



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Sentencing (Livestock Rustling) Amendment Bill

13/03/2018

Submission on the Sentencing (Livestock Rustling) Amendment Bill

1 Introduction

- 1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Sentencing (Livestock Rustling) Amendment Bill (Bill).
- 1.2 The Bill is designed to deter people from engaging in livestock rustling, by identifying it as an aggravating factor at sentencing.¹
- 1.3 The Bill would add an additional aggravating factor to section 9(1) of the Sentencing Act 2002, “that the offence involved theft of livestock”, because of the impact of livestock rustling on rural communities² and the aim of giving “more confidence to victims of livestock rustling that there is an additional deterrent in place to discourage this type of crime”.³
- 1.4 These concerns are understandable. However, the Sentencing Act already enables the courts to consider the “extent of any loss, damage, or harm” resulting from particular offending as an aggravating factor that may require the imposition of a stronger sentence.⁴ The particular harm resulting from livestock rustling is already able to be appropriately factored into sentencing decisions.
- 1.5 In the Law Society’s view, the harm caused by livestock rustling should continue to be assessed by the courts in the specific circumstances of each case. The Law Society considers that the Bill is not needed, and recommends that it not proceed.
- 1.6 The Law Society does not wish to be heard but is available to discuss this submission with the Committee or officials if that would be of assistance.

2 Current approach to sentencing

- 2.1 Sentencing in New Zealand takes the form of a three-step process set out by the Supreme Court in *R v Hessel*. The courts:⁵
 - a. identify a starting point, having regard to the purposes and principles of sentencing, and any aggravating and mitigating factors relating to the offending, as set out in section 9;
 - b. adjust the starting point, having regard to any aggravating or mitigating factors particular to the offender, as set out in section 9; and
 - c. make a final adjustment based on whether the offender has pleaded guilty.
- 2.2 The need for deterrence is a recognised factor in sentencing. As noted by the Court of Appeal in *R v Mako*:⁶

¹ Explanatory Note to the Bill, p1.

² Hansard, 31 January 2018, 727 NZPD 1603-1605.

³ Note 1.

⁴ Sentencing Act 2002, s 9(1)(d).

⁵ *Hessel v R* [2010] NZSC 135; [2011] 1 NZLR 607. See also *R v Taueki* [2005] 3 NZLR 372 (CA).

⁶ [2000] 2 NZLR 170, (2000) 17 CRNZ 272; per Gault J at [50].

Deterrence is a factor in sentencing. This generally is accommodated in the sentencing levels indicated. But there may be circumstances where a particular form of offending or offending in a particular area will call for special consideration. It is entirely appropriate to take into account the need to protect the public.

2.3 This is illustrated in a recent case. In *Long v Police*, Harrison J considered an appeal from a District Court sentence of imprisonment for what was described as ‘cattle rustling’, and noted that the District Court judge:⁷

[6] ... was satisfied that Mr Long’s offending has ‘all the hallmarks of cattle rustling’; and that Mr Long’s decision to cut and replace ear tags was evidence of premeditation ‘as opposed to the actions of a frustrated farmer’. **The sentencing principles of accountability, denunciation, deterrence and provision for victims were predominant.** The Judge did not consider that any sentence other than one of imprisonment was appropriate for the reason that:

Within a rural community to do otherwise would simply be sending the wrong message. The wrong message emanating from here would be that it’s okay to rustle and steal other people’s cattle but you won’t go to jail.

2.4 Harrison J continued:

[11] I am satisfied that the Judge correctly rejected a community based sentence. **The offending was serious. A deterrent sentence was required given the degree of Mr Long’s premeditation and his breach of the code of trust which is of such importance to neighbours in a rural community.** The only questions are whether the starting point adopted by Judge Roberts was manifestly excessive and whether he should have considered the alternative of home detention. [emphasis added]

2.5 This decision clearly illustrates that the courts already consider and routinely apply a range of aggravating factors relevant to specific types of offending such as livestock rustling. In introducing the Bill to the House, Hon Ian McKelvie referred to the various ways livestock rustling impacts on rural communities; as noted below, these are all currently recognised in section 9 as aggravating factors:⁸

- (a) The value of the livestock stolen (s 9(1)(d));
- (b) Actual or threatened violence (s 9(1)(a));
- (c) Frequent use of weapons, including firearms (s 9(1)(a));
- (d) Isolated, and therefore vulnerable victims (s 9(1)(g));
- (e) Premeditation and planning (s 9(1)(i)).

2.6 The courts have discretion to determine the degree or extent to which a relevant aggravating factor should be taken into account. There is also a ‘catch-all’ provision in section 9(4)(a) that allows judges to take into account any other aggravating or mitigating factor that they think fit, in

⁷ *Long v Police* HC New Plymouth CRI-2009-443-008, 5 March 2009, Harrison J, at [6], emphasis added.

⁸ (31 January 2018) 727 NZPD 1603-1605.

imposing sentence. It follows that there is no demonstrable need to add livestock rustling to the list of aggravating factors in section 9 of the Act.

- 2.7 Making this category of offending a specific aggravating factor might also result in the courts inappropriately 'double-counting' in sentencing. That is, the theft of livestock (as a specific section 9 aggravating factor) is regarded as inherently more serious than any other form of theft, and this is to be factored into the sentencing starting point; other aspects intrinsic to the offending, such as use of weapons or vulnerability of victims, are then be 'double counted' as aggravating factors to be added to the sentencing starting point. The opposite might also occur: sentencing judges may decide that other potentially applicable aggravating factors, such as use of weapons or vulnerability of victims, should *not* be taken into account because the type of offence itself has already been taken into account as an aggravating factor. This could give rise to the risk of inconsistent sentencing in cases involving livestock rustling.
- 2.8 The Law Society considers that the proposed amendment to section 9 of the Sentencing Act would introduce unhelpful and unnecessary complexity to the sentencing process. When fixing the sentencing starting point, the courts are well-versed in taking into account aggravating factors which are not listed in section 9 but which are relevant to the gravity of the offending.



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