioner* [2016] HCA 36, [91]-[92].

the Child (**CRC**).[7] The relevance of UNCROC in this context is reinforced by specific reference to that treaty in the OTA.[8]

15.3 Evidence regarding, among other things, neurological development of children, the effects of criminal processes and sanctions on children, and the most effective approaches to addressing child offending.

16. Application of these considerations to the amendment to OTA to provide for 12 and 13 year olds to proceed via criminal proceedings in the Youth Court – where they commit the new offence – leads to the conclusion that the amendment engages section 25(i) of the Bill of Rights Act. This is principally because each consideration supports the proposition that the age-appropriate treatment of offenders aged under 14 years old requires a welfare-based approach rather than a criminal law approach.

17. It has long been recognised in New Zealand that there is a strong public policy against subjecting children under 14 years old to criminal proceedings. The Children and Young Persons Act 1974 provided that children under 14 years old could not be prosecuted for offences other than murder or manslaughter. This approach was read over to the OTA, originally passed in 1989.

18. A court is likely to view alteration of these public policy settings as a departure from an age-appropriate process for determination of a charge against a child under 14 years old for the purposes of section 25(i) of the Bill of Rights Act.

19. In 2010 amendments were made to the OTA to expand the situations in which alleged offending by 12 and 13 year olds could be dealt with by criminal proceedings in the Youth Court, beyond the case of murder or manslaughter.[9] These situations are: (i) cases of serious offending, where the child is charged with an offence with a maximum penalty which is or includes life imprisonment or imprisonment of at least 14 years; and (ii) cases of repeat offending, where

---

7 Note in particular UNCROC, art 40 (which addresses youth justice).

8 OTA, s 5(b)(i).

9 OTA, s 272(1).

the child is a previous offender, and is alleged to have committed an offence for which the maximum penalty available is or includes imprisonment for at least 10 years but less than 14 years.

20. The Bill proposes to add a further pathway into the Youth Court for 12 and 13 year olds, where they are alleged to have committed the new offence. As already discussed, this involves departure from the baseline setting of dealing with child offenders via a care and protection process pursuant to Part 2 of OTA.

21. In the eyes of a court considering the consistency of the Bill with the Bill of Rights Act, the addition of a further pathway will raise concerns over widening of the situations in which children may be prosecuted through criminal proceedings. The new pathway does not require repeat offending: according to the new pathway 12 and 13 year olds could face criminal proceedings for first-time offending.

22. The longstanding differential treatment of offenders under 14 years old, compared to those over 14 years old, under youth justice legislation in New Zealand in turn reflects international standards and practice in relation to dealing with child offenders.

23. UNCROC requires states to adopt a minimum age of criminal responsibility.[10] The treaty does not specify a particular age. However, the CRC has encouraged state parties to raise the minimum age to 14 years old, observing that over 50 states parties have raised their age to 14 following ratification of UNCROC, and the most common minimum age internationally is 14.[11]

24. CRC, in its concluding observations on the sixth periodic report of New Zealand, published in February 2023, said it was 'seriously concerned' that '[t]he minimum

---

10 UNCROC, art 40(3).

11 Committee on the Rights of the Child, General Comment No 24 on Children's Rights in the Child Justice System, CRC/C/GC/24 (18 September 2019) [22].

age of criminal responsibility is below international standards and is offence-based rather than child-centred'.[12]

25. The CRC has also said states should 'not take any retrogressive steps' in the field of child justice.[13] It has expressed concern about practices that permit lowering the minimum age of criminal responsibility in cases where children are accused of serious offending.[14] The CRC strongly favours a standardised approach to the age below which a child cannot be held criminally responsible, without exceptions.[15]

26. The CRC's view that the minimum age of criminal responsibility should be 14 years old follows from evidence in the fields of child development and neuroscience which indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing.[16] Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings.

27. The default position of dealing with 12 and 13 year old offenders through a 'non-punitive' approach, via for example care and protection proceedings in the Family Court under Part 2 of OTA, reflects evidence that offending by children at this age is symptomatic of problems in the home environment.[17] For this group evidence suggests that measures should principally be designed to promote the welfare of the child, their family and address difficulties underlying the offending.

28. The evidence indicates formal criminal justice involvement is often associated with adverse consequences for the child and society, in particular by potentially increasing chances of reoffending. On the other hand, children have greater

---

12 Committee on the Rights of the Child, Concluding Observations on the Sixth Period Report of New Zealand, CRC/C/NZL/CO/6 (28 Feb 2023) [42].

13 Committee on the Rights of the Child, General Comment No 24 on Children's Rights in the Child Justice System, CRC/C/GC/24 (18 September 2019) [4].

14 Ibid [25].

15 Ibid [25].

16 Ibid [22].

17 N Lynch, *Youth Justice in New Zealand*, 2 ed (Thomson Reuters) 72-73; L Haysom, 'Raising the Minimum Age of Criminal Responsibility to 14 Years' (2022) 58 Journal of Paediatrics and Child Health 1504, 1506.

capacity for rehabilitation,[18] and this is reflected in the relevant articles of both the ICCPR and UNCROC which stress responses to child offending that promote rehabilitation, reintegration and avoidance of judicial proceedings.[19] These materials indicate early contact with the criminal justice system should be avoided.

29. In judging whether section 25(i) is limited by this Bill past case law establishes that a court will consider policy settings reflected in the OTA; international material; and evidence relating to children and criminal justice.

30. While there are some accommodations for 12 and 13 year olds under Part 4 of the OTA, the proceedings are nonetheless criminal and the overall system is calibrated to youth offenders between 14 and 18 years of age.

31. Proceedings under Part 4 OTA in the Youth Court, for example, open up the possibility of the child being detained pre-hearing (but not in police custody),[20] and significant sanctions such as supervision in residence.[21]

32. The proposed consequential amendments to the Bodily Samples Act will also enable a court to compel 12 and 13 year olds charged with the new offence to provide bodily samples.

Justification

33. Given the Bill limits section 25(i) protections, I next consider whether it is capable of justification under section 5 of the Bill of Rights Act.

34. The section 5 methodology for judging justifications asks the following questions:

    34.1 Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

---

18 *Churchward v R* [2011] NZCA 531, [77].

19 ICCPR, art 14(4); UNCROC, art 40(1), (3)(b).

20 OTA, s 238 (subject to s 272A).

21 OTA, ss 283(n), 365(3) (subject to s 272A).

34.2 If so:

34.2.1 Is the limiting measure rationally connected with its purpose?

34.2.2 Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

34.2.3 Is the limit in due proportion to the importance of the objective?

Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

35. In short, yes. The General Policy Statement in the Explanatory Note accompanying the Bill states that the Bill addresses reducing 'youth-dominated offending by increasing accountability for those who engage in criminal behaviour'.

36. The policy background and provisions of the Bill make it clear that the Bill is a response to a large increase in ram raids, which are predominantly carried out by children and young people.

37. Noting that courts generally adopt a deferential approach to this first question, 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.

Is the limiting measure rationally connected with its purpose?

38. The stated objective of the Bill is reducing youth-dominated crime by increasing accountability for such crime, with a particular focus on the new offence. The measure is the amendment to the OTA to enable criminal proceedings against 12 and 13 year olds who are alleged to have committed the new offence.

39. A court considering whether the limit is justified would require evidence that the measure will reduce youth criminal offending.

40. As was canvassed in an earlier of this report of this 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 abilities are not fully developed.

41. Conversely, early contact by children with the criminal justice system, and punishment, is linked to increased chances of re-offending, which in turn supports welfare-based responses to criminal offending by children.

42. As discussed above, underpinning the proposed measure is a concern to break the cycle of offending for a small group of repeat offenders aged 12 and 13 years old in respect of whom it is considered existing measures are not working.[22] 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 OTA by which they may be subject to criminal proceedings.[23]

43. Assuming there is no prior criminal conviction of the type discussed at paragraphs 15 to 19 above, in order to satisfy the prior offender requirement an application must have been previously made to the Family Court for a care and protection order on the ground the child has engaged in such offending as gives rise to a serious concern for the child's well-being, The Family Court, having found at least one offence proved, must either have made a care and protection order or indicated that it would have but for the child's needs being met by other means; and one or more of these earlier offences must carry a maximum penalty of at least 10 years imprisonment, or life imprisonment.[24]

---

22 Rt Hon Chris Hipkins and Hon Kiritapu Allan, 'New offence for ram raiding, young offenders to face more accountability', Press Release (19 July 2023). Available at: <https://www.beehive.govt.nz/release/new-offence-ram-raiding-young-offenders-face-more-accountability>.

23 See s 272(1)(c).

24 OTA, s 272(1A).

44. These threshold requirements and process complications may pose impediments for Police to utilise the existing repeat offender pathway in order to bring criminal proceedings against 12 and 13 year old repeat offenders. That a child who is alleged to have committed a fresh offence is a repeat offender, in the ordinary sense of having committed a previous crime, may not in itself be sufficient to proceed via the Youth Court pursuant to the existing repeat offender pathway.

45. These difficulties provide context for the proposal in the Bill for a fresh pathway into criminal proceedings in the Youth Court for 12 and 13 year olds who are alleged to have committed the new offence. This pathway will overcome impediments otherwise posed by the repeat offender pathway, at least in regard to children alleged to have committed the new offence.

46. However, notwithstanding issues relating to the existing repeat offender pathway, there remain questions over whether there is a rational connection between establishment of the new pathway and the objectives pursued by the measure. First, while the new pathway could be applied to repeat offenders (in the ordinary sense of that term), it can also be used against first-time offenders. In this connection, evidence regarding the criminogenic effects of early exposure to the criminal justice system is noted. Second, the nature of the scheme in OTA means that the most intensive sanctions available under Part 4 of the Act – those that would typically be associated with deterrence goals may not be applied to child offenders. Third, evidence has not been advanced to demonstrate that measures available via the criminal pathway, such as bail conditions or custody, would produce a significant deterrence effect and/or lead to better long-term outcomes for children, for example in relation to prospects for rehabilitation.

47. Therefore, while the proposed measure seeks to pursue objectives of public importance, it is not clear on the available evidence that the objectives will be carried forward by the proposed measure.

Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

48. This question requires consideration of the alternative measures which may exist to fulfil the Bill's objectives which may be less rights-limiting.

49. Limiting the application of this process to those offenders who are not, colloquially, "first-time offenders" (in that they have not been known to have been involved in ram raiding offences before) is a case in point. Process improvements to make the "repeat offender" mechanisms in the OTA and the Family Court could also be considered.

50. Therefore the proposed measure limits the section 25(i) right more than is necessary to achieve its objective.

Is the limit in due proportion to the importance of the objective?

51. This stage requires a consideration of the harms caused by the measure versus the benefits it will produce. In this case a court is, having considered relevant evidence, likely to conclude that the harms outweigh the benefits.

52. In terms of benefits, it is unlikely that the new pathway into the Youth Court for 12 and 13 year olds will, as a general proposition, result in a systematic benefit of reducing criminal offending or improving child outcomes, albeit there might be some instances where the Part 4 pathway may be considered beneficial for a particular child offender.[25]

Would a court apply a significant margin of appreciation to Parliament's policy choice?

53. On the one hand, Parliament, as the democratic representative institution in society, is uniquely well-placed to channel and respond to societal concerns over child offending.

54. On the other hand, courts have expertise and experience in relation to criminal justice matters. This is an area where a significant body of evidence regarding age-appropriate treatment of children would be available to a court, which in

---

[25] There is anecdotal evidence that particular children may benefit from the Part 4 pathway: *New Zealand Police v KK*, CRN 11244000103, Youth Court North Shore (26 September 2011) [23].

turn would provide an objective basis for a court to evaluate rights-consistency. Courts have increasingly focused on scrutiny of evidence-base in reviewing legislation for consistency with the Bill of Rights Act, and it is likely they would do so in this case.

Section 21 of the Bill of Rights Act

55. The Bill includes consequential amendments to the Bodily Samples Act which would enable the making of coercive court orders for the taking of bodily samples from 12 and 13 year olds who are suspected of the new offence. In doing so the Bill extends the categories of case in which children can have bodily samples so taken.

56. These amendments engage section 21 of the Bill of Rights – the right to be secure against unreasonable search and seizure.

57. The premise of the amendments to the Bodily Samples Act is that the amendments to the OTA would render it lawful to prosecute 12 and 13 year olds for the new offence. If the new criminal proceeding is not justifiable under the Bill of Rights Act, the premise for the amendments to the Bodily Samples Act falls away and cannot be justified. To nonetheless provide for bodily samples to be taken coercively would be inconsistent with section 21.

Section 14 of the Bill of Rights Act

58. The Bill amends the Sentencing Act to include a new aggravating factor relating to an offender livestreaming or posting online their offending. The Bill also provides for inclusion of substantially the same factor in the OTA, to apply in the context of criminal proceedings involving children and young persons in the Youth Court.

Sentencing Act

59. The amendment to the Sentencing Act adds as an aggravating factor that the offender did one or more of the following in relation to the offending for which they are being sentenced:

(i) live-streamed all or part of the offending on the Internet or an online application or similar:

(ii) posted all or part of a record the offending on the Internet or an online application or similar:

(ii) distributed all or part of a record of the offending to others by means of a digital communication:

60. This new factor is a generally applicable aggravating factor.

61. The proposed amendment potentially engages section 14 because it inhibits free speech.[26]

62. The sort of expression involved in posting serious criminal wrongdoing online will often be of very low value, and in some cases may arguably not even engage the protection of section 14.

63. However, in some circumstances publicising footage of offending may have greater value and clearly engage section 14. Such circumstances may include for example where a protestor in the course of committing criminal trespass captures video of public officers committing serious abuses of power, and/or captures video of other individuals committing serious crimes. In such circumstances, publishing the recordings may benefit the public interest by exposing abuses of power or enabling identification of wrongdoers.

64. One response to this risk is to rely on judges to apply the new aggravating factor in a manner consistent with the Bill of Rights Act. This is possible because sentencing involves a discretion and therefore there is room for courts to formulate rights-consistent outcomes.

65. The Explanatory Note to the Bill states that live-streaming or posting offending behaviour online 'increases the reach of offending, exacerbating the harm to victims and glamourising offending, which may encourage "copy-cat" offences'.

---

[26] By analogy the prospect of very high damages awards in defamation may limit the right to free expression of the defendant, a relevant concern being that the corollary of such awards may be to disincentive speech that is in the public interest: *Steel and Morris v UK* (2005) 41 EHRR 22.

66. The drafting could be re-framed to ameliorate or remove the rights-inconsistency, and more closely calibrate the factor to the precise mischief to which it is addressed, are listed:

66.1 Amend the aggravating factor to make explicit reference to 'glorifying' offending and/or 'inciting' offending. This would reduce the risk of unjustified intrusions upon expression, because the targeted forms of speech have low value and limitations can be readily justified.

66.2 Add a public interest rider to the aggravating factor, excluding from its scope of application instances where communication of the offending was in the public interest.

Hon David Parker
Attorney-General
23 August 2023