COMMUNITY
LEGAL CENTRES
TASMANIA

3 March 2019

Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001
attn: Director

via email: haveyoursay@justice.tas.gov.au

To Brooke Craven,
Re: *Workplaces (Protection from Protestors) Amendment Bill 2019*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Workplaces (Protection from Protestors) Amendment Bill 2019* ('the Bill').[1]

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

We are strongly opposed to the *Workplaces (Protection from Protesters) Act 2014* ('the Act'). In our opinion, the Act is unnecessary with existing legislation already providing sufficient scope to punish illegal protest. For example, under the *Police Offences Act 1935* (Tas), it is an offence to unlawfully enter land with the penalty for non-residential land being a fine of up to $650 or a prison term not exceeding 6 months.[2] Additionally, the *Police Offences Act 1935* (Tas) makes it an offence to destroy or injure property with the penalties being a fine not exceeding $1,300 or a prison term not exceeding 12 months.[3]

It should also be noted that the majority of the High Court strongly condemned the Act for impermissibly burdening the Constitution's implied freedom of political communication.[4] In the majority's view, a compelling justification is required by legislatures where a heavy burden on the implied freedom of political

[1] CLC Tas would like to acknowledge University of Tasmania constitutional law lecturer Brendan Gogarty who assisted in the preparation of this response.
[2] Section 14B of the *Police Offences Act 1935* (Tas). Also see sections 79, 244 of the *Criminal Code Act 1924* (Tas).
[3] Section 37 of the *Police Offences Act 1935* (Tas).
[4] *Brown v Tasmania* [2017] HCA 43.

communication is proposed.[5] In our opinion, simply removing the word 'protester' from the Bill does not change its intent, which remains the prosecution of persons protesting. We would also note that no explanatory materials were provided with the draft Bill to justify the proposed amendments to the Act. Furthermore, the fact that in its history of operation, the Act was only used twice (against Bob Brown and Jessica Hoyt) indicates that the powers are unnecessary.

The Act also infringes on Australia's human rights obligations with three United Nations human rights experts having urged the Tasmanian Government "to refrain from adopting legislation against protests that disrupt businesses".[6] Following the passing of the Bill into law the United Nations Special Rapporteur on the situation of human rights defenders "conveyed to the Tasmanian government his concern about the law, its implementation and deleterious impact on the freedom to peaceful assembly and human rights advocacy".[7]

We are also concerned that whilst some in our community may be able to understand the legislation and make an informed decision in relation to a particular activity, most will not, particularly as the Bill, if passed, is likely to lead to duplication with already existing legislation. For example, as well as proposed trespass and damage to property provisions in the Act already being contained in the *Police Offences Act 1935* (Tas), the Bill also replicates the obstructing police officer prohibition also contained in the *Police Offences Act 1935* (Tas).[8]

In our opinion, if the Government's intention is to provide greater protections to business, the *Workplaces (Protection from Protesters) Act 2014* should be repealed and the maximum penalties available under the *Police Offences Act 1935* (Tas) for trespass, destroying or injuring property or obstructing police officers be reviewed.

Nevertheless, if the Government intends to introduce the Bill we recommend adoption of the following amendments.

- **Thoroughfare Obstruction**

As clause 6(6) of the Bill currently reads any obstruction of a public thoroughfare, including a 'public space' that may impede the carrying out of a business activity is an offence. In other words, a protest disrupting any business at all (even if it is not the business activity which is the target of the protest) would be an offence. Protestors standing on a footpath in Salamanca or in the Launceston Mall handing out leaflets and/or holding a banner raising awareness of the harmful effects of salmon farming, or the logging of Tasmanian rainforests would be obstructing a

---

[5] *Brown v Tasmania* [2017] HCA 43 at para. [119]-[122].

[6] Office of the United Nations High Commissioner for Human Rights (2017), *Report of the Special Rapporteur on the situation of human rights defenders on his mission to Australia*. As found at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Documents/A_HRC_37_51_Add_3_EN.docx (Accessed 26 February 2019).

[7] Office of the United Nations High Commissioner for Human Rights (2014), 'UN experts urge Tasmania to drop its anti-protest bill' 9th September 2014. As found at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E (Accessed 26 February 2019).

[8] Section 34B of the *Police Offences Act 1935* (Tas).

public thoroughfare in an attempt to impede business activities, either through consumer spending or increased community concern. In a similar manner to clause 7 (discussed below) the effect of the clause is likely to have a chilling effect with persons choosing not to communicate about matters of government and politics for fear of being charged under the Act. The constitutional uncertainty of a clause lacking geographical, causative or temporal connections suggests that the provision does not sufficiently circumscribe the scope of the law to a degree necessary to satisfy the majority's finding in *Brown v Tasmania*, especially in cases with similar facts. We therefore recommend that clause 6(6) be narrowed significantly so that it is clear precisely what obstruction will amount to an offence.

- ***Threats***

We strongly believe that clause 7 should be removed from the Bill. This is because of the significant likelihood that it will have a chilling effect on persons voicing their concern at issues important to them such as private development in national parks. A recent example is an ABC News story in which opponents of a kunanyi/Mount Wellington cable car noted that 300 people had "expressed an interest" in attending "a training workshop for people who want to express their opposition to the project" including "non-violent direct action".[9] The retention of clause 7 in the Bill would mean that persons organising the training and even attending the training could be charged with "threaten[ing] to commit an offence... if the person intends, by so doing, to impede the carrying out of a business activity..."

- ***Police Direction***

We strongly believe that police officers should be required to direct, warn and move-on persons from business premises or business access areas before arresting them. As it currently stands, sections 8 and 11 of the Act allow police officers to direct persons away from business premises or business access areas. Similar directions are common in other Tasmanian Acts including the *Police Offences Act 1935* (Tas).[10]

Whilst sections 8 and 11 of the Act were struck down by the High Court in *Brown v Tasmania*[11] their invalidity was not a consequence of the subject matter but rather the lack of clarity about when and where it could legitimately be used. Taking into account the majority view that police directions were both a form of procedural fairness and recognition of the need for proportionality,[12] we therefore recommend that amended sections 8 and 11 of the existing Act be retained.

---

[9] Ellen Coulter and Alexandra Humphries, 'Hundreds of cable car opponents sign on for 'direct action protest training', *ABC News*, Saturday 23 February 2019. As found at https://www.abc.net.au/news/2019-02-23/cable-car-protest-training-sessions/10839254 (Accessed 27 February 2019).

[10] See, for example sections 10, 15B, 63A of the *Police Offences Act 1935* (Tas).

[11] *Brown v Tasmania* [2017] HCA 43 at para. [113]-[116] per Kiefel CJ, Bell and Keane JJ.

[12] For example, the majority observed that because it was unclear when and where an illegal act might arise, a police officer might 'erroneously' direct a person to move away from a place where they had a legal right to be. Further, because a warning could be given to a 'group of persons', even by loudspeaker, there was a chance that some of the group did hear the direction but were in fact not breaching the law at the time, but were still required to move on. See *Brown v Tasmania* [2017] HCA 43 at para. [80]-[83] per Kiefel CJ, Bell and Keane JJ.

- ***Balancing the right to assemble peacefully with the protection of business activities***

We strongly believe that the ability of the police to arrest without warrant (clause 13) should be balanced by the countervailing consideration of the right to peaceful protest. We recommend the incorporation of a clause similar to section 5 of the *Peaceful Assembly Act 1992* (Qld) which proscribes illegal assemblies but balances this with the right to assemble peacefully with others in a public place subject to public safety, public order, or the protection of the rights and freedoms of others.

If we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,

Benedict Bartl
Policy Officer
Community Legal Centers Tasmania