



Tasmanian Council of Social Service Inc.

Police Offences Amendment (Workplace Protection) Bill 2022

April 2022



**INTEGRITY
COMPASSION
INFLUENCE**

About TasCOSS

TasCOSS's vision is for one Tasmania, free of poverty and inequality where everyone has the same opportunity. Our mission is two-fold: to act as the peak body for the community services industry in Tasmania; and to challenge and change the systems, attitudes and behaviours that create poverty, inequality and exclusion.

Our membership includes individuals and organisations active in the provision of community services to Tasmanians on low incomes or living in vulnerable circumstances. TasCOSS represents the interests of our members and their service users to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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Introduction

Thank you for the opportunity to make a submission to the Department of Justice regarding the *Police Offences Amendment (Workplace Protection) Bill 2022* ('the Bill').

As noted in the fact sheet released to accompany the Bill,¹ the Bill repeals the *Workplaces (Protection from Protestors) Act 2014* ('the Act') and makes proposed amendments to the Police Offences Act ('the POA'), legislation governing summary offences in Tasmania.

As the Bill proposes amendments to existing legislation (rather than the introduction of a new piece of legislation), there is no objective stated in the Bill. The fact sheet outlines the following objectives:²

- Appropriate aggravated penalties where a court is satisfied that a trespass obstructed a business or undertaking, and clarify the elements of the trespass offence;
- Appropriate aggravated penalties where a court is satisfied that a trespass caused a serious risk to the safety of the trespasser or another person; and
- Appropriate penalties for the existing offence of public annoyance, and clarification that this offence includes unreasonable obstruction of the use of streets.

The Act has been subject to a successful challenge in the High Court of Australia,³ with certain provisions found to be constitutionally invalid. The Government has previously proposed amendments to the Act, and we refer to our previous submissions in relation to earlier legislative reform proposals,⁴ as well as the numerous submissions from other community and legal organisations.

TasCOSS acknowledges that the Bill addresses some of the concerns raised in our submission from 2021 (in particular, the duplication of offences already found in the POA). However, we remain concerned about the Bill and its potential impact on the Tasmanian community.

Concerns

Our principal concerns are as follows:

- The broad wording of the proposed amendments could create unintended consequences, which go beyond the stated intention of the Bill;
- The Bill is disproportionate; and
- The Bill may have a chilling effect on legitimate and lawful protest activity, which could have a significant impact on the entire Tasmanian community.

¹ Department of Justice 2022, Fact Sheet: *Police Offences Amendment (Workplace Protection) Bill 2022*, accessed at justice.tas.gov.au/community-consultation/consultations/police-offences-amendment-workplace-protection-bill-2022.

² Ibid.

³ *Brown v Tasmania* [2017] HCA 43.

⁴ TasCOSS 2021, Submission to Department of Justice, *Workplaces (Protection of Business and Workers) Bill 2021*, September; TasCOSS 2019, Submission to Department of Justice, *Workplaces (Protection from Protestors) Amendment Bill 2019*, March 2019).

Potential unintended consequences

TasCOSS is concerned about the potential impact changes to s13 of the POA could have on already marginalised groups. We are also concerned about the vague language used in proposed amendments to s14B and the potential broad application of these provisions.

Proposed amendments to s13 POA

The Bill amends s13 by adding an additional ground to the existing charge of ‘public annoyance’, making it a summary offence to ‘unreasonably obstruct the use of any street’. The amendment also increases the maximum monetary penalty which can be imposed from 3 penalty units to 10 penalty units.

We are concerned the Bill may capture activities which fall outside the scope or proposed objectives of the Bill. Although not expressly stated in the Bill or fact sheet accompanying the Bill, we understand the intent of the new provisions is to appropriately sanction protests or related activities which interfere with businesses and/or place workers at risk. However, the wording of the new subsection in s13 is extremely broad and could criminalise a range of activities unrelated to protests. For example, this subsection could be used to criminalise the use of public spaces, such as footpaths, by people experiencing homelessness or sleeping rough. Although the fact sheet states that the new offence does not, ‘prevent permitted activities on streets’,⁵ we are concerned about the potential for broad interpretation of this provision. We also note that certain communities, including young people, people experiencing homelessness and Aboriginal Tasmanians, are more likely to come into contact with the police when using public space.⁶ We are therefore concerned about the potential impact of new offences criminalising the use of public space for these communities, who are more likely to have their activities monitored and policed.

The Bill also increases the maximum monetary penalty, not only for the new offence created by (1) (ea), but also for all offences listed under subsection (1). This more than doubles the current monetary penalty for several public space offences, including disturbing the peace, disorderly conduct, and insulting or annoying any person. No justification is offered in the Bill or the fact sheet supporting this change.

TasCOSS strongly opposes any legislative reform which further criminalises the use of public space in Tasmania. Researchers have highlighted the impact of public space offences on marginalised groups, particularly those experiencing homelessness,⁷ as well as their potential incompatibility with international human rights law standards.⁸ TasCOSS is very concerned that this Bill not only seeks to broaden the range of activities which can be policed and criminalised in the public space, but that the Bill also increases the

⁵ Department of Justice, Fact Sheet: *Police Offences Amendment (Workplace Protection) Bill 2022*, accessed at justice.tas.gov.au/community-consultation/consultations/police-offences-amendment-workplace-protection-bill-2022.

⁶ For example, see Walsh, T 2004, ‘Who is the ‘public’ in ‘public space’? A Queensland perspective on poverty, homelessness and vagrancy’, vol. 29, no. 2, *Alternative Law Journal* 81; Adams, L 2013, ‘In the public eye: Addressing the negative impact of laws regulating public space on people experiencing homelessness’, accessed at homelesshub.ca/sites/default/files/In%20the%20Public%20Eye%20-%20Churchill%20Report.pdf.

⁷ Ibid.

⁸ Murphy, J 2019 ‘Homelessness and public space offences in Australia – a human rights case for narrow interpretation’, vol. 7, no. 1, *Griffith Journal of Law and Human Dignity* 103.

penalty of offences which have little or nothing to do with the conduct that the Government purports to be concerned with.

Proposed amendments to s14B

The Bill also creates new offences of ‘aggravated trespass’ in certain situations, including instances where a person has committed trespass and has ‘obstructed’ a ‘business’ or ‘undertaking’. None of these terms are defined in the POA.

TasCOSS is concerned about the lack of clarity created by the vague language of these subclauses, and the potential for perverse outcomes which go far beyond the stated objective of the Bill. The lack of definitions, or clear examples, could very easily lead to the prohibition of activities which are currently considered lawful and thus impose an unnecessary and unjustified restriction on the legitimate right to protest.

Under the amendments proposed by the Bill, any protest taking place on private property (including the site of a business) in which a business was ‘obstructed’ could fall under the provisions relating to ‘aggravated trespass’ under s14B (2AA). This is extremely broad and open to wide interpretation, potentially increasing penalties for any protest which could be seen to have a negative impact on a business or industry, regardless of where the protest takes place or the risk imposed by the protest activity. The High Court was critical of the breadth and uncertainty surrounding the prior law in *Brown v Tasmania*, a factor that contributed to the ultimate finding that the law was unconstitutional.

The Bill is disproportionate

Although the Bill does address some of the issues raised in our earlier submissions, TasCOSS believes the Bill continues to be a disproportionate response.

As well as introducing a new offence under the ‘public nuisance’ provisions of the POA, the Bill also introduces three new aggravating factors for trespass under s14B:

- When a person is convicted of trespass and they have ‘obstructed a business or undertaking’, or have taken an action which ‘caused a business or undertaking to be obstructed’;
- When a person is convicted of trespass and they caused, either directly or indirectly, a ‘serious risk’ to the safety of themselves or another person; and
- When a ‘body corporate’ commits a trespass which has obstructed a business or undertaking.

A conviction for the above aggravated offences can result in more severe penalties. A person convicted of trespass who has obstructed a business or undertaking is liable to a penalty not exceeding 50 penalty units or a maximum of 12 months imprisonment. A person convicted of trespass who caused a ‘serious risk’ to themselves or another person may face a penalty of up to 75 units, or a maximum of 18 months imprisonment; if the person has been previously convicted of a similar offence/offences, this can increase to 125 penalty units or up to 30 months imprisonment. A body corporate convicted of trespass in situations where they have obstructed a ‘business’ or ‘undertaking’ can face penalties of up to 900 penalty units.

The maximum penalties for the proposed offence of aggravated trespass are disproportionate when considered alongside penalties for other offences in Tasmania. For example, the maximum penalty for assault under the POA is 20 penalty units or 12 months' imprisonment, and the maximum penalty for aggravated assault (defined as an assault committed against a person who is known to be pregnant) is 50 penalty units or imprisonment for 2 years. This is less than the maximum penalty proposed for a person convicted of aggravated trespass who has prior convictions for similar offending.

There is no explanation for the extraordinary penalties proposed in the case of a 'body corporate'. We note concerns have already been raised by other stakeholders over the appropriateness of similar clauses in previous Bills; in particular, the Human Rights Law Centre noted (in relation to a similar provision in the Workplaces (Protection from Protesters) Amendment Bill 2021) that "[i]t 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."⁹

Also concerning is the provision which makes it an aggravating factor to cause a serious risk, either directly or indirectly, to oneself or another person whilst committing trespass. It is very possible this offence would capture instances where someone is completely unaware of the potential risk they presented to another person and did not intend for any harm to occur. It would also include situations where no harm was caused, only a 'serious risk' of harm – a term which is not defined in the legislation, with no examples provided. Considering the significant penalties which can be incurred for this offence, we agree with the Human Rights Law Centre's earlier submission (in relation to a similar provision in the Workplaces (Protection from Protesters) Amendment Bill 2021), which stated, "characterisation of 'circumstances of aggravation' is manifestly disproportionate and excessively penalises peaceful conduct that has potentially caused no physical harm."¹⁰ The fact that this aggravating provision is reliant on the response of a third party to the offender's conduct exacerbates the breadth and uncertainty of the proposed regime. In other words, the same conduct could or could not rise to an aggravated offence solely based on how a third party responded to conduct.

TasCOSS believes the offences outlined in the Bill, as well as the statutory penalties imposed, are a disproportionate response which go far beyond the stated objectives of the Bill.

The Bill may curtail legitimate and lawful protest activity

As noted above, the Bill seeks to introduce particularly harsh penalties for offences which are poorly defined and could potentially be applied to encompass a wide range of activities and circumstances. Many stakeholders, including TasCOSS, have already raised concerns about the potential 'chilling' effect of this type of legislation, which could easily result in confusion and concern about whether legitimate protest activities are lawful.

⁹ Human Rights Law Centre 2021, Submission to Department of Justice, *Submission on the Workplaces (Protection from Protesters) Amendment Bill 2021*, September.

¹⁰ Ibid.

Tasmania has a proud history of political and environmental activism. There are several examples of activism, including protests, playing a significant role in achieving social and legal reform, not only in Tasmania but throughout Australia. Protests and demonstrations are particularly significant for those members of our community who may be excluded from traditional law reform mechanisms and can provide opportunities for inclusive community debate and political expression. Although the Bill is not aimed at restricting lawful protest activities, TasCOSS is extremely concerned about the potential for the Bill to discourage citizens from engaging in peaceful, legitimate protest for fear or confusion about the lawfulness of this conduct.

Recommendations

TasCOSS does not support the Bill or the proposed amendments to the Act. As per our 2021 submission in relation to the Workplaces (Protection of Business and Workers) Bill 2021, we recommend the Tasmanian Government engage in further community consultation to adequately identify the needs of businesses and workers, and to present these findings to the community, before proceeding with any further attempts to legislate in relation to these issues. We make this recommendation in light of the importance of the freedom of political expression and the significant detrimental effect any limitation of this right may have on our community. Otherwise, given the concerns expressed above, it remains entirely possible that this Bill, if enacted, would again be found unconstitutional by the High Court.