THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Directors

Review of Part 4AF of the *Crimes Act 1900* (NSW)
Review of Part 9, Division 7 of the *Roads Act 1993* (NSW)

The Law Society is grateful to the Department of Communities and Justice and the Department of Transport for the opportunity to make a submission to the Statutory Review of Part 4AF of the *Crimes Act 1900* (NSW) (**Crimes Act**) and of Part 9, Division 7 of the *Roads Act 1993* (NSW) (**Roads Act**) respectively.

In light of the interrelationship between the provisions in the Crimes Act and Roads Act in this regard, we have addressed the relevant issues in a single submission to which our Human Rights, Public Law and Criminal Law Committees have contributed.

Introduction of Part 4AF of the Crimes Act and Part 9, Division 7 of the Roads Act

The *Roads and Crimes Legislation Amendment Act 2022* (NSW) amended the Roads Act and the Crimes Act 'to create offences for certain behaviour that causes damage or disruption to major roads or major public facilities'.[1] The legislation was introduced in response to protests by activists at Port Botany and Sydney's Spit Bridge which caused significant traffic disruption across the transport network. In the second reading speech on the Bill, then Attorney General, the Hon. Mark Speakman MP, referred to the 'major inconvenience' of these kinds of protests as well as the 'cost of economic vandalism…through direct economic loss and lost productivity'.[2]

[1] Explanatory Note, Roads and Crimes Legislation Amendment Bill 2022 (NSW) 1.
[2] New South Wales, Parliamentary Debates, Legislative Assembly, 30 March 2022, 8938.

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The amendments were designed to address a perceived gap in the law where existing penalties in the *Summary Offences Act 1988* (NSW) (**Summary Offences Act**) were deemed insufficient to respond to disruptive protest activity, with the then Attorney General noting:

> The problem with the current laws is that, unless there is a malevolent intention to endanger lives or vandalise property and there is only an intention to disrupt and cause economic chaos, the penalty will only be several hundred dollars. It is as if someone pays a small licence fee of a few hundred dollars to unleash enormous economic carnage on ordinary citizens. That is unacceptable. It is clear that there is insufficient deterrence for that sort of behaviour.[3]

It is unfortunate that this legislation was introduced without consultation with legal stakeholders, which limited any opportunity for careful consideration of the many statutory provisions in NSW that could relate to protest activity, including relevant provisions in the Crimes Act, Roads Act, Summary Offences Act, *Inclosed Lands Protection Act 1901* (NSW), the *Mining Act 1992* (NSW) and the *Forestry Act 2012* (NSW).[4]

While the decision in *Kvelde v State of New South Wales* [2023] NSWSC 1560 (***Kvelde***) has since found certain parts of s 214A of the Crimes Act to be invalid, and this statutory review offers a further opportunity to consider the offence, it is far preferable to fully consider issues of constitutional validity, as well as human rights concerns, at the stage of proposing and drafting new legislation, rather than subsequent to its passage into law as occurred with these amendments. This approach may also avoid litigation and unnecessary expense, including that incurred by the State.

Protest law in NSW – opportunity for reform

Protest as a form of political expression is central to the proper functioning of a democracy. At the same time, it is also accepted that a so-called 'right to protest', regardless of whether its legal basis is derived from the common law, statute or human rights framework, is not absolute.[5]

In contrast to jurisdictions such as Queensland, which provide for a statutory right to protest (see s 5(1) of the *Peaceful Assembly Act 1992* (Qld) (**Queensland Act**), in NSW the right is based on the common law freedom of assembly and freedom of speech.[6] As pointed out by the authors of a recent paper produced by the Parliamentary Research Service, the 'right to protest in NSW supports the peaceful assembly of persons but does not support activity that constitutes a criminal offence (as it only permits that which has not been prohibited)'.[7]

We suggest reliance on the common law, and an absence of a positive statutory right to peaceful assembly, has led to some confusion in New South Wales about whether a protest is lawful. The public assembly provisions in Part 4 of the Summary Offences Act aim to facilitate public assemblies by establishing a process for their authorisation, and also provide a 'shield', whereby members of an authorised public assembly under Part 4 will be prevented from being charged under s 545C of the Crimes Act in what is designated as an 'unlawful assembly'. These provisions have facilitated many peaceful assemblies by encouraging support and cooperation between protest organisers and law enforcement. However, the way that Part 4 is drafted may lead people to believe authorisation under the Summary Offences Act is a requirement before staging a public assembly, which is not necessarily the case, given the right is derived from the common law. In this respect, it would be useful to consider the addition of a provision which clarifies that nothing in the Summary Offences Act affects the

[3] Ibid., 8951.
[4] For a non-exhaustive list of offences related to protest in NSW see Parliamentary Research Service (T Gotsis and R Johns), Protest law in New South Wales, Research Paper 3, 2024.
[5] Ibid., 5.
[6] Ibid.
[7] Ibid., 6.

powers conferred by the common law as regards freedom of assembly: See an example of this kind of provision in s 4 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

While potentially out of scope for the current statutory reviews, it may be useful for the Government to consider whether legislation akin to the Queensland Act would be appropriate for NSW by expressly providing for the right of public assembly through dedicated legislation. Section 5 of the Queensland Act, for example, provides for a right to public assembly and sets out the scope of the right, which is subject only to such restrictions as are necessary and reasonable in a democratic society in the interests of public safety, public order, or the protection of the rights and freedoms of other persons.

In addition to the right as set out in the Queensland Act, Queensland's *Human Rights Act 2019* provides for the right to peaceful assembly (s 22) which is subject to 'reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom' (s 13). Equivalent rights to public assembly exist under the human rights legislation in Victoria (see s 16 of the *Charter of Human Rights and Responsibilities Act 2006*) and the ACT (see s 15 of the *Human Rights Act 2004*). In this context, we reiterate the Law Society's long-standing commitment to dedicated human rights legislation in NSW. We consider that such legislation would not only help to articulate the need to balance the rights and freedoms which in part motivated the introduction of these amendments, but would also assist in bringing about systemic changes, particularly through the scrutiny of all legislation in terms of its human rights compatibility.

Section 214A of the Crimes Act

Section 214A of the Crimes Act is set out in the following terms:

> **214A Damage or disruption to major facility**
>
> (1) A person must not enter, remain on or near, climb, jump from or otherwise trespass on or block entry to any part of a major facility if that conduct—
> (a) causes damage to the major facility, or
> (b) seriously disrupts or obstructs persons attempting to use the major facility, or
> (c) causes the major facility, or part of the major facility, to be closed, or
> (d) causes persons attempting to use the major facility to be redirected.
>
> Maximum penalty—200 penalty units or imprisonment for 2 years, or both.

As noted in the Editorial Note to the section, on 13 December 2023, the Supreme Court of New South Wales in *Kvelde* declared that section 214A(1)(d) is invalid and that section 214A(1)(c), to the extent that the paragraph makes it an offence for persons engaged in the conduct specified in the paragraph to cause part of the major facility to be closed, is invalid.

Repeal of s 214A

We consider it is desirable to repeal s 214A in its entirety. While we recognise that the Government has a legitimate purpose in enacting legislation which is necessary and reasonable in terms of public safety, order and the protection of rights of others, we draw attention to *General Comment No. 37 (2020) on the Right of Peaceful Assembly* (**General Comment 37**), which states:

> State parties should not rely on a vague definition of "public order" to justify overbroad restrictions on the right of peaceful assembly. Peaceful assemblies can in some cases be inherently or deliberately disruptive and require a significant degree of toleration.[8]

[8] Human Rights Committee, *General Comment No. 37 (2020) on the right of peaceful assembly (article 21)*, CCPR/C/GC/37 (17 September 2020) (**General Comment 37**) at 44.

Article 21 of the *International Covenant on Civil and Political Rights* (**ICCPR**) is set out in the following terms:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right 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.

As noted in General Comment 37, the exceptions contained in Article 21 form an exhaustive list. It is concerning that the rhetoric surrounding the introduction of the Roads and Crimes Legislation Amendment Bill 2022 conflated the notion of 'public order' with economic disruption. Further, the discussion at the time did not address, through a measured rights-based analysis, the way in which the intended restrictions on peaceful assembly impact other overlapping rights protected by the ICCPR including freedom of expression, association and political participation.

Repealing s 214A would serve to reverse the possible chilling effect arising from the 2022 changes and send a clear signal that the long-standing democratic tradition of peaceful assembly in this country should be protected. This would be consistent with *General Comment 37* and *General Comment No.34 on Article 19: Freedoms of Opinion and Expression*,[9] where legislative responses to freedom of assembly and expression should be made from the standpoint of facilitating rights, with any restrictions being the least intrusive to achieve their protective function.

Possible amendments to s 214A

If Parliament determines not to repeal s 214A, we suggest that the changes set out below may be appropriate.

As it is currently drafted, subsection 214A(1)(a) applies to even minor damage. This section should be restricted to serious damage. As set out in General Comment 37, freedom of assembly can be limited under international law to protect against a real and significant risk of serious damage to property, but not minor damage.[10]

Subsection 214A(1)(b) appears sufficient to cover certain concerns about the impact of protests on prescribed major facilities. To reduce the risk of further challenge, and to limit it to reflect what is reasonable and necessary, this subsection could be amended to the effect of, 'seriously disrupts or obstructs persons attempting to use the major facility for its primary purpose'. This drafting would limit the application of the offence to the purpose for which a major facility has been prescribed. Subsection (2) of section 144G of the Roads Act could be similarly amended.

As noted above, subsection 214A(1)(c) was found in *Kvelde* to be partially invalid. Even after removal of the offending part, we suggest that the remaining text of s214(1)(c), 'causes the major facility to be closed', appears to be unnecessary in light of s214(1)(b), which covers circumstances where the specified conduct 'seriously disrupts or obstructs persons attempting to use the major facility'. Therefore, subsection (c) should be removed in its entirety.

As established in *Kvelde*, subsection (d) is invalid in its entirety and, in our view, should not be replaced.

Definition of major facility

The definition of 'major facility' in section 214A(7) of the Crimes Act is broad, and covers infrastructure facilities 'including a facility providing … manufacturing, distribution or other

[9] Human Rights Committee, *General Comment No.34 on Article 19: Freedoms of Opinion and Expression* CCPR/C/GC/34 (29 July 2011).
[10] General Comment 37 (above n 8) at 43.

services to the public, prescribed by the regulations'. In our view, and given the broad definition of 'infrastructure facilities', it is not appropriate, nor is it good legislative drafting practice, to leave the definition of 'major facility' to the regulations.

Consideration should be given to including the definition of 'major facility' in primary legislation in accordance with best legislative drafting practice. As well as providing for proper Parliamentary consideration and scrutiny prior to prescribing facilities under a law to which a penalty of up to two years imprisonment applies, there should be regular review of whether the designations in place remain reasonably necessary and proportionate over time.

Section 144G of the Roads Act

Section 144G of the Roads Act prohibits damage, serious disruption/obstruction to the Sydney Harbour Bridge or any other major bridge, tunnel or road. As with 214A(1)(a) of the Crimes Act, s 144G(1)(a) applies to even minor damage and, in our view, should be restricted to serious damage.

The definition of 'major road' is defined in the regulations to include a main road. Section 46 of the Roads Act then provides:

> The Minister may, by order published in the Gazette, declare to be a main road—
>
> (a) any public road, or
>
> (b) any other road that passes through public open space and joins a main road, highway, freeway, tollway, transitway or controlled access road.

This definition is very broad. As was noted in the Legislation Review Digest, 'the definitions delegated to the regulations are relevant to determining whether an individual would be subject to the penalty provisions of the Bill, which include custodial sentences'.[11] We also consider that it is unreasonable to expect members of the public to access the Gazette to determine if a road has been declared a 'major road'.

Thank you for the opportunity to contribute. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or sophie.bathurst@lawsociety.com.au.

Yours sincerely,

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President

[11] Parliament of NSW (Legislation Review Committee), Legislation Review Digest No. 42/57, 10 May 2022, 6.