

Date: 2 August 2018

The Hon. Paul Toole MP
Minister for Lands and Forestry and Minister for Racing
GPO Box 5341
SYDNEY NSW 2001

Dear Minister,

Open letter regarding the power to prohibit certain activities on Crown land

The NSW Young Lawyers' Human Rights Committee writes with regard to the NSW government's power to prohibit certain activities on Crown land, under clause 13(1) of the *Crown Land Management Regulation 2018* (NSW) ("the *Regulation*"). We are concerned that the power raises potential human rights concerns as it may be exercised in a way which infringes the right to freedom of expression and the right of peaceful assembly. Additionally, the power may infringe the *Australian Constitution*.

NSW Young Lawyers is particularly concerned by the power to prohibit the following activities on Crown land:

- "Taking part in any gathering, meeting or assembly (except, in the case of a cemetery, for the purpose of a religious or other ceremony of burial or commemoration)";¹
- "Displaying or causing any sign or notice to be displayed";²
- "Distributing any circular, advertisement, paper or other printed, drawn, written or photographic matter";³ and
- "Operating an audio or audio visual device at a volume likely to cause a nuisance to any person".⁴

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The power may be exercised in a way which infringes the right to freedom of expression and the right of peaceful assembly

Australia is a party to the *International Covenant on Civil and Political Rights* ("ICCPR"), which applies to all levels of Australian government, including the NSW government.⁵

Article 21 of the *ICCPR* recognises the right of peaceful assembly subject only to restrictions "imposed in conformity with the law and which are necessary in a democratic society in the interests of national security

¹ *Regulation* cl 13(1) Table Item 4.

² *Regulation* cl 13(1) Table Item 6.

³ *Regulation* cl 13(1) Table Item 7.

⁴ *Regulation* cl 13(1) Table Item 29.

⁵ *ICCPR* art 50; Human Rights Committee of the ICCPR, *General Comment No 34* [7].

or public safety, public order ... the protection of public health or morals or the protection of the rights and freedoms of others.”⁶

Article 19(2) of the *ICCPR* states that “Everyone shall have the right to freedom of expression”. Article 19(3) recognises that this right may be subject only to such restrictions “as are provided by law and are necessary for the respect of the rights or reputations of others; or for the protection of national security or of public order ... or of public health or morals.”⁷

The United Nations Human Rights Committee (“UNHRC”) monitors the implementation of the *ICCPR*. It has the power to issue “General Comments”,⁸ which are, according to the International Court of Justice, of “great weight” as interpretive guidance.⁹ The UNHRC has stated that restrictions on the right to freedom of expression “must not be overbroad”¹⁰ and:

“When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”¹¹

NSW Young Lawyers considers that the power to prohibit certain political activities on Crown land in the *Regulation* is so broad as to go beyond what is necessary or proportionate for the protection of public order. Such a broad power permits the NSW government to prohibit peaceful political activities that pose no threat to public order. For instance, peaceful political activities often take place at Sydney’s Hyde Park, which is Crown land. We do not consider it necessary or proportionate for the NSW Government to have the power to prohibit such peaceful political activities.

We are concerned that the power may be used to prohibit peaceful political activities on Crown land including:

- Political gatherings, meetings or assemblies;
- Displaying or causing political signs or notices to be displayed;
- Distributing political circulars, advertisements, papers; and
- Operating an audio or audio visual device – such as a megaphone – at a volume necessary for a political gathering or assembly.

The power to prohibit these activities may have a chilling effect on the exercise of the right to freedom of expression and the right of peaceful assembly.

NSW Young Lawyers considers that public order is already sufficiently protected by part 4 of the *Summary Offences Act 1988* (NSW) (“SOA”) and related laws. Part 4 of the SOA provides a scheme by which a court can prohibit the holding of a public assembly upon the application of the Commissioner of Police.¹² Related laws include section 545C of the *Crimes Act 1900* (NSW), which creates an offence of knowingly joining or continuing in an unlawful assembly, and section 6 of the SOA, which creates an offence of obstructing traffic. NSW Young Lawyers submits that threats to public order can be appropriately managed with these laws.

⁶ *ICCPR* art 21.

⁷ *ICCPR* art 19(3).

⁸ *ICCPR* art 40(4).

⁹ *Diallo (Republic of Guinea v Democratic Republic of the Congo) (Judgment)* [2010] ICJ Rep 639, 664 [66].

¹⁰ Human Rights Committee of the ICCPR, *General Comment No 34* [34].

¹¹ Human Rights Committee of the ICCPR, *General Comment No 34* [35].

¹² *SOA* s 25(1).

The power may infringe the freedom of political communication under the *Australian Constitution*

The *Australian Constitution* implicitly affords freedom of political communication. The freedom may only be burdened by laws that are reasonably appropriate and adapted, or proportionate, to the pursuit of a legitimate purpose in a manner compatible with the maintenance of the system of representative and responsible government for which the Constitution provides.¹³

NSW Young Lawyers submits that the power burdens the freedom of political communication because it permits the NSW government to prohibit peaceful political activities on Crown land.

It is unclear what legitimate purpose the power pursues, particularly in light of the above discussion regarding the necessity of the power for the purpose of protecting public order. The Explanatory Note to the *Regulation* states that one object of the Regulation is to make provision with respect to “the regulation of entry to, and conduct on, certain Crown land”. Assuming that this is the power’s purpose, then NSW Young Lawyers submits that the power is not reasonably appropriate and adapted, or proportionate, to the purpose.

For a law to be reasonably appropriate and adapted, or proportionate, to a legitimate purpose, the law must be suitable, necessary and adequate in its balance:¹⁴

- “Suitable” means that the law has “a rational connection to the purpose”.¹⁵ NSW Young Lawyers submits that the powers which permit the prohibition of peaceful political activities are so broad as to raise significant doubt as to whether they can be rationally connected to the legitimate purpose of regulating entry to and conduct on certain Crown land.
- “Necessary” means that “there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom”.¹⁶ NSW Young Lawyers submits that the purpose of regulating entry to and conduct on certain Crown land is satisfactorily dealt with by other powers provided for by clause 13 of the *Regulation*.
- “Adequate in its balance” requires a value judgment as to “the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom”.¹⁷ NSW Young Lawyers submits that the powers to prohibit certain peaceful political activities on Crown lands are excessive as they impose severe restrictions on freedom of political communication. In the recent High Court case of *Brown v Tasmania*, it was reaffirmed that freedom of political communication is essential to Australia’s constitutional system of government and indispensable to the exercise of sovereignty by the Australian people.¹⁸

In light of the above, NSW Young Lawyers is concerned that the power may be exercised in a way that infringes upon the implied freedom of political communication protected by the Australian Constitution.

¹³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 200 [23] (French CJ, Kiefel, Bell and Keane JJ) [23]; *Brown v Tasmania* (2017) 91 ALJR 1089 [88], [150] (Kiefel CJ, Bell and Keane JJ).

¹⁴ *McCloy v New South Wales* (2015) 257 CLR 178, 194 [3] (French CJ, Kiefel, Bell and Keane JJ).

¹⁵ *McCloy v New South Wales* (2015) 257 CLR 178, 194 [3] (French CJ, Kiefel, Bell and Keane JJ).

¹⁶ *McCloy v New South Wales* (2015) 257 CLR 178, 194 [3] (French CJ, Kiefel, Bell and Keane JJ).

¹⁷ *McCloy v New South Wales* (2015) 257 CLR 178, 194 [3] (French CJ, Kiefel, Bell and Keane JJ).

¹⁸ *Brown v Tasmania* (2017) 91 ALJR 1089 [88] (Kiefel CJ, Bell and Keane JJ).

NSW Young Lawyers submits clause 13 of the *Regulation* should be disallowed and reissued with amendments so that the NSW Government does not have the power to prohibit peaceful political activities on Crown land.

If you have any queries, please contact the undersigned at your convenience.

Yours sincerely,



David Turner
President, NSW Young Lawyers

Cc: Gladys Berejiklian MP, Premier of NSW
Luke Foley MP, Leader of the Opposition
Mick Veitch MLC, Shadow Minister for Lands