

19 December 2018

Hon Andrew Little
Minister of Justice
Parliament
Wellington

By email: a.little@ministers.govt.nz

Dear Minister

Crimes Amendment Bill, SOP 185 – new criminal offences relating to livestock rustling

I am writing to bring to your attention the New Zealand Law Society's concerns that legislation creating significant new criminal offences relating to livestock rustling has been progressed without the opportunity for public consultation and select committee scrutiny. In the Law Society's view, this is an undesirable and unjustified departure from the usual consultation process for legislative reform.

We appreciate the government's desire to address the harms arising from theft of livestock but consider there is insufficient justification for amending the Crimes Amendment Bill (bill) via supplementary order paper (SOP) at a late stage in the bill's passage through the House. The Law Society has previously expressed concern about the practice of tabling substantive SOPs at the Committee of the Whole House stage, on the basis that there are constitutional objections (including a lack of public consultation and select committee scrutiny) to expansive amendments to bills at this late stage.¹

The proposed offences

As you know, the Law Society was recently consulted on a limited basis on the proposed new offences (confidential consultation at short notice, and the specific wording of the offences was not provided). A copy of the Law Society submission of 19 October 2018 is **attached** for ease of reference. The Ministry's response of 13 December is also **attached** for completeness.

The Law Society submitted that the new offences should be introduced via a new bill, rather than via SOP. In our view the proposed offences are a significant extension of the current law, and the appropriate avenue for making the legislative changes is through the introduction of a bill to allow for public consultation with relevant stakeholders including the legal profession and select committee consideration.

¹ New Zealand Law Society submission dated 25.11.16 on on the 2016 review of Standing Orders (available at https://www.lawsociety.org.nz/_data/assets/pdf_file/0016/107062/Standing-Orders-Review-25-11-16.pdf), at [6].

Subsequently, SOP 185 was introduced on 12 December 2018, the day after the bill's second reading. The SOP proposes to insert two new offences in the bill: a standalone offence of theft of livestock or other animal (carrying a maximum penalty of 7 years' imprisonment), and a new burglary offence of unlawful entry to land used for agricultural purposes, where the offender intends to steal livestock or act unlawfully against specified things, such as buildings or machinery, on that land (carrying a maximum penalty of 10 years' imprisonment).

The new offences are a significant extension of the current law. The Law Society reiterates its concerns about proposed sections 220A (theft of livestock and other animals) and 231A (entry onto agricultural land with intent to commit imprisonable offence) and questions the necessity for such offences.

- *New section 231A, Unlawful entry onto agricultural land*

The proposal to create an offence of unlawfully entering property used for agricultural purposes significantly extends the concept of burglary. The application of the new offence to agricultural land means that burglary will now apply to vastly greater areas of land/property in New Zealand than is presently the case. The offence of burglary is a serious offence, punishable by up to 10 years' imprisonment. Part of the reason it is considered to be a serious offence arises from the fact that burglary currently requires the offender to enter a building (or other enclosed space). Such conduct is considered inherently more serious than mere trespass or unlawful entry on to (essentially) open land or fields. That rationale does not apply in the case of agricultural land which may be significantly remote from any building or other enclosed space.

As noted, this is a significant expansion of the existing criminal law (section 231) and should be the subject of public submission and debate.

- *New section 220A, Theft of livestock*

Regarding the proposed theft offence, the Ministry's Departmental report to the select committee considering the Sentencing (Livestock Rustling) Amendment Bill noted that "theft of animals can be charged and adequately addressed through the existing theft offences, and Police have not identified problems with the way that the current law operates."²

The Ministry has further noted, in the Regulatory Impact Assessment for SOP 185, its view that the creation of a specific offence for livestock rustling cannot be justified as necessary and that Police currently successfully charge instances of livestock theft under general theft (Crimes Act 1961, section 219).³

While we understand the rationale for the proposed offence is that animals should be treated differently from theft of 'things', the courts in recent years have addressed these distinctions during sentencing.⁴

² Sentencing (Livestock Rustling) Amendment Bill - Departmental Report for the Primary Production Committee, at [9].

³ Ministry of Justice, Regulatory Impact Assessment *Addressing the theft of livestock rustling in New Zealand*, 20 September 2018, at pp1, 12.

⁴ As discussed in the Law Society's submission dated 13.3.18 on the Sentencing (Livestock Rustling) Amendment Bill. See for example *Collins v R* [2014] NZCA 342, *Hough v Police* [2015] NZHC 2691, *Elsmore v Police* [2013] NZHC 1849 and *R v Devery* [2016] NZDC 4863.

We would welcome an opportunity to discuss this matter with you.

Yours sincerely

A handwritten signature in black ink, appearing to be 'K. Beck', written in a cursive style.

Kathryn Beck
President

Encl (2):

1. NZLS submission to the Ministry of Justice, dated 19.10.18.
2. Ministry of Justice response, dated 13.12.18.

cc: Ministry of Justice, Policy Manager-Criminal Law (Stuart McGilvray)

19 October 2018

Stuart McGilvray
Policy Manager, Criminal Law
Ministry of Justice
Wellington

By email: Stuart.McGilvray@justice.govt.nz

Re: Proposed new offences – unlawfully entering agricultural property and livestock theft

Thank you for seeking views from the New Zealand Law Society on the confidential issues paper for targeted consultation, *Addressing the theft of livestock* (issues paper). The issues paper recommends the creation of two new criminal offences relating to:

- a) unlawfully entering property used for agricultural purposes; and
- b) the theft of animals (including livestock).

We understand the government proposes to amend the Crimes Act 1961 (the Act) to address identified legislative gaps relating to livestock theft. We also understand the government's preferred approach to implementing these changes is by way of a Supplementary Order Paper to the Crimes Amendment Bill (the Bill); the Bill is currently awaiting its second reading in the House, hence the targeted consultation in a short timeframe.

The Ministry has asked for the Law Society's views on the recommendations, on a confidential basis. The recommendations have been considered on that basis by the Law Society's Criminal Law Committee (Committee), whose members are senior and experienced criminal practitioners who have prosecutorial and defence experience, and the Committee's comments are set out below. As the Ministry will be aware, however, the Law Society's preference is for consultation to be public and transparent wherever possible, with confidential consultation limited to cases where it is justified in the particular circumstances. Open consultation provides an opportunity for full input from the profession and makes for better policy and legislation. Early, informed consultation with those working in the field helps to ensure effective and workable reforms and an effective justice system.

The Law Society considers that public consultation with relevant stakeholders including the legal profession is needed regarding the proposed new offences. Given that the Justice select committee has already reported back to the House and the Bill is likely to receive its second reading shortly, it appears that the public, including the wider legal profession, will not be given an opportunity to make submissions on the proposed new offences. In our view the proposed offences are a significant extension of the current law, and the appropriate avenue for making the legislative changes is through the introduction of a separate bill to allow for the usual select committee process and public input. The Law Society considers that this point ought to be brought to the Minister's urgent attention.

Criminal Law Committee comments on the proposed new offences

Unlawfully entering property used for agricultural purposes

The proposed offence

The proposal to create an offence of unlawfully entering property used for agricultural purposes significantly extends the concept of burglary. Burglary (section 231 of the Act) requires that a person enters a ship or building, without authority, with the intention to commit an offence. As noted in the issues paper, 'building' is broadly defined to include any building or structure and any enclosed yard. However, 'enclosed yard' means any land which is associated with a building.

The issues paper further notes that theft from rural land that is not associated with a building (or structure) is not captured by the current offence of burglary. It is on this basis that a new offence, to protect agricultural property, is proposed.

Committee comments

The Committee considers that a new standalone offence of 'entering a property used for agricultural purposes with the intention to commit an imprisonable offence' is not necessary or appropriate. Although the issues paper notes the offence would *supplement* as opposed to *supplant* section 231, the Committee consider this proposed offence is, effectively, a significant expansion of section 231. In practice it will mean that the offence of burglary will apply to vastly greater areas of property/land in New Zealand than is presently the case. The offence of burglary is a serious offence, punishable by up to 10 years' imprisonment. Part of the reason it is considered to be a serious offence arises from the fact that burglary currently requires the offender to enter a building (or other enclosed space). Such conduct is considered inherently more serious than mere trespass or unlawful entry on to (essentially) open land or fields. That rationale does not apply in the case of agricultural land which may be significantly remote from any building or other enclosed space.

Further, the Committee is concerned that the inclusion of an 'intention to commit an imprisonable offence' within the proposed offence, would also cover many potential offences, including offences currently covered in the Summary Offences Act 1981 (for example, disorderly behaviour). As such, the proposed amendments may mean that a person who enters agricultural land with an intent say to protest (for example, animal rights activists) will find themselves charged with the serious offence of burglary. In the Committee's view, this would be an inappropriate extension of the current offence of burglary making it overly broad with the potential to seriously criminalise behaviour which may not be intended to be caught by the new offence.

The Committee suggests that the present criminal law provides adequate responses to those who commit crimes on agricultural land (see further below). The Committee is not convinced there is an evidential basis to suggest that the current law is inadequate.

It is also noted that it is proposed that sections 232 and 233 of the Act would also be extended to cover the expanded definition of burglary. The Committee's comments above as to the significant expansion of the current statutory framework and the seriousness of the offence also apply to those sections (particularly section 232 which carries a maximum penalty of 14 years imprisonment).

Theft of animals (including livestock)

The proposed offence

The issues paper proposes a new offence of ‘theft of livestock or any animal that is the property of another person’, to treat animals differently to theft of ‘things’.

Committee comments

In principle, the Committee is not opposed to this proposed offence but questions the necessity for such an offence.

The Committee understands that rural communities have expressed concern that the risks associated with livestock theft are significant and increasing.

The Committee also acknowledges the views of the Ministry that the current offence of theft (section 219) does not adequately recognise the inherent value of animals as sentient beings and the potential suffering that may occur as a result of being stolen. While this may be the rationale for proposing a new offence that treats animals differently from theft of ‘things’, and which punishes such conduct by a maximum of up to seven years’ imprisonment (as opposed to the maximum penalty being dependent on the dollar value of the animal(s) stolen), as noted below the courts in recent years have in any event addressed these distinctions during sentencing.¹

As noted in the Law Society’s submission on the Sentencing (Livestock Rustling) Amendment Bill 2018,² 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:³

[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.

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]

¹ See for example *Collins v R* [2014] NZCA 342, *Hough v Police* [2015] NZHC 2691, *Elsmore v Police* [2013] NZHC 1849 and *R v Devery* [2016] NZDC 4863.

² https://www.lawsociety.org.nz/_data/assets/pdf_file/0003/119784/Sentencing-Livestock-Rustling-Amendment-Bill-13-3-18.pdf, at [2.3] – [2.4].

³ *Long v Police* HC New Plymouth CRI-2009-443-008, 5 March 2009, Harrison J, at [6], emphasis added.

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 within the current parameters of the theft offence under section 219 of the Act.

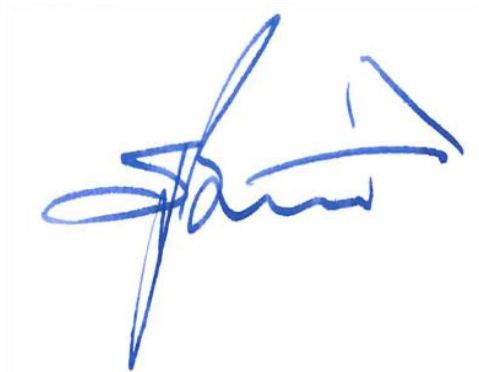
The Committee further notes the Ministry's Departmental report to the select committee considering the Sentencing (Livestock Rustling) Amendment Bill, stated that "theft of animals can be charged and adequately addressed through the existing theft offences, and **Police have not identified problems with the way that the current law operates.**"⁴

Prior to enacting any legislative change, it would be helpful for the Ministry to obtain further information on the extent to which theft of livestock is increasing and whether this justifies the creation of a standalone offence, separate from theft under section 219 of the Act.

Conclusion

We hope these comments have been helpful. If you wish to discuss this further, please feel free to contact me via the Committee Secretary, Amanda Frank (amanda.frank@lawsociety.org.nz / (04) 463 2962).

Yours sincerely



Stephen Bonnar QC
Convenor, NZLS Criminal Law Committee

⁴ Sentencing (Livestock Rustling) Amendment Bill - Departmental Report for the Primary Production Committee, at [9], emphasis added.