



Law Council
OF AUSTRALIA

Office of the President

22 August 2019

Senator Amanda Stoker
Chair
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Chair

Supplementary Submission: Criminal Code Amendment (Agricultural Protection) Bill 2019 [Provisions]

On 12 August 2019, the Law Council appeared before the Senate Standing Committees on Legal and Constitutional Affairs (**the Committee**) as part of its inquiry into the Criminal Code Amendment (Agricultural Protection) Bill 2019 (**the Bill**).

This supplementary submission addresses two issues that were raised by the Committee during the Law Council's appearance. The first question related to the increases in penalties for trespass offences in state and territory laws, and the second relates to whether the Law Council maintains its arguments about the proportionality of the penalties for the proposed offences in the Bill in light of these increased penalties.

Increases in Penalties for State and Territory Trespass Offences

At the time of the Committee hearing, Senator Stoker asked the following question:

CHAIR: *You foreshadowed that some state governments are considering increasing penalties for what you would regard as the primary offence of trespass. What are the proposed penalties that are being considered in relation to those?*

In Queensland, the Criminal Code (Trespass Offences) Amendment Bill 2019, was introduced into Parliament on 1 May 2019. The Explanatory Note to the Bill states that the objectives of the Bill are to:

1. Introduce a new offence of 'Aggravated trespass' to enable the prosecution of a person who enters or is in premises, private land or transport infrastructure with the intent to cause economic harm to another person, business or the State. The proposed maximum penalty for this offence is 100 penalty units or 3 years imprisonment.
2. Introduce a new offence of 'Serious criminal trespass' to enable the prosecution of a person who enters or is in premises, private land or transport infrastructure used

for business purposes and commits an offence punishable by 3 or more years imprisonment. The proposed maximum penalty for this offence is 3,000 penalty units or 10 years imprisonment.

3. Introduce a new offence of 'Organised trespass' to enable the prosecution of a person who participates in the organisation of trespass by counselling, procuring or arranging for another person to commit an aggravated or serious trespass offence. The proposed maximum penalty for this offence is also 3,000 penalty units or 10 years imprisonment.

In New South Wales, an offence of 'Aggravated unlawful entry on inclosed lands' was enacted in 2016 as section 4B of the *Inclosed Lands Protection Act 1901 (NSW)*, with a maximum penalty of 50 penalty units where an offence of unlawful entry on inclosed lands on which any business or undertaking is conducted is accompanied by one or more of five aggravating factors.

Following a review, the NSW Legislative Council Select Committee on Landowner Protection from Unauthorised Filming or Surveillance handed down its report on 'Landowner protection from unauthorised filming or surveillance' on 25 October 2018.¹ In its response tabled 20 February 2019, the NSW Government supported in principle establishing a working group to consider the adequacy of the penalties for offences relating to unauthorised entry onto inclosed lands.²

The NSW Government has also amended the *Biosecurity Regulation 2017 (NSW)*³. One of the objects of this amendment was "to make compliance with those biosecurity management plans a mandatory measure that must be complied with by persons who enter or who are at or in places to which the plans apply and who deal with biosecurity matters or carriers".⁴ The NSW Government states that commencing 1 August 2019, failure to comply with these arrangements when dealing with biosecurity matter, such as animals or produce, may be an offence under the *Biosecurity Act 2015 (NSW)*. Penalties can include an on the spot fine of \$1000 or a court ordered fine of \$220,000 for individuals and \$440,000 for corporations.⁵

In South Australia the existing offence of 'serious criminal trespass—non-residential buildings' contrary to *Criminal Law Consolidation Act 1935 (SA)*, section 168 is punishable by imprisonment for 10 years for a basic offence and imprisonment for 20 years for an aggravated offence.

This offence is a form of serious criminal trespass which criminalises a person entering or remaining in a place (other than a place that is open to the public) as a trespasser with the intention of committing an offence of theft or an offence of which theft is an element; an

¹ Legislative Council Select Committee on Landowner Protection from Unauthorised Filming or Surveillance, Parliament of New South Wales, [Landowner protection from unauthorised filming or surveillance](#) (Report, 25/10/2018).

² [Letter from the Hon Niall Blair MLC to Mr David Blunt](#), Clerk of the Parliaments and Clerk of the Legislative Council, 20 January 2019, 3.

³ See [Biosecurity Amendment \(Biosecurity Management Plans\) Regulation 2019](#) which inserted Part 2, Div 12 (cll 44A–44C) into the *Biosecurity Regulation 2017 (NSW)*.

⁴ [Explanatory Note](#), Biosecurity Amendment (Biosecurity Management Plans) Regulation 2019 (NSW).

⁵ Government of New South Wales Department of Primary Industries, 'Biosecurity Management Plan' (web page 19 August 2019, <<https://www.dpi.nsw.gov.au/biosecurity/your-role-in-biosecurity/primary-producers/biosecurity-management-plan>>).

offence against the person; or an offence involving interference with, damage to, or destruction of property punishable by imprisonment for 3 years or more.

The maximum penalty for this offence crosses the 5-year threshold for offences captured by the existing section 474.14 of the *Criminal Code Act 1995* (Cth), such that a person could currently be charged with an offence against that section for using a telecommunications network with intention to facilitate the commission of a serious criminal trespass.

Whether the Law Council Maintains its Proportionality Argument in Light of the Increased Penalties

Following the above question, Senator Stoker made the following request:

CHAIR: ...*When you consider that, could you also examine on notice whether the criticism you have made that says the proposed penalty of 12 months for these offences remains subject to your criticism that it is too high in circumstances of comparison to the primary offence when one considers the fact that the primary offence faces increases? ...*

As noted above, s 474.14 of the *Criminal Code* would already apply to the South Australian offence.

In the cases of proposed increases in other States, the offences introduced require the prosecution to prove one or more additional elements underlying more serious conduct which justifies those increased penalties. These elements include:

1. The intention to cause economic harm (as opposed to the lower threshold of recklessness as to possible detriment to a primary production business contained in the Bill);
2. The intention to commit a further offence;
3. The commission of the offence in company; or,
4. The presence of a biosecurity management plan.

These elements of the state offences which justify penalty increases would not necessarily be present in the criminality captured by the proposed offences in the Bill.

For that reason, the Law Council maintains its submission that the proposed maximum penalty of the offences in the Bill are not proportionate to the policy objectives of the Bill and the Law Council re-iterates paragraphs 48-52 of its submission, where it made the following recommendation:

<p>Recommendation:</p> <ul style="list-style-type: none">• The maximum penalty for the proposed offences of inciting trespass, damaging property or theft, should not exceed the maximum penalty of the substantive offences that are being incited to be committed.
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The Law Council remains of the view that the states and territories are better equipped to legislate a range of appropriate offences and corresponding penalties, depending on the exact factual circumstances that constitute the particular offending conduct that is sought to be criminalised. This is because the states and territory governments do not have the constitutional limitations that apply to the Federal government to legislate in this area.

Accessories to such offences, including those who use telecommunications to incite criminal conduct with the intention of inciting that conduct, can already be prosecuted in the states and territories under well-established principles of the criminal law.

We thank you once again for the opportunity to provide this supplementary submission to the Committee. If you have any further inquiries, please contact Dr Natasha Molt, Director of Policy, at natasha.molt@lawcouncil.asn.au or on (02) 6246 3754.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Moses'.

Arthur Moses SC
President