



Tasmanian Council of Social Service Inc.

TasCOSS Submission *Workplaces (Protection of Business and Workers) Bill 2021*

September 2021



**INTEGRITY
COMPASSION
INFLUENCE**



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.

Please direct any enquiries about this submission to:

Adrienne Picone

Chief Executive Officer

Phone Number: (03) 6231 0755

Email Address: adrienne@tascoss.org.au

Introduction

Thank you for the opportunity to make a submission to the Department of Justice regarding proposed amendments to the *Workplaces (Protection from Protestors) Act 2014* ('the Act') contained in the *Workplaces (Protection of Business and Workers) Bill 2021* ('the Bill').

Background

The Bill aims to modify the Act, legislation which was successfully challenged in the High Court of Australia 2017. In *Brown v Tasmania* [2017] HCA 43, the High Court found that key provisions of the Act were constitutionally invalid.

The Government subsequently sought to amend the Act and proposed amendments to the Act in 2019. TasCOSS and numerous other community and human rights organisations made submissions as part of the community consultation process relating to the proposed amendments to the Act. These proposed amendments were not adopted by the legislature and the proposed Bill was not enacted.

The Government has now proposed new amendments to the Act.

Key Issues

We remain concerned about the Bill and its potential impact on the Tasmanian community.

Our principal areas of concern are the following:

- The Bill is unnecessary and introduces offences which duplicate those already found in existing Tasmanian legislation;
- The Bill is a disproportionate response to potential risks for industry and workers; and
- There is the potential for the Bill to have unintended consequences which may impact on the human rights of Tasmanians and community groups.

1. The Bill is unnecessary

Section 7 of the Bill creates offences relating to acts of trespass on business premises or business vehicles which are committed with the intention to obstruct a business activity. Subsection 5 creates an aggravated trespass offence in circumstances where the trespass, or acts performed while a person or group is trespassing, cause a serious risk to the safety of any person. Section 8 also creates a further offence relating to the obstruction of a public thoroughfare or critical infrastructure with the intention of obstructing a business activity.

Most of the offences created by the Bill mirror offences which already exist in Tasmanian legislation. For example, the *Police Offences Act 1935* ('the POA') contains the offences of trespass and property damage, both of which have been used by industry and police to protect businesses from criminal activities. Businesses therefore already have legal protections from the kinds of activities which would be covered by sections 7 and 8 of the Bill.

The Bill does introduce an aggravated trespass offence which does not correspond to an existing offence under current Tasmanian legislation. However, the Government does not need to introduce this offence

in the Act to provide protection for businesses and workers in line with the stated objective of the Bill. If the Government seeks to create an aggravated offence to deal with instances where trespass or acts relating to trespass create a serious risk of harm, then this objective could be achieved by amending existing legislation dealing with the offence of trespass – for example, with the introduction of an aggravated trespass offence in the POA relating to the obstruction of business activities.

As the offences introduced by the Bill relate to activities which are already prescribed as unlawful in other pieces of Tasmanian legislation, police officers will have discretion as to which legislation best applies in the circumstances. As the penalties introduced by the Bill are significantly higher than penalties contained in the POA (discussed further below), the proposed amendments therefore create a situation of uncertainty and potential injustice in relation to how the laws may be applied to different people or groups.

2. The Bill is not a proportionate response to the potential harm to industry and/or workers

The stated objective of the Bill is found in section 3:

The object of this Act is to balance appropriately -

(a) the right of persons to carry out business activities on business premises, or in, on or from business vehicles, without being intentionally obstructed by trespassers or persons obstructing the use or construction of public thoroughfares or critical infrastructure; and

(b) the rights of persons to freedom of movement, assembly and lawful expression of opinion.

The Bill therefore acknowledges the tension between the protection of businesses and workers from potential disruption, harm and economic loss, and the rights of community members and groups to engage in protest. However, our view is that the scheme introduced by the Bill, including the penalties for offences proposed in the Bill, represents a disproportionate response.

The penalties for the proposed offences of trespass (found in s7 (1) and (2) of the Bill) are either a fine not exceeding 50 penalty units or imprisonment for a term not exceeding 12 months. These penalties are a significant increase from the penalties for offences relating to the same conduct found in the POA, where the maximum penalty for an act of trespass onto non-residential land is either 25 penalty units or imprisonment for 6 months. The Bill also introduces an offence of aggravated trespass with a more significant maximum penalty (60 penalty units or imprisonment for 18 months). In relation to the proposed offence of aggravated trespass, the Bill also allows for an increase in the maximum penalty in situations where the accused has previous convictions for aggravated trespass. These maximum penalties are 120 penalty units, imprisonment for 30 months or both. The penalties for the offences introduced by the Bill therefore represent a significant and substantial increase from the maximum penalties found for similar offending in the POA.

The maximum penalties for the proposed offence of aggravated trespass are in our view also 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.

The scheme introduced by the Bill must be viewed in light of the potential impact it may have on the community and the ability of individuals or groups to engage in activism. Although the object clause of the Bill acknowledges the need to balance potentially competing objectives, our view is that the Bill may disproportionately burden those groups who are most marginalised and least able to access traditional means of voicing opinion or dissent. Any proposed legislation seeking to curtail the already limited access of these groups or community members to engage in political expression or debate must be justified and proportionate in the circumstances.

We acknowledge the Government's intention to protect workers and businesses from situations where there is a serious risk of harm to personal safety. However, we are of the view that the penalty scheme introduced by the Bill is disproportionate when considering both the severity of the maximum penalties proposed and the stated objective of the Bill, together with the impact the Bill may have on Tasmanians.

3. The Bill has the potential to create unintended consequences

Although the Bill seeks to protect workers and businesses from harm or risk of harm, we remain concerned that the Bill may result in the unintended limitation of human rights, or public confusion and/or uncertainty about the lawfulness of engaging in protest activities.

One issue arises from the language used and concepts referred to in the Bill. The Bill creates offences for those who trespass on business premises or vehicles with the intention of 'obstructing' a business activity. The term 'obstruct' is defined in the Bill as 'to prevent, hinder, or obstruct, to a substantial extent', a vague and unclear definition including a subjective test which may result in discrepancies with how the law is applied. A similar issue arises with the proposed offence of aggravated trespass, which relates to occasions where a trespass results in a 'serious risk' to any person. No definition for this term or example of activities to be considered a 'serious risk' are provided in the Bill. A further issue relates to the element of intention; although all the offences introduced in the Bill relate to acts committed with the intention to obstruct business activity, there are no criteria provided or examples given for when police can assume intention as required. We are concerned that the subjective elements of these offences will create uncertainty in relation to how the law will be applied, or even result in arbitrary and unfair outcomes with the targeting of particular groups.

Apart from the uncertainty created by the language in the Bill, we are also concerned about the potential chilling effect this legislation may have on public discussion and debate in relation to political and social issues in Tasmania. Even though the Bill proposes a change in title from *Workplaces (Protection from Protesters) Act* to *Workplaces (Protection of Business and Workers)*, it is clear the Bill is intended to apply principally to acts of protest which may obstruct business activities. The importance of protest in a liberal democracy was highlighted by the High Court in *Brown v Tasmania*, and there are several examples in our recent history demonstrating the importance of peaceful protest in achieving legal and social reform. Even if the Bill is not intended to curtail peaceful protest or lawful activism, we are concerned that the Bill may have this effect in practice, which could significantly weaken our democratic processes and prevent Tasmanians experiencing marginalisation from having their voices heard and thereby creating change. TasCOSS opposes the introduction of any legislation which could

have the effect of limiting reasonable and peaceful protest, and we remain concerned the Bill may result in this outcome.

Recommendations

TasCOSS does not support the Bill or the proposed amendments contained within the Bill.

We urge the Government to consider alternatives to the Bill and engage in robust and meaningful dialogue with interested parties and groups to address the underlying issues driving the implementation of this legislation. If further legislative amendments are needed, our view is that this objective is best achieved either by introducing new offences into existing legislation (such as the POA), or by engaging 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.