Environmental Defenders Office

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

23 September 2021

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Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

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Executive Summary

Thank you for the opportunity to provide a submission on this important Bill. This submission is provided on behalf of Environmental Defenders Office (**EDO**).

EDO runs a Citizen Representation program (**CRP**). The CRP provides specialist legal advice and information about the laws that regulate protest activities concerning the environment. In addition, the CRP provides legal representation to those who have been charged with criminal offences arising from their participation in such activities. In this context we welcome the opportunity to provide a submission on the *Workplaces (Protection from Protesters) Amendment Bill 2021* (**the Bill**).

Overall, the EDO considers this Bill to be unnecessary, inappropriate and an overreach by the Tasmanian Government. The EDO does not condone illegal activity. The EDO advocates for fair, just, and proportionate laws.

The EDO considers these new offence provisions to unnecessarily duplicate or be in excess of existing laws and to carry penalties that are excessive when compared with similar existing offences.

In summary, this submission identifies the following nine key concerns:

1. The Bill directly targets protesters and places unreasonable restrictions upon them.
2. The definitions in the Bill are broad and ambiguous and may create uncertain operation.
3. Subjective and undefined thresholds in the Bill will cause confusion.
4. The Bill provides for an excessive and inappropriate expansion of police powers.
5. The Bill creates new offences that are unnecessary when the existing law is sufficient.
6. The Bill creates an excessive new offence of aggravated trespass, which would operate in such a way to unfairly capture a whole range of conduct.
7. Increased maximum penalties for the Bill's offence provisions, which are harsher than other forms of trespass and obstruction, are grossly disproportionate to the criminality involved in the offending.
8. The Bill affords limited protection for protesters.
9. The Bill is counter to Australia's obligations under international treaties and is furthering a trend towards repressing climate activism that the UN has specifically addressed as a problem.

In light of these concerns, our recommendation is that the Bill is unnecessary, disproportionate and, in our view, will operate to unreasonably stifle the freedom of opinion and expression and the freedom of peaceful assembly and of association in Tasmania.

The EDO recommends that the Bill should not proceed.

1. The Bill directly targets protesters

The Bill, although omitting any reference to "protesters", in our view directly targets the freedom of Tasmanians to use peaceful protest and civil disobedience to raise awareness about matters that are important to them.

The Bill, if passed, repeals many of the provisions of the *Workplaces (Protection from Protesters) Act 2014* (Tas) (**2014 Act**). The new offence provisions, although less restrictive than the 2014 Act, are still cause for significant concern because they directly target peaceful protest action. The Bill has the potential to have a chilling effect on the freedom of opinion and expression, the freedom of peaceful assembly and of association in Tasmania.

The Bill creates four main offences, as follows:

(1) A person commits an offence if –
- the person trespasses on business premises or, while trespassing on business premises, performs an act; and
- the trespass, or the act, obstructs the carrying out of a business activity on the business premises; and
- the person intends that the trespass or act obstruct the carrying out of a business activity on the business premises.[1] (**Trespass offence**)

(2) A person commits an offence if –
- the person trespasses on or in a business vehicle, or, while trespassing on or in a business vehicle, performs an act; and
- the trespass, or the act, obstructs the carrying out of a business activity in, on, or by means of, the business vehicle; and
- the person intends that the trespass obstruct the carrying out of a business activity in, on, or by means of, the business vehicle.[2] (**Business vehicle offence**)

(3) A person commits a more serious offence, if they commit an offence against (1) or (2) in circumstances of aggravation.[3] Circumstances of aggravation are if the commission of the offence causes, directly, or indirectly, a serious risk to the safety of the person or another person.[4] (**Aggravated trespass offence**)

(4) A person commits an offence if –
- the person obstructs the use, or construction, of a public thoroughfare or critical infrastructure; and
- the obstruction by the person of the use, or construction, of the public thoroughfare or critical infrastructure obstructs the carrying out of a business activity on business premises or in, on, or by means of, a business vehicle; and
- the person intends that the obstruction by the person of the use, or construction, of the public thoroughfare or critical infrastructure obstruct the carrying out of a business activity on business premises or in, on, or by means of, a business vehicle.[5] (**Thoroughfare and critical infrastructure offence**)

[1] *Workplaces (Protection from Protesters) Amendment Bill 2021* (**the Bill**) s 7(1).
[2] Bill s 7(2).
[3] Bill s 7(6).
[4] Bill s 7(7)
[5] Bill s 8.

2. Definitions in the Bill are broad and ambiguous and may create uncertain operation

In *Brown v Tasmania* (2017) 261 CLR 328; [2017] HCA 43 (**Brown**), the High Court took issue with the definition of business premises, business access areas and forestry land. Significantly, the Bill does not cure this problem as the definitions therein appear largely unchanged. The provisions of the Bill remain too broad and ambiguous with respect to these defined areas. The decision in Brown made clear that such provisions could be subject to abuse based on the ill-defined boundaries. This in fact occurred in Mr Brown's case, where the State withdrew the charges against Mr Brown and accepted that he was not in an area that was subject to the legislation when he was arrested.[6] As per Kiefel CJ, Bell J, and Keane J:

> [73] …In many cases it will be difficult for a police officer to be able to correctly determine where a protester is situated and where the line around business premises and business access areas is to be drawn. A protester will be in no better position in making such determinations. But the powers exercised by police officers under the Protesters Act have important consequences for protesters and for protests generally and experience suggests that their exercise will not always be based upon a correct appreciation of whether the land in which a protester is situated is forestry land to which the Protesters Act applies. In its practical operation, the Protesters Act may bring protest activity to an end upon the mistaken, albeit reasonable, belief of a police officer, unless the protesters are disposed to resist a direction, and thereby risk a breach of the peace, in order to test the issue.[7]

In Brown, the High Court reasoned that this ambiguity and vagueness in drafting will result in some lawful protests being prevented and will have the end result of deterring protesters from protesting.[8] Should this current Bill pass into law, it is submitted that the likely outcome will also be to perpetuate the uncertainty and thereby stifle political expression through peaceful protests and non-violent direct action or civil disobedience on a range of different issues.

3. Subjective and undefined thresholds in the Bill will cause confusion

"Obstruct" has been defined in the Bill as '*to prevent, hinder, or obstruct, to a substantial extent*'.[9] A clear ambiguity lies around what constitutes '*a substantial extent*'. This is a subjective and undefined threshold that will be subject both to the discretion of the police in arresting and charging individuals, and the discretion of the court in determining the guilt of those charged. There is no guidance in the Bill as to what the police, the court, or the public, should consider as constituting '*to a substantial extent'*.

This definition of 'obstruct' does not provide any increased protection to protesters. In Brown, the High Court noted that 'obstruct' in the 2014 Act "*should be construed, consistently with the principle of legality and s 3 of the Acts Interpretation Act 1931 (Tas), so as to apply only to the conduct or presence of a person which "substantially" or "seriously" hinders or obstructs business activities*." Although it may be couched in terms of an improvement as a higher threshold to limit the encroachment on freedom of speech, in practice it affords no greater protections than the 2014 Act, and instead increases uncertainty.

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[6] *Brown v Tasmania* (2017) 261 CLR 328; [2017] HCA 43 (**Brown**) at [74].
[7] Brown, at [73].
[8] Brown, at [77].
[9] Bill s 4.

4. Excessive and inappropriate expansion of police powers

The Bill provides for greater police powers than under the existing law. In our view, this proposed expansion, particularly of the power of arrest is unnecessary, excessive and disproportionately targets protesters.

The power of arrest under the existing law is sufficient. It sets out that the police have the power to arrest any person:

a) that they find committing a crime,
b) that they have reasonable grounds to believe committed a serious offence,
c) loitering at night in circumstances which afford reasonable grounds to believe that they have committed or are about to commit a crime, or
d) who is committing, or is about to commit, a breach of the peace.[10]

The Bill, if passed, would give police the power to arrest a person who the police officer reasonably believes is committing, or has committed, an offence against the provisions of the Bill, where the police officer reasonably believes it is necessary:

a) to ensure the attendance of the person before a court in relation to an offence against a provision of Part 2;
b) to prevent the continuation or repetition of an offence against a provision of Part 2;
c) to prevent the harassment of, or interference with, a person who may be required to give evidence in respect of an offence against a provision of Part 2;
d) to prevent the fabrication of evidence in respect of an offence against a provision of Part 2;
e) for the safety or welfare of members of the public or of the person;
f) to prevent the concealment, loss or destruction of evidence relating to the commission of an offence against a provision of Part 2.[11]

These provisions give greater powers to the police to arrest people in or around business premises, public thoroughfares and critical infrastructure in circumstances where the police reasonably believe a person has committed an offence. By comparison, the existing law does not empower the police to arrest a person who they reasonably believe has committed an offence unless that offence is a serious one.[12] This is a broad and unnecessary expansion of police powers.

Further, the Bill provides for additional police powers to remove from business premises or a business vehicle, a person who the police officer reasonably believes is committing or has committed an offence.[13] This provision enables the police to use force to effect this removal.[14] It does not, for example, provide for a warning or mirror the power of police to direct persons to disperse as provided for under the existing law.[15] Arguably, it is an extension of the current laws for no appropriate purpose or effect other than to make the laws more onerous to protesters.

The High Court in Brown discussed the deterrent effect that police powers can have on protesters. As per Kiefel CJ, Bell J, Keane J:

> [79] That the Protesters Act may operate effectively to stifle political communication which it is not the purpose of the Act to stifle is not merely a function of the vagaries of

[10] *Criminal Code Act 1924* (Tas) s 27.
[11] Bill s 10.
[12] The legislation does not use the term 'serious', however, it refers to offences in Appendix A and Appendix B of the *Criminal Code Act 1924* (Tas).
[13] Bill s 10(3).
[14] Bill s 11.
[15] *Police Offences Act 1935* (Tas) s 15B.

> the application of the concepts employed by the legislation to "facts on the ground"; it is a consequence of the design of the Act in its deployment of a possibly mistaken, albeit reasonable, belief of a police officer as the mechanism by which it operates. Protests may be effectively terminated in circumstances where it is not necessary that the protester has, in truth, contravened s 6(1), (2) or (3) of the Protesters Act, where it is not necessary to establish that any offence has been committed by the protester, and where judicial review of the mechanism whereby such a result is brought about is not practically possible before the protest is terminated.
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> …
> [85] Protesters of this kind will be deterred from being present in the vicinity of forest operations for fear that they may be subject to a direction to leave, with all the consequences which flow from such a direction. They will be deterred from protesting even though the direction may be based upon an erroneous view of where they are situated.

5. Offences created under the existing law are sufficient

The existing law of Tasmania is sufficient to address any trespass or obstruction offences on business premises, business vehicles, public thoroughfares and critical infrastructure. Offences such as unlawful entry on land,[16] common nuisance,[17] public annoyance,[18] and contravention of a dispersal direction[19] cover the whole array of criminal conduct that the Bill creates additional offences for.[20] In our view, there is no proper reason for this duplication.

The offence of unlawful entry on land captures conduct where a person enters a business premises or vehicle without consent or a lawful excuse.[21] The offence of common nuisance or public annoyance captures any conduct to obstruct business activities, public thoroughfares or critical infrastructure.[22] The Bill does not fill any deficiency in the criminal law, but instead duplicates the offences that protesters may already face under the existing law.

In addition, the Bill seeks to remove some of the important protections that are provided under the existing criminal law to individuals. For example, in regard to the existing offence of unlawful entry on land, '*[a] police officer is only empowered to arrest a person that they suspect of trespass when the officer has previously requested the person to leave the place where they are trespassing*.'[23] By way of contrast, the Bill provides no such safeguard prior to arrest but rather, empowers the arrest of those who contravene its provisions as long as the police officer believes on reasonable grounds that it is necessary for one of the stated purposes.[24]

6. New offence of aggravated trespass created

Arguably, the only offence created by the Bill that does not already exist, is the offence of aggravated trespass. The Bill specifies that a person commits an offence in circumstances of aggravation if the commission of the offence causes, directly or indirectly, a serious risk to the safety of the person or another person.[25]

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[16] *Police Offences Act 1935* (Tas) s 14B(1).
[17] *Criminal Code Act 1924* (Tas) Sch 1, s 141.
[18] *Police Offences Act 1935* (Tas) s 13.
[19] *Police Offences Act 1935* (Tas) s 15B(2).
[20] Other than the offence of aggravated trespass.
[21] *Police Offences Act 1935* (Tas) s 14B(1).
[22] *Criminal Code Act 1924* (Tas) Sch 1, s 141; *Police Offences Act 1935* (Tas) s 13.
[23] *Police Offences Act 1935* (Tas) s 14B(2).
[24] Bill s 10.
[25] Bill s 7(7).

The use of '*indirectly'* opens a pandora's box of possible circumstances where a trespasser's actions indirectly cause a serious risk to the safety of a person (whether themselves or another). The proposed language provides enormous scope for protesters to be held responsible at law for the safety of persons with whom they have had no direct contact, or that their protests do not directly affect.

The use of 'risk to safety' is also equivocal. There need not be any person actually in danger, just the risk that they may face danger. This use of 'risk' in combination with 'indirectly' draws a long and uncertain bow; one which could see a protester charged with this offence in a broad range of circumstances.

The offence of aggravated trespass is overreaching and not transparent, i.e., it is not clear what types of conduct the amendments are intended to cover and no justification is provided.

7. Increased maximum penalties are grossly disproportionate to the criminality involved in the offending

In comparison to the current penalties for unlawful entry on land (if entering dwelling-house: imprisonment of 12 months or $8,650 fine, if on any other land: imprisonment for 6 months or $4,325 fine[26]). The new penalty provisions are double this, carrying a maximum penalty of 12 months or a $8,650 fine, in essence, saying that trespassing on a business premise should be penalised in the same way as entering a dwelling-house, which is regarded by the public as of utmost importance to protect - a person's safe-haven.

The maximum penalty for aggravated trespass as a first-time offender is 18 months imprisonment or a fine of $10,380.

Maximum penalties for corporations equate to $103,800.

These penalties are grossly out of proportion to the criminality involved in the offending. In our view, the clear intent of these maximum penalties is to stifle peaceful protest action and deter protesters.

8. Limited protections for protesters

There are limited protections provided for protesters throughout the Bill. Notably, the offence of aggravated trespass is excluded from the defences listed in the Bill.[27] Therefore, members of the public who have authorised their protest and obtained a police permit, and union members advocating for their rights will not be protected if their actions indirectly cause a serious risk to a person's safety. This will no doubt stifle a broad range of protest activities.

The Bill's stated object is to balance the rights of persons carrying out business activities with the rights of persons to freedom of movement, assembly and lawful expression of opinion.[28] Further, the Bill aims to address the question of its constitutional validity by stating that it "*does not apply to the extent, if any, that it would infringe any constitutional doctrine of implied freedom of political communication*".[29]

These "protections and safeguards" for protesters are illusory, and simply paying lip service to their obligations to ensure the freedom of political communication is not burdened. In

[26] *Police Offences Act 1935* (Tas) s 14B.
[27] Bill s 9.
[28] Bill s 3.
[29] Bill s 6.

practice, these objects and provisions will not limit the ability of the police to arrest and charge protesters to prevent political discourse.

9. The Bill is counter to Australia's obligations under international treaties and furthers a trend towards repressing climate activism that the UN has specifically addressed as a problem

The right to freedom of peaceful assembly and association is enshrined in article 20 of the *Universal Declaration of Human Rights* and articles 21 and 22 of the *International Covenant on Civil and Political Rights*, which was ratified by Australia on 13 August 1980.[30] Under Australia's commitment to the *United Nations Framework Convention on Climate Change*, it has an obligation to "*promote and facilitate…public participation in addressing climate change and its effects and developing adequate responses*."[31] Further, under the Paris Agreement, Australia committed to enhancing "*public participation and public access to information, recognising the importance of these steps with respect to enhancing actions under this Agreement*".[32] The Bill is contrary to Australia's obligations and commitments under international law.

The Bill comes at the same time as the seventy-sixth session of the UN General Assembly, where the Special Rapporteur on the rights to freedom of peaceful assembly and of association will present their report on climate justice. Notably, the Special Rapporteur commented:

> 60. The exercise of the right to peaceful assembly is one of the most important tools people have for advocating for more effective and equitable climate action and environmental protection. Several mandate holders have stressed that the exercise of the right to freedom of peaceful assembly is an essential component of democracy and "an invaluable tool through which to ensure policy formation in the interest of the public good".
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> 61. As mentioned above, any restrictions imposed must be necessary and proportionate to the legitimate aim pursued. The practice of imposing blanket prohibitions on peaceful assemblies fails that test and does not comply with States' human rights obligations. This is also the case for the reliance on overly broad terms such as "critical infrastructure", "vital installations" and "national interests" in an attempt to shield particular economic ventures from protest. As the mandate holder has previously emphasized, States have a duty under international law to allow and promote space for opposition to commercial projects. In this context, it is important to underline that national, political, economic and government interests are not to be viewed as belonging to the same category as "national security or public order", recognized as grounds for the imposing of limitations under international human rights law.
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> 62. The Special Rapporteur reiterates 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. In the words of the Human Rights Committee, "(p)rivate entities and broader society may be expected to accept some level of disruption as a result of the exercise of the right". Businesses engaged in harmful activities should accept a reasonable level of economic loss resulting from disruptions caused by the peaceful assemblies organized in opposition to them, and organizers and participants should not be held liable for those disruptions.

[30] International Covenant on Civil and Political Rights [1980] ATS 23.
[31] United Nations Framework Convention on Climate Change, art. 6.
[32] Paris Agreement, art. 12.

63. Limitations of peaceful assembly on the grounds of “disruption of traffic”, as well as in some cases the broader and more general offences of nuisance and disorderly conduct, must be tightly defined in order to comply with human rights law and prevent undue interference with the right to peaceful assembly. The Special Rapporteur has emphasized that road blocking is a legitimate means of protesting, which has long been central to social movements around the world. While road blocking may be subject to certain limited restrictions, it should never be subject to the incurring of criminal penalties.

64. In light of the high level of public interest involved in advancing climate justice, it is particularly important that States recognize and provide space for civil disobedience and non-violent direct-action campaigns,[33] which are employed by many climate justice activists around the world who are following in the footsteps of other major transnational social movements. States must exercise great restraint in imposing restrictions on these forms of peaceful protests, including when taking decisions on whether to arrest, prosecute, impose pre-trial detention, convict or award damages against climate justice activists for engaging in such actions. Any limitations imposed must allow for judgment on a case-by-case basis and meet the legality, necessity and proportionality requirements, taking into account the significance of the aims of the protest in question from a rights-based perspective.

65. For example, the use of “trespassing” offences for public assemblies carried out on the private property of individuals who object to those assemblies or on critical infrastructure facilities should be assessed strictly against principles of necessity and proportionality. Prison sentences for non-violent protest activity are always disproportionate. In this regard, the European Court of Human Rights has indicated that when charging a person in connection with a protest, a “compelling consideration relating to public safety, prevention of disorder or protection of the rights of others” should be at stake and that “the need to punish unlawful conduct ... is not a sufficient consideration in this context”. Even when public safety interests are raised in a given case in support of a restriction on the right to peaceful assembly, the State would still need to demonstrate necessity and proportionality.[34]

To introduce heightened trespass and obstruction laws at this time is counter to democracy and the concern of the population facing the climate crisis.

The UN has previously condemned similar laws in Queensland and Western Australia. Western Australia’s *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015* (WA) sought to reduce the legal rights for citizens to protest "lawful activity". The United Nation’s human rights experts warned that the bill would “have the chilling effect of silencing dissenters and punishing expression protected by international human rights law”. They also stated that the proposed changes “discourages legitimate protest activity and instead, prioritises business and government resource interests over the democratic rights of individuals”.[35]

In 2019 Queensland passed the *Summary Offences and Other Legislation Amendment Bill 2019* (Qld) which, amongst other things, sought to criminalise the use of lock-on devices in protests. In a joint letter to the Australian government in 2019, UN experts expressed their

[33] See Human Rights Committee, general comment No. 37 (2020) (CCPR/C/GC/37), para. 16.
[34] Clement 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), 16-17.
[35] Office of the High Commissioner of Human Rights, ‘UN human rights experts urge Western Australia’s Parliament not to pass proposed anti-protest law’ (15 February 2016, online) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17047&LangID=E>.

serious concern that the Queensland laws allowed for the criminalisation of peaceful protests.[36] Similarly, to the concerns expressed in this submission, the UN experts expressed concern over the unclear definitions and the potential for abuse that the legislation creates:

> The unclear definition of what might constitute "unreasonable interference" or a "reasonable excuse" is a cause for concern in that it is excessively broad and open to very divergent interpretations. The grounds for determining whether an attachment device should be considered dangerous are similarly broad, and fail to recognise that attachment or 'lock-on' devices have been safely removed in the course of peaceful protests for many years.[37]

This communication further drew attention to the tightening of Australia's grip on stifling democracy. They said:

> Finally, we would like to mention that in his 2016 mission report to Australia, the Special Rapporteur on the situation of human rights defenders raised concerns about "the trend of introducing constraints by state and territory governments on the exercise of the right to freedom of assembly, in particular through "anti-protest legislation". Following the introduction of such legislation, "peaceful civil disobedience and non-violent direct action could be characterized as unlawful disruption". The Special Rapporteur expressed further concerns about the apparent prioritization of business interests over the fundamental right to freedom of assembly. He recalled that human rights defenders have the right to protect all human rights, "regardless of whether their peaceful activities are seen by some as frustrating business projects." The Special Rapporteur recommended your Excellency's Government to "[r]eview and revoke laws that unduly restrict the right to free and peaceful assembly." (A/HRC/37/51/Add.3, paras. 43, 45, 107).[38]

The Tasmanian Government needs to respect the internationally recognised right of its population to use peaceful protest and civil disobedience to give voice to their concerns. In contrast, the proposed Bill is oppressive and will operate to stifle political dissent in Tasmania.

Recommendations

In light of these concerns, our recommendation is that the Bill is unnecessary, disproportionate and, in our view, will operate to unreasonably stifle the freedom of opinion and expression and the freedom of peaceful assembly and of association in Tasmania.

The EDO recommends that the Bill should not proceed.

[36] Clement Nyaletsossi Voule, David R. Boyd, David Kaye and Michel Forst, *Special Rapporteur Communication to Australia*, UN Doc OL AUS 8/2019 (3 December 2019).
[37] Clement Nyaletsossi Voule, David R. Boyd, David Kaye and Michel Forst, *Special Rapporteur Communication to Australia*, UN Doc OL AUS 8/2019 (3 December 2019), 2.
[38] Clement Nyaletsossi Voule, David R. Boyd, David Kaye and Michel Forst, *Special Rapporteur Communication to Australia*, UN Doc OL AUS 8/2019 (3 December 2019), 4.