



New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

to

**The Parliament of Australia,
Senate Standing Committee on
Legal and Constitutional Affairs
re: the Criminal Code
Amendment (Agricultural
Protection) Bill 2019**

31 July 2019

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

<http://www.nswccl.org.au>

office@nswccl.org.au

Correspondence to: PO Box A1386, Sydney South, NSW 1235

Phone: 02 8090 2952

Fax: 02 8580 4633

NSWCCL Submission to the Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs re: the Criminal Code Amendment (Agricultural Protection) Bill 2019

The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to participate in this Committee's Inquiry to review the proposed legislative changes outlined by the Criminal Code Amendment (Agricultural Protection) Bill 2019 (the 'Bill'). We appreciate the invitation to provide our views on this legislation.

Summary

The Bill responds to a series of political protests that occurred around Australia in April 2019 in which activists sought to draw attention to the legitimate political issue of animal cruelty and the slaughter of animals for human consumption. The protests involved a series of conventional street rallies and less conventional 'sits-ins' that saw animal rights activists trespass upon and briefly occupy private property used for the slaughter of animals.

In response, Prime Minister Scott Morrison characterised the protestors as 'green-collared criminals', compared them with terrorist foreign fighters and vowed to implement stiff laws to prevent such protests happening again. The proposed laws are drafted in the spirit of this reaction. They seek to criminalise conduct that 'incites' either the summary offence of trespass (s. 474.46), or the indictable offences of unlawful damage and theft (s. 474.47) by using a carriage-service (the internet) to distribute information about a protest to be held on 'agricultural land'. No actual substantive offence need occur. Inciting trespass is punishable by 12 months imprisonment while inciting damage or theft carries a five-year term of imprisonment. Fault elements include both intention and mere recklessness. 'Agricultural land' includes not only land used for primary or food production but land used for forestry and logging purposes, expanding the scope of the Bill to capture more common logging and forestry protests, provided that they occur on private land (s. 473.1).

1. Broad Application

The legislation is drafted in such broad terms as to capture forestry, logging and other environmental protests - such as those dealt with by the High Court of Australia in cases such as *Brown v Tasmania* [2017] HCA 43 and *Commonwealth v Tasmania* (1983) 158 CLR 1. Clearly, the protest movements that triggered these important legal challenges were critical to the development of environmental law in Australia. The breadth of the proposed laws and their application to forestry industries or even protests against illegal land-clearing on private farms, for instance, threaten the future organisation of important environmental protest.

The legislation is also broad enough to capture anti-fracking protests that commonly occur on private farms where coal-seam gas companies often operate.

Recommendation 1: The NSWCCCL opposes this legislation in full. If it does proceed, however, specific exclusions or ‘carve-outs’ should be inserted into the Bill to provide immunity from prosecution in relation to the organisation or ‘incitement’ of protests implicating the forestry and mining industries.

2. Chilling Effect (on legitimate political protest)

The objective of these laws is to stifle political communication about the organisation of environmental and animal rights protest, provided that the protest occurs on, or damages, private property. Despite a vague reference to the laws not applying should they conflict with the implied freedom of political communication (s. 474.48), the practical application of these provisions is to arrest first and sort-out the legal consequences later. The direct effect of such law thereby stifles political protest and achieves an objective that starkly contradicts the implied freedom of political communication (‘the implied freedom’, as outlined by the High Court in *Lange v ABC* (1997) 189 CLR 520; and *McCloy v NSW* [2015] HCA 34).

The legislation attempts to distinguish itself from more blatant encroachments against the implied freedom (see, for example, *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Brown v Tasmania*) by specifying that the protest must be held on private agricultural land. However, the High Court has had no previous difficulties in striking-down legislation as constitutionally invalid when it interferes with an exercise of the implied freedom on private land. In *Coleman v Power* (2004) 220 CLR 1, for instance, the implied freedom was applied to invalidate legislation and executive acts that interfered with political protest in a private shopping mall. In *Brown v Tasmania*, the implied freedom was applied to strike-down legislation that interfered with political protest in shops and other places of forestry business. And in *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 – a case which stands on all fours with the trespass legislation raised by s. 474.46 of the present Bill – the implied freedom was applied to invalidate a charge of trespass against animal rights activists who filmed the interior of a possum meat processing plant.

Given this precedent, it is likely that the High Court would find that the implied freedom invalidates most arrests and charges contemplated by this legislation, if not the entire Bill. The fact that the Parliament would consider passing such legislation, in direct contravention of constitutional law, shows, in the view of the NSWCCCL, contempt for the High Court as well as basic civil liberties and political freedoms. It consolidates the impression that the objective of this legislation is to arrest first to stop protest and negotiate the constitutional law later.

Comment: The NSWCCCL strongly opposes this legislation where it infringes fundamental constitutional civil rights and liberties, in particular, the implied freedom of political communication.

3. Disproportionate and draconian

The legislation is disproportionate to the conduct that it seeks to prevent: the mere 'incitement' or steps preparatory to summary offending and other minor offences. These offences do not actually require the commission of the substantive offence of trespass or unlawful damage etc. The ultimate consequence of the proposed offences is to criminalise conduct for an offence that never eventuates. Such criminalisation is beyond justification, particularly in respect to offences as minor and trivial as trespass and unlawful damage. Such offences are the subject of summary criminal prosecution in every local court across the country on every day of the working-week. In this respect, the proposed legislation is draconian and disproportionate and might be said to infringe at least two of the four core principles of criminalisation, 'that the criminal law should only be used to censure persons for substantial wrongdoing' and 'that laws be enforced with respect for proportionality'.¹

The criminalisation of mere preparatory offences or 'pre-crime' is generally only acceptable in liberal democracies when reserved for offending with the potential for significant societal damage – e.g. terrorism, environmental and industrial catastrophe. To criminalise steps preparatory to the mere offence of trespass in these cases is to wield the proverbial sledgehammer against a half-cracked pistacchio. In theoretical terms, these laws apply the legal notion of 'precaution', intended to frame potentially catastrophic preparatory actions, to a petty criminal context. The precautionary principle is clearly inappropriate here. As criminal law academic Lucia Zedner has commented, outside of offences that have the potential for mass-scale damage,

the mentality of precaution feeds on existing insecurities and gives way to the exercise of fevered bureaucratic imaginings. The consequence is that old 'certainties' of risk have in significant measure been usurped by uncertainty as a justification for action ... It is our not knowing, our inability to know or unwillingness to prove what we think we know that provides the reason to act before that unknown threat makes itself known.²

Comment: The NSWCCCL strongly condemns the criminalisation of acts that are merely preparatory to the commission of minor offences. This is an impost on basic human freedom and is clearly disproportionate to the desired legislative ends.

4. Lacking Sufficient Justification

'Public safety' is a common and legitimate justification for laws that infringe the implied freedom of political communication: see for instance, *Levy v Victoria* [1997] HCA 31; *Clubb v*

¹ Andrew Ashworth, 'Is the criminal law a lost cause' (2000) 116 *Law Quarterly Review* 225, 225-6.

² Lucia Zedner, 'Fixing the Future?', in McSherry et al (eds), *Regulating Deviance* (Hart Publishing, 2009), 15.

Edwards [2019] HCA 11. It is clear that the Government has attempted to invoke the language of 'public safety' and 'food safety' in an attempt to justify the present Bill (see, the Explanatory Memorandum, pp. 5, 12 and 16). Problematically, however, the Government has presented no evidence, to date, that adequately addresses how the proposed offences threaten public safety. No government reports, such as CSIRO opinions, appear to have been sought. In fact, photographic evidence exists to the contrary, showing that some protestors, implicated in the various 'sit-in' protests, were wearing hair-nets and coveralls and other safe food processing outfits whilst occupying one of the meat processing works (see pictures, outlined in Annexure A). Indeed, viewed through a traditionally conservative, literal interpretative lens, it is difficult to see how the mere act of 'incitement' could ever contaminate a food source.

There is no safety justification for these powers, as alleged in the explanatory memorandum. Rather, these laws must be seen for what they are: an ill-considered, reactionary response to legitimate political protest that was held during an election campaign. They were announced by the Government 'on the run' during the election and their reactionary haste is reflected in the drafting.

Recommendation 2 (a): That the Commonwealth produce and make publicly available, evidence to show how public protests of the kind that occurred in April 2019 pose a threat to public safety and food contamination;

Recommendation 2(b): Should the Government be able to produce such evidence, that the offence provisions be amended to include an additional element. This element would involve incitement to commit a trespass or unlawful damage etc, 'in such a manner as to intentionally or recklessly threaten food safety'. The Commonwealth would be required to prove this additional element beyond reasonable doubt.

Concluding Comments

The NSWCCCL is proud that Australia has, recently, become an international leader in protecting freedom of speech and expression. To remain at the forefront of these issues, the Commonwealth should not proceed with these reactionary laws.

We thank you for your consideration of our submission.

This submission was written by Dr Eugene Schofield-Georgeson (NSWCCCL Vice-President) on behalf of the NSWCCCL.

Yours sincerely,

Therese Cochrance
Secretary
NSW Council for Civil Liberties
Mob 0402 013 303
Therese.Cochrane@nswccl.org.au

30 July 2019

Contact in relation to this submission

Dr Eugene Schofield-Georgeson:

Mob: 0412 394 646

Email: eugene.schofield-georgeson@uts.edu.au.

Annexure A

Photographs of animal rights protestors during the April 'vegan protests', depicted wearing safety coveralls (extracted from video footage):



Courtesy of *The Guardian*, 'Vegan protesters raid farms and stage blockades around Australia – video', 7 April 2019: <https://www.theguardian.com/australia-news/video/2019/apr/08/vegan-protesters-raid-farms-and-stage-blockades-around-australia-video>