

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders

REFERENCE: AL
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12 February 2016

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Special Rapporteur on the rights to freedom of peaceful assembly and of association, and Special Rapporteur on the situation of human rights defenders pursuant to Human Rights Council resolutions 25/2, 24/5, and 25/18.

In this connection, I would like to bring to the attention of your Excellency's Government information we have received concerning the Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 that, if adopted, will unduly restrict the rights to freedom of expression and freedom of peaceful assembly in the state of Western Australia.

According to the information received:

On 25 February 2015, the Western Australian Government introduced the "Criminal Code Amendment, Prevention of Lawful Activity Bill 2015" (hereafter the Bill) to the State Parliament. The Bill has undergone two readings in the Legislative Council and is scheduled to be debated on 16 February 2015.

The Bill creates two new offences in relation to the physical prevention of lawful activities. According to Section 68 AA. (2) of the draft law, it is unlawful to physically prevent lawful activity from being carried out with the intention of doing so. Pursuant to the presumption clause in Section 68 AA. (3), the requisite intention is presumed where the circumstances give rise to reasonable grounds and the contrary is not proved. The penalty, for a person found guilty of this offence, carries a prison term of one year and a fine of \$ 12,000. If the offence is committed in circumstances of aggravation, the penalty increases to a two-year prison sentence and a \$ 24,000 fine (Section 68 AA. (2) (a) and (b)). In addition, the Bill enables courts to order that the offender pay for the costs associate with removing a physical barrier (Section 66 AA (4)).

Section 68AB. further criminalises the preparation for physical prevention or trespass by prohibiting the manufacture, adaption and possession of things intended to be used for the purpose of the prevention of lawful activity. The same presumption clause and mandatory penalties described above apply for this offence.

According to the Western Australian Government, the Bill aims to prevent protesters from locking themselves onto equipment, trees and other objects in order to block roads or otherwise obstruct lawful activities. However, civil society organisations have expressed concern that the Bill prioritizes business interests; would severely restrict the rights to freedom of peaceful assembly and freedom of expression, and gives excessively broad powers to the police for targeting defenders of land and environment rights.

We express grave concern that the proposed Bill, in its current form and if approved, would impose undue restrictions to the exercise of the rights to freedom of peaceful assembly and freedom of expression in Western Australia by criminalising legitimate and lawful protest. We are seriously concerned that the Bill allows for the criminalization of a wide range of legitimate conduct, including peaceful protests that may entail blocking access to roads or buildings; acts of civil disobedience; non-violent direct action; and the possession of everyday items such as bike locks, if possessed for the purpose of physically preventing lawful activity. Serious concern is therefore expressed that the provisions of the Bill are so broad as to prohibit peaceful acts of protest and establish prohibitions that go far beyond the legitimate restrictions established by the International Covenant on Civil and Political Rights (ICCPR), especially articles 19 and 21. Further serious concern is expressed that the mandatory and disproportionate penalties could have the deterrent effect on the legitimate exercise of the right to peaceful assembly and the right to freedom of expression, silencing and punishing human rights defenders and any dissenters that hinder, obstruct or prevent a lawful activity.

In democratic societies, demonstrations and protests represent a central mechanism for raising awareness about human rights, political, social concerns, including on environmental, labour or economic issues, holding not just governments, but also corporations accountable. The Bill, if adopted, would impede that very function.

In connection to the above, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is our responsibility, under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above mentioned allegations.

2. Please provide detailed information on measures taken to ensure the compliance of the Bill with Australia's obligations under international human rights law and standards, particularly with the rights to peaceful assembly and freedom of expression.

3. Please provide information on any measures that are being taken to include civil society in genuine consultations on the Bill prior to its adoption in the State Parliament.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that all necessary interim measures be taken to ensure the compliance of the Bill with Australia's obligations under international human rights law and standards, particularly with the rights to peaceful assembly and freedom of expression.

It is our intention to publicly express our concerns on Monday 15 February 2015 as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Maina Kiai
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst
Special Rapporteur on the situation of human rights defenders

Annex
Reference to international human rights law

In connection with the above, and without prejudice to the accuracy of these allegations, we would like to draw the attention of your Government to the relevant international norms and standards.

We would like to refer you Excellency's Government to Article 50 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Australia on 13 August 1980, which provides that Covenant provisions apply in all parts of federal states without any limitations or exception.

We would like to bring to the attention of you Excellency's Government the right to freedom of opinion and expression and the right to freedom of peaceful assembly as set forth in articles 19 and 21 of the ICCPR. We recall that the ICCPR establishes that any restrictions to the right to freedom of expression must comply with the provisions of the ICCPR, can only be imposed on legitimate grounds as set out in article 19(3) of and must conform to the strict tests of necessity and proportionality. No restrictions may be placed on the exercise of this right of peaceful assembly other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

We would like to refer you to resolution 24/5 adopted by the Human Rights Council on 8 October 2013, which concerns the rights to freedom of peaceful assembly and of association. It stresses the importance of the rights to freedom of peaceful assembly and association for civil society and for addressing issues that are important to society such as the environment, consumer protection, social justice, and the realization of all human rights.

We would like to draw your attention to resolution 25/2 adopted by the Human Rights Council on 24 March 2014, concerning the right to freedom of opinion and expression. It recognizes that this right "is essential for the enjoyment of other human rights freedoms, and constitutes a fundamental pillar for building a democratic society, and strengthening democracy, bearing in mind that all human rights are universal, indivisible, interdependent and interrelated."

We would also like to refer you to resolution 25/38 adopted by the Human Rights Council on 11 April 2014, concerning the promotion and protection of human rights in the context of peaceful protests. The resolution emphasizes the duty states have to protect human rights in the context of peaceful protests, which is an "important form of exercising the rights to freedom of peaceful assembly, of expression, of association and of participation in the conduct of public affairs." It recognizes that peaceful protests can be used as a means to hold human rights violators accountable for abuses. The resolution urges states to provide protesters with access to public spaces, protect them from discrimination, and ensure that "no one is subject to excessive or indiscriminate use of

force.” It further calls upon states to ensure that their domestic legislation is in accordance with international obligations, even as applied to law enforcement, where principles of necessity and proportionality must be upheld.

Lastly, reference is made to draft resolution 26/22 adopted by the Human Rights Council on 25 June 2014, which emphasizes the important role civil society plays in encouraging accountability and raising awareness about the impact enterprises have on human rights issues.

We would also like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. In addition, we would also like to refer to Human Rights Council Resolution 22/6 adopted on 21 March 2013, which urges States to ensure that laws affecting human rights defenders are “clearly defined, determinable and non-retroactive”.