Privacy Commissioner
Te Mana Mātāpono Matatapu

# Privacy Commissioner's submission to the Justice Committee on the Ram Raid Offending and Related Measures Amendment Bill (283-1)

1. The Ram Raid Offending and Related Measures Amendment Bill (the Bill) is an omnibus Bill that has been introduced to address youth dominated offending. The key measures introduced by the Bill are:

    - Creating a new offence criminalising ram raids.
    - Amending the Criminal Investigations (Bodily Samples) Act 1995 (CIBS Act) to allow the taking of bodily samples from 12- and 13-year olds.
    - Allowing 12- and 13-year-olds to be prosecuted in the Youth Court for the new offence without being a previous offender.
    - Creating two new general aggravating factors for sentencing:
        - for livestreaming the offending or posting or distributing a copy of a livestream of the offending, and
        - for adults aiding, inciting, or counselling a child or young person to commit an offence.

## The role of the Privacy Commissioner

2. The functions of the Privacy Commissioner include examining new legislation for its possible impacts on individual privacy. The Privacy Act 2020 is New Zealand's main privacy statute. It governs the collection, use, storage, and disclosure of personal information and provides a mandate for my Office to consider wider developments that affect personal privacy, such as the taking of bodily samples.

3. Central to my examination of any proposed legislation is the principle that policy and legislation should be consistent with privacy rights unless there is a good reason (and evidence) to override those rights. Privacy is not an absolute right and limits on individual privacy are necessarily justified in certain circumstances.

## Key privacy concerns

4. The focus of this submission are the amendments to the CIBS Act and the new general aggravating factor for sentencing of livestreaming, posting, or distributing an online copy of the offence.

5. I acknowledge that the intent of these provisions is to discourage and create greater accountability for young offenders and ram raid offending. Consideration of the privacy implications of privacy intrusive proposals is always necessary. Given that this Bill is impacting children, careful consideration of these impacts is even more critical. Privacy and fairness concerns stemming from the collection and disclosure of personal information are magnified when it comes to the collection of data from children, given their greater cognitive, emotional, and physical vulnerabilities, and the fact that the actions and decisions of a child may not reflect who they become as adults.

6. My primary concern is that the Bill has been assessed as having adverse impacts on privacy and on section 21 of the New Zealand Bill of Rights Act 1990. Due to the quick

turnaround on developing the draft legislation there has not been adequate time for policy development, consideration of alternative options, or for consultation on the impact of the proposals and its unintended consequences. Officials have not been able to provide detailed advice on certain aspects of the bill, including on the privacy implications of certain provisions.

7. Genetic data is highly sensitive personal information, not only for the individual, but also their whānau. The proposal relating to DNA collection from young people would override the Privacy Act 2020. I have not yet seen sufficient evidence that would allow me to weigh up the policy case and whether the imposition into privacy rights will be effective to address the identified problem and is proportionate to the privacy intrusion.

8. I am concerned that the CIBS amendment provisions expand on a framework with significant existing issues in an ad hoc manner.

9. The intersectionality of those most likely to be impacted, children who identify as Māori and children with disabilities, only makes it more incumbent that the policy analysis behind this Bill is thorough and evidence based. Specifically, I have not seen a Te Tiriti o Waitangi analysis of these provisions, even though children and their personal information are considered taonga in te ao Māori.

10. I **do not support the passage of this Bill**. If this Bill were to proceed, I recommend that the provisions amending the CIBS Act and the provisions creating a new aggravating factor are removed and later made the subject to a further policy process to fully assess the implications.

**Privacy for Children and Young People / Background**

11. The Privacy Act 2020 governs the use of personal information in New Zealand. This covers children and young people.

12. New Zealand is a signatory to the United Nations Convention on the Rights of the Child (UNCROC). As a signatory to UNCROC, the New Zealand Government is required to make policy decisions that are in the best interests of the child. Article 16 of UNCROC enshrines the right to privacy for those under 18.

13. When considering privacy risks that may affect children and young people, slightly different considerations and protections should be taken into account. Privacy and fairness concerns stemming from the collection and disclosure of personal information are magnified when it comes to the collection of data from children, given their greater cognitive, emotional, and physical vulnerabilities, and the fact that the actions and decisions of a child may not reflect who they become as adults. The information privacy principle 4 (IPP) reflects this, outlining that particular regard needs to be given to the collection of children' personal information.

14. It is critical that any imposition into rights, especially the rights of children and young people, are subject to a robust policy process and evidence to show that the intrusion is proportionate and justified in the circumstances.

**Amendments to the Criminal Investigations (Bodily Samples) Act**

15. The CIBS Act governs the collection and use of DNA in criminal investigations. The Act gives Police powers to collect and use DNA from individuals and regulates the databanks containing DNA information from those charged or convicted with certain crimes.

16. In 2020, the Law Commission released their report on the use of DNA in criminal investigations. This report found that the CIBS Act was no longer fit-for-purpose for several reasons, including having an unclear purpose and confusing structure, issues with tikanga and te Tiriti o Waitangi, and no independent oversight and governance mechanisms. The Government accepted the conclusions of the report and agreed that a new Act and independent oversight body is required.[1]

17. Genetic data is highly sensitive personal information, not only for individuals, but also their whānau. I am supportive of the Law Commission's recommendations for CIBS Act reform to create a safer and more privacy enhancing regime for collecting genetic material for criminal investigations.

18. The collection of genetic material is a significant intrusion into individual privacy rights. Existing privacy and fairness concerns around the collection of genetic data in adults are heightened when it comes to the collection of genetic material from children, given their cognitive, emotional, and physical vulnerabilities. While it is proportionate and reasonable in some situations to mandate the collection of DNA, it is critical that such a significant intrusion into rights is accompanied by a robust policy process and evidence to show that this is reasonable.

19. The CIBS Act currently allows for the District Court to order a suspect who is aged 12- or 13- years old to give a bodily sample if the alleged offence carries a maximum penalty of at least 14 years or if the suspect is a repeat offender. Clause 7 to 10 of the Bill will amend this to allow orders to be made for the ram-raid offence, which will carry a maximum sentence of 10 years imprisonment. It is not clear to me what evidence there is to justify this expansion nor is there a clear policy rationale for why it should be treated differently from burglary or intentional property damage, very similar crimes which also carry a maximum sentence of 10 years.

20. Underpinning this Bill is the objective to deter young people from committing ram raids and provide more interventions to "break the cycle of offending" for a small group of repeat offenders.[2] Existing powers already allow for the District Court to order a suspect aged 12 or 13 to give a bodily sample if they are a repeat offender.

21. In addition to this, it is unlikely that the collection of genetic material will act as a deterrence for 12- and 13-year-olds as they are unlikely to do a cost/benefit analysis before choosing to offend.[3] Child offending often occurs in the heat of the moment, and children's decision making and reasoning skills are not fully developed at this stage.

22. While the ability to order and obtain a bodily sample from a suspect aged 12 and 13 may be necessary to aid in criminal investigations, it is essential that there are proportionate limitations on these powers, to reflect the right to be free from unreasonable search and

[1] Government response to the report of Te Aka Matua o te Ture/Law Commission: The use of DNA in Criminal investigations https://www.lawcom.govt.nz/sites/default/files/governmentResponseAttachments/Government-Response-to-Law-Commission-DNA-report-R144.pdf

[2] Rt Hon Christ Hipkins and Hon Kiritapu Allen 'New offence for ram raiding, young offenders to face more accountability', Press Release (19 July 2023) https://www.beehive.govt.nz/release/new-offence-ram-raiding-young-offenders-face-more-accountability

[3] Te Aka Matua o te Ture Law Commission 'The Use of DNA in Criminal Investigations' https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/Law%20Commission%20-%20DNA%20in%20Criminal%20Investigations%20-%20Report%20144.pdf page 78

intrusions into privacy. Little analysis is available to justify this expanded intrusion on these rights.

*Effects on Māori*

23. Māori are currently overrepresented in our justice system. Data released in September 2023 showed that 63% of children and young people with a finalised charge[4] and over half of the bodily samples taken from children and young people come from individuals that identify as Māori.[5] [6] This means that tamariki Māori will be disproportionately affected by the provisions in this Bill and its intrusions into privacy.

24. The provisions amending the CIBS Act will have significant effects for Māori as the collection and use of DNA engages several aspects of tikanga Māori, including whakapapa, mauri, and whanaungatanga.

25. It is important to consider Māori concepts of privacy. Genetic material carries biological whakapapa and is considered taonga. The Māori view is that it shows the connections between people, and their responsibilities between past, present, and future generation and is seen as cultural property rather than the property of the individual.[7] The storage and use of this information is therefore culturally significant.

26. As a taonga, biological whakapapa must be safeguarded. Māori participation and consultation is essential for balancing the rights of the collective and the individual and ensuring that Māori views are taken into account. I am not satisfied that this has occurred.

27. The Ministry of Justice states in the Bill's disclosure statement that due to time constraints there was no consultation with Māori, but the Bill has been assessed against the principles of te Tiriti o Waitangi.[8] Due to the disproportionate affect that this Bill will have on tamariki Māori and the cultural significance of genetic information, I do not believe it is appropriate for the CIBS amendment provision to go forward. I recommend that the provision amending the CIBS Act be removed until a full policy process, which includes consultation with Māori, can be completed.

28. Given the significant weaknesses that have been identified in the Law Commission report and the lack of evidence supporting the policy rationale, I **do not support** these provisions and **recommend that they are removed**, at least until a full reform process on the CIBS framework can be completed.

**Aggravating Factor – livestreaming or distributing a copy via digital communication**

29. I am concerned about the proposed new aggravating factors for sentencing, in particular live streaming the offending, posting a copy of the stream, or distributing a copy of the

[4] A finalised charge is a charge which has been concluded in court. This can include a charge being convicted, sentenced, or withdrawn.
[5] https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/#cyp data is during the period of July 2022 to June 2023.
[6] https://www.police.govt.nz/about-us/publication/annual-report-2022
[7] Te Aka Matua o te Ture Law Commission 'The Use of DNA in Criminal Investigations' https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/Law%20Commission%20-%20DNA%20in%20Criminal%20Investigations%20-%20Report%20144.pdf p 67 and 68
[8] Ministry of Justice 'Ram Raid Offending and Related Measures Amendment Bill Disclosure Statement' https://disclosure.legislation.govt.nz/bill/government/2023/283

stream online via digital communication. These new factors are not specific to ram raid offending, meaning it will affect a greater number of people.

30. The intention of this provision is to create new general aggravating factors that can apply to all crimes. As this amendment appears to be much broader than the ram raid offence and there appears to be no other similar aggravating factors, the potential privacy harms and unintended consequences are very broad and the risks are likely to fall disproportionately on certain population groups, including young people. It is critical that any changes are subject to a robust policy process and have a sufficient evidence base to support it. I am not satisfied that this has occurred.

31. I am concerned about the potential privacy impacts created by the monitoring of social media channels by Police to gather evidence of livestreaming or distributing images and videos of a crime. I acknowledge that livestreaming or posting offending behaviour online can increase the reach and encourage 'copy-cat' offending. However, there is a risk that monitoring may result in an intrusion into the privacy of individuals not directly involved with the crime. It is not clear how Police will conduct this monitoring in way that is not unreasonably intrusive.

32. **I recommend** that the clause 14 amending the Oranga Tamariki Act 1989 and clauses 21 to 23 amending the Sentencing Act 2002 are removed and made subject to an in-depth policy process to fully assess the implications of this new aggravating factor.

**Recommendations**

33. I **do not support** the passage of this Bill.

34. Given the significant existing privacy concerns with the CIBS Act, I **recommend** that the amendment provisions relating to the collection of DNA are removed until a full reform process to look at the CIBS Act and the framework governing the use of DNA in criminal investigations has been completed.

35. I **recommend** that the provisions creating the new aggravating factor of livestreaming or distributing via digital communication be removed, and later made the subject of a further policy process to fully assess the implications.

36. I trust my comments are of use to the Committee. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.

Michael Webster

**Privacy Commissioner**
20 October 2023