



FROM THE PERMANENT REPRESENTATIVE

AUSTRALIAN PERMANENT MISSION
GENEVA

13 April 2016

Mr Karim Ghezraoui
Chief Officer
Special Procedures Branch
Office of the High Commission for Human Rights
United Nations Office at Geneva
Palais Des Nations
1211 Geneva 10
Switzerland

Dear Sir

Joint Communication from UN Special Procedures Mandate Holders: Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 (Western Australia)

I refer to the Joint Communication sent from the Special Procedures Mandate Holders of the United Nations Human Rights Council of 12 February 2016 concerning the Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 (Western Australia) [AUS 1/2016]. Australia is disappointed that it was not given more notice of the Special Rapporteurs' intention to issue a public statement on 15 February 2016, to allow all appropriate authorities to be advised of and to engage with the Special Rapporteurs' concerns.

Australia takes its obligations under international human rights law seriously and is a longstanding party to the International Covenant on Civil and Political Rights (ICCPR). Australia is committed to upholding its obligations in relation to the rights to freedom of opinion and expression, peaceful assembly and association. Australia notes that under Article 19(3) of the ICCPR, freedom of expression may be limited as provided for by law and when necessary to protect the rights or reputations of others, national security, public order, or public health or morals. The rights to freedom of assembly and association in Articles 21 and 22 of the ICCPR respectively may be subject to permissible limitations imposed in conformity with the law and as necessary in a democratic society, including in order to protect public safety, public order and the rights and freedoms of others. Limitations should be consistent with the object and purpose of the Covenant, pursuant to a legitimate objective and reasonable, necessary and proportionate to achieving that objective. Australia acknowledges the Covenant extends to all parts of federal States, including the State of Western Australia, without limitation or exception (Article 50 of the ICCPR).

The Western Australian Parliament is currently considering the Bill. That Parliament consists of two chambers – the Legislative Assembly and the Legislative Council. The Legislative Council passed the Bill on 18 February 2016. The Bill is currently before the Legislative Assembly, awaiting a second reading debate.

The purpose of the Bill is to address a deficiency in Western Australian law relating to policing of incidents where a person locks themselves onto equipment, trees and other objects in order to block roads, or otherwise prevent lawful activity. This tactic has been used by those protesting development at James Price Point and anti-logging protesters in State's South West. Unlike other forms of protest, it is very detrimental to the public interest and public order. For example, it causes frustration and delays for workers and management at development sites and responding to protests of this nature can be a considerable drain on police resources.

In the past, protesters used simple devices such as bike locks, chains or ropes to crudely lock themselves to a picket line, tree, bulldozer or fence. These methods are easily combated by police as it is generally a simple case of using bolt cutters or similar cutting devices to free the protester. In recent times, more innovative, disruptive and dangerous methods are being used to hinder police attempts to remove the protestors. While there are various types of locking devices, a common feature is to make the device in such a way so that even the protester cannot unlock him or herself. An example is a device that locks around the thumb knuckles with the key hole, that makes it possible to release the person, encased in armoured steel. These types of locks usually have only one method of removal – to cut open the encasing with an angle grinder or similar cutting tool.

Removing these types of locks can be extremely dangerous to the police and protestor. In most cases release will require a skilled technician. Even using a skilled technician, it is often not possible to remove it without causing some degree of injury to the protester. Releasing protestors from these devices can take a number of days and often requires the use of specialist equipment and/or expertise. Dealing with these tactics at protests incurs considerable costs, including detrimental effects to public safety and order.

Current legislation has limitations in dealing with this problem. The main limitation is that these devices can be lawfully possessed and so in most cases, police officers are not able to act until such time as the device is used. Another deficiency is the absence of an offence specific to situations where lawful activity is prevented from being carried out because of a barrier put in place by the protesters.

In order to deal with these situations, police often employ the use of 'move on orders' that require a person to move-on in various situations, including when a person is hindering, obstructing or preventing any lawful activity that is being, or is about to be, carried out by another person. Move on orders are issued under section 27 of the *Criminal Investigation Act 2006* (WA). This section allows an officer to issue an order to a person requiring them to leave a particular location and stay a distance away from that location for a period of time up to 24 hours. Move on orders can be quite effective in dealing with offenders at normal or ordinary demonstrations where issues of public safety and order arise, as failure to comply with the order is an offence and renders the person liable to arrest. However, where a person is locked to an object and unable to release themselves from the device, issuing a move on order is problematic as the person is unable to comply. Accordingly, police are left in the position of having to employ specialist equipment and/or expertise to help extract the person and execute an arrest.

The Bill addresses these concerns by creating two new specific and limited, not general, offence provisions within *The Criminal Code* (WA).

Firstly, the Bill will provide for an offence that applies when a person physically prevents a lawful activity from being carried out. This offence will enhance the ability of police to issue move on orders when they suspect a person intends to commit the offence of physical prevention. It will also quite obviously provide a specific offence for those who successfully carry out the physical prevention of lawful activity. For the offence to apply, a person must create the barrier with intent to prevent the lawful activity. It is also a requirement that the activity is actually prevented, not just hindered or obstructed.

A second offence provision established by the Bill will prohibit the manufacture and possession of things intended to be used to prevent lawful activity. Specifically, under proposed section 68AB, it will be an offence for a person to make, adapt or possess an item for the purposes of using the item to assist in committing an offence of trespass or physical prevention of lawful activity. This offence will apply to situations such as where protesters are found in the vicinity of a proposed obstruction site with devices such as thumb locks, chain locks, arm locks or any article that is adapted for the purpose of creating an obstruction. Consequently, the offence will also assist in preventing the illegal manufacture of such devices. The scope of this offence is defined and limited by the intention to use the object. It will be necessary for the prosecution to prove beyond reasonable doubt that the person was in possession of the object in such circumstances that give rise to a reasonable suspicion that the person had the intention to commit trespass or physical prevention.

Protest action that attempts to communicate or bring attention to a political or ideological point of view will remain lawful. To commit the first-mentioned offence of preventing lawful activity, a person must prevent a lawful activity (not just hinder or inconvenience those carrying out a lawful activity) and must do so with the intention of preventing a lawful activity. For example, the Bill does not apply to situations where:

- the mere presence of a public assembly hinders or dissuades a lawful activity
- a person engaging in a lawful activity is inconvenienced or delayed by having to take a different route
- protesters'/groups' anti-activity message successfully deters the public from frequenting a business or buying a particular product, or
- a person locks themselves to an object that does not result in trespass or prevention of someone else's lawful activity.

As the Bill is currently before the Western Australian Parliament, there is opportunity for civil society, including the media, to engage with and comment on the Bill. This process is an important part of the democratic process that exists in Western Australia, and elsewhere in Australia, in which the Parliament of elected representatives, in two Houses, provides the opportunity for issues to be scrutinised and debated in the public domain.

Since the Legislation has been in Parliament, representatives from Western Australia Police and the Minister's Office have consulted with the following groups:

- Association Mining and Exploration Companies
- Forest Industries Federation of Western Australia
- Western Australia Farmers
- Pastoralists and Graziers Association, and
- Baptist Care and Community Legal Centres.

Given that the Bill has not yet been enacted, Australia would be pleased to provide more detail on the measure to the Special Rapporteurs during the course of 2016.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McConville'. The signature is fluid and cursive, with the first name 'Ian' written in a simple, slightly slanted script, and the last name 'McConville' written in a more complex, cursive style with large loops and flourishes.

Ian McConville
Chargé d'Affaires *a.i.*