

Submission
No 223

INQUIRY INTO PROVISIONS OF THE RIGHT TO FARM BILL 2019

Name: Ms Mary Ann Gourlay

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Thank you for the opportunity to make this submission

Although I am now resident in the ACT, my family has lived in NSW for 6 generations. I have a strong interest in legal reforms in NSW relating to animal law, in which I have been trained. I am opposed to the enactment of the *Right to Farm Bill 2019* (NSW) for the following reasons. Due to the limited time made available by Parliament to make this submission it will be brief.

It is submitted that significant aspects of the Bill are likely to be constitutionally invalid.

Centrality of the independence of the judiciary

The courts have found that there is significant control on the ability of the NSW Parliament to encroach on the independence of the judiciary.

In *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 McHugh J stated

"...it is a necessary implication of the Constitution's plan of an Australian judicial system with State Courts invested with federal jurisdiction, that no government can act in a way that might undermine public confidence in the impartial administration of the judicial function of State Courts".¹

The Court of Appeal of the Supreme Court of NSW also upheld the separation of powers and centrality of the independence of the judiciary in NSW in a unanimous decision by Spigelman CJ, Mason P, Priestley JA, Sheller JA and Powell JA in *Bruce v Cole* (1998) 45 NSWLR 163.

Finally, there is a strong precedent for the High Court upholding the centrality of the independence of the judiciary in the States of Australia in *South Australia v Totani* (2010) 242 CLR 1. In that case the majority held that the State of South Australia's amendment to a State Act was invalid as it was an interference with the institutional independence and impartiality of the State Courts.

It is submitted that Section 5 of the Bill would therefore be found to be invalid.

Maintenance of public confidence in the impartiality of the judiciary

Based on the preceding case law it is also strongly arguable that State legislatures cannot interfere with the ability of State courts to hear certain types of torts cases, such as nuisance cases. Public confidence in the impartial administration of the judicial function of the NSW courts may be undermined as the courts must be and must appear to be independent of the legislature and executive government. This is a coherent and "necessary implication of the Constitution's plan of an Australian judicial system with State Courts invested with federal jurisdiction, that no government can act in a way that might undermine public confidence in the impartial administration of the judicial function of State Courts" as found by McHugh J in *Kable*.² See also the reasoning of Gaudron J in the same case.

It is submitted that Section 4 of the Bill would therefore be found to be invalid.

¹ McHugh J, *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51, 118.

² Ibid.

Incompatibility with international human rights conventions

There is strong public concern that the right to protest or to direct a peaceful protest may be negatively affected by the proposed section 4C amendment to the *Inclosed Lands Protection Act 1901* (NSW).

Inclosed lands are defined in section 3 of the Act as:

- (a) prescribed premises, or
- (b) any land, either public or private, inclosed or surrounded by any fence, wall or other erection, or partly by a fence, wall or other erection and partly by a canal or by some natural feature such as a river or cliff by which its boundaries may be known or recognised, including the whole or part of any building or structure and any land occupied or used in connection with the whole or part of any building or structure.

prescribed premises means land occupied or used in connection with any of the following:

- (a) a government school or a registered non-government school within the meaning of the *Education Act 1990*,
- (b) a child care service,
- (c) a hospital,
- (d) a nursing home within the meaning of the *Public Health Act 2010*,

and any building or structure erected on that land, but does not include all or part of any building or structure that is for the time being occupied or used for a purpose unconnected with the conduct of such a school, child care service, hospital or nursing home.

Road means any land proclaimed, dedicated, resumed or otherwise provided as a public thoroughfare or way or any land defined, reserved or left as a road in any subdivision of lands.

There is a strong public perception that new section 4C has potential to stifle legitimate political protest at any of the above locations whether by farmers, school children, animal or environmental activists, unionists, students or anyone else who wishes to exercise their right to peaceful protest. The democratic right to peaceful protest is protected under international law by the *International Covenant on Civil and Political Rights* ('ICCPR'), Article 21.

Lack of proportionality

The proposed increased penalties in section 4B (1) lack proportionality and are extremely harsh. There is strong public concern this amendment also may have a serious impact on the rights of people to conduct legitimate peaceful protest on public or private land.

Thank you for considering my views.

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