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Workplaces (Protection from Protesters) Bill 2014 (Tas)  
An analysis of international human rights implications

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# 1. Overview

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## 1.1 Background

1. The Workplaces (Protection from Protesters) Bill 2014 (Tas) (**Bill**) was introduced into the Parliament of Tasmania on 24 June 2014 and passed by the House of Assembly on 26 June 2014. At the date of this report, the Bill is before the Legislative Council.
2. This report provides a summary of the legislative framework proposed under the Bill (as amended),<sup>1</sup> followed by an analysis of its international human rights implications, particularly with respect to the criminalisation of certain protest activity and proposed mandatory sentencing regime. It concludes with a recommendation that the Bill not be passed.

## 1.2 Executive summary

3. The Bill establishes the *Workplaces (Protection from Protesters) Act 2014* (Tas) (**Act**) under which legitimate protest activity is stifled and criminalised through the creation of a number of new offences. The Bill is unnecessary and breaches international human rights law.
4. A threshold problem with the Bill is that it is not necessary. The Bill establishes a series of criminal offences and associated mandatory penalties in an attempt to suppress or limit protest activity. Tasmania already has a wide range of criminal and other laws that adequately cover the types of behaviour the Bill seeks to regulate, making the Bill redundant.
5. The Bill violates multiple fundamental rights recognised and protected under the *International Covenant on Civil and Political Rights (ICCPR)*.<sup>2</sup> Ratified by Australia in 1980, the ICCPR obliges all levels of government – including Tasmania at the state level – to respect, protect and fulfil the human rights articulated in the ICCPR.<sup>3</sup>
6. As a starting point, criminalising certain protest activity violates the rights to peaceful assembly and freedom of expression, as contained in the ICCPR. Although some restrictions may be placed on these rights (eg to ensure public safety), the measures under the Bill are disproportionate and unnecessary to achieving the Bill's objectives. For example:

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<sup>1</sup> This report incorporates amendments to the Bill released on 24 September 2014 and 22 October 2014.

<sup>2</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**).

<sup>3</sup> ICCPR art 50; Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [4]; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 27.

- (a) the Bill fails to distinguish between peaceful protests and violent or dangerous protests, instead criminalising *all* types of protest activity on or near certain business premises;
  - (b) the Bill gives police the power, exercisable with a significant degree of discretion and irrespective of any potential risk to public safety or order, to determine when a peaceful assembly should be disbanded or stopped even before forming;
  - (c) key provisions of the Bill are ambiguously drafted or unnecessarily broad, resulting in a legislative framework under which individuals may not know whether their conduct would constitute a criminal offence; and
  - (d) the Bill inappropriately prioritises commercial and economic interests over fundamental human rights of individuals.
7. The mandatory sentencing regime attached to the new offences also potentially contravenes the ICCPR's prohibitions on arbitrary detention and calls into question the right to a fair trial.
8. Under the Bill, a court must impose a mandatory penalty for certain offences relating to protest activity, including a mandatory prison sentence for a subsequent offence, if heard in the Supreme Court. This means that, in some circumstances, a protester will be sent to jail irrespective of the severity of the relevant protest activity or the person's culpability, character, remorsefulness or prospects of rehabilitation. This creates a real risk that sentences imposed under the Bill will be grossly disproportionate and inappropriate for the relevant individuals. Moreover, a mandatory sentencing regime is inconsistent with the widely-recognised principles in the Australian legal system that the judiciary should have independent discretion; and that imprisonment should be used as a last resort.
9. Although a less severe sentencing regime is available if the Director of Public Prosecutions elects to prosecute an offence in the summary jurisdiction of the Magistrates' Court, this decision is discretionary, non-compellable and cannot be appealed. The default position under the Bill is that all offences are indictable, exposing protesters to an unacceptably high risk that their fundamental human rights will be violated.
10. The Bill has been amended twice since it passed the Legislative Assembly in June 2014.<sup>4</sup> The latter amendments significantly scaled back the scope of the protest activity that the Bill seeks to criminalise and reduced the severity of penalties that attach to the offences regime. Although the amended Bill is a considerable improvement on its original form, the amendments do not go far enough in making the Bill compliant with human rights.
11. The HRLC recommends that the Bill not be passed.

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<sup>4</sup> See Paul Harriss, 'Workplace Protection Laws' (Media Release, 24 September 2014) [www.premier.tas.gov.au/releases/workplace\\_protection\\_laws](http://www.premier.tas.gov.au/releases/workplace_protection_laws); Paul Harriss, 'Protecting Workers from Radical Protesters' (Media Release, 22 October 2014) [www.premier.tas.gov.au/releases/protecting\\_workers\\_from\\_radical\\_protesters](http://www.premier.tas.gov.au/releases/protecting_workers_from_radical_protesters).

## 2. Proposed legislative framework

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### 2.1 Overview of legislation

12. The Bill establishes the *Workplaces (Protection from Protesters) Act 2014* (Tas) under which certain protest activity is deemed an indictable offence attracting mandatory sentences.<sup>5</sup> The Bill involves three levels of enforcement:
- (a) a police officer has the power to give a protester a direction to stop their offending protest activity and refrain from doing so for the next three months;<sup>6</sup>
  - (b) if the person fails to comply with the direction, a police officer may issue them with an on-the-spot fine;<sup>7</sup> and
  - (c) if the person elects to have the matter heard by a court instead of paying the fine, he or she will be charged with an offence and subject to a severe penalty regime that includes mandatory sentencing.<sup>8</sup>
13. Provision is made for an offence to be heard and determined by a court exercising summary jurisdiction, with less severe penalties attached. As with all indictable offences triable summarily in the Magistrates' Court, this option is only available at the unfettered discretion of the Director of Public Prosecutions (**DPP**).<sup>9</sup> Prosecutorial decisions of the DPP are not appealable.
14. It is reasonable to assume that, in most circumstances, the DPP will elect for prosecutions under the Bill to proceed summarily, given the seriousness of offending under the Bill is unlikely to warrant the expense and delay involved in a jury trial in the Supreme Court. However, this is only an assumption, and there is nothing in the Bill requiring the DPP to proceed summarily nor any ability to appeal the DPP's decision. Accordingly, this report analyses the sentencing regime under the Bill at its highest, as it relates to offences tried on indictment in the Supreme Court. It is important to note that the mandatory imprisonment regime only applies to prosecutions proceeding in the Supreme Court.

### 2.2 Key concepts under the Bill

15. Under the Bill, some offences will apply to any person, while other offences will only apply to 'protesters'. A protester is someone who participates in a demonstration, parade, event or

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<sup>5</sup> *Workplaces (Protection from Protesters) Bill 2014* (Tas) (**Bill**) s 17(1).

<sup>6</sup> Bill s 12.

<sup>7</sup> Bill s 16.

<sup>8</sup> Bill s 6(6).

<sup>9</sup> Bill ss 17(2), 17(3).

collective activity for the purposes of promoting awareness of or support for an opinion or belief in respect of a political, environmental, social, cultural or economic issue.<sup>10</sup> A person is not a protester if he or she has the consent of the business occupier, or the protest activity is a protected industrial action under the *Fair Work Act 2009* (Cth).<sup>11</sup>

16. The concept of ‘business premises’ is central to the legislative framework under the Bill. The term is defined very broadly and includes buildings or land used for agriculture, manufacturing or construction, or the administration or management of these activities.<sup>12</sup> The definition also has a particular focus on forestry and mining operations, expressly including land on which mining, mining operations or exploration for minerals is being carried out as well as forestry land, which includes private commercial forests and land on which forestry operations or work preparatory to such operations is being carried out.<sup>13</sup> Hospitals, prisons, schools, universities, and premises occupied by charitable or religious organisations are not ‘business premises’.<sup>14</sup>

### 2.3 Offences relating to obstruction and damage

17. Under the Bill, it is an offence for a protester to:
- (a) prevent, hinder or obstruct access to a business premises or the carrying out of a business activity by entering or doing an act on a business premises or area used to access the premises;<sup>15</sup> or
  - (b) cause damage to business premises or an object used in the business that is on the premises,<sup>16</sup>

where the protester knows or ought reasonably be expected to know that his or her conduct is likely to prevent, hinder, obstruct or cause damage.

18. The Bill would also make it an offence for any *person*, whether or not they are a ‘protester’, to threaten damage in relation to business premises (including threats to obstruct an object used in relation to a business) for the purposes of promoting awareness of or support for an opinion or belief in respect of a political, environmental, social, cultural or economic issue.<sup>17</sup>

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<sup>10</sup> Bill s 4.

<sup>11</sup> Bill ss 4(6)-4(8).

<sup>12</sup> Bill s 5(1).

<sup>13</sup> Bill ss 3, 5(1).

<sup>14</sup> Bill s 5(4).

<sup>15</sup> Bill ss 6(1)-6(3), 6(6).

<sup>16</sup> Bill ss 7(1), 7(2).

<sup>17</sup> Bill ss 7(3), 7(4).

## 2.4 Mandatory sentencing and other penalties

19. Under the Bill, a protester who is engaging in conduct that would constitute an obstruction offence may be issued with a police direction to stop and refrain from repeating that conduct in the subsequent three months.<sup>18</sup> If the person is reasonably believed to have breached or be breaching that direction, a police officer may issue them with an on-the-spot fine for \$280.<sup>19</sup> The person may elect to have the matter heard by a court instead of paying the fine, but if the person is convicted of the offence in the Supreme Court, the court must impose a mandatory penalty between \$5,000 and \$10,000 for a first offence, and a mandatory term of imprisonment of at least 3 months and up to 2 years for each subsequent offence.<sup>20</sup>
20. The Bill also permits a police officer to issue a \$280 on-the-spot fine to a person who fails to comply with a direction to 'move on' from a business premises or access area, or returns within 4 days.<sup>21</sup> If the person elects to have the matter heard by a court and he or she is convicted of the offence, a penalty between \$5,000 and \$10,000 must be imposed.<sup>22</sup>
21. In relation to damaging a business premises or an object used in a business that is on the premises, the Bill does not give a police officer the express power to issue a warning or an on-the-spot fine. Rather, these offences attract severe mandatory sentences for individuals of between \$5,000 and \$50,000 and/or 5 years' imprisonment.<sup>23</sup>
22. Similarly, no warning or on-the-spot fine would be available for the offence of threatening damage in relation to a business. Only a non-mandatory but otherwise severe sentence may be imposed for this offence, being a maximum penalty of \$50,000 and/or 5 years' imprisonment.<sup>24</sup>

## 2.5 New police powers

23. Police would be given new powers with respect to persons reasonably believed to have committed, be committing or be about to commit an offence under the Bill. These include the power to demand proof of identity,<sup>25</sup> to direct persons to immediately leave a business premises

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<sup>18</sup> Bill s 12.

<sup>19</sup> Bill s 16. The relevant penalty is 2 penalty units. For the period of 1 July 2014 to 30 June 2015, the value of one penalty unit is \$140.

<sup>20</sup> Bill s 19(2). See also Tasmania, *Parliamentary Debates*, House of Assembly, 26 June 2014, 30 (Paul Harriss).

<sup>21</sup> Bill s 16.

<sup>22</sup> Bill s 8(1).

<sup>23</sup> Bill ss 7(1), 7(2).

<sup>24</sup> Bill s 7(3).

<sup>25</sup> Bill s 11(1).



or access area (ie 'move on' powers) and not return within 4 days,<sup>26</sup> and to arrest or remove a person who is on business premises or an access area in prescribed circumstances (eg where necessary to preserve public order).<sup>27</sup> Police would also be granted an express power to use the reasonable force necessary, including against persons, to exercise or perform their powers or functions under the Bill.<sup>28</sup>

### 3. International human rights implications of criminalising protest activity

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#### 3.1 Freedom of expression

24. Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression.<sup>29</sup> This freedom is a 'necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights'.<sup>30</sup> Under article 19(3), the right to freedom of expression may only be restricted by measures provided by law and necessary to respect the rights or reputations of others, or for the protection of national security, public order or public health or morals.<sup>31</sup>

25. The Bill, which restricts the right to freedom of expression by criminalising the exercise of this right in particular circumstances, goes beyond what is a permissible limitation for the following reasons.

#### **Proportionality and necessity**

26. The Bill seeks to protect the 'rights of businesses to create economic opportunities and to develop the economy of [Tasmania], along with the rights of workers to go about their work without disruption'.<sup>32</sup>

27. Limitations on the right to freedom of expression must conform to the strict tests of proportionality and necessity.<sup>33</sup> Many of the measures under the Bill seriously encroach on personal rights, and

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<sup>26</sup> Bill s 12.

<sup>27</sup> Bill ss 14(1)-14(6).

<sup>28</sup> Bill s 15.

<sup>29</sup> ICCPR art 19(2).

<sup>30</sup> Human Rights Committee, *General Comment No 34 – Article 19: Freedoms of opinion and expression*, 102<sup>nd</sup> sess, UN Doc CCPR/C/GC/34 (12 September 2011) (**General Comment No 34**) [3].

<sup>31</sup> ICCPR art 19(3).

<sup>32</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 26 June 2014, 26 (Paul Harriss).

<sup>33</sup> *General Comment No 34*, UN Doc CCPR/C/GC/34, [22].

inappropriately prioritise commercial and economic interests over fundamental human rights, such as the right to liberty. Criminalising otherwise legitimate protest activity and attaching severe mandatory penalties is far beyond the least intrusive method to achieving the protective function that the Bill serves.<sup>34</sup>

28. The Bill also fails to distinguish between peaceful protests and protests that are violent or endanger public safety; instead criminalising *all* types of protest activity that fall within the very wide ambit of the Bill's provisions. By not considering the manner in which protest action is carried out, the measures cannot be said to proportionately and therefore permissibly limit the fundamental right to freedom of expression.<sup>35</sup>
29. The new offences under the Bill are also unnecessary, both in the sense that they are not essential to the protection of economic interests of business operators, and also in the sense that existing legislation adequately protects such interests. For example, the offences of trespass to property, damage to property and common nuisance are already established by various legislative instruments as well as the common law, and could be relied on by the State in the event of contravention.<sup>36</sup>

#### **Precision of limitations**

30. Limitations on free speech must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.<sup>37</sup> Key provisions of the Bill are ambiguously drafted or unnecessarily broad, resulting in a legislative framework under which individuals may not know whether their conduct would constitute a criminal offence.<sup>38</sup>
31. For example, several offences under the Bill are triggered if a protester or person 'hinders' business activity or an object used in the business.<sup>39</sup> The Bill does not define 'hinder'. Using a non-legal definition – *to interrupt; to prevent from acting or taking place; to be an obstacle or impediment*<sup>40</sup> – the threshold for triggering the relevant offences would be met in many, possibly unintended, circumstances.

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<sup>34</sup> Cf Human Rights Committee, *General Comment No 27 – Freedom of movement (article 12)*, 67<sup>th</sup> sess, 1783<sup>rd</sup> mtg, UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) [14] cited in *General Comment No 34*, UN Doc CCPR/C/GC/34, [34].

<sup>35</sup> *General Comment No 34*, UN Doc CCPR/C/GC/34, [34].

<sup>36</sup> See *Police Offences Act 1935* (Tas) ss 13, 14B, 15B, 35, 37; *Criminal Code Act 1924* (Tas) s 140.

<sup>37</sup> *General Comment No 34*, UN Doc CCPR/C/GC/34, [25]. See also *Hashman & Harrup v United Kingdom* [2000] 30 EHRR 241.

<sup>38</sup> *The Sunday Times v United Kingdom (No 1)* (1979) ECHR 1, [49].

<sup>39</sup> See Bill s 6(1)-6(3).

<sup>40</sup> See *Macquarie Dictionary* (Macquarie Dictionary Publishers, 6<sup>th</sup> ed, 2013) 706.

32. The ambiguity of the new offences is even more problematic in light of new ‘move on’, removal and arrest powers which may be exercised where a police officer has a reasonable belief that a person is *about to commit* any offence under the Bill. These powers, which may be exercised on nothing more than a reasonable belief about a future event, are inconsistent with the Human Rights Committee’s (the authoritative, interpretive body of the ICCPR) position that a law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.<sup>41</sup>

#### **Compatibility with other ICCPR rights**

33. Lastly, laws restricting freedom of expression must not provide for penalties that are incompatible with the ICCPR.<sup>42</sup> As discussed below in section 4, the mandatory sentencing regime and other severe penalties established under the Bill are incompatible with articles 9 and 14 of the ICCPR, which, in turn, is an inappropriate restriction on the right to freedom of expression.

### 3.2 Right to peaceful assembly

34. Article 21 of the ICCPR protects the right of peaceful assembly. This article protects non-violent assemblies concerned with the discussion and proclamation of ideas,<sup>43</sup> and is likely to extend to civil disobedience manifested without force.<sup>44</sup> The right may be limited by measures in conformity with the law and which are necessary in a democratic society in the interests of national security, public safety, public order, public health or morals, or the protection of the rights and freedoms of others.<sup>45</sup> However, in the same way the right to freedom of expression is encroached, the Bill’s restrictions on freedom of assembly fall outside the scope of permissible limitations.

35. The proposed measures are disproportionate to the purpose they seek to achieve and go far beyond what is necessary to ensure public safety and public order.<sup>46</sup> For example, the Bill gives police officers the power, exercisable with a significant degree of discretion and *irrespective of any potential risk to public safety or order*, to determine when a peaceful assembly may be disbanded or stopped even before forming.<sup>47</sup> Importantly, existing laws already give police

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<sup>41</sup> *General Comment No 34*, UN Doc CCPR/C/GC/34, [25].

<sup>42</sup> *Ibid* [26].

<sup>43</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Publisher, 2<sup>nd</sup> revised ed, 2005) 485.

<sup>44</sup> *Ibid* 487.

<sup>45</sup> ICCPR art 21.

<sup>46</sup> The phrase ‘necessary in a democratic society’ in article 21 ICCPR imports the principle of proportionality in the sense that the type and intensity of an interference be absolutely necessary to attain a purpose: see Nowak, above n 43, 491.

<sup>47</sup> Bill s 12.

officers adequate powers, including arrest powers, to manage any potential risks posed by public assemblies (such as breaches of the peace or endangerment of public safety).<sup>48</sup>

36. Furthermore, although respect for the private property of others – such as business premises targeted by protest activity – may be recognised as a permissible restriction on the freedom of assembly,<sup>49</sup> this restriction must still be ‘necessary in a democratic society’ and must not ‘lead to a complete undermining of real possibilities for assembling’.<sup>50</sup> In some circumstances, the very purpose of the protest activity could not be properly achieved if it were not to occur on or near the business premises to which it relates. The Bill potentially requires a protester to abandon his or her protest in possibly the only place where such protest is relevant and important. This is a disproportionate restriction on freedom of assembly, contrary to the minimum standards of a pluralistic and democratic society.<sup>51</sup>

## 4. International rights implications of mandatory sentencing and other penalties

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### 4.1 Prohibition on arbitrary detention

37. Article 9(1) of the ICCPR provides that no one shall be subjected to arbitrary arrest or detention. Arbitrariness in this context does not simply mean contrary to law; it includes elements of inappropriateness, injustice and lack of predictability.<sup>52</sup> Detention will also be arbitrary if it is

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<sup>48</sup> See *Police Offences Act 1935* (Tas) s 15B which gives a police officer the power to direct a person to leave a public place and not return for at least 4 hours if the officer believes on reasonable grounds that the person: has committed or is likely to commit an offence, is obstructing or is likely to obstruct the movement of pedestrians or vehicles, is endangering or likely to endanger the safety of any person, or has committed or is likely to commit a breach of the peace. A police officer may arrest, without a warrant, any person who fails to comply with such a direction: *Police Offences Act 1935* (Tas) s 55(1)(c). See also *Criminal Code Act 1924* (Tas) ss 73-75 which criminalise participation in an unlawful assembly or riot, and s 27 for the corresponding police power to arrest a person for committing such a crime.

<sup>49</sup> Nowak, above n 43, 494.

<sup>50</sup> Ibid.

<sup>51</sup> The phrase ‘necessary in a democratic society’ in article 21 imports the notion that restrictive measures must correspond to a minimum democratic standard based on pluralism, tolerance and broadmindedness: see Nowak, above n 43, 491; *Handyside v United Kingdom* (1976) 24 Eur Court HR (ser A), [49].

<sup>52</sup> Human Rights Committee, *Views: Communication No 305/1988*, 39<sup>th</sup> sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*).

disproportionate in the prevailing circumstances.<sup>53</sup> The Bill's mandatory sentencing regime is inconsistent with article 9(1).

38. Under the Bill, if a person is found by the Supreme Court to be guilty of an obstruction offence, the Court must impose a penalty between \$5,000 and \$10,000 for a first offence, and a mandatory term of imprisonment of at least 3 months and up to 2 years for each subsequent offence.<sup>54</sup> The Court will be unable to exercise any judicial discretion in sentencing the defendant, meaning that any mitigating or personal circumstances that could otherwise reduce the severity of the sentence will be immaterial. This directly undermines the key sentencing principle of proportionality.
39. Limiting a court's ability to take into account the circumstances or context in which an offence was committed means there is a real risk that a mandatory sentence, particularly imprisonment, would be grossly disproportionate to the culpability of the accused or the severity of his or her conduct. Similarly, if a court is unable to take into account the personal circumstances of an offender (such as his or her character, remorsefulness, employment history, criminal history or prospects of rehabilitation), a mandatory sentence of imprisonment may be an entirely inappropriate and disproportionate form of punishment for the particular accused.
40. Detention must also be justifiable by the State as being necessary to achieve the purpose for which a person was detained.<sup>55</sup> In every Australian jurisdiction, including Tasmania, imprisonment is considered to be the punishment of last resort,<sup>56</sup> largely because of its serious curtailment of liberty and because non-custodial sentences often result in better sentencing outcomes with respect to rehabilitation and non-recidivism.<sup>57</sup> Imprisoning people who engage in

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<sup>53</sup> Human Rights Committee, *Views: Communication No 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) ('*A v Australia*') annex [9.2].

<sup>54</sup> Bill s 19(2).

<sup>55</sup> See *A v Australia*, UN Doc CCPR/C/59/D/560/1993, annex [9.2]-[9.4] and Human Rights Committee, *Views: Communication No 900/1999*, 76<sup>th</sup> sess, UN Doc CCPR/C/76/900/1999 (13 November 2002) ('*C v Australia*') annex [8.2].

<sup>56</sup> See *Crimes Act 1914* (Cth) s 17A(1); *Crimes (Sentencing) Act 2005* (ACT) s 10(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(12); *Criminal Law (Sentencing) Act* (SA) s 11(1); *Sentencing Act 1997* (Tas) s 12(2); *Sentencing Act 1991* (Vic) s 5(4); *Sentencing Act 1995* (WA) s 39. In the Northern Territory, although the *Sentencing Act* (NT) does not explicitly state that a sentence of imprisonment is to be imposed as a last resort, the principle is implied in that Act and otherwise encapsulated in the common law of that jurisdiction: see *Gumurdul v Reinke* (2006) 161 A Crim R 87; *Turner v Trenergy* [1997] 1 NTSC 21.

<sup>57</sup> See eg Jason Payne, 'Recidivism in Australia: findings and future research' (Research and Public Policy Series No 80, Australian Institute of Criminology, 2007) [www.aic.gov.au/documents/0/6/B/%7B06BA8B79-E747-413E-A263-72FA37E42F6F%7Drrp80.pdf](http://www.aic.gov.au/documents/0/6/B/%7B06BA8B79-E747-413E-A263-72FA37E42F6F%7Drrp80.pdf); Australian Bureau of Statistics, *4102.0 – Repeat Imprisonment* (16 March 2010) [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication16.03.102/\\$File/41020\\_RepeatImprisonment.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication16.03.102/$File/41020_RepeatImprisonment.pdf).

protest activity more than once is not necessary to protect the productivity of Tasmanian businesses and their employees' interests in working without interruption.<sup>58</sup>

41. Importantly, although in a different context, the Human Rights Committee has previously expressed concern at mandatory detention laws in other Australian jurisdictions, questioning these laws' compatibility with rights protected under the ICCPR.<sup>59</sup> The mandatory detention laws related to serious criminal offences, including theft and violent offences, in Western Australia and the Northern Territory.

## 4.2 Right to a fair trial

42. Article 14(1) of the ICCPR guarantees, in the determination of a criminal charge, a fair and public hearing by a competent, independent and impartial tribunal established by law. The fairness requirements extend to all stages of proceedings, including the sentencing of an offender.<sup>60</sup> This right will be infringed where a court's evaluation of the facts and evidence of a case is clearly arbitrary or amounts to a denial of justice.<sup>61</sup>
43. Imposing mandatory custodial sentences for offences under the Bill may amount to an arbitrary determination of a sentencing order, especially where the circumstances of the relevant offence are precluded from the court's decision-making process. Justice cannot properly be administered or afforded to a defendant whose personal characteristics are deemed irrelevant to his or her punishment.<sup>62</sup>
44. Further, although the right to appeal a conviction and sentence for an offence remains available under the Bill, mandatory sentences prevent substantial review of the penalty imposed.<sup>63</sup> Impairing the right to seek a proper review of a conviction and sentence by a higher tribunal is

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<sup>58</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 26 June 2014, 26-27 (Paul Harriss).

<sup>59</sup> See Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, 69<sup>th</sup> sess, 1967<sup>th</sup> mtg, UN Doc A/55/40 (28 July 2000) [522].

<sup>60</sup> *Ibid*; *V v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 24888/94, 16 December 1999) [109]; Dato' Param Kumaraswamy, 'Mandatory sentencing: the individual and social costs' (2001) 7(2) *Australian Journal of Human Rights* 7.

<sup>61</sup> Human Rights Committee, *General Comment No 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*, 90<sup>th</sup> sess, UN Doc CCPR/C/GC/32 (23 August 2007) [26].

<sup>62</sup> On the point of proper administration of justice, see Human Rights Committee, *General Comment No 13: Article 14 (Administration of justice)*, 21<sup>st</sup> sess, (13 April 1984) [1].

<sup>63</sup> See Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014) [78]-[80] [www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/2014\\_06\\_18\\_Final\\_Law\\_Council\\_Mandatory\\_Sentencing\\_Discussion\\_Paper.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/2014_06_18_Final_Law_Council_Mandatory_Sentencing_Discussion_Paper.pdf).

not only a violation of article 14(5) of the ICCPR, but is also generally inconsistent with the fair trial principle.<sup>64</sup>

## 5. Recommendation

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45. The Bill is unnecessary and breaches international human rights law by criminalising legitimate protest activity. Accordingly, the HRLC recommends that the Bill not be passed.

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<sup>64</sup> Cumaraswamy, above n 60.