



Law Council  
OF AUSTRALIA

# Criminal Code Amendment (Agricultural Protection) Bill 2019

Senate Legal and Constitutional Affairs Legislation Committee

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 28 June 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Ross Drinnan, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of the Law Society of South Australia, the Law Institute of Victoria and the Law Society of Western Australia in the preparation of this submission. The Law Council is also grateful to its National Criminal Law Committee, National Human Rights Committee, the Business Law Section's Corporations Law Committee and the Federal Litigation and Dispute Resolution Section's Constitutional Law Committee.

## Executive Summary

1. The Law Council of Australia is grateful for the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) inquiry into the Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) (**the Bill**).
2. The Law Council notes that trespass, property damage and theft is unlawful and acknowledges that such actions in relation to agricultural properties and the premises of primary production businesses can cause significant harm, including the potential to contaminate food safety, breach biosecurity protocols and cause considerable distress to members of the agricultural community.
3. The Law Council, while not opposed to the provision of protection to farmers against unlawful activity, maintains that it is necessary to balance this aim with the protection of legitimate rights and freedoms. The Law Council's primary concerns with the proposed measures in their current form are:
  - the potentially broad scope of the proposed measures to capture behaviour other than incitement to trespass, that may inhibit legitimate public dialogue;
  - the extent to which the proposed measures overlap with existing offences covering similar conduct;
  - the adequacy of proposed defences for journalists and whistleblowers; and
  - the severity of the penalties attached to the proposed offences.
4. It is for these reasons that the Law Council does not support the Bill in its current form. However, if the Committee were to conclude that the Bill ought to proceed, the Law Council makes the following recommendations with the view to improving the proportionality of the proposed measures:
  - the proposed offence provisions should include a clarification similar to subsection 474.29A(3) of the *Criminal Act 1995* (Cth) (**Criminal Code**) to make it clear that it will not constitute an offence merely because the person uses a carriage service to engage in public discussion or debate about agricultural practices, or advocate for reform of the law relating to agricultural practices, where the person does not intend to incite the commission of any offence;
  - the term 'journalist' at proposed subsections 474.46(2) and 474.47(2) should be clarified and given a broader meaning such as is used in section 126J of the *Evidence Act 1995* (Cth) (**Evidence Act**);
  - the Australian Government should continue to work towards a comprehensive whistleblower regime and establish a Whistleblower Protection Authority;
  - in the absence of clear justification, the prosecution should be required to prove as an element of the offence, that the material was not in the public interest to publish; and
  - the maximum penalty for the proposed offences of inciting trespass, damaging property or theft, should not exceed the maximum penalty of the substantive offences that are being incited to be committed.

# Scope of the proposed measures

## Summary of proposed scheme

5. The Bill seeks to amend the Criminal Code to introduce two new offences which would apply where a person uses a carriage service to transmit, make available, publish or otherwise distribute material to incite another person to trespass or commit property offences on agricultural land.
6. A person found guilty of the offence of using a carriage service for inciting trespass on agricultural land could face up to 12 months imprisonment. A person found guilty of using a carriage service for inciting property damage or theft on agricultural land could face up to 5 years imprisonment.
7. The Bill contains protections for journalists and those who are making lawful disclosures of information, including whistleblowers. The exemption for journalists is conditional on the report being made by a person working in their professional capacity as a journalist. The exemption for whistleblowers is predicated on the whistleblower not being subject to civil or criminal liability for the conduct as a result of the operation of a law of the Commonwealth, a State or a Territory.

## Elements of the proposed offences

8. Under proposed section 474.46 (using a carriage service for inciting trespass on agricultural land), the prosecution would be required to prove three elements:
  - (a) the offender transmits, makes available, publishes or otherwise distributes material<sup>1</sup> (physical element: conduct and fault element: intention of inciting another person to trespass on agricultural land);<sup>2</sup>
  - (b) the offender does so using a carriage service<sup>3</sup> (physical element: circumstance, fault element: absolute liability);<sup>4</sup> and
  - (c) the trespass of the other person on the agricultural land or any conduct engaged in by the other person while trespassing on the agricultural land could cause detriment to a primary production business that is being carried on the agricultural land<sup>5</sup> (physical element: circumstance, fault element: recklessness).<sup>6</sup>
9. Under proposed section 474.47 (using a carriage service for inciting property damage, or theft, on agricultural land), the prosecution would be required to prove two elements:

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<sup>1</sup> Explanatory Memorandum, Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) 10 [63].

<sup>2</sup> Ibid [64], 11 [72]-[74].

<sup>3</sup> Ibid 10 [63].

<sup>4</sup> Meaning the prosecution does not need to prove any fault element for this physical element and the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element: Explanatory Memorandum, Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) [66]. Item 4 of the Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) would make s 475.1B (provisions relating to element of offence that particular conduct was engaged in using a carriage service) of the *Criminal Code Act 1995* (Cth) applicable to the offence.

<sup>5</sup> Explanatory Memorandum, Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) 11 [75].

<sup>6</sup> Ibid [75]-[76]; *Criminal Code Act 1995* (Cth) s 5.6(2).

- (a) the offender transmits, makes available, publishes or otherwise distributes material<sup>7</sup> (physical element: conduct, fault element: intention of inciting another person to damage, destroy or commit theft of property on agricultural land);<sup>8</sup> and
- (b) the offender does so using a carriage service<sup>9</sup> (physical element: circumstance, fault element: absolute liability).<sup>10</sup>

10. The Law Council notes that while a defendant must have the intention under proposed section 474.46 of inciting another person to trespass on agricultural land, this might be established by the circulation itself. Further, the defendant must be reckless as to whether the trespass could cause detriment to the business. Section 5.4 of the Criminal Code provides that a person is reckless with respect to a circumstance if:

- (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
- (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

11. It would seem to be reckless not to know what someone else might do with the information. However, it is not possible to know the potential uses to which people will put information accessed on the internet or via social media, suggesting it would be unjustifiable to take the risk. This is particularly so given the broad definition of 'detriment' in the Criminal Code to include any disadvantage and which is not limited to personal injury or to loss of or damage to property.<sup>11</sup>

12. In this regard, it is noted that the Attorney-General, when introducing the proposed measures, stated that 'this offence would apply whether or not actual trespass or detriment results from the incitement. The intention of a person to incite trespass will be based on all the circumstances of a relevant case'.<sup>12</sup> This illustrates the breadth of the offence, and how potentially vague its limits are.

## The capacity to capture benign conduct

13. Noting the above points regarding the potential scope of the proposed offences, the Law Council is concerned that the scheme may have the potential to criminalise conduct that would be otherwise regarded as benign, and that it has the potential to create a chilling effect on legitimate dialogue and debate around animal rights and food production.

14. At a time when Australia is already subject to much international scrutiny regarding the integrity of media freedom within Australia, this Bill may again highlight this particular issue. Former High Court Justice Michael Kirby has observed that 'parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate

<sup>7</sup> Explanatory Memorandum, Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) 14 [96].

<sup>8</sup> Ibid [97], 15 [104].

<sup>9</sup> Ibid 14 [96].

<sup>10</sup> Meaning the prosecution does not need to prove any fault element for this physical element and the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element: Explanatory Memorandum, Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) 14-5 [98]. Item 4 of the Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) would make s 475.1B (Provisions relating to element of offence that particular conduct was engaged in using a carriage service) of the *Criminal Code Act 1995* (Cth) applicable to the offence.

<sup>11</sup> *Criminal Code Act 1995* (Cth) dictionary (definition of 'detriment').

<sup>12</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 30 (Christian Porter, Attorney-General, Minister for Industrial Relations and Leader of the House).

promoted by community groups'.<sup>13</sup> The Bill may in effect stifle such debate, and has the potential to reduce the electronic distribution of information or discussion relating to farming practices.

15. Despite the Bill providing an exemption for a professional journalist (see commentary below), it may nevertheless make many media outlets reluctant to pursue legitimate stories. It may also serve to discourage a person from sharing information about animal rights concerns on social media for fear of inciting the criminalised conduct, whether or not that act of sharing would potentially lead the person to be charged with one of the proposed offences.

16. The Law Council refers to the existing offence of inciting suicide using a carriage service at section 474.29A of the Criminal Code, and notes that this provision includes the following clarification as an aide to interpreting the offence (emphasis added):

*(3) To avoid doubt, a person does not commit an offence against subsection (1) merely because the person uses a carriage service to:*

*(a) engage in public discussion or debate about euthanasia or suicide; or*

*(b) advocate reform of the law relating to euthanasia or suicide;*

*if the person does not:*

*(c) intend to use the material concerned to counsel or incite committing or attempting to commit suicide; or*

*(d) intend that the material concerned be used by another person to counsel or incite committing or attempting to commit suicide.*

17. The Law Council suggests that as an additional safeguard, this aide to interpretation should also be available in the case of the proposed new offences of inciting trespass or property damage on agricultural land so that a person who engages in public discussion or debate about agricultural practices, or promotes reform of the law relating to agricultural practices, is not guilty of an offence.

#### **Recommendation:**

- **The proposed offence provisions should include a clarification similar to subsection 474.29A(3) of the Criminal Code to make it clear that it will not constitute an offence merely because the person uses a carriage service to engage in public discussion or debate about agricultural practices, or advocate for reform of the law relating to agricultural practices, where the person does not intend to incite the commission of any offence.**

## **The focus on primary production businesses**

18. The Law Council acknowledges the recent events that have been a primary driver for the introduction of the proposed offences, in particular concerns arising from the use of the internet to promote trespassing and obstruction in relation to agricultural properties and businesses.

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<sup>13</sup> *Lenah Game Meats Pty Limited v Australian Broadcasting Corporation* (2001) 208 CLR 199, [218] (citations omitted).

19. For this reason, the Bill has focussed on actions against primary production businesses, which are defined in the proposed measures by way of listing 17 distinct business types.
20. However, the Law Council notes that, given a key aim of the Bill is to strengthen protections against contamination of food production and breaches of biosecurity protocols,<sup>14</sup> it is unclear why the proposed offences are restricted to primary production businesses, rather than all food production facilities or indeed all commercial premises involved in the production, transport and storage of food. While the Law Council does not support such an extension, it seeks to point out the selective nature of the proposed offences, developed in response to recent high-profile incidents.

## Necessity of the proposed measures

### Overlap with existing state and territory laws

21. The Law Council notes that all states and territories in Australia have legislated offences criminalising trespass, unlawful entry, criminal damage and like conduct, with the vast majority of these jurisdictions arguably criminalising the conduct of inciting trespass and property damage behaviour through various legislative and common law extensions of criminal responsibility.
22. It should be noted that, in many cases where these extensions of criminal responsibility are relied on, the alleged offender remains liable to the same maximum penalty and is often as culpable as the principal offender.
23. A summary of state and territory offences that may apply to conduct related to trespass or the commission of property offences on agricultural land has been prepared for the benefit of the Committee and is attached as **Appendix A** to this submission.
24. The Law Council suggests that the case has yet to be made that these new offences are necessary and submits that further justification is required from the Australian Government.
25. As stated in *Clubb v Edwards*,<sup>15</sup> to assess the proportionality of the provisions in the Bill there needs to be a consideration of whether the law is necessary because there is 'no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom [of communication about governmental or political matters]'.<sup>16</sup>
26. There is no evidence that the existing laws are incapable of addressing the concerns that motivate the passage of the Bill or, alternatively, that any identified deficiencies are unable to be rectified through strengthening existing state and territory laws. In relation to the latter point, the Law Council notes for example recent announcements by the New South Wales Government to increase penalties for activists who illegally enter farms.<sup>17</sup>
27. The Law Council also notes that great complexity arises where Commonwealth and State laws cover substantially the same criminal offence but are different in terms of penalties, defences and the type of evidence necessary to satisfy the offence. Questions arise as to whether or not the Commonwealth has intended to 'cover the field'

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<sup>14</sup> Explanatory Memorandum, Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) 4 [9].

<sup>15</sup> *Clubb v Edwards* (2019) 93 ALJR 448.

<sup>16</sup> *Ibid* 462

<sup>17</sup> Tim Fookes and Cecilia Connell, 'Protesters Face Tougher Fines of up to \$400,000, Potential Jail Time as NSW Beefs Up Farm Trespass Laws', *ABC News* (online, 22 July 2019) <[www.abc.net.au/news/rural/2019-07-22/nsw-beefs-up-farm-trespass-laws/11330674](http://www.abc.net.au/news/rural/2019-07-22/nsw-beefs-up-farm-trespass-laws/11330674)>.

and whether the State law is invalid for inconsistency. The High Court has struggled with such issues in both *Dickson v The Queen* (2010) 241 CLR 491 and *Momcilovic v The Queen* (2011) 245 CLR 1. The complexity would be exacerbated where the Commonwealth has not legislated with respect to the primary offences (e.g., trespass, theft and property damage), but has with respect to incitement of those offences. There are good policy reasons for avoiding such complexity and the resulting uncertainty and litigation that would likely arise.

## The use of a carriage service to incite conduct

28. The proposed offences appear to be unique to Commonwealth criminal law (as opposed to state and territory offences) because of the jurisdictional element of using a carriage service to incite trespass, property damage or theft, which brings the offence within a head of power under the Constitution.<sup>18</sup>
29. While section 11.4 of the Criminal Code already contains provisions that criminalise inciting another person to commit an offence, it does so without a requirement that the first person is using a carriage service. These provisions cannot be used to charge a person with inciting the commission an offence typically criminalised at a state or territory level (such as general trespass or property damage) because the Criminal Code defines 'offence' to mean an offence against a law of the Commonwealth.
30. Criminalising the use of a carriage service to incite offending conduct (the conduct itself of which is the purview of state and territory criminal law) has the potential to create an entirely new suite of criminal offences. While the proposed measures apply only to a select group of offences, the Law Council questions whether the Commonwealth has adequately considered the possibility of unintended consequences of pursuing this legislative policy.
31. The requirement that the criminal conduct be engaged in using a carriage service is said to be a jurisdictional requirement.<sup>19</sup> The use of the Telecommunications Power generally to expand the reach of Commonwealth criminal law is a concern. This potentially foreshadows a precedent where, if the Commonwealth is dissatisfied with the framing or penalty of a particular state or territory offence, it may re-criminalise the incitement of that conduct as long as the jurisdictional element of use of a carriage service is present.
32. It is foreseeable that criminalising the use of a carriage service to incite other already illegal conduct could occur in the future, and the Law Council submits that caution should be exercised in this regard.

## Adequacy of exemptions

33. The Law Council notes the Bill contains exemptions for journalists and those making lawful disclosures of information, including whistleblowers. It is important that such exemptions are carefully considered and sufficiently broad, given that such disclosures in the past have led to several investigations and convictions against primary producers.<sup>20</sup>

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<sup>18</sup> Explanatory Memorandum, Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) 11 [70], 15 [102].

<sup>19</sup> *Ibid* 4 [13].

<sup>20</sup> See, e.g., *ACC v Turi Foods* [2013] FCA 1109; *ACC v Luv-a-Duck Pty Ltd* [2013] FCA 1136; *ACC v Pepe's Ducks Pty Ltd* [2013] FCA 570.

## Journalists

34. The Law Council notes that proposed subsection 474.46(2) provides an exemption from committing the offence of using a carriage service for inciting trespass on agricultural land if the material relates to a news report, or a current affairs report, that:
- a) is in the public interest; and
  - b) is made by a person working in a professional capacity as a journalist.
35. A similar exemption exists at proposed subsection 474.47(2) in relation to the incitement of property damage or theft.
36. In both cases, the onus of establishing each of the above matters is on the accused.
37. The Law Council considers that the requirement that a person be 'working in a professional capacity as a journalist' is unclear in its application. The Explanatory Memorandum refers to 'bona fide journalism', without further clarifying this subjective test and so provides little assistance in assessing this requirement.<sup>21</sup>
38. By limiting this exclusion to someone working in a 'professional capacity as a journalist', the exclusion fails to take account of the changes in the structure of the media brought about by digital commerce and the consequence that a considerable proportion of journalists today work freelance and publish on blogs in formats that might not satisfy the definition. The Law Council submits that there is a need for greater certainty as to when this exemption will be available noting that in its current form, it has the potential to be narrowly applied.
39. It is noted that section 126J of the *Evidence Act 1995* (Cth) (**Evidence Act**) defines 'journalist' as a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium. The Law Council suggests that the Evidence Act definition of 'journalist' may be broad enough to include those who report and comment upon news in the modern environment including bloggers and commentators.

### Recommendation:

- **The term 'journalist' at proposed subsections 474.46(2) and 474.47(2) should be clarified and given a broader meaning such as is used in section 126J of the of the *Evidence Act 1995* (Cth) (**Evidence Act**);**

## Whistleblowers

40. The Law Council notes that both proposed sections 474.46 and 474.47 are excluded in their operation if the relevant person is not subject to any civil or criminal liability for the conduct under Commonwealth, State or Territory law. Notes to the relevant provisions refer to the whistleblower provisions in the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**) and section 1317AB of the *Corporations Act 2001* (Cth) (**Corporations Act**).
41. The Law Council submits, however, that existing whistleblower protections from civil or criminal liability are at best, limited. The PID Act applies only to disclosures by

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<sup>21</sup> Explanatory Memorandum, Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) 13 [84].

Commonwealth public officials, while the Corporations Act provisions apply only to public companies and large proprietary companies, and are limited to certain types of disclosure that are unlikely to extend to animal cruelty.<sup>22</sup> Whilst, for instance, the *Public Interest Disclosure Act 2018* (SA) protects an informant in South Australia from liability in relation to an appropriate disclosure of public interest information, the Law Council is not in a position to advise whether the same protection may be afforded to employees in other states or territories.

42. It is submitted that the scope of the operation of the exception for whistleblowers is unclear and this exception may well not extend to the people who are most likely to have information about animal cruelty – namely employees and contractors in the primary production industry. For example, employees of private companies who witness repeated incidents of animal cruelty on a particular property who are not protected by the state and territory or Commonwealth whistleblower regimes who resort to disclosing their concerns via a carriage service.
43. The Law Council has consistently expressed strong support for a comprehensive whistleblower regime, as identified by the Parliamentary Joint Committee on Corporations and Financial Services (**the Corporations and Financial Services Committee**) *Whistleblower Protections Report* (September 2017). This regime should include:
- the creation of a single Whistleblower Protection Act covering all areas of Commonwealth regulation;
  - access to non-judicial remedies (e.g. through the Fair Work Commission under the PID Act);
  - an agency empowered to implement the regime such as a whistleblower protection authority; and
  - appropriate resourcing for effective implementation.
44. One of the Corporations and Financial Services Committee's main recommendations was the establishment of a Whistleblower Protection Authority, to be housed within a single body or an existing body, that can support whistleblowers, assess and prioritise the treatment of whistleblowing allegations, conduct investigations of reprisals, and oversight the implementation of the whistleblower regime for both the public and private sectors.<sup>23</sup> The Law Council strongly supports the establishment of such a body.

**Recommendation:**

- **The Australian Government should continue to work towards a comprehensive whistleblower regime and establish a Whistleblower Protection Authority.**

<sup>22</sup> The recent amendments to the *Corporations Act 2001* (Cth) in relation to whistleblowers apply to: contraventions of the *Corporations Act 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth), the *Banking Act 1959* (Cth), the *Financial Sector (Collection of Data) Act 2001* (Cth), the *Insurance Act 1973* (Cth), the *Life Insurance Act 1995* (Cth), the *National Consumer Credit Protection Act 2009* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth); offences against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more; or represents a danger to the public or the financial system; or is prescribed by regulation.

<sup>23</sup> Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections* (Report, September 2017) ch 12.

## Onus of proof

45. The Law Council notes the recent comments of the Senate Standing Committee for the Scrutiny of Bills in relation to its review of the Bill, that the defendant will bear the evidential burden of proof of proving the exceptions contained in proposed sections 474.46 and 474.47.<sup>24</sup>
46. The Law Council echoes the expectation of the Senate Standing Committee for the Scrutiny of Bills that any such reversal of the evidential burden of proof needs to be justified. The Explanatory Memorandum does not address how any of the offence-specific defences contained in the Bill are either peculiarly within the knowledge of the defendant or significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. These are the usual criteria for including them as an offence-specific defence (as opposed to being specified as an element of the offence) as contained in the *Guide to Framing Commonwealth Offences*.<sup>25</sup>
47. In the absence of clear justification, Law Council considers that shifting the evidential burden to the accused in this manner is unnecessary and disproportionate.

### Recommendation:

- **In the absence of clear justification, the prosecution should be required to prove as an element of the offence, that the material was not in the public interest to publish.**

## Proportionality of the response

48. The Law Council is concerned that the maximum penalty for the two proposed offences, especially the offence of using a carriage service for inciting trespass on agricultural land (which carries a maximum penalty of imprisonment for 12 months), is not proportionate to the policy objectives of the Bill.
49. This is especially so, given that the maximum penalty for the offence of trespass on land in some states or territories is lower – for instance, a maximum of 6 months imprisonment in the Northern Territory, 12 months' imprisonment in Queensland, and 50 penalty units (\$5,500) in New South Wales.
50. The Law Council reiterates that the proposed offence does not require actual detriment to a primary production business, just that the offender was reckless as to whether that might happen.
51. In relation to the offence under proposed section 474.47 relating to the incitement of property damage or theft, the maximum penalty is 5 years imprisonment or 300 penalty

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<sup>24</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 3 of 2019, 24 July 2019). Subsection 13.3(3) of the *Criminal Code Act 1995* (Cth) provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

<sup>25</sup> Criminal Justice Division, Attorney-General's Department, Commonwealth, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 50.

units (\$63,000).<sup>26</sup> By way of comparison, in Victoria, where the amount of destruction or damage to property is less than \$5,000, the maximum penalty is 25 penalty units or a maximum of six months imprisonment.<sup>27</sup> However, where the quantum of the damage is over \$5,000 the appropriate charge is contrary to section 74 of the *Crimes Act 1958* (Vic) (**Victorian Crimes Act**) where the maximum penalty increases to ten years imprisonment.<sup>28</sup>

52. Section 321G of the Victorian Crimes Act provides that it is already a criminal offence to incite a person to pursue a course of conduct that will involve the commission of an offence. 'Incite' under this provision includes commanding, requesting, proposing, advising, encouraging or authorising.<sup>29</sup> The Law Council notes that the penalty for 'incitement' cannot exceed the penalty for the relevant offence.<sup>30</sup> This restriction ensures that any penalty imposed is reasonable and proportionate to the harm caused. Similarly, section 11.4 of the Criminal Code, provides that the maximum penalty for incitement to commit an offence is a maximum of three years or for the maximum term of imprisonment for the offence being incited, whichever is the lessor.<sup>31</sup>

**Recommendation:**

- **The maximum penalty for the proposed offences of inciting trespass, damaging property or theft, should not exceed the maximum penalty of the substantive offences that are being incited to be committed.**

## Constitutional issues

53. The High Court of Australia has acknowledged that an implied freedom of communication exists under the Constitution in relation to political and government matters.<sup>32</sup> This implied freedom acts to restrict the powers of the executive and legislature and is not a personal right granted to individuals.<sup>33</sup>
54. The Law Council acknowledges that the implied freedom is not absolute but subject to limitations. Those limitations should themselves, however, be limited to 'what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution'.<sup>34</sup> The specific guarantee of freedom of political communication can be implied from the structure of the Constitution, because

<sup>26</sup> *Crimes Act 1914* (Cth) s 4B(2).

<sup>27</sup> *Summary Offences Act 1966* (Vic) s 9(1)(c).

<sup>28</sup> *Crimes Act 1958* (Vic) s 74.

<sup>29</sup> *Ibid* s 2A(1).

<sup>30</sup> *Ibid* s 321I(1)(a).

<sup>31</sup> *Criminal Code Act 1995* (Cth) s 11.4(5)(e).

<sup>32</sup> Leanne Griffiths, 'The Implied Freedom of Political Communication: The State of the Law Post Coleman and Mulholland' (2005) 12 *James Cook University Law Review* 93, 94; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*'); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 112; *Coleman v Power* (2004) 209 ALR 182, 232-3 (Kirby J) ('*Lange*').

<sup>33</sup> *Lange* (1997) 145 ALR 96, 107-8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); Kris Walker, 'It's a Miracle! High Court Unanimity on Free Speech' (1997) 22 *Alternative Law Journal* 179, 180. Contra *Theophanous* (1994) 182 CLR 104.

<sup>34</sup> *Lange* (1997) 145 ALR 96, 107-8. See also Max Spry, 'Constitutional Free Speech and Defamation: *Lange v ABC*' (1997) 17(8) *Proctor* 17, 18.

the freedom is 'logically or practically necessary for the preservation of the integrity of that structure' and text.<sup>35</sup>

55. It is noted that proposed section 474.48 provides that the subdivision does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication. The Law Council is concerned that this unfairly places the burden on any person prosecuted under these offences to establish that the provision does not apply in the circumstances because it would otherwise breach the implied freedom of political communication.
56. The Law Council is concerned that the new offences may impinge on the implied freedom of political communication in that that the breadth of conduct captured by proposed offences may overreach what is necessary for the effective operation of a system of representative and responsible government.
57. The Law Council notes the analysis of the High Court in the case of *Brown v Tasmania*<sup>36</sup> as being of assistance in evaluating the proposed offences and the implied freedom of political communication. The question for assessing validity turns on whether the law burdens the implied freedom in its terms, operation, or effect.<sup>37</sup>
58. As noted by Justice Kirby, as part of the majority judgment in *ABC v Lenah Game Meats*:

*The concerns of a government and political character must not be narrowly confined. To do so would be to restrict, or inhibit, the operation of the representative democracy that is envisaged by the Constitution. Within that democracy, concerns about animal welfare are clearly legitimate matters of public debate across the nation... Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups.*<sup>38</sup>

59. Nevertheless, the Law Council does not consider the Bill's purpose is to stifle protest regarding animal welfare. Rather, the purpose is to protect farmers on agricultural land from the damage, distress and injury caused by protesters who are engaged forms of conduct, such as trespass and other property offences, as well as to protect against threats to biosecurity and food production.
60. The issue is whether the Bill, as it is framed, is reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.<sup>39</sup> The Law Council considers that to restrict peaceful protest would not be reasonably appropriate and adapted to advance the legitimate object of the Bill. As noted by the majority in *Brown v Tasmania*:

*It is necessary to keep firmly in mind that the implied freedom is essential to the maintenance of the system of representative and responsible government for which the Constitution provides. The implied freedom protects the free expression of political opinion, including peaceful protest, which is indispensable to the exercise of political*

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<sup>35</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, [135] (Mason CJ).

<sup>36</sup> *Brown v Tasmania* (2017) 261 CLR 328.

<sup>37</sup> See also *Clubb v Edwards* (2019) 93 ALJR 448, 462 [5].

<sup>38</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

<sup>39</sup> *Brown v Tasmania* (2017) 261 CLR 328, [104].

*sovereignty by the people of the Commonwealth. It operates as a limit on the exercise of legislative power to impede that freedom of expression.*<sup>40</sup>

61. The Law Council also acknowledges that to the extent that a communication would otherwise be unlawful, it is not to be protected by the implied freedom, because there is no freedom to make the communication.<sup>41</sup> However, the Law Council notes with concern that where the communication would not itself otherwise be unlawful, persons may still be reluctant to make it for fear that it could be regarded as inciting trespass or criminal damage, even though no such incitement is intended.
62. In effect, the law may have a chilling effect on valid communications intended to alert the public to acts of animal cruelty or breaches of environmental laws or food safety laws by businesses engaged in the production of food. For example, an employee may, as a result of this proposed law, be too afraid to make public evidence of the use of poisonous chemicals on fruit produced at an orchard, for fear of prosecution, resulting in damage to the health of those who consume the fruit.
63. Whilst the employee may be covered by whistleblower exceptions, these are limited (see above discussion), and their availability should not override the ability of a person to avail themselves of an existing right or privilege to legitimately publicise incidents public interest. This is particularly so in light of the evidential burden imposed on the person if they seek to rely on the proposed whistleblower exceptions.

## Consistency with Australia’s human rights obligations

### Right to freedom of expression

64. Article 19 of the *International Covenant on Civil and Political Rights (ICCPR)* states that:

*[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*<sup>42</sup>

65. 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. Limitations must be prescribed by legislation, necessary to achieve the desired purpose and proportionate to the need on which the limitation is predicated.
66. The Law Council considers that the Bill may have the effect of prohibiting the broadcasting of matters relating to public affairs and political discourse by preventing communication of even publicly available information regarding primary production businesses on agricultural land. A restriction on the freedom of this kind of political communication requires significant justification.
67. Given that state and territory offences (through existing extensions of criminal responsibility), exist and cover the concept of incitement, the Law Council considers that

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<sup>40</sup> Ibid 359 [88].

<sup>41</sup> *Unions NSW v New South Wales* [2019] 93 ALJR 166, 200 [163] (Edelman J), citing *Levy v Victoria* (1997) 189 CLR 579, [622], [625]-[626]; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [107]-[108], [184], [186]-[187], [337], [354]; *Brown v Tasmania* (2017) 261 CLR 328, [557]-[563] (Nettle and Edelman JJ).

<sup>42</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.

the new offences are not a necessary limitation to achieving the stated aim of protecting the rights of Australian farmers and public health.

68. The effect of the Bill is that it does not seek to directly prevent trespass or other property offences, or to prevent conduct that has a harmful or deleterious effect on the farmers, the primary production business or its operations, or the biosecurity of our food sources, because it does not consider whether the property offences actually occurred, or were likely to occur, or even whether it was impossible that they would occur.

## **Right to freedom from interference in privacy and correspondence**

69. Under article 17 of the ICCPR, every person has the right to freedom from arbitrary or unlawful interference with their privacy or correspondence.<sup>43</sup>
70. The Explanatory Memorandum to the Bill notes that the Bill will engage the rights provided by Article 17 of the ICCPR, as it would limit the nature of correspondence between Australian citizens, albeit only for a narrow and specific type of material and communication – this being the use of carriage services to encourage trespass, property damage or theft on private property. The Explanatory Memorandum further notes that the sharing of material intended to incite a crime is not the type of correspondence Article 17 aims to protect.
71. Noting the concerns outlined in this submission, the Law Council urges the Commonwealth to exercise caution to ensure that the offence is in fact drafted narrowly enough to strictly capture this type of conduct and prevent unintentionally stifling of communication that is in the public interest with respect to primary production and agricultural practices.<sup>44</sup>

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<sup>43</sup> Ibid art 17.

<sup>44</sup> See *ABC v Lenah Game Meats* (2001) 208 CLR 199.

Appendix A - Criminal Code Amendment (Agricultural Protection) Bill 2019

<b>Jurisdiction</b>	<b>Trespass Offences</b>	<b>Property Damage Offences</b>	<b>Extensions of Criminal Responsibility</b>
<b>New South Wales</b>	<i>Inclosed Lands Protection Act 1901</i> (NSW), s 4B (Aggravated unlawful entry on inclosed lands, Maximum penalty: 50 penalty units)	<i>Crimes Act 1900</i> (NSW), s 195 (Destroying or damaging property) - imprisonment for 5 to 12 years (depending on the means and circumstances of the damage conduct).	<i>Crimes Act 1900</i> (NSW), s 351A (Recruiting persons to engage in criminal activity), s 351B (Aiders and abettors punishable as principals) and s 249F (incitement)
<b>Victoria</b>	<i>Summary Offences Act 1966</i> (Vic), s 9(1)(e) (Wilful destruction, damage etc. of property - trespass, Penalty: 25 penalty units or imprisonment for six months)	<i>Crimes Act 1958</i> (Vic), s 197 (Destroying or damaging property) – several offences - 10 to 15 years maximum imprisonment	<i>Crimes Act 1958</i> (Vic), s 324 (Person involved in commission of offence taken to have committed the offence), s 325 (Accessories) and s 321G-L (Inciting a person to pursue a course of conduct that will, if acted upon, involve the commission of an offence by the person incited and/or the inciter is an indictable offence)
<b>Queensland</b>	<i>Summary Offences Act 2005</i> (Qld), s 11 (Trespass, Maximum penalty—20 penalty units or 1-year imprisonment)	<i>Criminal Code</i> (Qld), s 469 (Wilful damage, imprisonment for approximately 5 to 7 years)	<i>Criminal Code</i> (Qld), s 8 (Offences committed in prosecution of common purpose)
<b>Western Australia</b>	<i>Criminal Code</i> (WA), s 69 (Forcibly entering land - imprisonment for 2 years. Summary conviction penalty: \$6 000) and s 70A (Trespass - imprisonment for 2 years. Summary conviction penalty: \$6 000)	<i>Criminal Code</i> (WA), s 444 (Criminal damage, maximum penalty: imprisonment for 3 years and a fine of \$36 000) and 445 (criminal damage, maximum penalty: imprisonment for 2 years and a fine of \$24 000)	<i>Criminal Code</i> (WA), s 7 (Principal offenders) and s 8 (Offence committed in prosecution of common purpose) and s 553 (incitement).

Appendix A - Criminal Code Amendment (Agricultural Protection) Bill 2019

<b>Jurisdiction</b>	<b>Trespass Offences</b>	<b>Property Damage Offences</b>	<b>Extensions of Criminal Responsibility</b>
<b>South Australia</b>	<i>Summary Offences Act 1953 (SA)</i> , s 17 (Being on premises for an unlawful purpose, maximum penalty: \$2,500 or imprisonment for 6 months-2 years depending on the penalty for the offence which constitutes the unlawful purpose) s 17A (Trespassers on premises, Maximum penalty: \$1,250)	<i>Criminal Law Consolidation Act 1935 (SA)</i> , s 85(3) (Damage property other than building or motor vehicle, maximum penalty: imprisonment for 10 years)	<i>Criminal Law Consolidation Act 1935 (SA)</i> , s 267 (Aiding and abetting)
<b>Tasmania</b>	<i>Police Offences Act 1935 (Tas)</i> , s 14B (trespass, max 25 penalty units or imprisonment for a term not exceeding 6 months in respect of entering into, or remaining on, any other land, building, structure, premises, aircraft, vehicle or vessel)	<i>Police Offences Act 1935 (Tas)</i> , s 37(1) (destroy or injure any property – maximum penalty: on summary conviction to a penalty not exceeding 10 penalty units or to imprisonment for a term not exceeding 12 months)	<i>Criminal Code (Tas)</i> , s 4 (Crimes committed in prosecution of common purpose) ss 298 and 342A (incitement)
<b>Northern Territory</b>	<i>Trespass Act 1987 (NT)</i> , s 5 (Trespass - maximum penalty: 20 penalty units or imprisonment for 6 months). <sup>1</sup>	<i>Criminal Code (NT)</i> , s 241(1) (criminal damage - maximum penalty: 14 years imprisonment).	<i>Criminal Code (NT)</i> , s 12 (Abettors and accessories before the fact) and s 43BI <i>Summary Offences Act</i> s 69B; <i>Police Administration Act</i> s 158 (Incitement)

<sup>1</sup> Section 5 is also a regulatory offence

Jurisdiction	Trespass Offences	Property Damage Offences	Extensions of Criminal Responsibility
<b>Australian Capital Territory</b>	<i>Trespass on Territory Land Act 1932</i> (ACT), s 4 (Trespass on Territory land – maximum penalty: 5 penalty units), <i>Crimes Act 1900</i> (ACT), s 151 (Forcible entry on land – maximum penalty: 20 penalty units, imprisonment for 1 year or both).	<i>Crimes Act 1900</i> (ACT), s 116(3) (Destroying or damaging property – maximum penalty: 50 penalty units or 2 years imprisonment), <i>Criminal Code</i> (ACT), s 403 (damaging property – maximum penalty: 1000 penalty units or imprisonment for 10 years).	Part 2.4 of the <i>Criminal Code</i> (ACT) e.g. s 45 (complicity and common purpose), s 45A (joint commission), s 46 (commission by proxy), s 47 (incitement however there is no offence of incitement under the Code if a person urges another person to procure a third person to commit an offence: <i>R v Holliday</i> (2017) 91 ALJR 874; [2017] HCA 35) and s 48 (conspiracy).