

T A S M A N I A

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**LAW REFORM**

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**I N S T I T U T E**

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Dear Brooke,

***Workplaces (Protection from Protestors) Amendment Bill 2019***

The Tasmania Law Reform Institute (**TLRI**) has previously recommended that, consistent with common law traditions and commitments under the *International Covenant on Civil and Political Rights*, Tasmania recognise the rights to freedom of expression, freedom of association and peaceful assembly, and the right to participate in public life.<sup>1</sup>

Recognition of those rights is also consistent with the implied constitutional freedom of political communication. In *Brown v Tasmania* [2017] HCA 43, Keifel CJ, Bell and Keane JJ stated:

*The implied freedom protects the free expression of political opinion, including peaceful protest, which is indispensable to the exercise of political sovereignty by the people of the Commonwealth. It operates as a limit on the exercise of legislative power to impede that freedom of expression.*

We endorse the statement in the recent Human Rights Law Centre report, *Say It Loud: Protecting Protest in Australia*:

*Governments must take positive steps to promote protest rights and must respond to particular protests in a way that accommodates the right to engage in peaceful protest, and that strikes a proportionate balance with public order and safety, and the rights of others.*<sup>2</sup>

Legislation such as Queensland's *Peaceful Assembly Act 1992* seeks to achieve this balance by entrenching the right to peaceful assembly, subject only to such restrictions as are necessary and reasonable in a democratic society in the interests of public safety; or public order; or the protection of the rights and freedoms of other persons. While not recognised by international human rights jurisprudence, the "rights and freedoms of other persons" described in the Act explicitly includes the rights of persons to carry on business.<sup>3</sup>

It is against that background that we make these brief comments in relation to the *Workplaces (Protection from Protestors) Amendment Bill 2019* (the **Bill**).

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<sup>1</sup> Tasmania Law Reform Institute. 2007. *A Charter of Rights for Tasmania – Final Report*. Available at [http://www.utas.edu.au/\\_data/assets/pdf\\_file/0003/283728/Human\\_Rights\\_A4\\_Final\\_10\\_Oct\\_2007\\_revised.pdf](http://www.utas.edu.au/_data/assets/pdf_file/0003/283728/Human_Rights_A4_Final_10_Oct_2007_revised.pdf)

<sup>2</sup> Human Rights Law Centre. 2018. *Say It Loud: Protecting Protest in Australia*. Available at [https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5c10e3192b6a285b171a3840/1544610599952/HRLC\\_protest\\_report\\_Dec2018.pdf](https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5c10e3192b6a285b171a3840/1544610599952/HRLC_protest_report_Dec2018.pdf)

<sup>3</sup> Section 5, *Peaceful Assembly Act 1992* (Queensland)

## *Necessity*

The offences under the Bill largely duplicate existing offences under the *Police Offences Act 1935*, Criminal Code, *Forest Management Act 2014*, and at common law. In fact, the Act<sup>4</sup> explicitly states (for example, ss.6(2) and (4)) that access is unauthorised only where the interference is a trespass or an offence against another Act. Accordingly, the legislation would appear to breach fundamental human rights principles that incursions on rights must be ‘necessary’.

The effect of the Bill is to impose higher penalties for existing offences. This creates a discretion for police officers in relation to which offence to pursue in the circumstances. Consequently, these provisions potentially breach the human rights principles of proportionality, clarity and certainty which renders them arbitrary incursions on rights.

Given the range of existing offences to protect against trespass, property damage, disorderly conduct and other interferences that may affect businesses, we question whether the legislative approach adopted by the Bill is necessary or appropriate.

## *Clarity of scope*

While the Bill proposes to reframe the *Workplaces (Protection from Protestors) Act 2014* as the *Workplaces (Protection of Lawful Business Activities) Act 2014*, it will continue to regulate protest activities. It is important that laws regulating protest activities, and the freedoms attached to such activities, are clear and can be easily understood by protesters (or those considering protest action), business owners, and police officers.

The Bill as drafted is difficult to follow, and the amended legislation will fail to fully address concerns raised by the High Court regarding lack of clarity regarding its application. In particular:

- the definition of “impede” is extremely broad and would capture a range of activities that would cause minimal disturbance to business activities.

For example, peacefully handing out pamphlets on the footpath could cause a minor obstruction for people accessing the business, but would not prevent them from entering and patronising the business. Despite this, the offence could be made out through the minor obstruction they experienced while accessing the premises.

- the definition of “forestry land”, acknowledged by the Court as very broad, has not been amended. The new s5A<sup>5</sup> provides for demarcation of a business premises (including forestry land), but does not limit “forestry land” for the purposes of the Act to areas that have been demarcated.
- the new s.6(6)<sup>6</sup> will make it an offence to obstruct a public thoroughfare (broadly defined as all public land and waterways) with the intention of impeding the carrying out of a business activity. This appears to apply to any protest on public land (or water) that could discourage people from using a particular business, regardless of whether the protest itself physically obstructs access to or operation of that business. The breadth of such a restriction is unjustified.

Any purported restriction of secondary boycott activities in this manner could also put the Bill in conflict with s.45DD of the *Competition and Consumer Act 2010*.

Again, these defects have implications for the lawfulness / non-arbitrariness of the Bill in human rights terms.

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<sup>4</sup> As amended by clause 11 of the Bill

<sup>5</sup> Inserted by clause 9 of the Bill

<sup>6</sup> As amended by clause 11 of the Bill

### ***Threatening to impede***

The new s.7<sup>7</sup> makes it an offence to threaten to commit an offence against s.6 if the person intends that the threat itself will impede the carrying out of a business activity. The offence carries a maximum penalty of \$5,000.

Given the difficulty in establishing intent in this circumstance, and without any requirement that a business activity is actually impeded, this offence (and associated penalty) is disproportionate and unwarranted.

Further, this provision does not conform to foundational principles of the criminal law in that it criminalises intent without requiring that intent to be manifest in actual consequences.

### ***Police discretion***

In our final report on Consolidation of Arrest Powers, the TLRI considered that “reasonable belief” was an appropriate formulation of the threshold for an officer’s belief that an offence was being committed and an arrest made without warrant. However, it was also noted that guidance, such as that set out in the Tasmanian Police Manual, would improve the consistency of factors relied on in reaching a reasonable belief.

This is particularly true where offences require the offender to intend for their action to impede business (for example, s.6(1)(b)).

By creating a new arrest power the legislation also runs counter to the consolidation recommendations made in that TLRI Report. The report pointed out that Tasmania’s arrest powers, being numerous, disparate and variously grounded, lack clarity, certainty, accessibility and predictability. This renders them arbitrary and unlawful in human rights terms. The creation of new arrest powers simply compounds this concern.

As noted above, many of the activities that would satisfy an offence under the Bill will also be offences under other legislation. However, the penalties imposed for the same activities will differ markedly depending on which legislation a person is found to be offending against. The discretion as to which charges are laid will fall to police officers, and may not be applied consistently. The lack of certainty created by these provisions also has implications for the lawfulness of the legislation in human rights terms. It introduces a clear element of arbitrariness in the application and interpretation of the law.

If the Bill is passed, we recommend that clear policy guidelines be developed to guide decision-making, and that the guidelines explicitly recognise that peaceful protest is allowed, subject to unreasonable interference with the rights of others.

### ***Move on powers and directions***

Sections 8 and 11 of the *Workplaces (Protection from Protestors) Act 2014* sought to moderate the application of the offence provisions by allowing police officers to first issue warnings and ‘move on’ directions to protesters. Only those protesters who failed to comply with directions or subsequently returned to the protest would commit an offence.

The High Court was critical of the lack of clarity around when directions could lawfully be given, but did not mandate the removal of the move-on powers.

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<sup>7</sup> Inserted by clause 11 of the Bill


The Bill removes the tiered approach of requiring directions to be given before an arrest can be made. Powers to give such directions exist under the *Police Offences Act 1935*, but there will be no mandatory link between those directions and the offence provisions under the Bill.

Given the significant penalties involved, we strongly recommend that a clear requirement for directions to be given to offenders be included in the Bill. This is particularly important in relation to offences where intent must be established – the issuing of a direction provides the alleged offender the opportunity to consider their intent and act accordingly.

Without consideration of the issues outlined above, we consider that the *Workplaces (Protection of Lawful Business Activities) Act 2014* would remain overly punitive and impose disproportionate and unnecessary restrictions on freedom of political communication. The likelihood that the legislation does not resolve the problems identified by the High Court in relation to its earlier iteration, in addition to the human rights problems identified above, mean that it could be open to challenge on constitutional grounds and for non-compliance with human rights.

If you would like to discuss these comments, please do not hesitate to contact us.

Yours sincerely,



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