Nature Conservation Council
The voice for nature in NSW

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To whom it may concern,

Review of s214A of the Crimes Act

The Nature Conservation Council of New South Wales (NCC) is the state's peak environment organisation. We represent over 200 environment groups across NSW. Together we are dedicated to protecting and conserving the wildlife, landscapes and natural resources of NSW.

NCC welcomes the opportunity to contribute to reviewing the Roads and Crimes Legislation Amendment Act 2022, which had the stated aim to strike a balance between the right to protest and the right of the public to move freely and not be obstructed in public places.

We believe the current laws are not fit for purpose. Rather than striking this balance, they overly restrict the right to protest, having an unacceptable freezing effect on the ability of the NSW community to participate in democratic expression.

Protest has had a long and significant history in the context of the environment movement. NSW has a long and proud history of protests which have led to significant positive change, including, for example, saving world heritage rainforests from logging and saving the Northern Rivers from destruction caused by coal seam gas. 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 to affirm their right to self-determination, their land and water rights, an end to police violence and against the ongoing structural racism that locks them out of justice.

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Contrary to its stated policy objective, the Act imposes disproportionate penalties on the freedom of assembly and freedom of political communication.

As recognised by Justice Adamson in Commissioner of Police v Langosch, because public spaces are shared spaces, it is 'of the nature of a protest that others will be affected and that their routines will be, at least ephemerally, interrupted.' International law protects disruptive protests as long as they remain peaceful.[1] Temporary disruptions caused by protest do not undermine the duty that governments and their agencies have to guarantee the right to protest and to protect protesters - mere disruption of vehicular or pedestrian movement or daily activities does not amount to "violence" at law.[2] Tolerance of disruption to ordinary life is necessary in a democratic society if our rights to peaceful protest, association, and expression are to have true value.

The Act introduces a sentence of imprisonment and 10-fold greater fines for conduct such as causing pedestrians to be redirected or part of a road being closed.[1] These kinds of interruptions arise as part of the ordinary exercise of freedom of assembly and can be said to be a relatively insignificant imposition on the rights of the public to move freely.

Indeed, the judgement in Kvelde confirmed that such a restriction in S214A impermissibly burdened the freedom to political communication. The finding of the unconstitutionality of s214A(1)(c) and (d) in Kvelde requires that the law at least be amended to remove these sections. The burden on government resources and taxpayer funds to run a defence in the constitutional challenge has already been significant and the legislation cannot be allowed to remain in its current form.

The judgement in Kvelde also affirms the need for careful consideration and proper consultation regarding the introduction of any legislation affecting the right to protest. The urgent manner in which the 2022 amendments were brought forward and the lack of review afforded to them directly contributed to the improper over-reach of s214A(1)(c) and (d). Legislative decision-making must be guided by a regard for fundamental rights and take place with the involvement of the community.

Furthermore, protests at major facilities are a necessary part of the exercise of the right to protest, and serious disruption is important for many protests to be effective. Disruption has allowed protests throughout history to raise awareness,

[1] s144G(2)

communicate politically and generate media coverage for concerns that would be otherwise denied attention. There has already been cases where the threat of these laws has been used to discourage and constrain protest.

NCC calls on the NSW government to review the Summary Offences Act protections for protest. The freedoms of assembly and freedom of political communication cannot be said to be sufficiently ensured by the existence of the Summary Offences Act (SOA) protections for authorised protests ('the Form 1 regime'). Section 24 of the SOA protects participants in an authorised public assembly from being charged with any offence relating to participating in an unlawful assembly or the obstruction of any person, vehicle or vessel in a public place. As the protections are addressed only to these offences, the Form 1 regime does not itself protect protest participants from being charged with seriously disrupting a major bridge, tunnel or road under s144G(1)(b).

The Form 1 regime is particularly poorly adapted to protecting protests undertaken with urgency, as pointed out by Justice Walton in Kvelde at [277]. In the event that a protest organiser provides less than 7 days' notice to Police, the Commissioner can oppose the holding of the public assembly, denying it the related protections. In deciding to do so, the Commissioner must be guided by the statutory intention of the Summary Offences Act to facilitate protest and be guided by the balancing exercise between the right of free speech and other considerations as set out by Justice Hamilton in Gabriel.

The right to protest involves the exercise of spontaneous protests, particularly given the fact that protests are often responding to political and social matters that arise rapidly and without warning. The Form 1 regime is not adequately adapted to protect the right to spontaneous protests in the context of the substantial penalties of s144G and s214A.

The protections of the Form 1 regime apply only insofar as a protest is being held 'substantially in accordance' with the Notice of Intention submitted to Police. This means that a protest risks losing Form 1 protections if members of the crowd decide to deviate from the agreed protest route or stage a sit-in. In this circumstance, even protest-goers who are engaging in the protest in a way that is 'substantially in accordance' with the Notice of Intention would be at risk of being in breach of s144G.

Plainly, it is unacceptable that members of the public could be subject to serious penalties for conduct that they have no part in. This has particularly serious implications for protests that might face counter-protestors or agitators who could join a march posing as participants and then undertake actions contrary to the Notice of Intention, thus exposing all protest-goers to the risk of being in breach of s144G.

Furthermore, it is clearly an unacceptable burden for protest-goers to have to know the conditions in the Notice of Intention so as to be able to comply with them sufficiently to protect themselves from the serious penalties of s144G. Freedom of assembly must include the freedom to spontaneously join a protest and to arrive at a protest without having first consulted the exact conditions under which it is being held.

It is also unclear what threshold is required for a protest to stop being held 'substantially in accordance' with the Notice of Intention. Legal Observers NSW has documented several instances of Police using 10 minute delays to the running order of a protest to begin putting pressure on organisers by stating that they risked not being in compliance with their Notice of Intention. Antaw v R has been the sole Court decision on the matter, and concerned a protest which continued hours after the finishing time stated in the Notice and during which tents were erected on the road. Clearly, there is a gap between what is judicially considered to be 'substantially in accordance' with a Notice of Intention and how this provision is interpreted by Police on the ground.

Another stated policy objective was to protect the capacity for the community to engage in protests concerning industrial action, industrial disputes and industrial campaigns.

However, we believe that industrial issues are of equal importance to other issues that provoke protest, including climate change and First Nations justice.

NCC would like to submit the following recommendations for consideration.

Recommendations

1. Crimes Act s214A should be repealed
2. Barring repeal of the entire section, s214(1)(c) and (d) should be repealed

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3. A review should be carried out into introducing a Human Rights Act for NSW to ensure the right to protest is protected
4. A review should be undertaken of the Summary Offences Act protections for protest and whether their operation facilitates the exercise of the right to protest

Thank you for the opportunity to participate in the consultation.

Your key contact point for further questions and correspondence is Jacquelyn Johnson, Executive Officer, available via [redacted] and [redacted]. We welcome further conversation on this matter.

Yours sincerely,

[redacted]

Jacqui Mumford
Chief Executive Officer
Nature Conservation Council