

Human  
Rights  
Law  
Centre.

Submission on the *Workplaces (Protection from Protesters) Amendment Bill 2021*

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# Human Rights Law Centre

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## Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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# 1. Executive Summary

We welcome the opportunity to make this submission regarding the *Workplaces (Protection from Protesters) Amendment Bill 2021* (the **2021 Bill**).

The 2021 Bill is the Tasmanian government's third attempt at legislation criminalising a range of protest action. Each iteration of these laws, including the 2021 Bill, has been unnecessary, disproportionate and harmful to people's right to protest in Tasmania.

In 2017 the High Court struck down parts of the *Workplaces (Protection from Protesters) Act 2014* (the **Act**) on the grounds that several provisions were an impermissible burden on the constitutionally protected freedom of political communication (*Brown v Tasmania*).<sup>1</sup>

In March 2021, the *Workplaces (Protection from Protesters) Amendment Bill 2019* (the **2019 Bill**), which purported to respond to the High Court ruling, was voted down by the Tasmanian Legislative Council after being criticised as ineffective, broad and unnecessary.

The 2021 Bill maintains many of the amendments in the 2019 Bill but seeks to address some of its criticisms by increasing some offence thresholds, reducing maximum penalty levels, removing excessive police powers, reducing the scope of compensation provisions and inserting a new defence.

The 2021 Bill also creates several new offences, namely:

- trespass on business premises or on or in business vehicles with intent to obstruct business activity; and
- the obstruction of the use or construction of a public thoroughfare or critical infrastructure with intent to obstruct business activity.

As set out in this submission, our concerns with the 2021 Bill are threefold:

1. The Bill is unnecessary - existing laws in Tasmania already address the conduct this Bill purports to target.
2. The Bill is disproportionate, attaching dramatically increased prison sentences to conduct already covered by existing laws in circumstances where that conduct may have a democratic motive.
3. The Bill would have a chilling effect on legitimate democratic activism.

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<sup>1</sup> [2017] HCA 43.

We recommend that the 2021 Bill not be passed, that any evidence suggesting that existing criminal laws do not sufficiently capture relevant conduct be closely scrutinised, and that this law generally not be persisted with.

## 2. The Bill is Unnecessary

Protest is crucial to democracy. Protest rights can be subject to limitations, but only to the extent strictly necessary and proportionate to a legitimate aim.

This well-established human rights principle was confirmed by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association in their recent report to the UN General Assembly, with the Special Rapporteur noting that “any restrictions imposed [on protest rights] must be necessary and proportionate to the legitimate aim pursued”.<sup>2</sup> The Special Rapporteur also observed that “[s]tates have a duty under international law to allow and promote space for opposition to commercial projects” and that “a certain level of disruption of ordinary life, including disruption of traffic, annoyances and inconveniences to which business activities are subjected must be tolerated if the right to freedom of peaceful assembly is not to be deprived of meaning.”<sup>3</sup>

The 2021 Bill restricts protest rights by criminalising conduct which can at times form the basis of issues-based activism. The Bill seeks to justify these restrictions as necessary to protect “the right of persons to carry out business activities... without being intentionally obstructed by trespassers”.<sup>4</sup> However, existing law already deals with this - the offences of unlawful entry on land, damage to property, riotous assembly, assault, public annoyance and common nuisance are already established in Tasmanian legislation under the *Police Offences Act 1935 (Tas) (POA)* and *Criminal Code Act 1924 (Tas) (Criminal Code)*.<sup>5</sup>

As well as being unnecessary, this duplication of offences risks creating a regime that is difficult to understand and consistently implement. The offences in the 2021 Bill carry higher penalties than their POA counterparts, and the resulting police discretion to charge under either legislation creates uncertainty and has the potential to be used punitively against certain people or groups.

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<sup>2</sup> Clément Nyaletsossi Voule, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, UN Doc A/76/222 (23 July 2021) 15[61].

<sup>3</sup> *Ibid.*

<sup>4</sup> 2021 Bill s 3(a).

<sup>5</sup> See, for example, POA ss 13, 14B, 35 and 37; Criminal Code ss 73-75, 140 and 183-184.

### 3. The Bill is Disproportionate

In addition to being necessary and in pursuit of a legitimate aim, any restrictions on protest rights must also be proportionate. The severity of penalties is a key consideration in assessing proportionality. As a guide, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association recently observed that “prison sentences for non-violent protest activity are always disproportionate.”<sup>6</sup> The 2021 Bill provides for significant prison sentences to be applied to a range of non-violent protest actions and as such is inherently disproportionate.

We are also concerned that the 2021 Bill fixes significantly higher penalties to conduct already dealt with under existing Tasmanian law. Under the 2021 Bill, if an individual is convicted of a single trespass-related offence the court may impose a fine of up to 50 penalty units or a term of imprisonment of up to 12 months.<sup>7</sup> This is double the penalty for unlawful entry on non-residential land and vehicles under the POA.<sup>8</sup> Further, the financial penalty for obstructing the use, or construction, of a public thoroughfare or critical infrastructure under the 2021 Bill is a fine of up to 30 penalty units.<sup>9</sup> This is significantly greater than any financial penalty for an offence relating to public annoyance under the POA, the highest of which is 10 penalty units.<sup>10</sup>

It appears that the key difference from existing criminal law, created by the 2021 Bill's offences, is that the conduct be carried out with the intent of obstructing business activity. If it is, then the penalties dramatically increase from those under existing law.

Various types of nonviolent disruptive actions form an important part of advocacy and activism on a range of issues throughout the world. Under Tasmanian law, where such actions involve trespass or property damage, they are dealt with by existing criminal legislation. The fact that an unlawful trespass is committed with what is a nonviolent and ultimately democratic intent should not warrant a dramatically increased penalty, which is what the 2021 Bill would impose in practice.

The 2021 Bill also provides that where a trespass-related offence is committed in circumstances of aggravation, a person may be subject to more serious penalties.<sup>11</sup> The penalty for such an offence is up to 60 penalty units or imprisonment for a term not exceeding 18 months.<sup>12</sup> This maximum penalty increases to up to 120 penalty units or 30 months imprisonment where a person is convicted of a second trespass-related offence committed in circumstances of aggravation.<sup>13</sup> For a person to be

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<sup>6</sup> Clément Nyaletsossi Voule, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, UN Doc A/76/222 (23 July 2021) 16[65].

<sup>7</sup> 2021 Bill ss 7(1), 7(2) and 7(4). As at time of writing in September 2021, 50 penalty units equates to \$8,650.

<sup>8</sup> See POA s 14B.

<sup>9</sup> 2021 Bill s 8. As at time of writing in September 2021, 30 penalty units equates to \$5,190.

<sup>10</sup> See POA s 13. As at time of writing in September 2021, 10 penalty units equates to \$1,730.

<sup>11</sup> 2021 Bill ss 7(5), 7(6).

<sup>12</sup> *Ibid.*, s 7(5).

<sup>13</sup> *Ibid.*, s 7(6).

found guilty of such an offence, their conduct need only “*indirectly*” cause serious risk to the safety of themselves or another person, regardless of whether this risk is a direct result of their actions or whether the risk eventuates.<sup>14</sup>

The broad scope of this offence is far greater than any aggravated offence under the POA, where circumstances are limited to an assault-related charge and the penalty is lower.<sup>15</sup> Similarly, under the Criminal Code, aggravation is reserved for more serious crimes such as armed robbery, assault and carjacking.<sup>16</sup>

If the 2021 Bill passes, a person convicted in circumstances of aggravation under the Act may face imprisonment where they did not intend, and in fact their conduct did not cause, any harm to another. Particularly when compared to the penalty loading for aggravation under the POA, the 2021 Bill’s characterisation of “circumstances of aggravation” is manifestly disproportionate and excessively penalises peaceful conduct that has potentially caused no physical harm.

We also note that under the 2021 Bill’s trespass-related offences,<sup>17</sup> where a person is a body corporate, the financial penalties are extraordinarily high, at 600 penalty units.<sup>18</sup> It is unclear from the legislation how a body corporate might commit the offences, and this lack of clarity compounds the disproportionality and excessiveness of the penalty.

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<sup>14</sup> See definition of “circumstances of aggravation” at s 7(7) of the 2021 Bill.

<sup>15</sup> See POA s 35.

<sup>16</sup> See, for example, Criminal Code ss 183, 240(2), 240(4), 240A(2) and 245.

<sup>17</sup> 2021 Bill, ss 7(1) and (2).

<sup>18</sup> *Ibid.*, s 7(3). As at time of writing in September 2021, 600 penalty units equates to \$103,800.

# 4. The Bill's Chilling Effect on Democratic Advocacy

Legal certainty is a key aspect of the rule of law. Vagueness and ambiguity make it more likely that a law will be applied inconsistently, misapplied, or misunderstood in practice. In the protest context, the risk of an unclear law is that protest will be prevented or ended when it should not be. A law may be applied more broadly than intended or in a manner that is unreasonable, and people may be deterred from engaging in protest for fear of falling foul of a law when they are uncertain whether or not it will apply to them. These risks are compounded when a law contains disproportionate penalties.

We note that the 2021 Bill purports not to target protesters through amending the Act's name, inserting a new objects provision under section 3 and a new application provision at section 6.<sup>19</sup> However the combined effect of the disproportionate penalties described above, and the subjective and unclear thresholds and broad definitions described below, is that the 2021 Bill will have a significant chilling effect on advocacy and democracy in Tasmania.

## 4.1. Subjective and unclear threshold

The 2021 Bill provides for a higher threshold requirement compared to its predecessors in determining what conduct will be considered obstructive with relation to the offence provisions. The offences in the 2021 Bill apply to conduct that would intentionally "prevent, hinder or obstruct" business activity (as stated in the 2019 Bill), however it provides a higher threshold requiring the obstruction be *substantial*. The previously defined term "impede" has been replaced in the 2021 Bill with "obstruct", which otherwise carries the same definition except for the new threshold condition; "to prevent, hinder or obstruct, **to a substantial extent**."<sup>20</sup> This threshold applies to all offences under the 2021 Bill.

Though this narrows the scope of the offences relative to the law's previous iterations, the requirement that a person's conduct impact business activity to a "substantial extent" is subjective and unclear. There is no guidance on what type of obstruction will be considered substantial.

## 4.2 Broad definitions

A number of new defined terms have also been inserted into the 2021 Bill, including "construction" and "critical infrastructure". "Critical infrastructure" is defined as water infrastructure, water system, sewerage infrastructure, sewage system, electricity infrastructure and telecommunications

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<sup>19</sup> See 2021 Bill, ss 3, 5 and 6. The 2021 Bill seeks to amend the Act's title to *Workplaces (Protection for Business and Workers) Act 2014*.

<sup>20</sup> See definition of "obstruct" at s 4 of the 2021 Bill.

infrastructure.<sup>21</sup> The UN Special Rapporteur noted that “overly broad terms such as “critical infrastructure”...” used in an attempt to “shield particular economic ventures from protest” are not compliant with governments’ human rights obligations.<sup>22</sup> The definition of “public thoroughfare” was previously expansive, capturing a “public place” both on land and water and has been expanded further in the 2021 Bill to include rail infrastructure.

Most of the key definitions in the 2019 Bill have been retained, for example, the definitions of “business premises” and “business vehicle” remain the same in the 2021 Bill. The definition of “business premises” in particular raises questions regarding the Act’s application. The term was criticised in *Brown v Tasmania* for being vague and uncertain. The High Court stated that “[t]he Protestors Act operates more widely than its purpose requires. It is principally directed to preventing protestors being present within ill-defined areas in the vicinity of forest operations or access points to those areas....”<sup>23</sup>

In *Brown*, Kiefel CJ, Bell and Keane JJ, stated the main practical problem with this definition, is that for protestors –

it will often not be possible to determine the boundaries of “business premises”...That problem arises because the term “business premises” is inapt for use with respect to forestry land. The definition of “business premises” with respect to forestry land does not provide much guidance. The question simply becomes whether a protester is in an area of land on which forest operations (a widely defined term) are being carried out.<sup>24</sup>

While the 2019 Bill and the 2021 both removed some problematic definitions, like “business access area”, many vague and expansive definitions remain in the 2021 Bill, compounding the law’s uncertainty and its chilling effect on protest rights.

We recommend that the 2021 Bill not be passed, on the basis that it would be an unnecessary and disproportionate restriction on protest rights and have a significant chilling effect on their exercise. We urge that any evidence suggesting that existing criminal laws do not sufficiently capture relevant conduct be closely scrutinised, and that this law generally not be persisted with.

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<sup>21</sup> See definition of “critical infrastructure” at s 4 of the 2021 Bill.

<sup>22</sup> Clément Nyaletsossi Voule, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, UN Doc A/76/222 (23 July 2021) 15[61].

<sup>23</sup> *Brown v Tasmania* [2017] HCA 43 [140].

<sup>24</sup> *Ibid.*, [67].