Human Rights Law Centre

REVIEW INTO THE CRIMES ACT 1900 (NSW)

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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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1. Context

1.1 Introduction

On 1 April 2022, the Parliament of New South Wales enacted the *Roads and Crimes Legislation Amendment Bill 2022*, amending both the *Roads Act 1993* and the *Crimes Act 1900*.

The *Roads and Crimes Legislation* among other things, inserted Part 4AF into the *Crimes Act*. Section 214A of Part 4AF makes it a crime for anyone to enter, stay, jump from, or otherwise trespass on or block entry to any part of a major facility if their actions cause damage, seriously disrupt or obstruct anyone trying to use the facility, or leads to the partial or full closure of the facility.

Part 4AF and its subsections were introduced with the explicit intention of addressing the use of non-violent direct-action tactics by climate change protestors.[1]

The right to peaceful protest[2] is a fundamental human right that allows us to express our views, shape our societies and press for social and legal change. Participating in protest is a way for all of us to have our voices heard and be active in public debate.

New South Wales has a long and proud history of protests and movements which have won significant change. The first Aboriginal Day of Mourning in Gadigal/Sydney in 1938, the Freedom Rides in 1965, and the enduring legacy of the first Mardi Gras in 1978 - a protest against police violence by LGBTIQ+ communities - stand as testaments to the power of protest and collective action in the state. The ongoing fight to safeguard the environment and combat climate change continues to underscore the importance of protest in effecting change in New South Wales.

The right to protest is particularly important for Aboriginal and Torres Strait Islander people and their ongoing calls for justice. Since colonisation, Aboriginal and Torres Strait Islander communities have fearlessly used protest as a way to fight for their right to self-determination, their land, air and water rights, an end to police violence and against the ongoing structural racism that continue to lock them out of justice.

1.2 The legal foundation of the right to protest in New South Wales

In New South Wales the right to protest is based on international human rights law and the common law implied right to political communication in the *Constitution*.[3]

1.2.1 The right at international human rights law

The right to peaceful assembly and association is proclaimed in the *Universal Declaration of Human Rights*.[4] This right is a bedrock which enables our participation in public life and economic and social policy debates.

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[1] New South Wales, *Parliamentary Debates,* Legislative Council, 30 March 2022, Roads and Crimes Legislation Amendment Bill 2022, Mr Mark Speakman, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-123848'>.

[2] In this submission the 'right to protest' and the 'right to peaceful assembly' are used interchangeably. Any references to the right to protest are taken to mean the right to peaceful assembly contained in Article 21 of the International Covenant on Civil and Political Rights unless otherwise stated.

[3] Tom Gotsis, Rowena Johns, *Protest Law in New South Wales* (Research Paper: 2024-03, February 2024) 5-6.

[4] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

Australia recognised the importance of the right to protest when it became a signatory to the International Covenant on Civil and Political Rights (***ICCPR***).[5] The *ICCPR*, among other things, provides for the rights to freedom of expression, peaceful assembly and the freedom of association.

Under international human rights law, States and their agencies have a duty to respect, ensure, and protect all of the rights contained in the *ICCPR* to all people within its jurisdiction, including citizens, non-citizens, people seeking asylum or refuge, or stateless persons.[6]

The right to peaceful assembly protects assemblies wherever they take place, be it outdoors, indoors, online, in public or private spaces, or any combination of these.[7] An assembly can also take many forms, including demonstrations, protests, picketing, parades, meetings, processions, rallies, sit-ins, vigils, or flash mobs.[8]

All assemblies enjoy protection under the *ICCPR* as long as they remain peaceful regardless if they are, or could be, temporarily disruptive.[9]

1.2.2 The right at common law

Australia's common law tradition recognises the freedoms of expression and assembly.[10] Common law freedoms only apply insofar as laws do not infringe upon them.[11] The High Court has deliberated on the conditional nature of these freedoms in *Lange v Australian Broadcasting Corporation:*[12]

> "Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it."[13]

The right to protest receives limited protection in Australia's *Constitution*. The High Court has interpreted the *Constitution* to imply the existence of a freedom of political communication, even though this is not explicitly stated in its text.

The High Court reasoned that the free exchange of political communication is fundamental to the system of representative and accountable government that the *Constitution* establishes and must be protected from undue interference.

In its 2017 decision in *Brown v Tasmania* (***Brown***), the High Court considered the freedom's application to laws restricting protest rights. In *Brown*, the Court stated that:[14]

> "The implied freedom protects the free expression of political opinion, including peaceful protest, which is indispensable to the exercise of political sovereignty by the people of the Commonwealth. It operates as a limit on the exercise of legislative power to impede that freedom of expression."

For this reason, laws that prevent or deter political communication will limit the implied freedom and must be justified and proportionate to achieve a legitimate objective to be constitutionally valid.

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[5] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), see Article 19 (freedom of expression) and Article 21 (right to peaceful assembly).
[6] Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (Article 21), 129th sess, UN Doc CCPR/C/GC/37 (17 September 2020) 4-8.
[7] Ibid 4-8.
[8] Ibid.
[9] Ibid.
[10] *South Australia v Totani* [2010] HCA at 30-39; *Evans v New South Wales* (2008) 168 FCR 576 at 594-596 [72]- [77].
[11] Tom Gotsis, Rowena Johns (n 3) 5.
[12] Ibid.
[13] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.
[14] *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [88].

1.3 Limiting the right to protest

The rights to freedom of expression, peaceful assembly and freedom of association are not absolute, meaning that they can be limited.

Article 21 of the *ICCPR* provides that:

> "The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."

Article 21 requires all restrictions on the right to protest be imposed through law or an administrative decision based on law.[15] Therefore, laws affecting the right to peaceful assembly must be clear and easily understood by everyone including, protesters, police, and the general public.[16] Vagueness and ambiguity make it more likely that a law will be applied inconsistently, misapplied, or misunderstood in practice.

Article 21 requires that any restriction on the right to protest must be necessary and proportionate in a society based on democracy, the rule of law, political pluralism and respect for human rights.[17] A limitation on the right to protest must be an appropriate response to a pressing social need, be the least intrusive measure to achieve a legitimate objective and moreover they must be proportionate to that objective.[18]

Article 21 also provides that a limitation on the right to protest is permitted on public order grounds, however public order at international law does not refer to 'law and order' or the prohibition of public disorder. Public order is the sum of all of the rules that ensure the proper functioning of society or the fundamental principles on which society is founded.[19]

Similarly, Article 21 provides for a restriction on the right for public safety grounds. This ground can be invoked only if it can be established that a particular protest creates a real *and* significant risk to the safety, life, and security of people, or a real *and* significant risk to serious damage to property.[20]

As noted above, under Australian law, restrictions to our constitutionally protected freedom of political communication must be "reasonably appropriate and adapted" to achieving a legitimate objective to be valid.

[15] Human Rights Committee (n 6) 39.
[16] Ibid.
[17] Ibid 40.
[18] Ibid.
[19] Ibid 44.
[20] Ibid 43.

2. Policy Objectives of Part 4AF

2.1 The policy objectives of Part 4AF

In principle, seeking to prevent damage or disruption to major facilities in New South Wales is a valid policy objective. Similarly, achieving a balance between the use of public spaces for peaceful protests and ensuring the public's right to move freely through public spaces is a valid policy objective.

Recognising the validity of these policy objectives, for the limitations imposed by Part 4AF of the *Crimes Act* on the right to peaceful assembly to be compatible with international human rights law, they must be scrutinised for their legality, necessity and proportionality.

2.1.1 Legality

To not violate Article 21, authorities must demonstrate that any of the imposed restrictions meet the requirement of legality, that is they were imposed through law or administrative decisions based on law. Furthermore, the law must be sufficiently precise to allow all people to regulate their conduct.[21]

Part 4AF was lawfully enacted. However, the amendment to the *Crimes Act* was introduced into Parliament and came into operation in approximately 30 hours.[22] It is arguable that a law made with such haste could not have been subjected to the required parliamentary scrutiny and debate, particularly as the law significantly restricts a fundamental democratic freedom for all people in New South Wales.

2.1.2 Necessity

Article 21 stipulates that any restrictions must be deemed "necessary in a democratic society." Any limitations must address an urgent societal need and should represent the least intrusive means to achieve the intended goal.[23]

In introducing this legislation, the then Attorney General, the Honourable Mark Speakman, noted in his Second Reading Speech that the limitations on the right to protest contained in Part 4AF were intended to deter actions that close roads, cause traffic diversions, and economic loss.[24]

Seeking to limit or prevent the obstruction of roads, bridges or similar infrastructure is not on its own a necessary limitation on the right to protest, as international law protects protests that cause temporary disruption to everyday life so long as they remain peaceful.[25]

To satisfy the requirement of necessity, limitations on the right to protest must be both essential and proportionate rather than just merely reasonable or convenient.

In introducing Part 4AF into the *Crimes Act*, Mr Speakman did not clearly outline what urgent social need the law was intended to remedy, beyond preventing temporary disruption to some. Furthermore, Mr Speakman did not inform Parliament what, if any, other less intrusive limitations were explored to achieve the expansive limitations on peaceful protests at major facilities contained in Part 4AF.

While acknowledging that Mr. Speakman's comments might not fully encapsulate policy intent, it's crucial to recognise that the amendments both to the *Crimes Act* or the *Roads Act* did not emerge from a comprehensive and meticulous law reform process. Consequently, the absence of clearly articulated policy intent exacerbates the existing concerns surrounding the necessity of the amendments.

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[21] Ibid 39.
[22] *Kvelde v State of New South Wales* [2023] NSWSC 1560, 9
[23] Human Rights Committee (n 3) 16.
[24] New South Wales, *Parliamentary Debates,* Legislative Council (n1).
[25] Human Rights Committee (n 3) 16.

2.1.3 Proportionality

Part 4AF introduced significant penalties for breaches, including a maximum of up to two years imprisonment and a fine of up to $22,000. Furthermore, where previous legislation covered disruption on major bridges or tunnels, Part 4AF covers roads, train stations, ports and public and private infrastructure.

To determine the proportionality of a restriction on the right to protest at international law, a value assessment must be made weighing the nature and detrimental impact of the limitation on the right to protest against any benefits. If the detriment outweighs the benefit, at international law, the restriction is disproportionate and not permitted.[26]

The expanded provisions in the *Crimes Act* inserted by Part 4AF are so broad and vague that almost all protest activity without prior approval risks criminal sanction. The provisions do not allow for a differentiated or individualised assessment of the conduct of people participating in peaceful protests at major facilities, like roads and ports. Rather, the restriction on the right to protest applies to all peaceful protests at major facilities, at all times. Blanket restrictions such as these are presumptively disproportionate at international law.[27]

Part 4AF of the *Crimes Act*, while in pursuit of a legitimate policy objective, does not appear to be reasonably adapted in pursuit of that objective. Mr Speakman's Second Reading Speech does not articulate whether a value assessment was made as to whether a broad limitation on the right to protest was justified in this instance. Furthermore, Mr Speakman did not demonstrate that the restriction was both necessary for, and proportionate to, at least one of the permissible grounds for restrictions in Article 21.

Similarly, the Supreme Court of New South Wales has recently found that sections of Part 4AF were invalid as they disproportionately burden the *Constitution*'s implied freedom of political communication.

2.1.4 *Kvelde v State of New South Wales* [2023] NSWSC 1560 (***Kvelde***)

In *Kvelde*, two environmental activists, Ms Helen Kvelde and Ms Dom Jacobs, were charged under provisions in Part 4AF, namely s 214A (1).

Ms Kvelde and Ms Jacobs sought a declaration from the Court that s 214A is invalid because it infringes the implied constitutional freedom of political communication and is thus beyond the power of the Parliament of New South Wales.

In examining the validity of section 214A of the *Crimes Act,* Justice Walton stepped through the settled three-part test to establish whether a law contravenes the implied freedom of political communication.

(1) Does the law effectively burden the implied freedom in its terms, operation or effect?

In answering this limb, the Court reaffirmed the general proposition that protests over environmental issues constitute political communication, whilst noting that this form of communication can take many forms. With this established and having analysed the construction and operation of section 214A, the Court concluded that there was real prospect that section 214A could impact on various methods of political communication and that the burden is potentially substantial and direct.

The State of New South Wales contended that section 214A did not effectively burden the implied freedom primarily because the conduct it prescribes is otherwise unlawful. However, Justice Walton found that the State failed to prove that the conduct prohibited by subsection 214A(1)(c), so far as the partial closure of

[26] Ibid 40.
[27] Ibid 36.

facilities is concerned, and subsection (1)(d) insofar it causes a person to be redirected from a major facility, is otherwise prohibited.

These subsections were viewed by the Court as considerably wider and deeper in their operation and whilst the contemplated conduct may cause inconvenience, it is not otherwise unlawful. Accordingly, for those subsections, the burden was concluded to be direct and substantial.

(2) Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

The Court found that the purpose of section 214A was legitimate, being "one which is compatible with the system of representative government provided for by the *Constitution*, such that the purpose does not impede the functioning of that system and all that it entails".

The Court accepted the purpose of section 214A as being "to increase deterrents to such conduct causing damage or serious disruption or obstruction to facilities and hence, to community generally". Justice Walton did not consider that the purpose ought to extend to the criminalisation of conduct merely causing inconvenience to particular people who, for example, were redirected by protesters situated near a major facility.

(3) Is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

In answering this question, Justice Walton found that s 214A(1)(c) and (d) were found to not be reasonably necessary in the way they were cast. To demonstrate the point, the Court considered an alternative prohibition proposed by the plaintiffs, being the creation of an offence for engaging in unlawful conduct that causes damage or serious disruption to major facilities where unlawful conduct is defined to include tortious conduct.

The Court observed that the prescription of an offence in that way would have achieved effectively the same objectives while imposing a significantly lesser burden upon the implied freedom. This finding empowered the Court to conclude that the adverse effect of section 214A(1)(c) and (d) on the implied freedom significantly outweighed the benefit sought to be achieved.

The Court declared that subsection 214A(1)(c), so far as the provision criminalises conduct that causes the closure of part of a major facility, and subsection 214A(1)(d) impermissibly burden the implied freedom of political communication contrary to the *Constitution* and are therefore invalid.

In conclusion, Part 4AF of the Crimes Act poses significant barriers to the right to peaceful protest in New South Wales and is incompatible with the state's obligations under international law. Specifically, it fails to meet the requirements of necessity and proportionality, which are essential elements for justifying limitations on protest rights.

Moreover, the ruling by the Supreme Court of New South Wales in the case of *Kvelde* confirms that key aspects of the law are invalid.

The ruling in *Kvelde* means that some sections of Part 4AF are valid and some are not. Legal certainty, a cornerstone of the rule of law, is compromised by this vague and uncertain framework. This uncertainty will only make it difficult for ordinary people to understand whether the law applies to their actions and to what extent. Further, the enactment of Part 4AF raises concerns about the state's commitment to upholding human rights standards more broadly.

3. Recommendation

The right to peaceful protest stands as a cornerstone of democratic societies, offering all people a vital avenue to express their opinions, influence social change, and contribute to public discourse.

New South Wales has a duty to ensure the protection of the right to protest and only impose limitations in accordance with international human rights law and principles, and constitutional requirements. It is evident that the current legislative framework falls short of meeting these standards.

The Human Rights Law Centre makes the following recommendation:

3.1 Part 4AF of the *Crimes Act* should be repealed

While temporary disruptions to everyday life may occur during protests, it is imperative that such inconveniences do not serve as a pretext to undermine the protection of this fundamental right. The current provisions of Part 4AF of the *Crimes Act* fail to adequately uphold and safeguard the right to protest in New South Wales while pursuing a legitimate policy objective and should be repealed.

While we recognise that preventing damage or disruption to major facilities in New South Wales is a valid policy objective, the law already provides for punishment for this type of behaviour through other provisions that do not also improperly affect the right to peaceful protest in New South Wales.