

Acting Committee Secretary
Legal Affairs and Community Safety Committee
Parliament of Queensland

By email: lacsc@parliament.qld.gov.au

8 October 2019

Dear Committee

Summary Offences and Other Legislation Amendment Bill 2019 (Qld)

We write to express our concern that the *Summary Offences and Other Legislation Amendment Bill 2019 (Qld)* (**Bill**) will unfairly and unreasonably impact on peoples' freedom to peacefully protest in Queensland.

The Queensland Parliament has a legitimate interest in ensuring that protests are peaceful. However, this Bill criminalises the employment of common, peaceful protest tactics such as the use of sleeping dragons, tripods and monopoles, even where no harm is likely to eventuate to protesters, first responders or the public. There is a real risk that, as currently drafted, this Bill is not compatible with the right to freedom of expression and the right to peaceful assembly and freedom of association.

The Bill has been justified publicly by Premier Anastacia Palaszczuk after having seen "evidence of locking devices laced with traps" deliberately designed to harm first responders and passers-by.¹ However, reporting has cast doubt over these claims,² and the Bill goes far beyond such conduct to criminalise devices that are clearly a tool used for peaceful protest.

We recommend that the Committee carefully consider evidence of when the relevant devices have been used in a way that intentionally or recklessly risked injury to first responders or passers-by, and whether the existing criminal laws sufficiently capture such conduct. If these claims are well-founded

¹ S Stevenson, "Protesters branded "extremist" as Palaszczuk Government cracks down on road block tactics" *ABC News*, 20 August 2019 available at <https://www.abc.net.au/news/2019-08-20/climate-protester-tactics-called-extremist-palaszczuk-government/11431336>.

² B Smee, "Queensland premier refuses to offer evidence to back claims of 'sinister' climate activists" *The Guardian*, 23 September 2019, available at <https://www.theguardian.com/australia-news/2019/sep/23/queensland-premier-refuses-to-offer-evidence-to-back-claims-of-sinister-climate-activists>.

and the current criminal laws were not sufficient to address the problem – which not clear to us – a limited response by Parliament to address this precise issue would be justified. If the evidence and existing laws indicate that new laws are necessary, the Bill should be amended to capture only this conduct.

The political rhetoric around protest in the context of this Bill also deserves brief mention. That the Queensland Government describes protesters who use these devices as “extremists”³ is a cause for great concern.

The disruption Queensland is experiencing as a result of environmental protests is a symptom of a deeper cause. Protesters are responding to the implications of a climate crisis. So long as we have policy paralysis in dealing with the climate crisis, governments can expect people will continue to come together to voice their concern and demand action. In the meantime, governments should resist the knee-jerk response of criminalising disruptive conduct, and recommit to facilitating peaceful protest as far as is practicable in an equal, democratic society. This was Queensland Parliament’s commitment when it passed the *Human Rights Act 2019* (Qld) (**Human Rights Act**) earlier this year.

Provisions of the Bill that restrain protest rights

Proposed section 14C of the Bill criminalises the use of “dangerous attachment devices” to:

- a) Unreasonably interfere with the ordinary operation of transport infrastructure (penalty: 50 penalty units or 2 years imprisonment).
- b) Stop a person entering or leaving a place of business (excluding monopoles and tripods) (penalty: 20 penalty units or 1 year imprisonment).
- c) Cause a halt to the ordinary operation of plant or equipment because of concerns about the safety of any person (excluding monopoles and tripods) (penalty: 20 penalty units or 1 year imprisonment).

“Attachment device” is defined in proposed section 14A as a device that reasonably appears to be constructed to enable a person to resist being removed from a place or safely separated from a thing. The definition clarifies that ropes, bike locks, padlocks, glue and chains are not, by themselves, determined to be “attachment devices”.

“Dangerous attachment device” is defined in proposed section 14B as a device that:

- a) reasonably appears to be constructed or modified to cause injury to a person who attempts to interfere with the device;

³ S Stevenson, “Protesters branded “extremist” as Palaszczuk Government cracks down on road block tactics” *ABC News*, 20 August 2019 available at <https://www.abc.net.au/news/2019-08-20/climate-protester-tactics-called-extremist-palaszczuk-government/11431336>.

- b) reasonably appears to be constructed or modified to cause injury to a person if another person interferes with the device; or
- c) incorporates a dangerous substance or thing.

The following are also defined as dangerous attachment devices under the Bill:

- a) **sleeping dragon**: an attachment device that incorporates an anchor point for a person to hold or to which a person's hand can be bound or locked, and a casing that shields the person's hand from being released by another person.
- b) **dragon's den**: attachment devices that incorporate one or more sleeping dragons or tubes large enough to pass a person's hand through, and reinforces the casing of the sleeping dragon or tube by adding bulk and weight.
- c) **monopole**: an attachment device that relies on a long pole and support riggings to suspend a person off the ground, which will appear to fall and injure the person if the support riggings are interfered with.
- d) **tripod**: an attachment device in which the legs of the device form a tripod large enough to be used to suspend a person off the ground, which appears to be set up to collapse and injure the person suspended if another person interferes with the legs of the device or any support riggings for the device.

The Bill also amends the *Police Powers and Responsibilities Act 2000* (Qld) to give the police greater powers to search people and vehicles without a warrant if they may possess a dangerous attachment device that has been or may be used to disrupt lawful activity (clauses 3 and 4).

Human rights principles applicable to regulating protest

The following principles, taken from the Commonwealth Constitution, international law, common law, and general democratic principles, should guide governments when regulating and protecting protest:

- a) **Protest activities are protected by the Australian Constitution and international law.** The High Court recently ruled in *Brown v Tasmania*⁴ that Australia's Constitution protects peaceful protest as it is "indispensable the exercise of political sovereignty by the people of the Commonwealth".⁵ Any regulation of protest must be reasonably appropriate and adapted to a legitimate end.

⁴ [2017] HCA 43.

⁵ *Brown v Tasmania* [2017] HCA 43 at [88] (per Kiefel CJ, Bell and Keane JJ).

- b) The right to protest is not absolute, but any regulation of protest must be for a legitimate purpose and limited to what is necessary and proportionate.⁶
- c) As far as possible, protesters should be able to choose how they protest.⁷
- d) Laws affecting protest should be drafted as clearly and carefully as possible.⁸
- e) Laws regulating protest should not rely on excessive police discretion, and where discretion is necessary it should be properly guided by the law.⁹
- f) Lawmakers and governments (including police) should take positive steps to promote freedoms of expression and assembly.¹⁰
- g) Notification procedures should facilitate, not restrict, peaceful protest.¹¹
- h) Lawmakers and governments should not prohibit protest based on its message, except in narrow circumstances where that message causes harm to other people.¹²
- i) Other human rights of protesters must be respected, including privacy, equality and freedom from inhuman or degrading treatment.¹³
- j) The use of force by authorities should only occur in exceptional circumstances and as a last resort.¹⁴

⁶ This principle applies at international law: article 19(3) *International Covenant on Civil and Political Rights*; is similarly a principle of the implied freedom of political communication under the Commonwealth Constitution: *Levy v Victoria* (1997) 189 CLR 579; and arises under section 13 Queensland's *Human Rights Act 2019* (Qld).

⁷ Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ODIHR) & Venice Commission Panel of Experts (Venice Commission), *Guidelines on Freedom of Peaceful Assembly* (2nd edn, 2012), [17] and footnote 44 therein.

⁸ *Bakir v Turkey* (European Court of Human Rights, Chamber, Application No 46713/10, 10 July 2018) [52]-[54]. The risk of an unclear law is that protest will be prevented or ended when it should not be: *Brown v Tasmania* [2017] HCA 43 (18 October 2017), [73], [77]-[79], [84]-[86].

⁹ Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ODIHR) & Venice Commission Panel of Experts (Venice Commission), *Guidelines on Freedom of Peaceful Assembly* (2nd edn, 2012), [10], [60], [91], [134], [147] and [149]; Joint Committee on Human Rights, *Demonstrating respect for rights? A human rights approach to policing protest*, House of Lords Paper 47, House of Commons Paper 320, Session 2008-09 (2009), [71], [76].

¹⁰ The facilitation of protest (even where it causes certain disruption) is compatible with the function of law enforcement to maintain public safety and public order, particularly if there are good channels of communication and trust between protesters and police: Joint Committee on Human Rights, *Demonstrating respect for rights? A human rights approach to policing protest*, House of Lords Paper 47, House of Commons Paper 320, Session 2008-09 (2009), [32].

¹¹ OSCE/ODIHR & Venice Commission, *Guidelines on Freedom of Peaceful Assembly* (2nd edn, 2012), 63; Joint Standing Committee on the National Capital and External Territories, *A Right to Protest* (May 1997) xvii.

¹² Article 4, *International Covenant on Civil and Political Rights*.

¹³ Article 2, Code of Conduct for Law Enforcement Officials, GA Res 34/169, UN GAOR, 34th sess, 106th plen mtg, UN Docs A/RES/34/169 (17 December 1979).

¹⁴ Article 3, Code of Conduct for Law Enforcement Officials, GA Res 34/169, UN GAOR, 34th sess, 106th plen mtg, UN Docs A/RES/34/169 (17 December 1979).

The human rights engaged by the Bill

Queensland Parliament made history when it passed the Human Rights Act earlier this year. It was an unequivocal statement by Parliament that human rights standards are important and will be respected by the State Government.

As the Human Rights Act does not come into effect until 1 January 2020, this Committee will likely not need to report to the Legislative Assembly about a statement of compatibility with human rights.¹⁵

Nonetheless, in good faith with the recent passage of the Act, it would be appropriate that the Committee carefully consider and form a view as to the impact this Bill will have on human rights.

Neglecting to address these concerns now, could mean that, if passed, the laws will be more vulnerable to a finding of incompatibility with human rights by the Supreme Court of Queensland.¹⁶

The relevant rights contained in the Human Rights Act are the right to freedom of expression, and the right to peaceful assembly and freedom of association. They provide:

21 Freedom of expression

- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland and whether—
 - (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art; or
 - (e) in another medium chosen by the person.

22 Peaceful assembly and freedom of association

- (1) Every person has the right of peaceful assembly.
- (2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

Section 21 is drawn from article 19 of the *International Covenant on Civil and Political Rights (ICCPR)*. Section 22 is drawn from articles 21 and 22 of the ICCPR, and is expressly limited to peaceful assemblies, described in the Explanatory Notes of the Human Rights Act as protests that do not involve violence.¹⁷

When the Human Rights Act comes into effect, the Supreme Court of Queensland will be empowered to declare laws incompatible with human rights if it deems that the law's limitation on the relevant

¹⁵ Section 39 of the *Human Rights Act 2019* (Qld) requires portfolio committees examining a Bill to consider the statement and report on whether the Bill is compatible with human rights.

¹⁶ Section 49 of the *Human Rights Act 2019* (Qld).

¹⁷ Explanatory Notes, *Human Rights Bill 2018*, Legislative Assembly of Queensland, 21.

human right cannot be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. The Court will take into account the purpose of the law and the relevant factors enunciated in section 13:

- (a) the nature of the human right;
- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
- (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
- (e) the importance of the purpose of the limitation;
- (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
- (g) the balance between the matters mentioned in paragraphs (e) and (f).

Compatibility of the Bill with the right to freedom of expression, peaceful assembly and freedom of association

The Explanatory Notes (**EN**) broadly cite three purposes for the Bill:

- (a) Preventing inconvenience caused to the public and businesses by the use of such devices. This arises from the additional time it takes to safely extricate a person from a device, which slows the removal of the protester from blocking a road, preventing the safe operation of mining machinery etc.
- (b) Preventing injury to protesters that may arise when extricating protesters from the relevant devices.
- (c) Preventing injury to first responders and passers-by that may arise when extricating protesters from the relevant devices.

An assessment of the compatibility of the Bill with human rights requires balancing between the aims of the Bill and the rights to freedom of expression, peaceful assembly and freedom of association.¹⁸

a) Inconvenience and disruption

The EN states that “some activists during a peaceful assembly have been unlawful and can cause annoyance or inconvenience to the public”.¹⁹ The EN provides examples of such activities, including

¹⁸ *Victoria Police v Anderson (Max Brenner)* (2012) Magistrates' Court of Victoria (23 July 2012), 33 (per Magistrate Garnett).

¹⁹ Explanatory Notes, *Summary Offences and Other Legislation Amendment Bill 2019*, Legislative Assembly of Queensland, 1.

where people have glued themselves to a road to hold up traffic or used sleeping dragons during protests to slow down the ability of police to remove them.²⁰

Sections 21 and 22 of the Human Rights Act replicate the language of sections 15 and 16 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**). In *Victoria Police v Anderson (Max Brenner)*,²¹ Magistrate Garnett dismissed charges against 16 accused for the offences of trespass and besetting premises following a protest, on account the protection of the rights to freedom of expression and association under sections 15 and 16 of the Victorian Charter. As one of the few relevant Charter cases addressing a disruptive protest in detail, his judgment provides useful guidance for analysing this Bill.

Magistrate Garnett made the following observations when dismissing the charges against the protesters:

- i. The protesters did not have criminal intent and nor were they reckless as to the consequences of their acts, whether it be by causing criminal damage to property, causing a significant breach of the peace or a threat to public order.²²
- ii. The conduct of the protesters did not promote violence.²³
- iii. Freedom of speech should be restricted for reasons of public order only when there is a clear danger of disruption rising far above annoyance.²⁴ Disruption should reach a level to which “the public could not reasonably be expected to endure because of its intensity or its duration or a combination of both those factors”.²⁵

Disruption to public order may justify criminalisation in some circumstances, and ultimately that assessment requires a value judgment based on the circumstances of the individual case.²⁶

Crucially, however, this Bill criminalises the use of dangerous attachment devices even where there is a very low level of disruption. For instance, protesters who suspend themselves in a tripod over a pedestrian footpath, or use dragon dens in a way that prevents a person from entering a shop, or disrupt mining equipment for ten minutes, could all face up to two years in prison if the Bill is passed. The Queensland Government has not established a sufficiently strong case of inconvenience to the

²⁰ Explanatory Notes, *Summary Offences and Other Legislation Amendment Bill 2019*, Legislative Assembly of Queensland, 1.

²¹ (2012) Magistrates’ Court of Victoria (23 July 2012).

²² *Victoria Police v Anderson*, at [64] (per Magistrate Garnett).

²³ *Victoria Police v Anderson*, at [64] (per Magistrate Garnett).

²⁴ *Victoria Police v Anderson*, at [65] citing New Zealand Supreme Court in *Brooker v Police* [2007] NZSC 30 at [42]-[43] and *Terminiello v Chicago*, 337 US 1 (1949).

²⁵ *Victoria Police v Anderson*, at [66] (per Magistrate Garnett) citing *Victoria Police v Anderson Brooker v Police* at [42]-[43].

²⁶ *Victoria Police v Anderson*, at [64] (per Magistrate Garnett) *Brooker v Police* at [42]-[43].

public and to business to justify harsher penalties in these circumstances. Further, protesters who engage in such conduct are already subject to criminal penalties under Queensland law.²⁷

b) Risk of injury to protesters

The criminalisation of a common and peaceful protest tactic should be evidence-based. Devices such as sleeping dragons, monopoles and tripods have a long history of use in peaceful protest without causing any harm or injury to the protester. In these circumstances, the protester's choice to take a calculated risk of harm in order to make their political opinion heard should be respected.

c) Risk of injury to first responders and passers-by

If the Minister for Police and Corrective Services believes, as he claimed in the Second Reading Speech for the Bill, that criminalising the use of such devices is necessary to prevent injury or death to first responders and the public,²⁸ it is important that he bring evidence of this before the Committee. We understand these devices – in particular monopoles and tripods – to be peaceful and to not pose a risk of harm to other people in the vast majority of cases.

Insofar as the Minister justifies the Bill on the grounds that police have, in the past, identified a “small cohort” who have intentionally or recklessly designed sleeping dragons to harm others if interfered with,²⁹ such conduct is already likely to be an offence under the Queensland Criminal Code.³⁰ If these existing provisions are inadequate, minor amendments could be made to the relevant existing laws to capture such rare conduct.

We are concerned that the Queensland Government has used the most extreme cases to justify a law that criminalises a typically peaceful protest tactic across the board. The Bill, in criminalising such a broad range of conduct, is at risk of being declared a disproportionate response to maintaining public order and safety, and therefore incompatible with human rights.

HRLC's recommendation

We recommend that:

- (a) The Bill not be passed in its current form.

²⁷ Common charges for protesters in Queensland include trespass under section 11 of the *Summary Offences Act 2005* (Qld), which attracts a sentence up to one year; obstructing police (a sentence of up to 6 months in prison): section 790 *Police Powers and Responsibilities Act 2000* (Qld); causing an obstruction as a pedestrian (a fine of 20 penalty units): regulation 236 *Transport Operations (Road Use Management--Road Rules) Regulation 2009* (Qld).

²⁸ M Ryan, Second Reading Speech, *Legislative Assembly Chamber of Queensland Parliament*, 19 September 2019, at 3025.

²⁹ M Ryan, Second Reading Speech, *Legislative Assembly Chamber of Queensland Parliament*, 19 September 2019, at 3025. We note that the Premier's claim that recent protests have involved “locking devices laced with traps” has been doubted in media reports: B Smee, “Queensland Government accused of “fabricating” claims about climate activists”, *The Guardian*, 21 August 2019, available at <https://www.theguardian.com/australia-news/2019/aug/21/queensland-government-accused-of-fabricating-claims-about-climate-activists>.

³⁰ Section 245 of the *Criminal Code 1899* (Qld) defines “assault” broadly, as “applying force” (be it by heat, gas, electrical force) without a person's consent, directly or indirectly.

- (b) The Committee call for evidence of when the relevant devices have been used in a way that intentionally or recklessly risked injury to first responders or passers-by, and whether the existing criminal laws sufficiently capture such conduct. If the evidence and existing laws indicate that new laws are necessary, the Bill should be amended to capture only this conduct.

We would be pleased to assist the Committee if it has any further questions.

Yours sincerely



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