

Workplaces (Protection from Protesters) Amendment Bill 2021

Submission to Tasmanian Department of Justice

20 September 2021

Contents

| | |
|---|---|
| Who we are | 4 |
| Introduction | 5 |
| The jurisprudential basis of the Bill | 5 |
| The offence provisions..... | 6 |
| The concept of “trespass” | 6 |
| The mental element of the offences in s 7 (1) and (2) | 6 |
| The ALA’s previous legislative proposal | 7 |
| Conclusion..... | 7 |
| Annexure 1..... | 8 |

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to provide a submission on the proposed Workplaces (Protection from Protesters) Amendment Bill 2021 ('the Bill'). The ALA holds grave concerns about the Bill. The chief concerns are set out below.

The jurisprudential basis of the Bill

2. The ALA considers that the jurisprudential basis of the Bill is unsound.
3. The Bill essentially proposes to criminalise certain forms of conduct commonly encountered during protest action.
4. The criminal law prohibits conduct for various reasons. Sometimes it is because the conduct is seen as fundamentally wrong,² as with the most serious crimes that have been prohibited in almost all societies and at almost all times of human history.³ Sometimes, as with offences involving property, criminal law prohibits conduct because it is thought that the conduct would, if permitted, unbalance the forces holding society in equilibrium.⁴ At other times, criminalisation of certain conduct is understood to be necessary to achieve regulatory efficacy.⁵
5. What the criminal law ought not to do is prohibit conduct for the sake of ideology. Whilst, in a sense, no law ever exists outside of ideology, the use of criminal sanction to frustrate competing ideological expression is in reality a misapplication of the power of the State to punish.
6. This Bill is essentially designed to employ the power of the State to punish, when the State ought to be politically neutral against those whose ideological expression imperils profit.
7. The Bill is, in its most basic nature, incompatible with the jurisprudential course of Australian criminal law.

² The concept of *malum in se*, or "a thing wicked in itself" accounts for the development of common law crimes such as murder and rape; J Yogis QC, *Canadian Law Dictionary* (Barrons 2003).

³ Aristotle, *Rhetoric*, 1373b 2-8.

⁴ J Locke, *Two Treatises of Government*, 2.7.

⁵ ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (2002), 2.11-14.

The offence provisions

The concept of “trespass”

8. The offence provisions in section 7(1) and (2) of the Bill both require proof of a “trespass” on business premises.
9. Despite the elaborate definitions provided in section 3 of the Bill, “trespass” is not defined. It would accordingly fall to a court hearing a complaint for the offence to construe the meaning of “trespass”. It is likely that “trespass” would be held to import the common law of “trespass”, or less likely, that it is to be read to mean the offence in s 14B of the *Police Offences Act 1935* (Tas).
10. Common law offences were abolished in Tasmania with the passage of the *Criminal Code Act 1924* (Tas), specifically section 6. The rationale was that it should be clear when a person is breaking the law on the face of the statute that creates the offence. It is undesirable to leave the limits of criminal law uncertain, and to be ascertained by reference to prior judgments of the criminal courts.

The mental element of the offences in section 7(1) and (2)

11. It seems that the present iteration of the Bill would now create the offences in section 7 (1) and (2) as offences of specific intent.
12. The ALA first notes the discrepancy between these two offence provisions.
13. Section 7(1) relates to business premises, and section 7(2) relates to business vehicles. Both offences require either a trespass to have been committed, and for either the trespass, or an act committed whilst trespassing, to have caused obstruction to business activity. The section 7(1) offence is completed with an intent that the trespass, or act whilst trespassing, obstruct business activity; while the section 7(2) offence is completed with an intent only that the trespass obstruct business activity, even though the structure of the offence leaves open that the trespass did not objectively cause any such obstruction.
14. Secondly, the problems presented by the imprecision of the word “trespass” are compounded by the introduction of the concept into the mental element. Is the offence complete if the defendant does not know that they lack permission to be on the premises, but still intends to obstruct a business activity? Is the offence complete if the defendant is

reckless as to whether they lack permission to be on the premises, but intend to obstruct a business activity?

15. The manner of drafting the mental element provisions into the two offences is strange and, frankly, jurisprudentially aberrant. The ALA is aware of no example of the drafting of a penal provision resembling section 7(1) and (2) in Tasmania.

The ALA's previous legislative proposal

16. In March 2021, during parliamentary debate in relation to the Workplaces (Protection from Protestors) Bill 2019, the ALA released a draft alternative Bill, the Police Offences Amendment (Protection from Business Disruption) Bill 2021 ('the alternative Bill').
17. The ALA submits that the alternative Bill, a copy of which is annexed hereto, is conceptually simple, involves minimal legislative change, is unlikely to present complex problems of interpretation, and would meet the proper ends of this Bill.

Conclusion

18. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the proposed Workplaces (Protection from Protestors) Amendment Bill 2021. As indicated above, the ALA has several concerns about the Bill and submits that the annexed alternative Bill is a preferred model. The ALA is available to provide further assistance to the Tasmanian Government's Department of Justice on the issues raised in this submission.



Fabiano Cangelosi

On behalf of the Tasmanian branch of the Australian Lawyers Alliance

Annexure 1

TASMANIA

**POLICE OFFENCES AMENDMENT (PROTECTION FROM BUSINESS
DISRUPTION) BILL 2021**

CONTENTS

PART 1 – PRELIMINARY

1. Short Title
2. Commencement

PART 2 – POLICE OFFENCES ACT 1935 AMENDED

3. Principal Act
4. Section 14B (2AA) and (2AB)
5. Repeal of Act

POLICE OFFENCES AMENDMENT (PROTECTION FROM BUSINESS DISRUPTION) BILL 2021

(Brought in by ...)

A BILL FOR

A Bill to amend the *Police Offences Act 1935* to protect business from disruption, and to make provision for compensation.

Be it enacted by Her Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

1. Short Title

This Act may be cited as the *Police Offences Amendment (Protection from Business Disruption) Act 2021*.

2. Commencement

This Act commences on a day to be proclaimed.

PART 2 – POLICE OFFENCES ACT 1935 AMENDED

3. Principal Act

In this part the *Police Offences Act 1935* is referred to as the Principal Act.

4. Section 14B (2AA) and (2AB)

The Principal Act is amended by inserting subsection (2AA) and (2AB) into section 14B:

- (2AA) However, if the court that convicts a person of an offence under this section is satisfied that the person:
- (a) impeded the carrying out of a business activity on or in the land, building, structure, premises, aircraft, vehicle or vessel; and
 - (b) intended that the trespass impede the carrying out of a business activity on or in the land, building, structure, premises, aircraft, vehicle or vessel –

the person is liable to:

- (c) a penalty not exceeding five times that provided for by subsection (2);
 - (d) an order that the person make restitution to the person carrying on the business activity in an amount commensurate to the loss, if any, occasioned by the impediment to the carrying out of the business activity.
- (2AB) An order under subsection (2AA):
- (a) may be made by the court on an application made on that person's behalf by the DPP, if the sentencing court was the Supreme Court, or the complainant or police prosecutor, if the sentencing court was a court of petty sessions;
 - (b) may be enforced as a restitution order under the *Sentencing Act 1997* section 66.

5. Repeal of Act

This Act is repealed on the first anniversary of the day on which it commenced.