

**Criminal Code Amendment  
(Agricultural Protection) Bill  
2019**

Legal Aid NSW submission to  
the Senate Legal and  
Constitutional Affairs  
Legislation Committee

*12 August 2019*

## About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority, Drug Court and the Youth Drug and Alcohol Court.

The Criminal Indictable Section provides representation in trials, sentences and short matters listed at the Downing Centre District Court, complex committals in Local Courts throughout NSW, Supreme Court trials and sentence proceedings throughout NSW, fitness and special hearings in the District and Supreme Courts, and high risk offender matters in the Supreme Court.

Legal Aid NSW provides civil law services to some of the most disadvantaged and vulnerable members of our society. Currently we have over 150 civil lawyers who provide advice across all areas of civil law.

The Civil Law practice provides legal advice, minor assistance, duty and casework services to people through the Central Sydney office and 13 regional offices. Its Human Rights Group specialises in the areas of human rights, discrimination, false imprisonment and judicial review.

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## Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee's (the Committee) Inquiry into the Criminal Code Amendment (Agricultural Protection) Bill 2019 (the Bill).

The Bill proposes two new criminal offences which relate to the incitement of trespass or property offences on agricultural land. The first offence applies when a person uses a carriage service to transmit, make available, publish or otherwise distribute material with intent to incite another person to trespass on agricultural land. This offence can be proven if the person is reckless as to whether the other person's trespass or related conduct could cause detriment to a primary production business operating on the land. The maximum penalty for this offence is 12 months imprisonment.

The second offence prohibits a person from using a carriage service to transmit, make available, publish or otherwise distribute material with intent to incite another person to unlawfully damage or destroy property, or commit theft on agricultural land. The maximum penalty for this offence is 5 years imprisonment.

Legal Aid NSW opposes the Bill for a number of reasons:

- the new offences are unnecessary
- the Bill would add to an already complex and overlapping system of laws in relation to complicity
- the penalties are excessive given the broad nature of the offences
- the safeguards are inadequate, and
- the Bill arguably impinges on the implied freedom of political communication.

Should the Bill proceed, the exemptions contained within the Bill should be strengthened. The protections for journalists are currently too narrow. Additionally, we recommend a good faith defence to protect persons who distribute material in good faith.

Our detailed response is set out below.

## The offences in the Bill are unnecessary and duplicative

Under existing laws, various categories of participatory liability combine with the numerous offences relating to trespass, property damage and theft to cover the field of criminal behaviour which the Bill is attempting to address.

There are a wide range of existing offences that criminalise trespass, property damage and theft. In NSW, these include:

- unlawful entry and aggravated unlawful entry into enclosed lands,<sup>1</sup>
- unlawful entry, property damage and theft offences<sup>2</sup>,

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<sup>1</sup> *Inclosed Lands Protection Act 1901* (NSW), ss 4, 4AA and 4B.

<sup>2</sup> See, for example, *Crimes Act 1900* (NSW), ss 111, 117, 126, 195-200.

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- failure to comply with mandatory biosecurity measures,<sup>3</sup> and
  - failure to comply with a biosecurity management plan.<sup>4</sup>

The principle of complicity provides various ways in which a person can be held criminally responsible for encouraging or assisting the commission of such offences.

Any person who aids, abets, counsels, or procures the commission of a minor indictable offence can be prosecuted and convicted as a 'principal' offender.<sup>5</sup> The prosecution of a person who aids or abets a crime is not dependant on the prosecution of the 'principal' offender.<sup>6</sup>

An adult who recruits another person to commit a serious indictable offence is liable for 7 years imprisonment.<sup>7</sup> There are comparable provisions contained within the *Criminal Code Act 1995* (Cth) (Criminal Code).<sup>8</sup>

Under the *Crimes Act 1900* (NSW), a person can be held liable as an accessory before the fact, for a serious indictable offence.<sup>9</sup> The prosecution of this offence is also not dependant on the prosecution of the 'principal offender'.<sup>10</sup>

Incitement offences are a further way in which criminal responsibility is attributed to a person who is not the 'principal offender'. In NSW, it is an offence to incite the commission of a crime.<sup>11</sup> Incitement includes urging, aiding, encouraging and conducting operations for the commission of crimes.<sup>12</sup> It is also an offence to print or publish any writing which incites crime.<sup>13</sup> These offences directly overlap with the two offences proposed in the Bill.

Conspiracy is another form of participatory liability. It is an offence to conspire to commit an unlawful act with the intention of carrying it out. The intention to carry out the crime is the essential element, though the crime does not need to have occurred.<sup>14</sup> The Criminal Code imports the common law concept of conspiracy for commonwealth offences punishable by imprisonment by more than 12 months or by a fine of 200 penalty units or more.<sup>15</sup>

In addition, it is already an offence under the Criminal Code to use a carriage service to facilitate a serious offence.<sup>16</sup>

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<sup>3</sup> *Biosecurity Act 2015* (NSW), s 25.

<sup>4</sup> *Biosecurity Regulation 2017* (NSW), s44C.

<sup>5</sup> *Crimes Act 1900* (NSW), s 351B.

<sup>6</sup> *Crimes Act 1900* (NSW), s 351.

<sup>7</sup> *Crimes Act 1900* (NSW), s 351A.

<sup>8</sup> *Criminal Code Act 1995* (Cth), ss 11.2 and 11.2A.

<sup>9</sup> *Crimes Act 1900* (NSW), s 346.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Crimes Prevention Act 1916* (NSW), s 2.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Crimes Prevention Act 1916* (NSW), s 3.

<sup>14</sup> *Yip Chiu-Cheung v R* (1994) 99 Cr App R 406 at 410, per Lord Griffiths; *R v Wilson* (unrep, 12/08/94, NSWCCA).

<sup>15</sup> *Criminal Code Act 1995* (Cth), s 11.5.

<sup>16</sup> *Criminal Code Act 1995* (Cth), s 474.14

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Legal Aid NSW considers that the above provisions provide an extensive framework for the prosecution of people involved in activism on agricultural lands, whether they carry out the activity directly, or conspire or incite others to carry it out. In addition, NSW police have broad powers to interfere with protest activities by utilising search and seizure powers without warrant, where they suspect a person is in possession of items such as locks and chains, which might be used to interrupt the conduct of a business or undertaking.<sup>17</sup>

Besides the above mentioned criminal laws, various other legal measures are available to address the concerns that the Bill seeks to address, such as apprehended violence orders, injunctions, torts and other civil law remedies.

### Complicity is already complex and overlapping

In their review of participatory liability, the NSW Law Reform Commission found that the nuanced definitions, overlaps, similarities and differences among the various ways in which group criminal behaviour can be addressed are potentially confusing for those engaged in the administration of criminal justice.<sup>18</sup> Adding two new offences, which duplicate or cross-over with existing offences, will exacerbate this issue. The Committee should instead consider the broad range of relevant offences and the existing law in relation to complicity across Australian jurisdictions, rather than introducing new offences without establishing a clear and critical gap in the existing provisions.

### The penalties are excessive

The proposed penalties in the Bill are disproportionate to the level of criminality reflected in the activity. Both proposed offences can involve the mere making of a statement of incitement and attract significant penalties, regardless of the size or nature of the audience. For both of the proposed offences, penalties are available regardless of whether the substantive offence is committed or the objective seriousness or triviality of any offence committed. The proposed offence of inciting trespass has a penalty of 12 months imprisonment and it is irrelevant if detriment to a primary production business actually occurs as a result of any incited trespass.

Legal Aid NSW considers that the proposed penalties in the Bill are excessive and disproportionate, particularly in light of the limited available defences and safeguards contained in the Bill.

Incitement offences are wider forms of participatory liability, as they involve encouragement, assistance or activity. In our view, this can be distinguished from the more traditional forms of complicity (such as accessory or joint criminal enterprise) and therefore penalties should be proportionately lower to reflect this lower level of criminality. This view is consistent with the appropriately low penalties contained in the

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<sup>17</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), ss 45A-45C.

<sup>18</sup> NSW Law Reform Commission, *Report 129: Complicity* (2010) 4.

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*Crimes Prevention Act 1916* (NSW).<sup>19</sup> For example, a person who publishes any writing which incites a crime is punishable by imprisonment for 6 months or 1 penalty unit.<sup>20</sup> By contrast, the penalty for the proposed offence of incitement of property damage or theft is 5 years imprisonment. This penalty is the same as the penalty for the substantive offences of property damage<sup>21</sup> or theft.<sup>22</sup> The penalty for the proposed offence of inciting trespass is 12 months imprisonment which is greater than the penalty for the substantive offence of trespass under the *Inclosed Lands Protection Act 1901*(NSW), which is 5 penalty units.<sup>23</sup>

Other incitement offences in the Criminal Code carry lesser maximum penalties proportionate to the substantive offence. The Criminal Code provides for a tiered penalty depending on the maximum penalty of the offence incited.<sup>24</sup> For example, the penalty for inciting offences which carry life imprisonment is a maximum penalty of 10 years imprisonment.

## The exemptions are too narrow

The exemptions contained in the Bill are too narrow and do not provide sufficient safeguards when considering the broad nature of the offences.

The exemption for journalists requires that the material relates to a ‘news report’ or ‘current affairs report’. This narrow conceptualisation does not reflect the current diversity of platforms and publications where reports, discussion and debates about matters of public interest occur.

The requirement that the report is made by a person working in a professional capacity as a journalist is also inappropriately narrow. A broad range of people may participate in discussions about animal welfare standards across the agricultural sector. Not only does this assist the community by uncovering abuse of animals, but it may also assist the industry by helping consumers make informed choices to support farms that have high welfare standards. Should the Bill proceed, the exemptions should be wide enough to permit public discussion about facilities that do not meet community expectations. We recommend a broad good faith defence. This would be comparable to the defence available against incitement to violence offences contained in the Criminal Code.<sup>25</sup>

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<sup>19</sup> *Crimes Prevention Act 1916* (NSW), ss 3 and 4.

<sup>20</sup> *Crimes Prevention Act 1916* (NSW), s 3.

<sup>21</sup> *Crimes Act 1900* (NSW), s 199.

<sup>22</sup> *Crimes Act 1900* (NSW), s 117.

<sup>23</sup> *Inclosed Lands Protection Act 1901* (NSW), s 4(1)(b).

<sup>24</sup> *Criminal Code Act 1995* (Cth), s 11.4

<sup>25</sup> *Criminal Code Act 1995* (Cth), s 80.3.

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## The Bill impinges on the implied freedom of political communication

The implied freedom of political communication has been interpreted as a right provided by the Australian Constitution.<sup>26</sup> The Bill arguably impacts on the implied freedom of communication about government or political matters. The new offence provisions contained in the Bill could have the effect of limiting public debate in Australia about animal welfare. The High Court emphasised the benefits of such debate in *Australian Broadcasting Corporation v Lenah Game Meats*:

...concerns about animal welfare are clearly legitimate matters of public debate across the nation. So are concerns about the export of animals and animal products. Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings.

Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by community groups. To be successful, such debate often requires media attention. Improvements in the condition of circus animals, in the transport of live sheep for export and in the condition of battery hens followed such community debate. Furthermore, antivivisection and vegetarian groups are entitled, in our representative democracy, to promote their causes, enlisting media coverage...<sup>27</sup>

The second limb of the test in *Lange v Australian Broadcasting Corporation*, in considering whether the implied freedom invalidates laws that restrict political communication, considered what is 'reasonably appropriate and adapted to achieving that legitimate object or end'.<sup>28</sup> In our view, the limitation on political communication in this Bill is not reasonably necessary or appropriate to address concerns regarding animal cruelty protests on private land. Rather, it unnecessarily duplicates existing offences and powers, is inchoate in nature and lacks appropriate safeguards.

The rights of agricultural businesses must be balanced against the right to freedom of political communication. Legal Aid NSW considers that the Committee should explore non-legislative responses to the conduct that the Bill is attempting to address. A more positive approach to addressing community concerns about animal welfare could include measures to improve transparency in the agricultural sector, to ensure that the sector delivers on community expectations. This would reduce the perceived need for independent 'policing' by activist groups and individuals.

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<sup>26</sup> Gotsis, T. NSW Parliamentary Research Service, 'Protests and the law in NSW', Briefing Paper No 7/2015, 7. Citing: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Cunliffe v The Commonwealth* (1994) 182 CLR 272; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *McGinty v Western Australia* (1996) 186 CLR 140; *Lange v ABC* (1997) 189 CLR 520 and *Levy v Victoria* (1997) 189 CLR 579; *Coleman v Power* [2004] HCA 39; *Monis v The Queen*, *Droudin v The Queen* [2013] HCA 4.

<sup>27</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, 217-218.

<sup>28</sup> *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 112.