National Tertiary Education Union
NSW Division

Submission to the Department of Communities and Justice Statutory Review of Part 4AF of the Crimes Act 1900 (NSW)

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Introduction

The National Tertiary Education Union (NTEU)(NSW Division) welcomes the opportunity to make a submission to the Statutory review of Part 4AF of the *Crimes Act 1900* (NSW). The NTEU represents approximately 7,800 members in NSW employed in the tertiary education sector (including public and private universities, vocational education and training (VET) and English-language courses (ELICOS)), the research sector and in student organisations.

The right to political communication is a fundamental right and is a crucial and defining characteristic of a healthy democracy that supports community participation in it. The High Court of Australia in Levy v Victoria (1997) 189 CLR 579 held that the implied freedom of communication extends to non-verbal communication. Along with academic and intellectual freedom,[1] political communication is a critical component of our tertiary education sector. It is essential to fostering the valuable contribution that the sector, and its members, make to the public sphere by pursuing critical intellectual inquiry; cultivating robust debates; exchanging different ideas and perspectives; educating and advancing knowledge. The NTEU strongly supports the right to peacefully protest and exercise both academic freedom and freedom of speech on university campuses and in public places. The NTEU and members of the tertiary education sector have a deep and proud history of engaging in a wide variety of political communication, including campaigns, demonstrations and protests on issues of local, national and global significance.

At times, these modes of political communication may give effect to disruptions to roads, ports, transport facilities or other public infrastructure. However, imposing the sanction of the criminal law upon these effects, and thereby criminalizing political communication because it might have these effects, as Part 4AF of the Crimes Act, and particularly s 214A, do, imposes a significant and disproportionate restriction on the right to political communication. As the Supreme Court of NSW declared in Kvelde v State of New South Wales [2023] NSWSC 1560 ("Kvelde") Part 4AF of the Crimes Act, "restrict(s) the implied

[1] See NTEU Policies on Intellectual and Academic Freedom https://www.nteu.au/NTEU/PolicyManual/Public_Policy/AcademicFreedomResource.

freedom beyond valid existing laws, thereby constituting an incremental burden on the ability of persons to engage in political communications."

The NTEU (NSW Division) does not support the use of public policy or legislation to explicitly or inadvertently undermine or infringe upon the right to political communication, including engagement in protests.

Part 4AF, Crimes Act

Section 214A makes it a criminal offence to damage or disrupt a major facility. The definition of "major facility" is dependent on an additional and external instrument, the *Crimes Regulation 2020* and is limited to 41 'railway and metro stations' mostly in the greater Sydney area, but also including Newcastle and Wollongong; two 'other public transport facilities, being the Circular Quay and Manly Ferry Terminals; two ports, being the Sydney Cove Passenger Terminal and the White Bay Cruise Terminal in Rozelle; 18 'infrastructure facilities' that are either 'publicly' or 'privately' owned. Governments will have the flexibility to amend these lists.

What constitutes 'damage' or 'disruption' lacks definition and presents difficulties in statutory interpretation. The list of damaging and/or disruptive behaviours includes *conduct* in relation to the major facility that 'causes damage'[2]; 'seriously disrupts or obstructs persons attempting to use the major facility';[3] 'causes the major facility, or part of the major facility, to be closed';[4] 'causes persons attempting to use the major facility to be redirected.'[5] The 'conduct' that is prohibited is entering, remaining on or near, climbing, jumping from, otherwise trespassing on or blocking entry to any part of the major facility.[6] The causal element of the conduct is not expressed as to require intent. Thus, it is dangerously possible that a person may be convicted of the offence even if they did not intend to cause damage or disruption.

[2] Section 214A(1)(a).
[3] Section 214(1)(b).
[4] Section 214(1)(c).
[5] Section 214(1)(d).
[6] Section 214A.

Section 214A(2) provides for a 'reasonable excuse for the conduct' defence to the prosecution of a charge under Part 4A. However, the question of 'reasonableness' is one that must be treated case-by-case and which is likely to be subject to complex and contested litigation, given that the burden of proof is beyond reasonable doubt in criminal matters and the onus of proof is borne by the person charged[7] (e.g. an individual protester). Notably, this raises a critical question of access to justice, particularly for people that cannot afford legal representation or who are otherwise vulnerable or disempowered by the legal system. Concerns about justice and proportionality are only heightened by the maximum penalty of 200 penalty units (i.e. $20,000) or imprisonment for 2 years, or both.

Importantly, conduct that forms part of industrial action, an industrial dispute and an industrial campaign are rightfully exempted from the s 214A offence and so is conduct that occurs at a person's workplace or "at a workplace owned, occupied, operated or used by an employer of the person."[8] However, the poor drafting of the provision raises questions as to whether any industrial action is exempt or whether it is limited to the definition provided at s 19 of the *Fair Work Act 2009* (Cth).

Also exempted from the offence is "anything done or omitted to be done in accordance with the consent or authority of" the NSW Police Force, another public authority or the owner or operator of a privately owned major facility."[9] It is disconcerting that a statutory provision that concerns the potential expression of dissent against the state and its institutions through exercising the right to political communication, should privilege and promote pre-emptive policing.

Whether the policy objectives of Part 4AF of the Crimes Act 1900 remain valid

The policy objectives of Part 4AF of the *Crimes Act* were not valid to begin with and thus remain invalid. Part 4AF of the Crimes Act was introduced by the Roads and Crimes

[7] Section 214(3).
[8] Section 214(4).
[9] Section 214(6).

Legislation Bill 2022 in reaction to climate change protests in Sydney and was rushed through Parliament in less than two days without sufficient public consultation or Parliamentary debate. Such haste, poor drafting and lack of scrutiny fall below the standard of democratic law making. Review is therefore timely and critical.

In his Second Reading Speech, former Attorney General, the Honourable Mark Speakman admits that the rushed bill was a reaction to one isolated incident:

> *Protests such as those that occurred in Port Botany were not authorised under the Summary Offences Act 1988. Media reports indicate that, in one of the Port Botany incidents, emergency services were required to abseil to the protester to end the disruption. Not only did the protester's actions cause significant traffic delays and economic loss; it also unnecessarily endangered the safety of the protester and emergency services personnel. While there are existing offences that capture such conduct, the actions of these protesters make it clear that the penalties available for these offences are not sufficient to deter illegal protests that disrupt the lives of the people of New South Wales and that the threshold to meet the more serious offences is not being met.*[10]

If the law already provides for sanctioning of the kind of conduct that was considered to be so offensive in this isolated case, as Mr Speakman identified, it was unnecessary to introduce Part 4AF. Although Mr Speakman articulated, as the primary policy objective of the amendment "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,"[11] it is apparent that the amendment was motivated by other policy concerns and ideological positions on what constitutes valid protest action and where. For the former Attorney

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[10] 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'> at pg 8938.

[11] 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'>

General, that would be protests that are authorized by Police, a public authority or corporate interests as provided by s 214(6) and not in places that would be likely to gain maximum attention. Sentiments such as "Governments have a responsibility to ensure that freedom of assembly and freedom of protest are not unduly impinged upon, but also to ensure that protest activity does not unduly impede the rights of other members of the public or evolve into the form of economic vandalism that we are currently seeing" lend themselves to the very justifiable critique from a range of diverse groups, that these are "anti-protest" laws.[12]

Whether the terms of Part 4AF of the Crimes Act 1900 remain appropriate for securing those objectives

If the objective of Part 4AF is to balance the 'right to protest' against the 'right of other members of the public to move freely and not be obstructed in public places,' then the terms of Part 4AF of the *Crimes Act* fail to strike the right balance and do not remain appropriate for securing this objective. There are many instances where the right of members of the public to move freely or to be free from obstruction in public places is infringed without notice and for varying periods of time. Examples include accidents and road repairs that close or cause traffic diversions on major roads; trackwork that shuts down whole train lines; and development and maintenance of building infrastructure that causes economic loss. Yet in none of these cases is the obstruction a criminal offence, punishable by law, or requiring approval by the NSW Police Force. The impact on public movement caused by a protest or gathering is no different from these other obstructions to public places, yet Part 4AF makes it an offence to protest on major roads or near major facilities without approval.

Although Mr Speakman assured Parliament that "the bill in no way seeks to impose a general prohibition on protests,"[13] Part 4AF does impose a general deterrence from exercising the right to protest by arousing fear that an individual participating in a

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[12] See Counteractive Open Letter Against Anti-Protest Laws, 31 March 2022 < https://counteract.org.au/open-letter-against-anti-protest-laws/>; Human Rights Law Centre, *Civil Society Groups Warn Against Police Overreach in NSW Climate Defenders Raid,* 23 June 2022 < https://www.hrlc.org.au/news/2022/6/23/civil-society-groups-warn-against-police-overreach-in-nsw-climate-defenders-raid>.
[13] Ibid.

protest may be charged and convicted of a criminal offence that carries a penalty including imprisonment for two years. That is a disproportionately hefty price to pay when compared to the degree of inconvenience resulting from a road closure for a couple of hours or canceling a train. For students (including minors) exercising their right to political communication through participation in a protest, rally or demonstration about climate change, this may have a significant detrimental impact on their future careers that they cannot possibly envisage in the present. For First Nations people whose community already experience high rates of criminalization and incarceration, this is only going exacerbate these rates simply for standing up and marching for Black Lives. It is a disproportionate response to peaceful public gatherings and to citizens actively voicing their concerns and demanding government action on matters in which governments play a primary role. It also criminally targets and impacts particular groups disproportionately. Groups more likely to protest are groups that are more likely to be socially marginalized, oppressed, seeking change or who have a history of distrust and poor experiences of policing. Part 4A does not protect these groups from the risk of police overreach, discrimination or bias in application and targeting of persons or groups on the basis of their identity or political opinions.

The right to protest has its source in international human rights law and, at common law, in the Constitution's implied right to political communication. The 'right to protest' is covered by the 'right to freedom of assembly and association' (which includes the right to form and join trade unions) found in articles 21 and 22 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 8 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). It is also contained in article 5(d)(ix) of the *Convention on the Elimination or All Forms of Racial Discrimination* (CERD), article 15 of the *Convention on the Rights of the Child* (CRC) and article 21 on the *Convention on the Rights of Persons with Disability* (CRPD). Australia has ratified all these treaties and therefore the government of New South Wales has a duty to ensure these rights are protected. The High Court of Australia has recognized rights to freedom of assembly, expression and protest at common law.[14]

[14] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564; Brown v Tasmania [2017] HCA 43 (18 October 2017)[88].

Importantly, in *Brown v Tasmania*[15] the High Court held that sections of the *Workplaces (Protection from Protestors) Act 2014 (Tas)* which restricted the right to protest, violated the implied freedom of political communication in the Australian Constitution and were therefore invalid. Gaegler J (as his Honour was then) stated the analytical framework, established in *Lange v Australian Broadcasting Corporation,*[16] for determining whether a Commonwealth, State or Territory law contravenes the implied freedom of political communication as follows:

1. Does the law effectively burden freedom of political communication?
2. Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government?
3. Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government?

If the first question is answered "yes", and if either the second question or the third question is answered "no", the law is invalid.[17]

Applying this framework to Part 4AF arrives at a similar conclusion that it is an invalid law as the NSW Supreme Court in *Kvelde v State of New South Wales* has ruled.

The impact of the NSW Supreme Court's decision in Kvelde v State of New South Wales [2023] NSWSC 1560 on section 214A

The case presents a necessary test to the efficacy and legitimacy of section 214A. The plaintiffs, Helen Kvelde and Dom Jacobs, were environmental activists, part of the 'Knitting Nannas Group', who were charged under s 214A(1). They sought declarations that s 214A of the Crimes Act and cl 48A of the *Roads Regulation 2018* were invalid. The New South Wales Supreme Court ruled in their favour by determining that both s 214A of the *Crimes Act* and 48A(1) of the *Roads Regulation* were invalid.

[15] Brown v Tasmania [2017] HCA 43.
[16] Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
[17] *Brown v Tasmania* [2017] HCA 43 per Gaegler J at [156].

Applying the three-pronged analytical framework of *Lange* and *Brown*, to an assessment of s 214A Walton J concluded that:

- To the extent that the provision prohibits "conduct of entering, remaining on or near a major facility which causes the partial closure of major facilities and/or persons attempting to use the major facility to be redirected" it does effectively burden the implied freedom of political communication.
- As to the purpose of the law, His Honour considered that the purpose of the law did not extend to the criminalisation of conduct that merely caused inconvenience to individuals who were redirected by protesters situated near a major facility. However, the Court took the view that the purpose of the law was to increase deterrents to such conduct causing damage or serious disruption or obstruction to facilities and consequently, to the community in general. It regarded this as a legitimate purpose of the law.
- Regarding the question of whether the law was reasonably appropriate, His Honour concluded that in the case of s 214A, it was not. It represented overreach from its legislative purpose and its adverse effects "on the implied freedom in terms of deterring otherwise lawful protests significantly outweighs the benefit sought to be achieved by more effectively deterring any conduct that may disrupt major facilities themselves."[18] Walton J held that specifically ss 214A (1)(c) and 214A(1)(d) failed the test of reasonable proportionality.

Having concluded that s 214A of the *Crimes Act* does effectively burden the implied freedom of political communication in its terms, operation and effect, the Court held that the law was constitutionally invalid.[19] Since it was ss 214A (1)(c) and 214A(1)(d) that failed the test of reasonable proportionality, Walton J determined these provisions were specifically constitutionally invalid. Relying on statutory and case authority, Walton J declared that "The Court may sever an invalid provision from an Act if severance is consistent with Parliament's intention for the impugned legislation"[20] and he proceeded to sever ss 214A (1)(c) and 214A(1)(d).

[18] Kvelde v State of New South Wales [2023] NSWSC 1560 at [517].
[19] Ibid at [557].
[20] Ibid at [558].

Recommendation

The NTEU (NSW Division), as an affiliate of Unions NSW, joins the union movement and civil society organisations in their condemnation of what are effectively 'anti-protest' laws that silence the democratic right to express political opinions by threatened criminalization and demand that such laws be repealed.

These laws threaten everyone ranging from children marching for action on climate change; anti-war protesters calling for ceasefire and an end to the occupation of Palestine; First Nations and non-First Nations people demanding redress of colonial injustice, promoting reconciliation and for Black lives to matter; nurses advocating for nurse-to-patient ratios critical to quality patient care; and workers across all sectors demanding fair pay and safe work conditions.

Part 4AF is significantly unbalanced as it authorizes an unreasonable level of intrusion relative to the goals it seeks to achieve. Part 4AF is incompatible with fundamental constitutional, civil and political rights and has been held by the Supreme Court of NSW following the High Court, to be an invalid law. Following the Supreme Court of NSW's quite drastic measure of severing two subsections from s 214A, because of its constitutional invalidity, the whole of Part 4AF is problematized.

These are compelling reasons for the NTEU (NSW Division's) recommendation that Part 4AF of the *Crimes Act* be entirely repealed.