Submission to: The Department of Communities and Justice's Review of the *Crimes Act 1900* (NSW)

MAY 2024

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Foreword

The New South Wales Nurses and Midwives' Association (NSWNMA) is the registered union for all nurses and midwives in New South Wales. The membership of the NSWNMA comprises all those who perform nursing and midwifery work. This includes registered nurses; enrolled nurses and midwives at all levels including management and education, and assistants in nursing and midwifery.

The NSWNMA has approximately 78,000 members and is affiliated to Unions NSW and the Australian Council of Trade Unions (ACTU). Eligible members of the NSWNMA are also deemed to be members of the New South Wales Branch of the Australian Nursing and Midwifery Federation.

NSWNMA strives to be innovative in our advocacy to promote a world class, well-funded, integrated health system by being a professional advocate for the health system and our members. We are committed to improving standards of patient care and the quality of services of all health and aged care services whilst protecting and advancing the interests of nurses and midwives and their professions.

It is that commitment that led to the NSWNMA to adopt a position in support of peaceful protest at our 2023 Annual Conference (see attached).

We welcome the opportunity to provide a submission to this Review.

This response is authorised by the elected officers of the New South Wales Nurses and Midwives' Association.

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Introduction

The right of peaceful assembly, the right to organise and the freedom of association are universal human rights codified in international law.[1] These rights are hallmarks of a free and functioning democracy and underpin the very existence of trade unionism.

Both peaceful assembly and civil disobedience have long played a role in protecting against government or corporate overreach and in highlighting social injustices. There are countless examples of social causes that were precipitated by peaceful assembly and protest, in cases where governments or corporations were an impediment to social progress and justice. This includes the suffragette movement, the peace movement against the Vietnam War, Aboriginal and Torres Strait Islander land rights and LGBTQIA+ rights.

Trade unions have long defended civil liberties and human rights such as the freedom of assembly and the right to protest. The Australian union movement has a proud history of supporting social movements and having solidarity with the struggles of working people around the world.

Criminalising the ability for people to peacefully protest, is unhealthy for democracy.

Context

THE LEGAL RIGHT TO PROTEST

The common law

The right to protest in NSW is based on Australia's common law recognition of the freedom of expression and freedom of assembly. Common law freedoms do not expressly bestow positive rights on an individual, but rather they operate only to the extent that the law does not infringe upon them.[2]

Australian courts have long recognised that freedom of association should be considered a common law right.[3] The High Court of Australia has considered the freedom to be a "fundamental aspect of our legal system".[4]

When the Government legislates to limit the application of this common law right, the High Court has stated that the laws must be justified and proportionate to achieve a legitimate objective. That is because the Court considers, "the implied freedom protects the free expression of political opinion,

[1] *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), Art 20.
[2] Tom Gotsis and Rowena Johns, 'Protest law in New South Wales' (Research Paper 2024-03, Parliamentary Research Service, Parliament of NSW, February 2024) 5.
[3] *Tajjour v New South Wales* (2014) 313 ALR 221; *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.
[4] *Tajjour v New South Wales* (2014) 313 ALR 221, [224].

including peaceful protest, which is indispensable to the exercise of political sovereignty by the people of the Commonwealth".[5]

Australian Constitution

The Australian Constitution does not expressly grant a constitutional right to peaceful assembly. However, it does provide for an implied freedom of political communication which results from the compounding effect of multiple constitutionally protections that establish Australia's system of representative and responsible government.[6]

The right to peacefully assemble is protected by the implied freedom of political communication because it is an essential forum in which Australian citizens can communicate their political views and concerns.

The NSW Supreme Court has already determined that the Act is partially constitutionally invalid based on these implied freedoms.[7] Commentary on this will be provided for in latter sections of this Submission.

International law

Article 20 of the *Universal Declaration of Human Rights* expressly states that the right to peaceful assembly and association is a fundamental human right afforded to all human beings.[8] Australia is a signatory to the *International Covenant on Civil and Political Rights* which provides for rights to freedom of peaceful assembly, freedom of expression and freedom of association.[9]

It is contradictory for Australia to be a signatory to such important international law documents, whilst also placing an undue burden on individuals and organisations attempting to exercise their human rights. That is the case with s 214A of the *Crimes Act*.

EROISON OF THE RIGHT TO PROTEST IN NSW

The right to protest has been incrementally diminished by the NSW Parliament, leading to severe legislative limitations being imposed on all citizens in NSW. This has created a complicated legislative landscape which makes it difficult for citizens to fully, and freely, exercise their human rights.

Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016

In 2016, the Baird Coalition Government passed the *Inclosed Lands, Crimes and Law Enforcement Act (interference) Act 2016.* The Act increased penalties for and restrictions upon protesting on inclosed lands (including public hospitals) and removed protections for genuine protests or organised assemblies against police move-on orders, giving police broad discretionary powers to criminalise a protest.

Whilst protections for 'industrial disputes' were not removed; these laws undoubtedly have the potential to impinge upon unionists' rights to protest workplace laws and disputes which have not been

[5] *Brown v Tasmania* [2017] HCA 43, [88].
[6] Above n 2, 10.
[7] *Kvelde v State of New South Wales* [2023] NSWSC 1560
[8] See above n 1.
[9] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Arts 19, 21.

categorised as lawful industrial action. It would also arguably prevent unionists from supporting other social justice causes.

Under these laws, nurses and midwives could potentially be charged for holding protests, or participating in peaceful assemblies, on hospital grounds.

Civil society, including the Law Society of NSW ('LSNSW'), the NSW Bar Association, and Unions NSW, were outspoken against these amendments.

ROADS AND CRIMES LEGISLATION AMENDMENT BILL 2022

On 1 April 2022, the NSW Parliament enacted the *Roads and Crimes Legislation Amendment Bill 2022* (NSW) ('the Bill'). This amended both the *Crimes Act 1900* (NSW) ('the Act') and the *Roads Act 1993* (NSW).

These amendments inserted into the Act, Part 4AF. This Part is the topic of this Review and will be the source of criticism that follows within this Submission.

The insertion of s 214A made it a crime to damage or cause disruption to a major facility if that conduct:

(a) Causes damage to the major facility, or
(b) Seriously disrupts or obstructs persons attempting to use the major facility, or
(c) Causes the major facility, or part of the major facility, to be closed, or
(d) Causes persons attempting to use the major facility to be redirected.

Sub-sections (c) and (d) have since been declared invalid by the NSW Supreme Court.[10]

These new laws were the source of intense criticism by trade unions, civil society groups and many in the legal community. An open letter, signed by 39 civil society organisations, including the Human Rights Law Centre, Aboriginal Legal Service and Amnesty International Australia, declared the laws, "incompatible with the democratic right to protest and our fundamental civil liberties".[11]

Whilst conduct stemming from, 'industrial action', 'industrial dispute', or 'industrial campaign' are an exception to an offence under the Act,[12] it still limits the ability for nurses and midwives to potentially protest in support of causes which do not fit within one of these categories. It could also limit the ability for the wider community to participate in solidarity with nurses and midwives.

It will be a recommendation of this Submission, that the entirety of s 214A, be repealed.

[10] See above n 7.
[11] Redfern Legal Centre, *'Concern raised around new protest laws passed in NSW'* (Web Page) < https://rlc.org.au/news-and-media/news/concern-raised-around-new-protest-laws-passed-nsw>.
[12] *Crimes Act 1900* (NSW) s 214A(3)(a)-(c).

Part 4AF – Damage to Major Facilities

The 2022 amendments to the *Crimes Act 1900* (NSW) made it a crime to engage in unauthorised activities that damage or disrupt major facilities. A 'major facility' is defined in s 214A(7) as being a railway station, or other public transport facility, private port, infrastructure facility including water, sewerage, energy, manufacturing, distribution, or other services to the public. The definition of 'major facility' is subject to change depending on the relevant regulations.[13]

These new offences are subject to a maximum penalty of $22,000 or imprisonment for 2 years, or both.

POLICY OBJECTIVE

The Government wanting to prevent damage or disruption to major facilities could be seen as a valid policy objective. However, this objective must be balanced against the right of citizens to engage in peaceful protest and assembly. The objective must also be necessary.

In the Second Reading Speech on the Bill, then Attorney General Mr Mark Speakman, stated that, "freedom of assembly and speech have long been recognised by Australian courts as important rights that are integral to a democratic system of government; however, the right to protest must be weighed against the right of other members of the public to move freely and not be obstructed in public places".[14] He was correct in this formulation of the right, these are well-established rights for Australian citizens. However, he was wrong in his contention that protests effectively can't be disruptive to others. Under Article 21 of the *ICCPR*, all assemblies are protected as long as they remain peaceful.[15] The United Nations Human Rights Committee has stated that the status of a peaceful assembly should not be questioned simply because they cause disruption.[16] The Committee states that, "private entities and broader society may be expected to accept some level of disruption as a result of the exercise of the right".[17] Therefore, it is unacceptable under international law to strip someone of their fundamental human right to peacefully assembly, in order to ensure someone else isn't stuck in traffic or has to use a different entrance to a train station, as is arguably a consequence under s 214A.

If the objective of s 214A is to reduce disruption to major facilities, then why are exceptions applicable for certain types of activities? Whilst the NSWNMA would benefit from the defences offered under sub-s (3), it brings into question why some activities and not others?

If a nurse or midwife was to obstruct a person attempting to use a major facility under sub-s (1)(b) during an industrial campaign (e.g., picket line), their actions would be protected under the exception afforded by sub-s (3)(c). However, if a nurse or midwife was obstructing a person attempting to use the same major facility because they were protesting an Aboriginal land rights issue, those same

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[13] *Crimes Regulation 2020* (NSW) Schedule 1.
[14] New South Wales, *Parliamentary Debates,* Legislative Assembly, 30 March 2022 (Mark Speakman, Attorney General).
[15] See above n 9.
[16] Human Rights Committee, General Comment No 37 (2020) on the right to peaceful assembly (Article 21) 129th sess, UN Doc CCPR/C/GC/37 (17 September 2020) 7.
[17] Ibid, 31.

protections would not be available to them. This creates a contradictory legal landscape. Having the law apply differently, despite the outcome of the 'obstruction' being identical, is not good law. Therefore, is the objective of the policy to stop disruption, or to stop the disruption being for reasons the Government doesn't agree with nor approve of?

It becomes clear from the second reading speech that a secondary objective of the Act is to deter 'illegal protests' by increasing the penalty to $22,000 and/or 2 years in prison.[18]

Mr Speakman's speech refers to Part 4 of the *Summary Offences Act 1988* (NSW). He references this piece of legislation to reduce the speculation that the Bill was attempting to impose a general prohibition on protests. The *Summary Offences Act* does contain a scheme to facilitate lawful protests. However, if a secondary objective of the Act was to deter 'illegal' protests, then why is necessary to introduce new laws and offences, when it arguably could have been sufficient just to increase the penalties under the existing statute?

The necessity of s 214A is also questionable when one considers the volume of laws that already apply to protests in NSW. For example, it was already an offence to obstruct a railway under s 213 of the *Crimes Act*. It was already an offence to obstruct traffic under s 6 of the *Summary Offences Act* and rr 125 and 236 of the *Road Rules 2014* (NSW). Police already have both special and general powers when it comes to interacting with persons involved in an assembly or protest.[19] Creating an overcrowded area of jurisprudence serves no purpose apart from to limit the ability of individuals and organisations to peacefully protest.

A nurse's or midwives' ability to exercise their right to peacefully assemble and protest should not be dependent on whether they have, or do not have, access to sub-s (3) of the Act. It should not matter whether the cause they are supporting is industrial in nature or social justice in nature.

REACTIVE LAWS

The *Roads and Crimes Legislation Amendment Act Bill* was declared an 'urgent bill' by the then-Attorney General, Mark Speakman.[20] This means there was less than 30 hours between the Bill being introduced to Parliament, and it being enacted as law.[21]

Given this extremely short time between proposal and law, the Government did not allow proper time for community and stakeholder consultation. The Labor Opposition had not even seen a full copy of the Bill until the afternoon of Parliamentary debate.[22] Unions, including the NSWNMA, were unable to provide commentary on how these changes would impact their members. Members of the public were unable to give feedback to their Members of Parliament, which is their right in a representative democracy.

It is almost impossible to argue against the notion that these laws were reactionary. They were formulated in response to a very small number of climate protests. Mr Speakman says so repeatedly in

[18] See above n 14.
[19] *Summary Offences Act 1988*; *Law Enforcement (Powers and Responsibilities) Act 2022* (NSW).
[20] See above n 14.
[21] See above n 7.
[22] See above n 14.

his Second Reading Speech.[23] Laws that could apply to all people, should be rational. It is not rational, neither is it good law, to create entirely new criminal offences to deter a small number of climate activists. Good laws create certainty in the community, these laws do not.

There is no certainty for unions as to what is captured by 'industrial action, 'industrial dispute' or 'industrial campaign'. Would a nurse of midwife be protected by sub-s (3) if they disrupt a major facility in support of an industrial campaign of another union? There is no certainty around what 'reasonable excuse' means in sub-s (2). The fact these laws were created to respond to a very specific 'problem', they provide very little specificity for the public undertaking peaceful protests. That is a direct result of a rushed law that was not subject to a thorough judicial review process.

The NSWNMA has welcomed the opportunity to provide a Submission as part of this Review, however this opportunity should have occurred prior to enactment in 2022. The same concerns were present then, as are present now.

INVALID LAWS

As discussed above, the NSW Supreme Court has found the Act to be only partially valid. The Court found that s 214A(1)(c)-(d) impermissibly burdened the implied freedom of political communication which is contrary to the rights afforded to citizens under the Constitution.[24]

The case of *Kvelde v State of New South Wales* [2023] concerned two members of the Knitting Nannas environmental group who sought declarations from the NSW Supreme Court around the validity of s 214A of the *Crimes Act 1900* based on the implied freedom. They had standing in the Court as individuals who had a 'special interest' in the matter as they had a long-held interest in participating in protests in NSW.

This is a direct result of the rushed fashion in which the laws were passed. The fact that the implied freedom of political communication was not mentioned at all during the then-Attorney General's Second Reading Speech, one must infer that it had not been key component of the Government's rationale for the laws. The implied freedom of the Constitution is well-established law and the absence of any discussion about how these laws were going to interact, or limit, the freedom, emphasise the very narrow approach of the Government. This was highlighted by the Justices when it came to their critique of the vague and broad terms contained within sub-s (1) such as 'on' or 'near' a 'major facility'.[25] The Court raised concerns about what the legislature meant using such terms. For example, a person may be situated 'near' a major facility but is not actually within the physical boundaries of the major facility. Therefore, the use of the word 'near' acts as an expanding word and provides no actual unit of measurement.[26] Would a nurse or midwife who is protesting 'near' a major facility, i.e., a hospital, be in breach under the law if they were 50 metres near, or 500 metres near said facility? The lack of specificity creates no certainty for those wanting to exercise their right to peacefully protest.

The Court also examined how these vague terms can be applied under sub-s (1)(d) when persons may be re-directed because of a protest, but there may be more than one entrance/exit to a major facility.[27] For example, train stations such as Martin Place and Town Hall have multiple entrances/exits. If a

[23] See above n 14.
[24] See above n 7, [578].
[25] Ibid, [168]-[170].
[26] Ibid, [169].
[27] Ibid, [186]

protest blocks entry to one entrance/exit, but several more entrances/exits are available, is a protester committing an offence? The Court seemingly determined that it would be determined on a case-by-case basis, which is not an unusual determination, but it does raise serious questions as to the lack of certainty this affords to the public. Most protesters would not be in a position to make a judgment on their actions based on a complex history of legal precedent and statutory interpretation. Good laws should not be overly complicated. The vague and broad language of s 214A provides for no certainty and as the Court has determined, is partially Constitutionally invalid.

INCOMPATIBLE LAWS

The Nursing and Midwifery Board of Australia's (NMBA) professional standards highlight that nurses and midwives should promote health and wellbeing and understand and apply the principles of public health. Nurses and midwives should also participate in health advocacy for community and population health in a way that addresses health inequality. The Code of Ethics for Nurses specifically calls on nurses to: contribute to achieving the United Nations Sustainable Development Goals; recognise the significance of the social determinants of health and contribute to, and advocate for, policies and programmes that address them; collaborate with other health and social care professions and the public to uphold principles of justice by promoting responsibility in human rights, equity and fairness and by promoting the public good; and to act on local and global issues that affect health, such as poverty, food security, shelter, immigration, gender, class, ethnicity, race, dignified work, environmental health and education.

Accordingly, the amendments made to the Crimes Act 1993 undermine our members professional requirement to advocate for various social justice issues that directly relate to and impact upon the social determinants of health, nurses and midwives are directly advocating for population health in a way that addresses health inequality.

Recommendation

The NSWNMA will always support the right of citizens to peacefully protest. The union movement, including the NSWNMA, has a long-standing commitment to many social justice movements and the right to peaceful protest or of peaceful assembly has been the cornerstone of many victories for working people. It is an important role of the union movement to be vigilant about government power being used to silence healthy dissent.

Part 4AF of the *Crimes Act 1900* fails to uphold the right of NSW citizens to peacefully protest. The NSW Supreme Court has already found that parts of the law are constitutionally invalid, and this should serve as an indicator that the law goes too far.

The NSWNMA recommends that Part 4AF be repealed.

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