TASMANIA
LAW REFORM
INSTITUTE

Faculty of Law, Private Bag 89, Hobart, TAS 7001
Phone: (03) 62262069
Email: law.reform@utas.edu.au
Website: www.utas.edu.au/law-reform/

29 September 2021

Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001

By email: haveyoursay@justice.tas.gov.au

Dear Ms Craven,

Workplaces (Protection from Protestors) Amendment Bill 2021

Thank you for the opportunity to comment on the draft Bill.

The Tasmania Law Reform Institute *("TLRI" / "Institute")* acknowledges the Government's continued work to clarify, simplify and amend the Principal Act and previous versions of this Bill. The TLRI notes that the High Court has confirmed that "the protection of businesses and their operations" is a legitimate purpose of a law, so long as the operation of that law is proportionate to its burden on freedom of political communication.[1]

The Institute recognises the significant work to redraft the Bill in response to: the High Court's declaration of the invalidity of the operative provisions of the Principal Act; and to many concerns that motivated the Parliament's rejection of this Bill's predecessor. The Institute refers to its submissions on previous versions of this Bill and reiterates the need for appropriate balance between: the legitimate ends of the Bill on the one hand; and protecting human rights – including freedom of political communication, speech and association – on the other.

The Institute remains concerned about the Bill for the following reasons:

- The process of redrafting and refining reveals the essential core of this Bill, which is an exercise in modifying and recalibrating existing summary offences relating to interference with business property. In fact, in practice the Bill serves to criminalise private nuisance, which could be achieved with a single code amendment. Given this is the case, the subject of any reform should be directed to the consolidated omnibus of simple offences that the Bill functionally aggravates.
    - Law reform should be directed to simplifying the law, removing defects, uncertainties and conflicts. Consolidation leads to those outcomes, de-consolidation undermines them.[2]
    - The Institute urges the Government to reconsider the long-term implications of situating standalone offences outside of the appropriate, existing, consolidating omnibus.

[1] *Brown v Tasmania* (2017) 261 CLR 328, per Kiefel CJ, Bell and Keane JJ at 363, 369

[2] Tasmania Law Reform Commission, *Report on Powers of Arrest, Search and Bail*, 1977; Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania,* 2011.

- The apparent targeting of some workplaces as receiving particular legislative attention (cl 5(1)) – in particular the express inclusion of aquaculture, mining and slaughterhouses – is of concern. The rule of law – and its subordinate principle of legal equality – dictates that laws of general application (such as trespass) should be written generally and not expressly, impliedly or politically favour some members of a class over others of the same class.
- There is no compelling evidence to disturb the common law ascendency of a person's private home over other types of property. Nor, in the Institute's opinion, is it necessary to create a new criminal offence of private nuisance that applies to only some occupiers of land and not others.

Consequently, whilst the Institute commends the Government's continued efforts to refine and strengthen its approach to protecting workplaces it is not supportive of this Bill in its present form.

The Institute reiterates that workplaces are appropriately protected by existing police powers, summary offences and criminal laws. If the Parliament is of the view that interference with business premises is equivalent to interference with people's homes then the most appropriate and discrete way to achieve a recalibration is within the existing omnibus of summary offences. However, the Institute notes that the evidence of trauma and impact on victims of such offences does not support such an approach.

Whilst the Institute's broader position is that the Bill is unjustified and unnecessary, we have provided general and specific clause comments in the attached document.

If you would like further information or explanation of our response, please contact Dr Gogarty (03) 6226 7562

Yours sincerely,

Brendan Gogarty

For the **Tasmania Law Reform Institute**

TASMANIA
LAW REFORM
INSTITUTE

Faculty of Law, Private Bag 89, Hobart, TAS 7001

Phone: (03) 62262069

Email: law.reform@utas.edu.au

Website: www.utas.edu.au/law-reform/

WORKPLACES (PROTECTION FROM PROTESTERS) AMENDMENT BILL 2021

1. The present Bill, appears, on its face to be more tailored and textually circumscribed than its predecessors. It is understood that this tailoring is a response to:

- The High Court's declaration of invalidity of the previous purported provisions of the Principal Act; and
- The rejection of the previous Bill by the state Parliament.

2. The Government's work to respond to those decisions in a considered way is to be commended. However, the process of tailoring has brought into relief that the primary legislative outcome the Bill seeks to achieve is the recalibration and modification (by adding aggravating elements) of existing criminal offences relating to property interference. In particular, the Bill ostensibly seeks to reform Tasmanian criminal law to ensure that workplaces are as legally inviolable to as a 'dwelling house',[3] and to punish people who interfere with them with at least the same, if not more severe criminal penalties. For the reasons below, the Institute does not consider that approach is suitable, necessary or appropriately balanced.

The Bill must be suitable, necessary and balanced

3. The Fact Sheet for the Bill notes that:

> "The Bill is necessary to address a High Court decision that certain provisions of the 2014 Act … are invalid because they impermissibly burden the implied freedom of political communication contrary to the Commonwealth Constitution
>
> …
>
> [The Bill] replaces all the substantive provisions of the 2014 Act with a consolidated set of new provisions"

[3] *Police Offences Act 1935*, s 14B(2)

4. It may be accepted that the High Court's decision in *Brown v Tasmania* affected all the substantive provisions of the 2014 Act. Notably, the full extent of invalidity cannot be known, because the Court confines itself to the factual circumstances of the matter before it at any one time.[4]

5. It does not however follow that the declaration of invalidity made it "necessary" to replace the invalid purported provisions of the Principal Act. In fact, the Majority in *Brown* considered the 2014 Act went "far beyond" what was "necessary" to protect workplaces.[5] Indeed, whilst the High Court confirmed protection of workplaces is a legitimate end of state law, it found that end purpose was already being prosecuted outside of the 2014 Act through laws found in consolidated omnibuses of summary and indictable offences [see below 10]. The High Court therefore confirmed that it is in fact *not necessary* (or constitutionally proportionate in that case) to pass a standalone law to deal with workplace interference.

6. The Institute similarly cautions any assumption the Bill appropriately responds to the High Court's decision by including a clause stating its intention to be constitutional. Whilst the inclusion of provisions referencing the implied freedom of political communication (and other rights) are welcome, they are predominantly declaratory and would not save the Bill from a constitutional challenge.[6]

7. As the Plurality in *Brown* explained:

> 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.

8. Parliament does not gain that power, or immunise purported laws that it has no power to make, by simply stating it is complying with the Constitution. Rather the question is what the law does in practice, considering its *term*s, *operation or effect*,[7] and whether its

[4] Given much of the Majority's decision turned on the operational uncertainty of the Act – in particular the scope and effect of its intersecting substantive provisions – it is appropriate to assume the Act was substantially, if not entirely constitutionally invalid.

[5] *Brown v Tasmania* (2017) 261 CLR 328, Kiefel CJ, Bell & Keane JJ at 373 [146].

[6] The phrase is recommended by the Commonwealth Office of Parliamentary Council's Drafting Directions for bills which are likely to have an effective burden on political communication . Australian Government Office of Parliamentary Counsel, *Drafting Direction No 3.1—Constitutional Law Issues* (2019), 6. However, despite the phrase being found in some Commonwealth statutes the terms have never been considered by any Court as relevant to the assessment of constitutionality of any Act it has never been subject to litigation.

[7] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567

design, operation and implementation is "suitable", "necessary" and "adequate in its balance".[8]

9. In the Institute's view the present approach, although improved is not adequate in its actual balance, but most importantly it is not a suitable or necessary way of achieving the stated ends of the Bill.

The Bill replicates and aggravation existing offences

10. As Gordon J explained in *Brown v Tasmania,* Tasmanian statute already consolidates offences relevant to workplace interference in the *Tasmanian Criminal Code* (Code) and *Police Offences Act* (POA), notably:

> (1) **unlawfully destroying or injuring property** ([*Code,* s 273; s 37(1) of the *POA*.]);
>
> (2) **unlawful entry on any land, building, structure or premises** (['**Trespass to lands**' *POA*, s 14B, which the High Court has taken to codify the elements of "**criminal trespass**" under Tasmanian law.[9]]);
>
> (3) committing a **common nuisance** which endangers the lives, safety, or health of the public, or which occasions injury to the person of any individual ([*Code* ss 141(1) of the *Code*; 14(1) POA; A common nuisance includes an unlawful act "which **endangers** the **lives**, **safety**, **health**, **property**, or **comfort** of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects": *Code*, s 140(1)]);
>
> (4) causing **public annoyance** in a public place, including: behaving in a violent, riotous, offensive, or indecent manner; disturbing the public peace; engaging in disorderly conduct; jostling, insulting, or annoying any person; and committing any **nuisance** ([*POA,* s 13(1)(a)-(e)]);
>
> (5) **failing to comply with a direction given by a police officer** to leave a public place and not return for a specified period of not less than four hours if the police officer believes on reasonable grounds that the person: has committed or is likely to commit an offence; or is obstructing or is likely to obstruct the movement of pedestrians or vehicles; or is endangering or likely to endanger the safety of any other person; or has committed or is likely to commit a breach of the peace (*POA,* s 15B); and
>
> (6) **organising or conducting** various activities, including a **demonstration or a procession,** on a public street without a permit.

[8] *Brown v Tasmania* (2017) 261 CLR 328, Kiefel CJ, Bell & Keane JJ at 369 [127]
[9] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; Also, *Strickland v. Killen* [1983] Tas.R.31; [LCA 7/1983]

11. The substantive provisions of the Bill, contained in proposed Part 2, overlap and are additional to those offences. That is, for the summary offences in the Bill to be made out, it is necessary to show that a person is:

    (1) *Trespassing on property* (intended s 7 of clause 7) which is codified in s POA, 14B(1) ("criminal trespass")[10] , or
    (2) *obstructing a public place or critical infrastructure (*indented s 8 of clause 7), which gives rise to several offences (notably the summary offence of common nuisance); and
    (3) Whilst committing one of those offences ((1) or (2)) it is further proven that the person intentionally *obstructs a business activity* (by definition causes a 'private nuisance').

12. Read in this way the offences operate as aggravated penalties to existing criminal offences. That is, each Bill offence shares common elements with a simple offence but requires the establishment of at least one further element to give rise to a higher penalty than the simple offence.[11]

13. Such an aim appears confirmed by the Bill's Fact Sheet which justifies the provisions on the grounds that "the trespass or acts arising intentionally obstruct business activity, merits a higher maximum penalty than trespass alone" and the penalty is to be set "at the same level as trespassing in a residence" under the POA. It is notable that trespass to residences is itself a form of aggravated trespass (compared to trespass to land simpliciter).[12]

14. In simple terms the operative provisions can be distilled to:

- Trespass to land (POA*)* + obstruction of a business activity (Workplace Bill)
- Common nuisance (POA / Code) + obstruction of a business activity (Workplace Bill)

Aggravation in a separate act generates uncertainty around double punishment

15. It is likely that the location of aggravating elements in separate acts will lead to some confusion about which Act should apply to which offences. It may also lead to perceptions by protesters and other persons the Bill will affect that they may be liable to

[10] *Strickland v Killen*; [1983] Tas R 31 (12 April 1983).

[11] The nature of aggravating offences was explained by the Majority of the High Court as follows: "Proof of the aggravated form of offence will usually constitute proof of the simple offence and, in that way, the two offences can be seen to overlap …the two offences (one simple, the other aggravated) have some (often many) common elements; at least one further element must be proved to establish the more serious offence" see *Ma'aming v The Queen* (2013) 252 CLR 381, per French CJ, Hayne, Cernan, Kiefel and Bell JJ at 389.

[12] "[It] is clear that only one offence of trespass was created by 14B [of the Police Offences Act] and it and all of its elements are to be found in subs(1). Subsection (2) merely prescribes two *alternative maximum penalties* for the one offence depending on the occurrence or otherwise of the *aggravating factor of a dwelling-house" Adams v White* [2006] TASSC 50 (22 June 2006) per Crawford J at [13].

double-punishment under multiple overlapping Acts. As will be discussed this reflects a broader problem with situating summary offences outside the appropriate omnibus. Notwithstanding this the Institute assumes that the Bill is designed to comply with the rule against double-punishment, and the provisions of the *Acts Interpretation Act*, s 32. That section would appear to generally circumscribe double punishment for the trespass simpliciter and the secondary performative act of obstruction of a business. However, the wording of the present Bill may generate uncertainties in situations where trespass and nuisance to businesses occurs over a long period or as part of a persistent course of conduct.

16. It will not always be readily obvious whether the trespass obstruction clause is to operate as a separate offence to the simple trespass to property that precedes it.[13] That is because the proposed provision operates on an assumption of trespass as a separate continuing act to the obstruction (i.e., a person "while trespassing"). That being the case, the act of trespass may be assumed to have occurred separately in time and space from the act of obstruction. Each separate act would potentially escape the double punishment rule applying to common acts. The result would be that some forms of trespass to a business would produce a cumulative maximum penalty of 18 months, as opposed to the 12 months which applies to private-residences under the POA. Given such a result would be contrary to the stated intention of the Government that the Bill impose *equivalent* penalties to that of trespass to a dwelling-house (12 months under POA, s 14B) it must be assumed that such a potential for overlap was unintentional.

17. The thoroughfare obstruction in proposed s 8 (clause 7) also produces uncertainty about the possibility of cumulative penalties arising from an interrelated or connected course of conduct. That is, in part because the offence shares common elements with other consolidated offences, albeit with the 'aggravating' further element of obstructing a business activity or business vehicle. Unlike the trespass offence, which begins with a set of common elements (criminal trespass to land), the overlap of common elements may occur at any point along a temporal continuum during which a number of effects may be produced. For instance, a picketer who blocks a public thoroughfare may cause continuing or separate public annoyance and common nuisances to individual users of that thoroughfare over the course of the day. However, they may only effectively obstruct a business vehicle entering the adjacent business premises once during that time. Whilst the overarching intent behind the blockade may be to obstruct the business

[13] More appropriately an 'aggravated' offence, albeit contained in a separate act.

vehicle, it is much less clear whether the other offences which resulted from the blockade are separate or coextensive with it.

18. If the Government chooses to continue with the present approach, then the Institute recommends clarifying the language of proposed sections 7 and 8 to avoid any doubt that obstructing the carrying out of business activities is not intended to attract a separate penalty to equivalent simple offences (i.e., criminal trespass to land, public nuisance etc) of which they share common elements.

19. However, the Institute's view that such an aggravation is not necessary, or if it is necessary a separate act is unjustified.

Inverting the common law ascendency of private property

20. In the Institute's view there is no justification for interference with a business activity constituting an aggravating further element of criminal trespass or nuisance.

21. Owners and occupiers of land have a general, albeit regulated, inviolable right to use and enjoy that land as they please. This reflects the fundamental nature of property in the common law and the right of a lawful occupier to autonomy and relative dominion over and within their property.[14] This is a right shared and protected equally under law by trespass and nuisance.[15]

22. **Trespass** (criminal and civil) protects against the unlawful interference with an occupier's lawful use and enjoyment of the land. As Gordon J explained in *Brown*,

> trespass to land, [involving] direct interference, either intentional or negligent, with possession of the land without the plaintiff's consent or without other lawful authority … That would capture conduct on [public or private] business premises [located on public or private land] that prevents, hinders or obstructs business activity or damages business premises.

23. Trespass would also capture all other forms of interference to activities the owner or occupier of public or private premises has the lawful right to undertake.

24. To the extent that the policy behind this Bill is (as the Fact Sheet implies) to elevate business premises to the same status as private homes the Institute urges caution. Unlicensed invasion of a person's home has long been an aggravating factor to trespass, this arises by consequence of the particular status of that form of property as ascendent

[14] The inviolability of a person's home was recognised early in the history of English law. It is an immunity equal to the inviolability of the person himself." *Re Crowley AND Ors* [1981] FCA 31; (1981) 52 FLR 123.
[15] The principle was set out by Blackstone in 1765 who stated that the " absolute right, inherent in every [citizen], is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution … [the Law is] extremely watchful in ascertaining and protecting this right. William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) Book 2.

over all others in the common law.[16] It is unquestionably within the power of Parliament to override the common law hierarchy of property rights. However, there would need to be a particularly strong justification for doing so, particularly given the continued recognition of the special status of a person's home (including their safety, privacy and family life there) remain central to domestic and international human rights law.[17]

25. More importantly the actual operation of the Bill is not directed to making businesses and homes equivalent under criminal law. If it was, then all interferences with lawful activities undertaken on a property would be protected. This Bill aggravates only a very specific form of obstruction to lawful acts conducted on property (which under the Bill could in fact include a dwelling house).[18] Such an approach involves the criminal law casting additional protections over property owners because of what they choose to do on property. That is not the role of criminal law, and it conflicts with the notion that property owners are treated equally by and under law. Throughout common law history the poorest person living in even the most "ruined tenement" has been afforded the same equal rights and protections as the most powerful land owner, without reference to how they choose to exercise (or not exercise) their property rights.[19]

26. **Nuisance** protects the same property rights and liberties from unlawful interference as trespass does, albeit in situations when there is no evident trespass or the interference is separate to it. Nuisance applies to:

> interferences with the occupier's use or enjoyment of the land … by encroachment, direct physical injury or interference with the quiet enjoyment of the land".[20]

27. However, unlike criminal trespass, common criminal nuisance does not presently extend to private property.[21] Rather it is up to the land owner to use civil remedies to deal with the private nuisance – even if it is occasioned by, or a consequence of, a public nuisance.

---

[16] Importantly such an aggravation is not discriminatory – insofar as it operates on the assumption (more appropriately a legal fiction) that all citizens have a home – where particular and unique private rights require special protection by the state. *New South Wales v Corbett* [2007] HCA 32; (2007); see historically *Semayne's Case* [1572] EngR 333; (1604) 5 Co. Rep. 919; 77 E.R. 194; *Bostock v Saunders* (1773) 2 Wm Bl 912 at 914 per De Grey CJ [1746] EngR 341.

[17] *International Covenant on Civil and Political Rights,* Article 17.

[18] For instance a collocated garage, a home accounting business, a manager/administrator or office worker working from home during lockdown.

[19] "'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement.' So be it - unless he has justification by law." *Denholm Southam v. Smout* (1964) 1 QB 308, per Denholm LJ at p 320.

[20] *Brown v Tasmania*, Gordon J at 453.

[21] *Smith v Cornish* (1971) Tas SR 383 NC ; *Richter v Risby and Others* (1987) Tas R 36.

28. In *Attorney-General v. P.Y.A Quarries Ltd*, Denning LJ (as he then was), explained the common law position on criminal versus private nuisance as follows:

> The classic statement of the difference (between a public nuisance and a private one) is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals ... a public nuisance is a nuisance which is so widespread in its rage or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.[22]

29. In practice, proposed section 8 widens the operative field of public nuisance to private (including Crown) property where individual rights are affected, namely business activities. It makes the protection of those specified forms of property rights a matter of community rather than individual concern. The justification for doing so is not especially clear given business owners are more likely to have the resources and capacity to pursue an action in private nuisance (or private trespass) than private citizens do.

The Bill would operate in a discriminatory and arbitrary manner

30. Offences which aggravate trespass or nuisance based on specified activities conducted on land represent a departure from the principles of equality and the inviolability of private property. They signal an elevation of some property uses over others, and the willingness of the state to enact selective, protective targeting of some property owners through the use of the State's criminal apparatus. This is particularly acute given the Bill's implicit focus on some forms of business activities (i.e., aquaculture, forestry, mining) [23] and express exclusion of others which would seem to be especially vulnerable to obstruction (i.e., kindergartens, hospitals, charity shops).

31. The selective focus on 'business' activities belies the fact that an obstruction occasioned by trespass or nuisance may have much more profound effect on other forms of activities which citizens have a right to enjoy on their properties.[24]

- Trespass to a private home which intentionally obstructs the activities its occupants have the right to enjoy is likely to have profound and long-lasting effects on a family living there.
    - A public nuisance obstructing a private vehicle may cause equally significant obstruction, including the ability of a person to attend work, visit family and so on.

[22] (1957) 2 QB 169 at p 190.
[23] Bill, clause 6.
[24] Matt Tonkin, Amy Burrell. *Property Crime: Criminological and Psychological Perspectives* (Routledge, 2020), Ch 5.

- A public nuisance on a thoroughfare outside a kindergarten, aimed at interfering with the business of the kindergarten provider is likely to be highly distressing to the lawful occupants of the facility, especially the young children who are being cared for.

32. There is no clear reason why trespass-based obstructions to those activities should not be sanctioned equally obstructions of business activities. Nor is there any clear reason why the community at large has as much, if not, more interest in protecting against such interferences. If enacted, the Bill would create arbitrary outcomes and unequal punishment for equivalent acts of interference with private property rights.

33. As the ACT Department of Justice has correctly advised:

> Aggravated offences should be used very sparingly and carefully considered [and avoid] arbitrary elevating one group of society over another in criminal law.
>
> For example, at first blush it seems appropriate that assaults against public servants who provide social services should attract a higher penalty than other assaults. However, a closer look at assault rates would reveal a range of industries and professions where employees experience assault.
>
> Including everyone who had a case for a higher penalty would lead to a significant and arbitrary division in the population of who was covered by such an aggravation and who was not.[25]

34. The plurality of High Court explained in *Green v The Queen*:

> "Equal justice" embodies the norm expressed in the term "equality before the law". It is an aspect of the rule of law … Consistency in the punishment of offences against the criminal law is "a reflection of the notion of equal justice" and "is a fundamental element in any rational and fair system of criminal justice"[26]

35. Mason J similarly warned of the implications from departing from such rule of law conventions

> Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, *is calculated to lead to an erosion of public confidence in the integrity of the administration of justice*.[27]

---

[25] Department of Justice & Community Safety (ACT), *Guide for Framing Offences* (version 2, ACT Government, 2010) https://www.justice.act.gov.au/sites/default/files/2019-08/report_GuideforFramingOffences_LPB_2010.pdf 35.
[26] *Green v The Queen* (2011) 244 CLR 462, per French CJ, Crennan and Kiefel JJ 472, emphasis added.
[27] (1984) 154 CLR 606 at 611.

36. Such principles are ones of "general application"[28] with constitutional relevance to the legislative functions of Parliament.

37. Decoupled from the simple offences which the operative provisions of the Bill rely, it appears that its true objective is to penalize *specific forms* of unlawful interferences with the use and enjoyment of property by the lawful occupier of that property. The problem with that approach is that it is discriminatory in operation and arbitrary in application.

38. If common nuisance is to be extended to incorporate private land and interests then it should be extended to all lawful uses of land. That is a relatively simple task of law reform. It would simply involve the amendment of the definition of public nuisance in the Code,[29] and/or POA.[30] Alternatively it could be achieved through the creation of a summary offence of private nuisance within one of those omnibuses, which would 'pick up' the elements of the common law tort as a general criminal act.

39. The Institute emphasises that it does not necessarily support extending the criminal law to cover private nuisances, but simply that doing so achieves the aims of the Bill in an equal way, consistent with the rule of law and common law conventions respecting property rights.

The Bill effectively de-consolidates summary offences of general application

40. More broadly the Institute is concerned about the approach of situating offences of general application outside the relevant consolidated criminal omnibus. Law reform should be directed to simplifying the law and removing defects, uncertainties and conflicts. Consolidation leads to those outcomes, de-consolidation undermines them.[31]

41. The process of consolidating criminal laws into codified omnibuses has been a major initiative across the common law world since at least the 19th Century.[32] This was in response to the serious problems created by the historic preponderance of offences across the statute books, notably that criminal law was 'in a state of complete

---

[28] *Wong v R* (2001) 207 CLR 584, per Kirby J [89].

[29] For instance (amending words in emphasis), s 140 of the Coe would become " A common nuisance is an unlawful act or an omission to discharge a legal duty, such act or omission being one which endangers the lives, safety, health, property, or comfort of the public, *or any lawful occupier of land*, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects, *or by which any lawful occupant of land is obstructed in the exercise and enjoyment of any legal right of occupation and control of that land*."

[30] i.e., by specifying in 13(1)(e) that it captures 'public or private nuisance' or by creating a separate summary offence of private nuisance.

[31] Tasmania Law Reform Commission, *Report on Powers of Arrest, Search and Bail*, 1977; Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* 2011,

[32] Beginning with the *Criminal Law Consolidation Acts 1861* (UK) and in Australia the *Criminal Code Act* 1899 (Qld); see Sandra Berns, 'Codifying Passion: the Griffith Defamation Code' in *Griffith, the Law, and the Australian Constitution* (Royal Historical Society of Queensland, 1998), 36.

uncertainty' for citizens, litigants, law enforcers and the legislature.[33] Indeed, members of Parliament complained that the process of law reform was undermined and unnecessary litigation increased by the fragmented nature of statute law.[34]

42. The present criminal provisions for trespass and public nuisance contained in the *Police Offences Act* are, in fact, the result of such a consolidation project having been previously located in the *Trespass to Lands Act 1946* and *Police Act 1905*. The Bill reverses that consolidation effort by de-consolidating an aggravated further element to criminal trespass into a standalone Act.

43. Consolidation was a central concern for the Gibbs Committee as part of its national criminal law reform agenda in the 1980 and 1990s.[35] That Committee emphasised the need for summary and criminal offences of general application to be collocated in a consolidated omnibus statute that Committee. It did so on the grounds of:

- Reducing "inconsistency and duplication in the statute book that is indefensible from a criminal law policy viewpoint."
- Reducing the "total number"' of criminal offences because in broad principle, this is a desirable objective."
- Ensuring that the "courts, the legal profession and the police [are] able to deal more effectively with a limited number of omnibus offence provisions with which they would become familiar than a much greater number of provisions in particular Acts."
- Ensuring "matters [that] are of such significance in the administration of law and justice … be governed by general provisions carefully thought out in advance rather than provisions drafted ad hoc for the purpose of each particular statute."
- "Convenience to the user of the legislation, not merely the convenience of the Department concerned, but of the public" through textual coherence, clarity and ease of access who can easily identify and understand the rights, duties, powers and obligations created by law. [36]

44. In the Institute's view these objectives should be pursued as a matter of legal convention, rule of law and human rights to any criminal law reform. Unless there is a

---

[33] Sir Fitzroy Kelly, *Consolidation of the Statute Law,* House of Commons (UK), 14 February 1856, vol 140, p 719.

[34] Ibid.

[35] Gibbs Committee. 'Terms of Reference', in Gibbs Committee, *First Interim Report*, Appendix 1, p 60.

[36] Rt Hon. Sir Harry Gibbs "*Review of Commonwealth criminal law :* Interim report - Principles of criminal responsibility and other matters" July 1990 (1990, Commonwealth Attorney Generals Department), 436 [50.8]; see also Review of Commonwealth Criminal Law, *Discussion Paper No. 14: Omnibus Provisions to Replace Provisions in Common Form in Particular Acts*, May 1988, p 6 ['*Discussion Paper No. 14*'].

clear and precise reason to situate criminal offences outside of consolidated omnibuses that is where statutory amendments should be directed.

45. Ultimately the aim of the proposed law reform is to criminalise private nuisance, whether in an aggravated or simple form. Such a reform does not warrant an entirely bespoke legislative framework to carry into effect. Indeed, many of the problems faced by this Bill's predecessors are likely caused by the attempt to create an "ad hoc" framework to support the "purpose of each particular statute" (criminalising private nuisance to businesses).

46. There are times in which it is preferable for offences to be included in an act that operates in a specific field of operation (such as on a public road) or with respect to a specific entity (such as breaches of duty of a corporation). The present Bill does not pursue such a narrow legislative remit – rather it operates broadly, to all areas in Tasmania and penalises all citizens who interfere with the use and enjoyment of a very broad class of land. As such, the provisions should be co-located with other summary or criminal offences upon which they rely or of which they replicate.

47. In this case the Institute considers the public interest in consolidation to greatly outweigh any political benefit from the punitive signalling of a standalone act.

48. The Institute takes the same view of the additional police powers set out in proposed Part 3 to give effect to the substantive trespass and nuisance offences**.**

The Bill makes police powers arbitrary and overly harsh

49. In its Report into the *Consolidation of Arrest Laws in Tasmania* the TLRI pointed out that Tasmania's arrest powers, being numerous, disparate and variously grounded, lack clarity, certainty, accessibility and predictability. This renders them arbitrary and unlawful in human rights terms. The creation of new arrest powers simply compounds this concern.

50. As noted above, many of the activities that would satisfy an offence under the Bill will also be offences under other legislation. However, the penalties imposed for the same activities will differ markedly depending on which legislation a person is found to be offending against. The discretion as to which charges are laid will fall to police officers, and may not be applied consistently. The resultant lack of certainty generates arbitrariness in the application and interpretation of the law which, at the very least, is contrary to human rights norms.

51. Should Part 3 remain the Institute notes the lack of a tiered approach to police powers (which is presently found in existing consolidated legislation. Sections 8 and 11 of the *Workplaces (*Protection *from Protestors) Act 2014* sought to moderate the application of the offence provisions by allowing police officers to first issue warnings and 'move on' directions to protesters. Only those protesters who failed to comply with directions or subsequently returned to the protest would commit an offence.

52. The High Court was critical of the lack of clarity about when directions could lawfully be given, but did not mandate the removal of the move-on powers.

53. The Bill removes the tiered approach of requiring directions to be given before an arrest can be made. Powers to give such directions exist under the *Police Offences Act 1935*, but there will be no mandatory link between those directions and the offence provisions under the Bill. This is another reason the operative provisions not be included in a standalone act but are rather consolidated in the relevant criminal omnibus.

54. Given the significant penalties involved, we strongly recommend that a clear requirement for directions to be given to offenders be included in the Bill. This is particularly important in relation to offences where intent must be established – the issuing of a direction provides the alleged offender the opportunity to consider their intent and act accordingly.