

24 July 2019

Jonathan Smithers
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By email: Myles.Gillard@lawcouncil.asn.au

Dear Mr Smithers

CRIMINAL CODE AMENDMENT (AGRICULTURAL PROTECTION) BILL 2019

Thank you for your letter dated 8 July 2019 inviting the Law Society to comment on the above Bills.

In summary the Law Society opposes the amendments and considers that the proposed Bill is completely unnecessary as it appears that the criminal conduct targeted by it can already be effectively prosecuted under existing WA State criminal offences.

The following comments are submitted to provide further detail for the Law Society's position:

1. Existing Western Australian law covers trespass, damage and incitement. If there is an issue in a particular State that the penalties are inadequate, then that is a matter for the State to legislate on not the Commonwealth.
2. The use of the Telecommunications Power generally to expand the reach of Commonwealth Criminal Law is a concern. There is nothing intrinsic to that head of Commonwealth legislative power in these offences. It is not like the 'cyberpredator' type offences, where the use of a carriage service is an integral part of the commission of the offence. If the use of a telephone is a sufficient ground to invoke the Commonwealth jurisdiction, it is difficult to see what limits could exist. It has the potential to create a situation where there can be an arbitrary distinction, potentially with a significant difference in penalty, between using a telephone to plan an offence and meeting in person to plan an offence. Moreover, if the meeting in person was arranged by telephone, this could also attract liability.
3. It appears that this legislation is enabling the Commonwealth to intentionally "squeeze" into the scope of a power subject matter outside the usual scope of the power. It also raises the issue that if this was found to be a valid exercise of Commonwealth power, the Commonwealth could then extend its legislative reach into almost anything. The High Court has, to date, only allowed the Commonwealth to use the defence power in such a manner.

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4. Other than the telecommunications power, there is no relevant Commonwealth power to support this legislation. Apart from the issue of quarantine (section 51(ix)), the Commonwealth has no legislative power in relation to agriculture. While necessarily, some laws in relation to trade (section 51(i)), taxation, (section 51(ii)), quarantine (section 51(ix)), fisheries (section 51(x)), corporations (section 51(xx)) and railways (section 51(xxxii)-(xxxiv)) may need to specifically deal with agriculture or agricultural land, there is no rational basis for the telecommunications power to be a vehicle to distinguish between offences committed in respect of agricultural land and any other offence.
5. The incitement provisions seem aimed at lowering the bar on what is already covered by Chapter II of the Criminal Code (WA), allowing people to be charged as a primary offender when they could be charged as an accessory under existing provisions.
6. In the event that the legislation is passed, the exemption for people '*working in a professional capacity as a journalist*', given that there is not readily known definition of a 'journalist' is too vaguely expressed to be capable of properly defining an exemption.

Yours sincerely



Greg McIntyre SC
President