

# IN DEFENSE OF DISSENT

Mapping the repression of protest rights in Australia and identifying strategies communities can use to protect them.



## Acknowledgement of Country

We acknowledge the Bidjigal and Gadigal peoples of the Dharug Nation who are Traditional Owners of the unceded land on which we live and work. We pay our respects to all First Peoples of this land, their Elders and their Ancestors and celebrate the enduring connections of Aboriginal and Torres Strait Islander peoples to culture and Country. This always was and always will be Aboriginal land.

## With thanks

The data analysis in this report has been made possible by the often voluntary work of grassroots communities and organisations documenting government and police responses to protest, including particularly Melbourne Activist Legal Support, Action Ready and Legal Observers NSW. It also draws on the work of the Human Rights Law Centre, Environmental Defenders Office and Greenpeace Australia. Most importantly, this report is indebted to communities around Australia engaging in protest and working to resist repression of protest rights.

## Please note

This publication is prepared for general information only. It is not legal or other professional advice. Grata Fund and Australian Democracy Network have made every attempt to ensure the information provided is correct as at the date of publication, but we are not responsible for any errors or omissions.

The ability to express diverse views through peaceful protest is a core pillar of democratic participation and a universal human right. The views and opinions expressed by protest movements in this publication and beyond do not necessarily reflect the official policy or position of the publishers. While the publishers do not necessarily endorse the views of all protest movements, they support the open exchange of ideas and perspectives. The inclusion or exclusion of the opinions or viewpoints of various protest movements in this publication does not undermine their validity but rather reflects a snapshot of the diversity of thought in Australia.

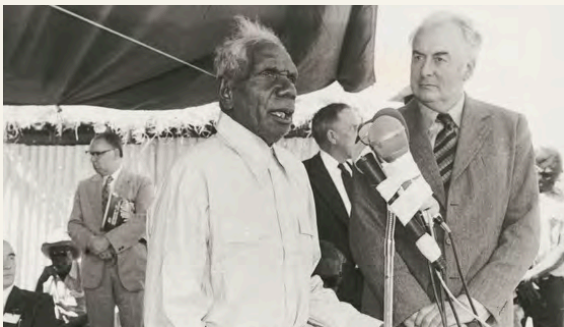
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# INTRODUCTION

Protest movements have long played an instrumental role in holding power to account in Australia. From the Wave Hill Walk-Off in the 1960s, where 200 Gurindji people led a seven-year strike that led to the first attempt by an Australian government to legally recognise Aboriginal land ownership to the feminist movement winning women's right to vote in the early 1900s; from the Green Bans movement in the 1970s which protected green spaces and low-income housing across our major cities, to the recent, hard-won struggle for marriage equality in 2017 — protest has been critical to winning the rights and freedoms that we all benefit from today.



*Vincent Lingiari addressing the media after Gough Whitlam officially returns Aboriginal land at Wattle Creek, 1975. Source: National Library of Australia*

Protest is a form of direct political participation that allows all of us to have a say in our shared future. It creates a method for the public to hold power to account, to peacefully dissent, to influence decision-makers in between elections. It also empowers communities to democratically counteract the undue influence of corporate lobbyists and connected power brokers who have unequal and opaque access to the halls of Parliament. Protest movements foster political engagement among citizens, connect communities, and inspire hope for

change. In these ways and more, the right to peaceful protest is essential to a strong, healthy democracy and thriving communities.

Despite the vital role protest has long played in our democracy to catalyse positive change, protest rights have been under unprecedented attack in Australia. In 2023, a United Nations Special Rapporteur raised the alarm on Australia's "troubling" and "draconian" protest rights restrictions in several states,<sup>1</sup> and in 2019, the CIVICUS Monitor — a global alliance monitoring the health of civil liberties — downgraded Australia's civic space from "open" to "narrowed", citing the increasing number of anti-protest laws as a contributing factor.<sup>2</sup> The CIVICUS Monitor's latest reporting in 2023 upheld Australia's "narrowed" status.<sup>3</sup>

In this report, we map the multiple fronts of attack on protest rights in Australia, and lay out concrete pathways that communities, grassroots movements, and civil society organisations can use to reclaim our right to protest.

We identify five key "themes" driving protest rights regression:

- corporate clampdown on opposition,
- the criminalisation of protest,
- over-policing (and eight sub-themes within this),
- government misuse of emergency powers, and
- authorisations and pre-approval systems.

Using the reports of independent legal observer organisations and media from around Australia, we track the prevalence of each theme between 2019–2024,

showing the shape and extent of the repression of protest. Legal observers attend protests (usually in a volunteer capacity) to protect the rights of protesters and improve police accountability. Legal observers usually wear clothing to identify their legal observer status, hand out legal information to protesters, take notes and photographs, and record interactions between protesters and police. They are recognised as Human Rights Defenders by the Office of the United Nations High Commissioner for Human Rights and are protected under the Declaration on Human Rights Defenders.<sup>4</sup> Despite this, police in New South Wales and Victoria have been known to arrest, physically shove and seize the property of legal observers at protests.<sup>5</sup>

New South Wales, Victoria and Queensland are the only states with established independent legal observer organisations and contain a large proportion of Australia's population. Therefore, the bulk of the reports relate to incidents in these jurisdictions. Media reports of incidents in other jurisdictions have also been included in the dataset. The dataset of these reports is included in **Appendix A**.

In each theme section, we include case studies illustrating how these practices are limiting the freedoms to protest. The data and case studies show that groups experiencing marginalisation are being particularly impacted by the restriction of protest, including First Nations people, people with disabilities, people of colour, and the LGBTIQI community.

Corresponding to each theme, we then present strategic litigation pathways and advocacy strategies for stemming regressive attacks on people's right to protest and expanding protest

protections. Strategic litigation can be a powerful tool in tackling protest rights regression through its ability to challenge the lawfulness of anti-protest laws, clarify broadly defined offences, and hold police and governments accountable for unlawful practices. Similarly, advocacy for targeted legislative and policy reform is a vital piece of the puzzle in winning back lost ground. We examine pathways for legislative change that we can unite behind and use to strengthen protections for our right to protest.



*Crowds in front of Town Hall in Sydney rally for same-sex marriage, 2017. Source: National Museum of Australia*

It's important to highlight the absence of a federal Human Rights Act in Australia, and gaps in state-based human rights protections, which leaves vulnerabilities in protest rights protections. Strategic litigation pathways to advance protest rights necessitate creative thinking and novel approaches, due to the lack of human rights acts in multiple jurisdictions. In jurisdictions that do have human rights acts, some do not permit direct legal challenges. In this report, we have endeavoured to highlight the broad range of possible legal pathways that we believe are worth pursuing, and others that warrant further investigation.



This report has been collaboratively prepared by Grata Fund and the Australian Democracy Network (ADN).

**Grata Fund** supports people and communities in holding powerful government and corporate leaders accountable and achieving systemic change through the courts.

**Australian Democracy Network** works with civil society and communities to campaign for the changes that make our democracy more fair, open, participatory and accountable.

Grata Fund and ADN can provide support to activists and legal teams seeking to pursue litigation and/or advocacy to strengthen protest rights and freedoms — see page X to learn more.



## Do we have a legally protected right to protest in Australia?

Yes — but protections are not as robust as they could be.

As a signatory to the International Covenant on Civil and Political Rights (ICCPR), Australia guarantees the right to peaceful assembly. Common law developed through legal precedent also upholds the right to peacefully protest, though it can be limited by legislation. Queensland, Victoria, and the ACT have further enshrined the right to protest in state-based human rights laws. Lastly, the Australian Constitution contains an implied freedom of political communication, safeguarding political protests from excessive legal restrictions.

Unlike other countries, Australia does not have a federal Human Rights Act, which means protest rights are protected by a patchwork of laws that can be exploited by governments looking to curb our protest rights as a reaction to unwanted political pressure or for the benefit of special interest groups. A federal Human Rights Act would strengthen protest rights by providing a unified legal framework that guarantees these rights at a national level, setting a clear standard for how protest rights should be recognised and protected, as well as providing avenues for redress when protest rights are limited.



## What kind of protests are protected by international human rights law?

International law protects the right to peaceful assembly, meaning assembly that is non-violent. Disruption of traffic, pedestrian movement or daily activities does not amount to violence at law, and neither does mere pushing and shoving.<sup>6</sup> Violence entails the use of physical force against others that is likely to result in injury or death, or serious damage to property.<sup>7</sup>

If individuals engage in violent behaviour during a protest, police must differentiate between those individuals and other participants; the right to protest of those not involved in violence must not be affected.<sup>8</sup> Violence against participants by authorities, members of the public or participants in a counter-protest does not render the assembly non-peaceful.<sup>9</sup>



## What is strategic litigation?

Strategic litigation, also known as impact litigation, involves pursuing a meritorious legal case that has relevance to the broader public and can have impact on a large scale. This is often part of a broader advocacy campaign aimed at raising awareness about specific issues, or advancing the rights of oppressed and disadvantaged groups.

When successful, strategic litigation can achieve transformative outcomes — and this has been the case in the advancement and protection of protest rights in Australia. For example, recently, the NSW Supreme Court struck down parts of NSW's draconian anti-protest laws finding them unconstitutional, after the Knitting Nannas – a group of grandmothers fighting for a safer climate future — and the Environmental Defenders Office challenged the Government in court, and in 2017, the High Court struck down parts of Tasmania's anti-protest laws after Bob Brown challenged them.<sup>10</sup>

# KEY FINDINGS

Communities who express their views through protest in Australia are facing an increasingly hostile environment. We have identified five broad themes in the repression of protest rights between 2019 and 2024.

## THEME 1: CORPORATE CLAMPDOWN ON OPPOSITION

- Strategic Lawsuits Against Public Participation (SLAPPs) and surveillance technologies are increasingly deployed against activists globally, including in Australia, where they have been leveraged against climate, First Nations justice, and human rights activists.

## THEME 2: CRIMINALISATION OF PROTEST

- The rate at which people who protest are sentenced to imprisonment after engaging in peaceful protest is intensifying in Australia.
  - Over the last three years, nine activists engaged in civil disobedience have been sentenced to a combined total of 50 months imprisonment.
  - This is a ten-fold increase in total length of imprisonment sentences compared with the decade prior to 2021, when only one activist had been sentenced to 5 months in prison for civil disobedience.<sup>11</sup>
  - Five of those people were charged under newly introduced anti-protest laws in NSW and Tasmania, with their sentences totalling 27 months.<sup>12</sup>
- Police appear to be imposing punitive bail conditions on protesters as part of a strategic policing technique to limit the organising ability of protest groups engaging in peaceful protest. For example, between 2019–2024, 64 peaceful protesters in NSW were subject to police bail conditions that ban them from associating with either members of a specific protest group or “issue motivated groups” generally.<sup>13</sup>

## THEME 3: OVER-POLICING

- Police appear to be engaging in over-policing, particularly at protests by marginalised groups including protests carried out by First Nations communities and South West Asian and North African (SWANA) communities. Communities peacefully engaging in protest have been increasingly subject to heavy-handed militarised policing, including more frequent deployment of dangerous police weapons such as OC spray (pepper spray), tear gas, batons, rubber bullets and flash-bang grenades.



### THEME 3: OVER-POLICING

- Police were reported to have deployed OC spray at 18 protests between 2019–2024, resulting in over 200 people needing to be treated by street medics.<sup>14</sup>
- In at least five incidents, police were reported to have deployed OC spray directly in the face of a protester, against use of OC spray guidelines.<sup>15</sup>
- The use of OC spray has increased in the last year, having been used at 11 protests in 2023–24, compared to seven in the five years prior.<sup>16</sup>
- Following a Black Lives Matter protest in Sydney in 2021, police were reported to have pepper sprayed 100 people.<sup>17</sup>
- At a pro-Palestine rally, police were reported to have restrained a person of colour by handcuffing them so tightly that their hands went numb, and then refused to remove the handcuffs for 20 minutes."<sup>18</sup>
- People with physical disabilities and children are being seriously impacted by heavy-handed, militarised policing. For example:
  - Three incidents involved people with disabilities, with police removing a person from their wheelchair in one instance, and forcefully moving and damaging a wheelchair in another;<sup>19</sup>
  - Four involved children, including four children aged 16 and under being pepper sprayed and a child in a pram caught up in a police kettle, a controversial police tactic also known as containment or corralling;<sup>20</sup>
- LGBTIQ+ people have experienced mistreatment in custody based on their gender identity and/or sexuality:
  - Incidents have been recorded of homophobic and transphobic remarks by police, including an officer reported to have called a protester in custody a "worthless f\*ggot".<sup>21</sup>
  - Police have continued calling a trans protester by their birth name despite them changing their legal name as part of their gender transition and despite several requests from the protester and their lawyer to use their legal name.<sup>22</sup>
- Police have used random breath testing and minor traffic infringements to justify pulling over cars of individuals they suspect to be connected to protest activity
  - In Newcastle in November 2022, police pulled over a local childcare worker who was living in accommodation that police suspected had connections to Blockade Australia.

### THEME 3: OVER-POLICING

- She was ostensibly stopped for a random breath test, but then told by another police officer that he had intelligence to suggest she was involved in the Blockade Australia protests. One of the police officers reported to a colleague that the car was “straight as anything”, he couldn’t “find anything on her”, he couldn’t “defect it”, and that he “even checked the window wiper fluid”.<sup>23</sup>
- In 2023–24, police in NSW were observed by independent legal observers to target cars with Palestinian flags driving near Hyde Park during a rally for stop and searches, with drivers being fined for minor infringements such as tucking P plates under a number plate instead of on a bracket. Police were also observed to be writing down the number plates of vehicles with Palestinian flags. None of the other many cars passing by the area were stopped and searched or had their vehicles recorded by police.<sup>24</sup>
- Police engage in significant intelligence and surveillance regarding protest groups which informs pre-emptive policing of protests
  - NSW has a Public Order and Events Intelligence Unit of 8 officers which is responsible for the centralised collection, analysis and dissemination of intelligence related to “issue motivated groups”.<sup>25</sup> “Issue motivated group” is a classification used by NSW Police for coalitions or groups of individuals whose actions are inspired by a common interest, goal or ideology.<sup>26</sup>
  - The surveillance of protesters has been used to inform pre-emptive policing that identifies individuals likely to engage in a protest and seeks to deter them from doing so. At least 133 homes across NSW, Victoria and Queensland have been visited by police in the leadup to protests, with police informing individuals that if they choose to participate in a particular protest without police authorisation of the protest, they may be engaging in illegal activity.<sup>27</sup>
  - In the lead-up to the 2022 International Mining and Resources Conference (IMARC), five activists were stopped in cars by NSW Police seemingly based on the recognition of their number plate according to Legal Observers NSW. Police searched their cars and justified these searches as based on the suspicion that these individuals would engage in the IMARC protest having previously engaged in other protests.<sup>28</sup>

#### **THEME 4: GOVERNMENT MISUSE OF EMERGENCY POWERS**

- Broad emergency power laws are at times being misapplied with the effect of unduly restricting peaceful protesters' rights to freedom of expression and peaceful assembly. The threat of their use, even when ultimately enacted, can create a 'chilling effect' which discourages the organising of protests, and creates confusion around legality for participants.
- Police have imposed harsher emergency restrictions on First Nations protests. For example, NSW Police sought a Supreme Court prohibition order against three Black Lives Matter protests on the basis of COVID transmission risk despite low case numbers and organisers implementing COVID safety plans. In 2021, police dispersed an Invasion Day rally due to it allegedly breaching restrictions on outdoor gatherings. Less than three weeks later, police allowed a Women's March rally of similar size and also in breach of gathering restrictions to proceed unobstructed.<sup>29</sup>

#### **THEME 5: NOTIFICATION AND PRE- APPROVAL SYSTEMS**

- Protest notification and pre-approval regimes are increasingly operating as de facto 'authorisation' systems, which runs counter to Australia's democratic obligations under international law.
- The use of permit systems as de-facto authorisation regimes has had a particular influence on First Nations groups, with a First Nations group in the NT having been required to pay for their own traffic control in January 2024 as a precondition to obtaining authorisation from police to carry out protests when there are no recorded instances of other groups having to do so.<sup>30</sup>



*School Strike for Climate protest, Sydney / Gadigal Country, 2023.*

# KEY RECOMMENDATIONS

## *to protect protest*

### **THEME 1: CORPORATE CLAMPDOWN ON OPPOSITION**

#### *Legal Pathways*

- **Recommendation 1:** Communities encountering corporate clampdowns on protest should seek legal advice on whether:
  - 1a. privacy rights have been breached,
  - 1b. criminal law protections from surveillance have been broken.
- **Recommendation 2:** Communities encountering corporate clampdowns on protest should seek legal advice on whether requests for information could be sought via freedom of information processes to support their claims.

**Recommendation 3:** Communities encountering corporate clampdowns on protest should consider whether complaints could be made via independent complaints processes.

#### *Policy & Legislative Pathways*

- **Recommendation 4:** Federal, State and Territory governments should introduce anti-SLAPP legislation that is in line with best practice anti-SLAPP legislation globally. This legislation should apply to any lawsuit involving an expression on an issue of public interest; include the ability to stay all proceedings between parties, including discovery; have a shifting onus; provide for the courts to provide expedited hearings for anti-SLAPP motions; have an equal access cost model to allow defendants to bring anti-SLAPP motions without risking financial ruin; and include a right to immediate appeal.
- **Recommendation 5:** Federal, State and Territory governments should repeal or amend anti-protest laws as necessary to uphold Australia's democratic system of representative and responsible government, and ensure compliance with Australia's international human rights obligations.
- **Recommendation 6:** The Federal, Western Australian, South Australian, New South Wales, Tasmanian, and Northern Territory governments should introduce human rights acts. The Victorian, ACT and Queensland governments should strengthen human rights acts to ensure consistent protection of our right to protest and other fundamental human rights guaranteed by international law. These acts should include a stand-alone cause of action in the relevant State/Territory/Federal court or tribunal, provide access to effective remedies, and should have an equal access model cost provision to ensure that people who have suffered human rights breaches can have their day in court without risking financial ruin.

## THEME 2 CRIMINALISATION OF PROTEST

### *Legal pathways*

- **Recommendation 6:** Where an anti-protest law places onerous limits on an individual's ability to protest, communities should consider whether they can argue that it 'impermissibly burdens' the implied freedom of political communication and is invalid.
- **Recommendation 7:** If individuals are fined, communities should consider whether an appeal on the basis that the notice was not validity made or whether there were extenuating circumstances. Such wins could potentially set a precedent for other protesters who received penalty notices for the same protest action. Communities can also ask for a review of the fine by the relevant agency i.e. Revenue NSW.
- **Recommendation 8:** If harshly sentenced, communities should consider appealing, and consider arguing necessity and emergency defences, especially under the Queensland Criminal Code.

### *Policy & legislative pathways*

- **Recommendation 9:** Federal, State and Territory governments should repeal or amend anti-protest laws as necessary to uphold Australia's democratic system of representative and responsible government, and ensure compliance with Australia's international human rights obligations.

## THEME 3: OVER POLICING

### *Legal Pathways*

- **Recommendation 10:** Communities should consider assault, battery and false imprisonment claims when police act beyond their power, including via class action.
- **Recommendation 11:** Where communities see evidence of direct or indirect discrimination by police on the basis of sex, race, disability or age, they should consider a discrimination claim at the Australian Human Rights Commission and, where a resolution isn't reached there, through legal action in the Federal Court.
- **Recommendation 12:** Communities should consider whether police warrants, data access orders and other production orders were made lawfully or breach privacy rights.
- **Recommendation 13:** If subjected to harsh bail conditions, communities should consider challenging the lawfulness of these conditions or asking court to vary bail conditions.



- **Recommendation 14:** Communities should consider whether heavy handed policing unlawfully burdens the freedom of political communication, and consider using freedom of information processes to gain information that may assist, including evidence that police were seeking to preemptively deter potential protest.

#### *Policy & Legislative Pathways*

- **Recommendation 15:** Federal, State and Territory governments should regulate the use of dangerous weapons at protests, and prohibit the use of all types of explosive devices, such as stinger grenades and flash-bangs, OC aerosols, kinetic impact projectile weapons and police horses against people involved in peaceful assembly, including non-violent direct action.
- **Recommendation 16:** Federal, State and Territory governments should introduce independent police accountability bodies that are adequately resourced and have the power to conduct independent, impartial, and effective investigation of all complaints against police, make disciplinary decisions, and conduct public interest investigations within a timely manner. Accountability processes should remain independent at every stage and should not refer matters back to police for investigation.
- **Recommendation 17:** Police departments to review with expert and community input the use of ‘strategic incapacitation’ and high-visibility policing practices, which interfere with the right to peaceful assembly, and modify policing practice towards a ‘negotiated management’ approach that aims for protester-police communication and minimising police presence and intervention at protests.



## **THEME 4: GOVERNMENT EXPANSION OF AND MISUSE OF EMERGENCY POWERS**

#### *Legal Pathways*

- **Recommendation 18:** Communities experiencing protest restriction on the basis of emergency powers should consider challenges to emergency powers and decisions made under them where they are inconsistent with protected rights in Queensland, Victoria and the ACT.
- **Recommendation 19:** Communities experiencing protest restrictions on the basis of emergency powers should consider whether those emergency powers unlawfully burden the freedom of political communication.
- **Recommendation 20:** Communities experiencing protest restriction on the basis of emergency powers should consider whether emergency powers and decisions made under them (including warrants) were lawfully made.



#### *Policy & Legislative Pathways*

- **Recommendation 21:** Federal, State and Territory governments should bring emergency power and notification regimes in line with Australia’s democratic system of representative and responsible government, and its international human rights obligations. Any emergency powers should at a minimum, be provided for in law; have a legitimate aim; be strictly necessary in a democratic society to achieve that aim; be the least intrusive and restrictive measures available to reach that aim; be based on scientific evidence; not be arbitrary or discriminatory in application; and be of limited duration, respectful of human dignity and subject to review.

## **THEME 5: NOTIFICATION AND PRE-APPROVAL PROCESSES**

#### *Legal Pathways*

- **Recommendation 22:** Communities blocked from protesting by notification regimes should consider whether those regimes are inconsistent with protected rights in Queensland, Victoria and the ACT.
- **Recommendation 23:** Communities blocked from protesting by notification regimes should consider whether the regime unlawfully burdens the implied freedom of political communication.
- **Recommendation 23:** Communities blocked from protesting by notification regimes should consider whether police or the relevant authority followed the correct legal processes in using the notification system, and seek further information via freedom of information processes where this isn’t clear.

#### *Policy & Legislative Pathways*

- **Recommendation 25:** Federal, State and Territory governments should bring emergency power and notification regimes in line with international human rights obligations. Any emergency powers should at a minimum, be provided for in law; have a legitimate aim; be strictly necessary in a democratic society to achieve that aim; be the least intrusive and restrictive measures available to reach that aim; be based on scientific evidence; not be arbitrary or discriminatory in application; and be of limited duration, respectful of human dignity and subject to review.



*Pro-Palestine protest, Port Botany, Sydney / Gadigal Country,  
21 November 2023. Photographer: Jack Murray*

# THEME 1: CORPORATE CLAMPDOWN ON OPPOSITION

One of the first direct confrontations between the fossil fuel industry and protest movements in Australia was led by the Yungngora people in the Kimberley, who locked the gate to American oil company AMAX in 1979 at Noonkanbah. The West Australian government had given AMEX a licence to drill on Yungngora land without their knowledge or permission, and escorted the company from Perth to the Kimberley by police convoy and a convoy of 49 trucks.

The Yungongora people mounted a massive blockade in 1980, standing AMEX equipment in Perth in collaboration with the union movement; organising a blockade of 100 people, rocks and stones at Tappa Tappa Bridge and a 400 person picket line in Broome; and blockading Mickey's Pool Creek with cars. After arresting everyone and moving cars with a bulldozer, twenty rig workers – members of the Australian Workers Union – refused to work, with financial support to cover lost wages donated by ACTU member donations. Throughout this time, the blockade had been under surveillance by the oil and gas industry's peak industry body, APEA (now APPEA), including by an informant who during the blockade 'spent 15 days ... living and travelling with some of the key activists'. APEA used this information to inform lobbying against uniform federal land rights legislation and facilitate continued extraction.<sup>31</sup>

This long history is repeating and escalating as fossil fuel corporations face increasing land rights and climate protests.

Private industry plays a critical role in limiting protest rights in Australia today, both separately and in collaboration with governments and police, particularly through aggressive litigation tactics (Strategic Action Against Public Participation or SLAPP), surveillance, and lobbying governments for regressive anti-protest reforms.

According to Privacy International, surveillance technology is increasingly being used globally to monitor protesters, and is often deployed secretly, without a clear legal basis, and without oversight mechanisms.<sup>32</sup> While most instances of protest surveillance are police-led, there have been several concerning examples of businesses, and public/private groups harnessing surveillance technologies to target protesters. For example, several private security contractors infiltrated the anti-coal Leard Blockade in 2014 to surveil activists on behalf of Whitehaven Coal.<sup>33</sup>

Strategic lawsuits brought by corporations against protesters are also increasingly deployed against protest movements to frustrate their impact. These lawsuits, more broadly known as Strategic Litigation Against Public Participation (**SLAPP**) suits, are intended to censor, intimidate, and silence critics by tying them up in legal red tape and fees until they are no longer a threat.<sup>34</sup> In April 2024, Office of the United Nations High Commissioner for Human Rights noted that SLAPPs are being used increasingly across the world.<sup>35</sup> Mining company Bravus (formerly Adani) has been doggedly pursuing litigation against

environmental activist Ben Pennings since 2020, in what Pennings' lawyers say amounts to an "abuse of process".<sup>36</sup> In February this year, Woodside commenced litigation against multiple Disrupt Burrup Hub campaigners, and has also given notice it intends to expand this litigation to encompass as many campaigners as possible.<sup>37</sup>



*Stop Adani x GHD action, Sydney / Gadigal Country, 25th October 2019.*

Private industry has long had outsized influence in draconian anti-protest legislation in Australian parliaments via lobbyists, donations, and a revolving door of industry and political personnel. For example, in May 2023, just days before his government passed draconian anti-protest legislation, South Australia's Minister for Energy and Mining Tom Koutsantonis was reported to have told an oil and gas industry conference in Adelaide that his state government is "at your disposal".<sup>38</sup> In 2016, former NSW Premier Mike Baird told a mining industry dinner that his government would "crack down" on civil disobedience and "throw the book" at people who "unlawfully enter mining sites", before introducing increased penalties for mining protesters, alongside a raft of new powers for police.<sup>39</sup>

Universities have played an increasingly repressive role in relation to protest, despite the long history of student protest movements. Although universities are public institutions, they have increasingly run on a commercial corporate model.<sup>40</sup> Universities also function as private landholders, enabling them to exclude certain individuals from university land. This year, students at fourteen universities around Australia set up encampments calling on their universities to divest from military and academic ties with Israel. Several universities responded by imposing new restrictions on protest on campus and instituting disciplinary action against students. Monash University and University of Melbourne erected signs banning members of the public from entering university land if they intended to participate in protest.<sup>41</sup> In July 2024, the University of Melbourne used surveillance technology to identify students involved in a sit-in protest for the purpose of disciplinary proceedings, prompting the Office of the Victorian Information Commissioner to make 'preliminary enquiries' into whether the University broke privacy laws.<sup>42</sup> In October 2024, security guards at University of Technology Sydney (UTS) threatened students with disciplinary action for handing out flyers that use the word 'genocide'.<sup>43</sup> Two universities introduced new Campus Access Policies that require students to notify the university of any protests 48–72 hours beforehand and get approval for activities commonly involved in protest, including setting up tables, using megaphones or placing placards or banners on university land.<sup>44</sup> These policies apply not only to students seeking to protest, but any students engaging in club and society activities on campus that involve setting up tables or putting up posters.

# CASE STUDIES

## **Woodside Energy threatens legal action against climate activists in WA**

In July 2023, Woodside Energy, Australia's largest oil and gas company, threatened to sue climate activists for financial damages following a protest involving a non-toxic stink bomb at its Perth headquarters.<sup>45</sup> The protest aimed to mimic a gas leak and led to an evacuation. Woodside's lawyers demanded compensation and the identification of other protesters. Activists, including Joana Partyka from the Disrupt Burrup Hub group, refused, accusing Woodside of using legal threats to silence peaceful protests.

Bond University's Professor Nicole Rogers stated that Woodside Energy's threat of legal action for financial compensation is part of a broader strategy to stifle climate activism.<sup>46</sup>

## **University of Melbourne surveils students during peaceful sit-in protest**

In July 2024, the University of Melbourne used surveillance technology to identify students involved in a sit-in protest.<sup>47</sup> Twenty-one pro-Palestine student protesters at the University were served with "general misconduct" notices, which included CCTV footage and detailed records of their WiFi usage, as evidence of alleged misconduct.

This prompted The Office of the Victorian Information Commissioner to make 'preliminary enquiries' into whether the University broke privacy laws.<sup>48</sup>

## **University of Sydney security guards threaten students holding a bake sale with disciplinary action**

On October 22, student groups at University of Sydney, Autonomous Collective Against Racism and BDS Youth, were holding a bake sale to raise funds to help evacuate a Palestinian family in Gaza.<sup>49</sup> They set up a table with baked goods in an area commonly used for student clubs and society stalls. Campus security attended the area and told the students they were in contravention of the Campus Access Policy and asked for students' IDs. When students did not provide IDs, security told them they had ten minutes to get off campus or there would be 'consequences'. Students had to move the bake sale off university property as a result.



# RECOMMENDATIONS

## *To protect protest*

### 1. Legal pathways

#### Privacy law challenges

The right to privacy is enshrined in various international treaties but is principally protected at a domestic level in Australia under the *Privacy Act 1988* (Cth), in privacy and health information legislation at a state/territory level, and in human rights legislation in the Australian Capital Territory, Queensland and Victoria.<sup>50</sup> However, there are limited avenues for enforcement under these various domestic privacy regimes.

The use of surveillance technology against protesters by corporations could potentially be challenged as a breach of an individual's right to privacy.

However, there are currently limited protections against surveillance or the taking of videos or photos in a public place. For example, if a video or photo is taken in a public place, the *Privacy Act 1988* (Cth) doesn't apply.<sup>51</sup>

If an organisation with a turnover of more than \$3 million in Australia engages in action that breaches privacy, the *Privacy Act 1988* (Cth) may apply.<sup>52</sup> A complaint can be made to the Office of the Australian Information Commissioner. If you are unhappy with the OAIC's decision, you may apply to the Federal Circuit and Family Court or Federal Court for judicial review.

At the time of writing, the federal government is considering privacy law reform, including introducing a tort of

privacy, which may open up legal action to protesters who have their privacy interfered with by private entities.<sup>53</sup>



Photographer: Jack Murrar

#### Criminal offences

Each state and territory has laws which regulate the use of surveillance devices.<sup>54</sup> Certain uses of surveillance are unlawful. For example, it is unlawful to video record people without their consent in areas they would expect to be private, such as a bathroom, change room or bedroom as this is considered to be illegal surveillance under the Criminal Code acts in some states and territories.<sup>55</sup>

It is generally unlawful for private entities to use surveillance devices to record private conversations, or to use an optical surveillance device within premises or a vehicle without the consent of the party being recorded.<sup>56</sup> It is also unlawful to use tracking devices without a person's consent;<sup>57</sup> and to intercept telecommunications.<sup>58</sup>

These are criminal offences under various state, territory and federal laws. If a protester experiences unlawful surveillance or tracking, they can make a complaint to the police who may then issue fines or charges and refer the matter to the director of public prosecutions for prosecution.



*Anti-poverty activists call for the boycott of employment services provider Sarina Russo, Adelaide, 2021.*

### FOI challenges

If protesters are keen to understand the influence of corporations on government decision makers, including government departments and parliamentarians, they can access the federal Freedom of Information (FOI) system, and their state and territory equivalents, to gain information on meetings that may have been had between corporate leaders and decision makers.

At the federal level, if an FOI request is refused, it is possible to apply for review by the Office of the Information Commissioner, and if unsuccessful, apply to the Administrative Review Tribunal for merits review.

### Complaints to independent bodies

Universities are public service providers whose conduct is generally covered by State Ombudsman schemes. In order to make a complaint to the Ombudsman about the conduct of the university, individuals must generally first have engaged in the university's internal complaints procedure and found it unsatisfactory in resolving their complaint.

The Information and Privacy Commissioner may be able to investigate complaints about university handling of information, including CCTV footage or other personal data. The Australian Human Rights Commission can investigate complaints in relation to suspected discrimination or breaches of human rights under federal laws.

## **2. Policy & legislative pathways**

### Anti-SLAPP laws

Currently, the only jurisdiction with anti-SLAPP laws in Australia is the Australian Capital Territory, which introduced the Protection of Public Participation Act 2008 (ACT) (PoPP Act) in 2008.

The purpose of the PoPP Act is to “protect public participation, and discourage certain civil proceedings that a reasonable person would consider interferes with engagement in public participation.”<sup>59</sup>

The Act applies where the defendant's conduct is public participation,<sup>60</sup> and the plaintiff is pursuing an improper purpose by bringing the case.<sup>61</sup>



An improper purpose is defined as:

1. discouraging the defendant from engaging in public participation; or
2. diverting the defendant's resources away from engagement in public participation; or
3. punishing or disadvantaging the defendant from engaging in public participation.<sup>62</sup>

If a corporation was to file a case against a protester in the ACT for an improper purpose, the protester could potentially use the POPP Act to bring an anti-SLAPP motion and have the case dismissed.

However, there are some exceptions to the POPP Act, for example, it doesn't apply to defamation cases.

Anti-SLAPP legislation at the Federal and State level could follow the model of best

practice Anti-SLAPP legislation globally, and have the following elements:

- A broad scope, to apply to any lawsuit involving the public interest, including defamation;
- The ability to stay proceedings between the parties, including discovery as soon as a motion to dismiss is filed;
- A shifting onus to impose a limited obligation on the defendant to show the lawsuit involves a matter of the public interest, with the onus then shifting to the plaintiff to show that the action has substantial merit, and the defendant has no reasonable defence;
- The ability to seek an expedited hearing from the Courts to hear an anti-SLAPP motion; and
- Costs provisions to ensure that successful defendants are not out of pocket if they succeed in their anti-SLAPP motion.



Anti-police violence x Mardis Gras rally, Sydney / Gadigal Country.  
Photographer: Chels Hood Withey

# THEME 2: CRIMINALISATION OF PROTEST

In recent years, a raft of anti-protest laws that target climate activists and non-violent protest tactics more generally have been introduced. In fact, over the past two decades, 49 laws affecting protest have been introduced in federal, state and territory parliaments.<sup>63</sup> Many of these laws act to criminalise forms of peaceful protest for our communities, imposing disproportionate penalties on protesters for non-violent protest action, excessive bail conditions and even imprisonment. For example, in NSW, protesters face fines of up to \$22,000 and two years in prison for protests that disrupt roads, transport and infrastructure;<sup>64</sup> in South Australia, protesters face fines of up to \$50,000 or three months imprisonment for obstructing a public place;<sup>65</sup> and in Tasmania, protesters obstructing access to a workplace face fines of up to \$10,100 or 12 months imprisonment.<sup>66</sup>

These anti-protest laws are also often rushed through parliament with limited debate, bypassing democratic checks and balances, and raising further concern about the stifling of democratic engagement. For example, both South Australia's and New South Wales' anti-protest legislation passed parliament within days.<sup>67</sup>

The consequences of criminalisation of protest extends far beyond those directly impacted. The threat of criminal sanctions creates a much broader "chilling effect", wherein citizens are increasingly cautious about voicing dissent in public spaces, due to vaguely defined laws and harsh penalties.

Ultimately, this stifles our ability as community members to challenge our governments and to participate in democracy.

The rate at which protesters are sentenced to imprisonment has also intensified. Prior to 2021, the only recorded case of an activist being jailed was a Tasmanian forestry activist spending 5 months in prison for breaching a suspended sentence.<sup>68</sup> Over the last three years, nine activists in Australia have been sentenced to a combined total of 50 months imprisonment.<sup>69</sup> Five of those people were charged under newly introduced anti-protest laws in NSW and Tasmania, with their sentences totalling 27 months.<sup>70</sup>

Over 200 people have been charged under the new NSW anti-protest laws to date. Most recently, of the 170 people charged for participating in Rising Tide's peaceful blockade of the Newcastle coal port, 138 people were charged under the new anti-protest provisions in the Crimes Act NSW (1900).<sup>71</sup> Police attempted to use the threat of the anti-protest laws to constrain Rising Tide protestors by establishing a line of buoys along an arbitrary line in publicly accessible waters and threatening protestors with charges under the laws if they crossed it.<sup>72</sup>

See **Appendix B** for a list of offences restricting protest rights have been introduced or amended in the last 10 years.

# CASE STUDIES

## **Climate activist sentenced to imprisonment for protesting coal exports in NSW**

In July 2024, Laura Davy, a young woman and climate protester was sentenced to three months imprisonment for allegedly peacefully disrupting part of a coal loading facility at the Newcastle Coal Port for its role in fuelling climate change.

Davy was arrested and charged under broad anti-protest laws rushed through the NSW parliament in 2022 which established harsh penalties for community members who protest. The laws have been widely condemned as draconian and undemocratic, and contributing to a 'chilling effect' on peaceful political participation through protest. NSW's anti-protest laws are now under review, after a push from civil society.<sup>73</sup>

## **Extinction Rebellion activists arrested for paint action, draconian laws rushed through in SA**

In May 2023, four climate activists in their 40s, 50s and 60s calling for action on climate change were arrested after allegedly throwing paint at a Santos building to protest its role in fuelling climate harm.<sup>74</sup> Santos is one of Australia's largest fossil fuel companies and is playing a key role in the expansion of polluting gas.

In response to the Extinction Rebellion's peaceful action, the South Australian Government passed draconian anti-protest laws in under 30 hours, without public consultation.<sup>75</sup> Under the new laws, individuals could now face fines of up to \$50,000 and three months in jail for obstructing a public place, a substantial rise from the previous maximum fine of \$750.<sup>76</sup>



Greenpeace activists abseil off of the Sydney Harbour Bridge, 2019.

## Knitting Nannas challenge draconian NSW anti-protest laws in court

In April 2022, the NSW Government passed sweeping amendments to the *Crimes Act 1900* (NSW) and the *Roads Act 1993* (NSW). These new laws imposed jail terms of up to 2 years and/or fines of up to \$22,000 on protesters who caused disruption to major roads or facilities.<sup>77</sup>

Under the new laws, peaceful protesters gathering at accessible central locations, such as Sydney's Town Hall or Central Station, faced possible imprisonment simply if their presence caused a person wanting to use the facility to be redirected to a different entrance. These changes silenced and intimidated peaceful advocates like the Knitting Nannas.

Two members of the Knitting Nannas, Dominique and Helen — who are mothers, wildlife carers living on the mid North Coast of NSW — launched a legal challenge against the new laws.<sup>78</sup> They asked the NSW Supreme Court to declare the Crimes Act amendment invalid as it unlawfully burdened the implied freedom of political communication protected by the Constitution. They also argued that the Minister's power to declare something a 'major road' in the *Roads Act* was too broad.

Their challenge was partially successful. The NSW Supreme Court invalidated the harshest elements of the Crimes Act amendments because they unlawfully burdened the implied freedom of political communication. This legal win means that peaceful protest activity that merely causes a partial facility closure or causes someone to be redirected will not be punishable by the harsh criminal penalties introduced by the NSW Government. The Knitting Nannas were represented by the Environmental Defenders Office. Grata provided financial backing for the case.



The Knitting Nannas attend a rally Empire Energy's AGM in Sydney / Gadigal Country, 2023.



# RECOMMENDATIONS

## *To protect protest*

### 1. Legal pathways

#### Implied freedom challenges

While the Australian Constitution doesn't contain an express right to protest, the High Court has found that because the constitution establishes Australia as a representative democracy, we have an implied freedom of political communication<sup>79</sup> which includes peaceful protest.<sup>80</sup> This means that governments cannot lawfully pass legislation that removes or severely limits a person's implied right to engage in political communication, or relevantly, protest. Where an anti-protest law places onerous limits on an individual's ability to protest, it may be possible to argue that it 'impermissibly burdens' the implied freedom of political communication and is thus invalid.

The court will consider whether the legitimacy of the law exceeds the implied limitation by assessing:

1. Whether the law burdens the freedom in its terms, operation or effect;
2. If yes, whether the purpose of the law is legitimate i.e. is it compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If yes, whether the law is reasonably appropriate and adapted to advance that legitimate object in a way that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.<sup>81</sup>

The implied freedom was successfully (partially) argued in the Knitting Nannas case as detailed above and in the High Court case of *Brown v Tasmania* which challenged a Tasmanian law that limited protest on forestry land.



Invasion Day protest, Sydney / Gadigal.

#### Responding to fines

If a protester is issued with an on-the-spot fine or penalty notice, they may be able to challenge it in court.

Based on the factual circumstances of the fine being issued, and the power to issue the fine under the relevant state or territory legislation, a protester may be able to challenge the fine by arguing:

- That the penalty notice is not valid or does not comply with the regulating act i.e. if the notice is not specific enough/does not specify a penalty notice offence;
- That the notice was issued in error i.e. that the protester was not engaging in the conduct that would warrant the fine being issued; or
- That there were extenuating circumstances.

If a protester is successful in arguing that the notice is not valid or that they had extenuating circumstances, this could potentially set a precedent for other protesters who received penalty notices for the same protest action.

In most jurisdictions, a protester could ask for a review of the fine by the relevant agency i.e. Revenue NSW. In response to the review application, you may be ordered to pay the fine (this could be appealed in court); may be issued a caution with no fine; or the fine may be cancelled.

A fine can also be disputed by electing to go to court. This usually occurs in a local or magistrates court across the states and territories. This will require a protester to enter a plea of either guilty or not guilty.

If the court finds the protester not guilty, the fine will be dismissed. If the protester pleads guilty or is found guilty by the court, the court will usually impose a penalty during sentencing. There are some risks in electing to go to court, for example, the court may order heavier penalties than a penalty notice fine, such as maximum fines, a criminal conviction and/or imprisonment, so it is important that the protester receives legal advice before making a court election.

### *Responding to harsh sentences*

If a protester is sentenced to time in prison, they may be able to appeal the sentence on various grounds, including that they are not a risk to the community. Generally, an appeal against sentence involves a rehearing on the basis of evidence given at the first instance proceedings, but fresh evidence may also be given. The judge can allow the appeal and quash the conviction entered and/or resentence the protester; or dismiss

the appeal, which means the original sentence will stand. There is a risk that a Judge could impose a harsher sentence on appeal, so it is important that the protester receives legal advice before appealing.

### *The necessity defence and the emergency defence*

There is a common law defence of necessity that has been used successfully overseas by climate protesters facing criminal charges, including in the UK, USA, Switzerland, France and Germany.<sup>82</sup> The necessity defence is a complete defence in circumstances where the accused broke the law to avoid even more dire consequences.

The basic elements of the defence are:

1. the criminal act must have been done in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he or she was bound to protect;
2. the accused must honestly have believed on reasonable grounds that he or she was placed in a situation of imminent peril; and
3. the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided.<sup>83</sup>

The common law defence of necessity is available in NSW, Victoria and South Australia. In arguing the defence, the climate activist is saying that their conduct was not unlawful because it was a proportionate response to the situation of imminent peril.

In Queensland, climate change activists have unsuccessfully attempted to use the extraordinary emergency defence (which is a version of the necessity defence) contained in the Queensland Criminal Code.<sup>84</sup> This defence excuses or allows a criminal act in circumstances of a sudden



or extraordinary emergency if an ordinary person possessing ordinary power of self-control could not be expected to act otherwise.<sup>85</sup>



*School Strike for Climate protest, Sydney / Gadigal Country, 2019.*

The necessity and emergency defences are yet to be successfully argued by climate activists in Australia. To successfully argue the necessity and/or emergency defence, climate activists will first have to get over the hurdle at the preliminary stage that the defence can be raised – they will have to show that they have a basis for the defence before it can be argued. If this is successful, climate activists will need to engage climate scientists as expert witnesses to provide evidence of the climate emergency, and why it is a situation of ‘imminent peril’ (under the common law) or “sudden or extraordinary emergency” (under the Queensland Criminal Code) that justifies the use of the necessity/emergency defence. Even where the defence is not permitted to be argued, there is a chance that evidence raised in relation to the necessity or emergency defence may be considered as a mitigating factor in sentencing.

Due to the differing elements of the defence at common law and in the Queensland Criminal Code, it appears that a possible pathway may be to argue the emergency defence under the Queensland Criminal Code as it may be easier to make out that the climate emergency is a sudden emergency (for example, in the context of a protest in response to a natural disaster) or extraordinary emergency rather than a situation of imminent peril as required under the necessity defence.

## ***2. Policy & legislative pathways***

### ***Repeal or amendment of anti-protest laws***

The anti-protest laws listed in Appendix B would likely require repeal or amendment in order to be compliant with Australia’s international human rights obligations. Australia is a party to the International Covenant of Civil and Political Rights (‘ICCPR’)<sup>86</sup> and has an obligation to respect and ensure the right to peaceful assembly enshrined in Article 21. It also has an obligation to take legal and other measures to achieve this purpose. Under Article 21, any restriction on the right to protest must be necessary, proportionate and justifiable in a democratic, pluralistic society which respects human rights. Restrictions on protest rights can only be imposed in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. They must also be the least intrusive among the measures that might serve the relevant protective function.<sup>87</sup>

Moreover, they must be proportionate, which requires a values assessment, weighing the nature and detrimental impact of the interference on the exercise of the right against the resultant benefit to one of the grounds for interfering. If the detriment outweighs the benefit, the restriction is disproportionate and thus not permissible.<sup>88</sup>

Article 21 imposes an obligation to protect disruptive protests as long as they remain peaceful. Temporary disruptions caused by protest do not undermine the duty that governments and their agencies have to guarantee the right to protest and to protect protesters – mere disruption of vehicular or pedestrian movement or daily activities does not amount to violence at law.<sup>89</sup> Assemblies are a legitimate use of public and other spaces, and since they may entail by their very nature a certain level of disruption to ordinary life, such disruptions must be accommodated, unless they impose a disproportionate burden, in which case the authorities must be able to provide detailed justification for any restrictions.<sup>90</sup>

Many of Australia's anti-protest laws could be argued to fall foul of these obligations due to the disproportionate restriction they place on protest without adequate justification. The most common justifications for anti-protest laws in Australia have been protests causing disruption and impacting public safety. Mere disruption of vehicular and pedestrian movement has been used to justify severe penalties, while the public safety concerns evoked in the introduction of anti-protest laws have sometimes relied on unsubstantiated or even false accounts of the impact of protests on first responders or workers.

In South Australia, for example, the Premier's claims that harsher laws were needed because climate protests had

hindered ambulances were rejected by the Ambulance Union.<sup>91</sup> In Tasmania, the Attorney General confirmed there had been zero forestry worker injuries reported as a result of protests, despite this claim being the main impetus for introducing harsher penalties for anti-logging protests.<sup>92</sup>



*Activists hold an occupation of public housing due to be demolished, Sydney, 2023.*

### Consideration of compatibility of new laws with the right to public assembly

Under Article 21 of the ICCPR, Australia must ensure that domestic law recognises the right of peaceful assembly.<sup>93</sup> The Commonwealth, Western Australia, South Australia, New South Wales, Tasmania and the Northern Territory all currently lack legislative recognition of the right of peaceful assembly, meaning the human rights compatibility of laws restricting protest does not need to be considered by law-makers. The introduction of robust human rights legislation in these jurisdictions would ensure human rights compatibility is taken into account in the consideration of laws that have the potential to restrict protest.



While Victoria, Queensland and the ACT recognise the right to peaceful assembly in their respective human rights legislation, the protective capacity of this legislation is limited by the way it operates. For example, the *Victorian Charter of Rights and Responsibilities* allows 'reasonable limitation' on relevant rights if this limitation is necessary for a legitimate reason.<sup>94</sup> The 2022 Timber Harvesting Zone anti-protest laws<sup>95</sup> were assessed by the Victorian Parliament's Scrutiny of Acts and Regulations Committee to impose only 'reasonable and justified' limitations on the rights in the Charter.<sup>96</sup> This is contrary to the assessment of civil liberties advocates,

including the International Network of Civil Liberties organisations which used the laws as an example of Australia not living up to its international human rights obligations.<sup>97</sup> Human rights legislation requires a strong limitations clause which provides for robust consideration of the factors that inform the consideration of whether a limitation is reasonable and justified, such as that contained in the *Queensland Human Rights Act*.<sup>98</sup> Both Queensland and Victorian human rights laws also allow parliaments to override the laws in extraordinary situations – the limitations this places on their effectiveness is discussed in the 'Government Misuse of Emergency Powers' section of this report.



Rally outside the Federal Court in support of Uncle Pabai and Uncle Paul & the Australian Climate Case, Melbourne / Naarm, 2023.

# THEME 3: OVER-POLICING

As a party to the International Covenant of Civil and Political Rights ('ICCPR'),<sup>99</sup> Australia has an obligation to respect and ensure the right to peaceful assembly. These obligations extend to state agencies, including the police. This means that police are obligated by international law to protect the right to protest and ensure that public participation in protest activities is facilitated peacefully and safely. However, gathered evidence, outlined below, shows that police overwhelmingly approach protests as a risk to public safety and deploy disproportionate numbers of officers, who in many cases engage in heavy-handed, unsafe and sometimes violent conduct towards protestors, ultimately repressing the right to protest.



Police at a Pro-Palestine protest, Sydney.  
Photographer: Jack Murrar

First Nations and culturally and racially marginalised communities face particular risks from heavy-handed policing of protest. Police are more likely to use violence against these communities<sup>100</sup> and the marginalisation of these communities in the form of visa status, job security and

other socio-economic factors<sup>101</sup> makes their interaction with the legal system more high-risk. Gathered evidence also shows that LGBTQIA+ people,<sup>102</sup> people of colour,<sup>103</sup> children<sup>104</sup> and people with disabilities<sup>105</sup> have been particularly impacted by the heavy-handed and militarised policing of protest.

This section details several concerning over-policing themes that threaten the right to peaceful protest, including high-visibility policing, excessive use of force and use of dangerous police weapons, misuse of move on directions, misuse of stop and search powers, police privacy infringements and use of surveillance, police obstructing accountability, and misuse of bail conditions.

## High-visibility policing

As described earlier in this report, there has been a concerning increase in legislation that criminalises ordinary, peaceful protest activity across Australia. A corollary of this theme is the growing high visibility presence of police at protest gatherings, and evidence of many instances where officers exercise their powers to issue directions, use force, use weapons, surveil, and detain and charge individuals to an unjustified and excessive degree, as outlined in subsequent parts of this report. High visibility policing is a policing strategy that relies on deploying large numbers of police in public with a pre-emptive rationale that high visibility disrupts crime or public disorder.<sup>106</sup> An additional rationale is that high visibility policing has a reassurance effect on the public that the state is tough on crime and can manage public disorder.<sup>107</sup>

In March 2024, Legal Observers NSW released a report on the policing of weekend pro-Palestine street marches in Sydney. The report described the policing of fourteen weekly street rallies, with 100 to 150 police officers often present at each rally, despite no incidents of violence or disturbance occurring at the protests.<sup>108</sup> In Victoria, Melbourne Activist Legal Support have frequently reported over-deployment of police, with at least one recorded incident of police outnumbering protesters.<sup>109</sup> At arms conference protests in Melbourne in September 2024, 2,000 police officers were deployed for about 1,200 protestors, with officers from NSW and Queensland sent down for the protest.<sup>110</sup> Recently, the supposed necessity of deploying high numbers of police at protests has been used in NSW and Victoria as a pretext to suggest police should be able to restrict protests on the basis of their policing being too costly.<sup>111</sup>

The deployment of high numbers of police at protests has contributed to obstructive and dangerous police manoeuvres. During at least two protests, the enforcement of police lines obstructed an injured person's access to an ambulance.<sup>112</sup> The 'kettling' of protesters – forming police lines that restrict them in a small area and prevent them from leaving – has been recorded by legal observer groups on at least five separate occasions.<sup>113</sup> In one incident, a child in a pram had to be lifted up by the crowd from a kettle formed by NSW Police, even after officers had been made aware there were children in the crowd.<sup>114</sup> Four other incidents of excessive use of police force against children during high deployment of police at protests have been recorded and are set out in the section below. In another, protesters who were attempting to comply with a move on order were prevented from doing so by the police kettle.<sup>115</sup> Kettling has been criticised for the risk it poses to protesters and its escalatory effects.<sup>116</sup>

### Excessive use of force by police and harmful use of police equipment

51 incidents of excessive use of force against people protesting by police in restraining and moving protesters have been reported in 2019–2024.<sup>117</sup> These have included police using dangerous holds such as headlocks and chokeholds, placing knees on protesters' heads and faces and necks, and police pushing protesters to the ground. Resulting injuries have included a perforated eardrum,<sup>118</sup> serious bruising,<sup>119</sup> soft tissue damage,<sup>120</sup> scarring from scratches,<sup>121</sup> a broken arm<sup>122</sup> and a sprained finger.<sup>123</sup> Police uses of excessive force were recorded to occur with little justification – for example, three police officers tackled a person of colour to the ground at a Sydney pro-Palestine rally due to him being observed to have opened and close his bag erratically, and in circumstances where the person attempted to calmly walk away from police.<sup>124</sup> The deployment of high numbers of police at rallies has made police-protestor interactions that involve excessive use of force by police in response to relatively innocuous conduct from protestors more likely.

The policing of protest has become increasingly militarised over the last decade, with more frequent deployment of OC spray (pepper spray), tear gas, batons, rubber bullets and flash-bang grenades. The use of OC spray has intensified in the last year, having been used at 11 protests in 2023 and 2024, compared to seven in the 5 years prior.<sup>125</sup> Police deployment of OC spray at a total of 18 protests in 2019–2024 has resulted in over 200 people needing to be treated by street medics.<sup>126</sup> In at least five of these incidents, police were reported to have deployed OC spray directly in the face of a protester.<sup>127</sup> In one incident at a Sydney Black Lives Matter rally, police kettled 40–60 protestors attempting to



leave the rally in Central Station and then pepper sprayed them.<sup>128</sup>

OC spray, tear gas and flash bang grenades have been recorded as being used against protesters who were moving away from police and complying with police directions, contrary to police use of force guidelines.<sup>129</sup> Rubber bullets used at protests in Melbourne in September 2024 resulted in at least twenty people being treated for resulting injuries, with one person suffering a perforated eardrum.<sup>130</sup>

A 2023 submission to the UN Special Rapporteur on Torture, based on the monitoring of protest policing in Victoria over several years by Melbourne Activist Legal Support, showed that police have consistently used weapons and force in ways that can constitute cruel, inhuman or degrading treatment as per the *Victorian Charter of Human Rights and Responsibilities 2006* and *Australia's international human rights commitments*.<sup>131</sup>

At least three instances have also been recorded of police using handcuffs in dangerous ways and on protesters who were complying with arrest.<sup>132</sup> In one incident a NSW Police officer was reported to have handcuffed a protester, who was a person of colour, so tightly that their hands went numb and began to feel painful, with police not removing the handcuffs for 20 minutes after being made aware of the person being in pain.<sup>133</sup> The use of police horses in protests in NSW and Victoria has been recorded to result in police riding horses into crowds on at least four occasions, creating conditions where horses could easily injure protestors.<sup>134</sup> Police have also been recorded exercising their powers in ways that endanger protestors. For example, at the Rising Tide protests in Newcastle in November 2024, police were recorded to have confiscated the oars of several kayakers participating

in the protest, including older people, and left them to float on the water with no way to get back to shore.<sup>135</sup> Police also towed several kayakers whose oars they had confiscated back to shore and later claimed that this was a necessary 'rescue'.<sup>136</sup>

At least three recorded incidents of excessive use of force involved people with disabilities, with police in one instance removing a person from their wheelchair and forcefully moving and damaging a wheelchair in another.<sup>137</sup> Children have also been impacted by excessive use of force and dangerous use of police equipment, with a 12 year old girl pushed by Queensland police,<sup>138</sup> at least four children of ages 16 and under pepper sprayed by police at street rallies in NSW and Victoria and a baby in a pram caught up in a police kettle.<sup>139</sup>



Police at a Pro-Palestine protest, Sydney. Photographer: Jack Murray

### Misuse of move on orders

Police powers to move on individuals participating in a protest have been gradually expanded in law and practice, with new laws in NSW giving police the power to order protestors to leave an area.<sup>140</sup> These powers are subject to restrictions –



in NSW, for example, the protesters' conduct must pose a serious risk to safety or, if the protest isn't authorised, obstruct traffic. However, Legal Observers NSW has reported four incidents of protesters being given a move on order where no risk to safety or obstruction of traffic was occurring.<sup>141</sup> This has included a group of people who had previously participated in a protest sitting in a park being moved on<sup>142</sup> and a 13 year old girl being given a move on order at a School Strike 4 Climate protest.<sup>143</sup> In another instance, a person who had been participating in a stationary pro-Palestine rally received some distressing news and was sitting on the steps of Sydney Town Hall to recover when they were issued a move on order by police and threatened with physical removal if they did not comply.<sup>144</sup> Police have issued move on orders in such a way that protesters could not hear them and only became aware of it when police began arresting them for not complying.<sup>145</sup> In one instance at a protest in Sydney, only one officer issued the order and legal observers less than 5 metres away from him were unable to hear it, and police began arresting individuals for not complying with the move on order less than 10 minutes after issuing it.<sup>146</sup>

### *Misuse of stop and search, ID powers*

The use of stop and search powers that harass and intimidate activists has been recorded in several instances. Police have used the pretext of random breath testing and minor traffic infringements to justify pulling over individuals they suspect to be connected to protest activity and question them. In 2023–24, police in NSW were observed to target cars with Palestinian flags for stop and searches, with drivers being fined for such infringements such as P plates being tucked under a number plate instead of on a bracket.<sup>147</sup>

In Newcastle in November 2022, police pulled over a local childcare worker who was living in accommodation that police suspected had connections to Blockade Australia. She was ostensibly stopped for a random breath test, but then told by another police officer that he had intelligence to suggest she was involved in the Blockade Australia protests. One of the police officers reported to a colleague that the car was “straight as anything”, he couldn’t “find anything on her”, he couldn’t “defect it”, and that he “even checked the window wiper fluid”.<sup>148</sup>

In the lead-up to the 2022 International Mining and Resources Conference (IMARC), five activists were stopped in cars by NSW Police seemingly based on the recognition of their number plate, according to Legal Observers NSW. Police searched their cars and justified these searches as based on the suspicion that these individuals would engage in the IMARC protest having previously engaged in other protests. One of the cars was defected despite it having undergone a recent service.<sup>149</sup>

Individuals at pro-Palestine rallies in Sydney have also been directed to take off their facial coverings and keep them off in order to enter the protest,<sup>150</sup> which is not a power police have under the provision relating to briefly removing facial coverings for ID purposes.<sup>151</sup>

### *Police privacy infringements and use of surveillance:*

Police have used their powers in ways that significantly impact the right to privacy of individuals participating in protest. In Western Australia, police have executed search warrants, production orders and data access orders to raid the homes of protest participants, seize electronic devices, and demand that journalists hand over protest footage and sources.<sup>152</sup>



Police at a Pro-Palestine protest, Sydney.  
Photographer: Jack Murrar

Police have also deployed several forms of surveillance in relation to protestors. This includes the covert surveillance of individuals on private property as a form of preemptive policing, metadata collection from phones and other telecommunication devices, the use of facial recognition technology, and the forensic investigation of CCTV and social media footage from protests.<sup>153</sup> NSW has a Public Order and Events Intelligence Unit of 8 officers which is responsible for the centralised collection, analysis and dissemination of intelligence related to “issue motivated groups”.<sup>154</sup> “Issue motivated group” is a classification used by NSW Police for coalitions or groups of individuals whose actions are inspired by a common interest, goal or ideology.<sup>155</sup> This broad term justifies surveillance against any group of people acting towards a common interest. Mass surveillance of protestors via CCTV towers and Evidence Gathering Teams filming the crowd has been recorded at over 40 street rallies in Victoria, NSW and Queensland, capturing tens of thousands of protestors.<sup>156</sup>

Human rights organisations and experts have criticised such measures for often being deployed in secret, without a clear legal basis and weaponised in order to

deter individuals and communities from participating in protest activities.<sup>157</sup> The surveillance of protestors has been used to inform pre-emptive policing that identifies individuals likely to engage in a protest and seeks to deter them from doing so. At least 133 homes across NSW, Victoria and Queensland have been visited by police in the leadup to protests, with police informing individuals that if they choose to participate in a particular protest without police authorisation of the protest, they may be engaging in illegal activity.<sup>158</sup>

### *Police obstructing accountability:*

Simultaneous to this over-policing, police have engaged in actions that obstruct accountability and monitoring of protest policing. Police have frequently been recorded failing to follow ID requirements, with incidents of police removing ID badges before engaging in excessive use of force against protestors and frequent covering up of badges with high-vis vests by NSW Police.<sup>159</sup>

Police have also obstructed independent legal observers in 12 recorded incidents. Legal observers attend protests in a<sup>160</sup> volunteer capacity to protect the rights of protestors and improve police accountability. Legal observers usually wear clothing to identify their legal observer status, hand out legal information to protestors, take notes and photographs, and record interactions between protestors and police. They are recognised as Human Rights Defenders by the Office of the United Nations High Commissioner for Human Rights and are protected under the Declaration on Human Rights Defenders.<sup>161</sup> Despite this, police in New South Wales and Victoria have been known to arrest, physically shove and seize the property of legal observers at protests.<sup>162</sup>

## Misuse of bail conditions

With protest increasingly cast as a criminal activity, police have sought to use bail conditions to restrict the capacity of individuals to engage with activist groups and participate in protest. Between 2019–2024, 64 protesters in NSW have been subject to police bail conditions that ban them from associating with either members of a specific protest group or “issue motivated groups” generally.<sup>163</sup> This condition casts protest groups as primarily directed towards criminal activity and seriously restricts the capacity of individuals to participate in political communication and freedom of assembly.

Protesters have also been placed on house arrest during bail, with one protester unable to leave the house for 21 days<sup>164</sup> and another for 42 days.<sup>165</sup> Curfews have been imposed limiting the time that protesters can spend outside of home to as little as 8 hours a day.<sup>166</sup> Individuals have been recorded to have had to report to the police as often as 3 times a week as part of their bail conditions.<sup>167</sup> Police have also used bail to exclude protesters from places where protests commonly take place, with two activists banned from Sydney CBD.<sup>168</sup>

In June 2022, NSW Police imposed bail conditions on at least one Blockade Australia activist that would prohibit the

use of encrypted communication apps such as WhatsApp and Signal.<sup>169</sup> NSW Police also imposed conditions forcing the activists to hand over any communications device to police and provide passcodes upon request. Digital Rights Watch labelled these conditions “deeply concerning and a huge overreach”.<sup>170</sup>

## Mistreatment in custody

Police violence towards protesters has extended to their treatment in custody. Independent legal observer reports have recorded 11 instances where police mistreated protesters in police custody in 2019–2024. These have included police taking over an hour to call for medical attention for a protester’s epilepsy seizure after she alerted police she was about to experience one<sup>171</sup> and police failing to provide an elderly person with their prescribed course of medication as requested.<sup>172</sup> Two activists spent 17 days in solitary confinement after being denied bail, due to a staff strike at the correctional facility.<sup>173</sup> Incidents have also been recorded of homophobic remarks by police, such as an officer calling a protestor in custody “worthless f\*ggot”<sup>174</sup> and ongoing deadnaming (referring to someone by their birth name when they have changed their name as part of a gender transition) of a trans protester by police despite several requests from the protester and their lawyer to use their legal name.<sup>175</sup>

# CASE STUDIES

## **Police violence against peaceful theatrical action at pro-Palestine rally**

On 23 March 2024, a group of 3 people weekly Pro-Palestine rally in Sydney engaged in a theatrical “die in” along the march route, with protesters splashing a water-based red solution on themselves to symbolise blood. The solution was made out of corn syrup, water and red food dye. Legal Observers NSW recorded that as the protesters splashed the solution on themselves, a small amount got on the uniform of a nearby police officer.<sup>176</sup>

Legal Observers NSW reported that the police moved in quickly to make arrests, violently grabbing and shoving protesters, which resulted in another officer getting the solution on her uniform. One activist who had a bottle in his hands but had not yet splashed it on himself was grabbed by 4–5 officers, with one of them placing a hand on the protester’s neck as he was being moved. The protester was put on the ground, with a police officer placing a knee on his back despite the protester already being incapacitated and complying with police.

The three protesters were charged with assaulting police. Legal Observers NSW noted in their report of the incident that the regular deployment of 100–150 police officers at the weekly pro-Palestine rallies created greater potential for escalation at an otherwise peaceful protest and that protest organisers played the primary crowd management function at rallies.<sup>177</sup>

## **Rising Tide activists forced to accept restrictive bail conditions in NSW**

In November 2023, hundreds of people concerned about climate change took part in an on-water blockade of the Newcastle Coal Port – the world’s largest coal port. Of the 109 protesters who were arrested for their involvement in the peaceful action, sixteen were held in custody until they agreed to punitive bail conditions. These included broad non-association orders with any “issue-motivated group”, including communication via a third-party or on social media. Examples of “issue-motivated groups” listed included Rising Tide, Blockade Australia, Extinction Rebellion and Cop28 [sic from police bail conditions].<sup>178</sup>

## Activist banned from City of Sydney for poster

In March 2023, an activist stuck an A4 piece of paper to the statue of Lachlan Macquarie in Hyde Park with a quote from Macquarie ordering the mass murder of First Nations people in Sydney. The activist was charged with property damage and banned from going within 2km of Sydney Town Hall by police bail conditions. He was subsequently taken into custody for breaching bail by going to Sydney Town Hall to participate in the School Strike 4 Climate. The conditions were removed by a Magistrate on the basis of them not being appropriate.<sup>179</sup>

## Policing of IMARC protests

Between 19–31 October 2019, a group of people protested fossil fuel companies fueling climate change in the vicinity of the International Mining and Resources Conference (IMARC) in Melbourne. People protesting linked arms at the entrance to the conference centre and did not move when told to do so by police. Independent legal observers from Melbourne Activist Legal Support monitored and reported on the police response. Police proceeded to advance on the protesters with batons, punches, kicks, the dangerous use of horses and OC spray.<sup>180</sup> Several incidents were recorded of police grabbing, holding, pulling, or restraining people by their necks. Protesters reported that police action resulted in bruising, scratches, soft tissue, ligament damage and intense pain from OC spray. About 50 people were treated for OC spray exposure. In many cases recorded by observers, police failed to give directions, commands or orders prior to using force and used crowd control tactics that generated confusion and exposed protesters to injury. A class action regarding the use of OC spray by Victoria Police at this protest is ongoing.<sup>181</sup>

In 2022, IMARC moved from Melbourne to Sydney for the first time in eight years. Earlier that year, NSW had introduced the harshest anti-protest laws in Australia.<sup>182</sup> In the lead-up to the 2022 IMARC, police in NSW, Victoria and QLD visited over 120 homes of individuals connected to protest to warn them that protests at IMARC may constitute an unauthorised public assembly and be subject to prosecution under the new anti-protest laws.<sup>183</sup> Those questioned included a 16 year old on their way home from a peaceful climate rally, the relatives of activists and members of a university climate collective.<sup>184</sup> Several people were told that the police would keep coming back to their home until they were there to answer their questions.<sup>185</sup> The vast majority of those questioned had no intention to protest at IMARC, with some not even knowing it was on. In the course of these visits, NSW Police misrepresented the nature of the Form 1 protest protection system in NSW, stating that it is an offence to protest without completing a Form 1.<sup>186</sup>

Five activists across NSW were pulled over by police seemingly based on number plate identification and had their cars searched and checked for defects. Police justified the search as based on the suspicion that the relevant individuals would engage in unlawful assembly based on having previously participated in protest.<sup>187</sup>



# RECOMMENDATIONS

*To protect protest*

## 1. Legal pathways

### Intentional tort claims

A tort is an act or failure to act that causes injury or harm to another person or people. Courts can hear cases about torts and hold the person who committed the tort responsible to a civil, rather than criminal standard.

Police in each state and territory have a range of powers to help them protect the community and respond to crime. Those powers are regulated by legislation and common law principles, which place limits on how and when police are allowed to use their powers, especially involving force or arrest.

If police use unjustified and excessive force against protest participants or legal observers, including through the use of physical contact, tasers and OC spray, searches, seizure of property or threats of arrest actions, they may be acting beyond their powers. If so, there may be grounds to bring an assault, battery or false imprisonment claim against the police. If successful, these types of claims could result in compensation, an apology, disciplinary action against officers and changes to police policy.

In 2020, Professor Simon Rice, a University of Sydney law professor and Chair of Law and Social Justice, was violently arrested and fined on the sidelines of a student protest. Professor Rice successfully sued NSW Police for assault, battery and false

imprisonment. Judgement was entered in his favour by consent in September 2023. There is a class action currently before the Supreme Court of Victoria concerning Victoria Police's use of OC spray on protesters demonstrating outside the IMARC conference in October 2019. The lead plaintiff is arguing that Victoria Police's use of OC spray at the protest was unlawful as an assault, battery and breach of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Three protesters are also suing Victoria Police in relation to alleged assaults during a 2023 trans rights rally, including an officer punching one protester in the throat.<sup>188</sup>

Other intentional torts are also noted below in the context of challenging search warrants and other orders that compel production.

### Discrimination claims

Federal, state and territory legislation provides protection to individuals from discrimination on the basis of various protected attributes such as age, race, disability and sex, subject to limited exceptions. If police have targeted a particular individual or group involved in protest activities and their conduct is discriminatory on the basis of a protected attribute, there may be grounds to bring a claim of direct and/or indirect discrimination against police. For example, if there is a disproportionate issuing of fines targeting a particular racial group such as First Nations people, an argument may be made that the act constitutes unlawful discrimination on the basis of

race, in contravention of s 9 of the Racial Discrimination Act 1975 (Cth). It would need to be shown that police decisions to stop, fine, arrest or question First Nations protesters were made on the basis of race rather than a legitimate policing reason.

Remedies available under discrimination law include declarations that unlawful discrimination has occurred, compensation, apologies, and orders to stop the discriminatory conduct.

### Administrative law challenges

Where invasive search warrants, data access orders and other production orders are executed by police against protesters or journalists, there may be grounds to challenge the validity of those orders and their execution if they had limited lawful basis or were beyond power. Such an argument could, in turn, ground a claim in tort of trespass if police relied on an invalid search warrant to enter premises, or the tort of conversion if police seize personal property without a lawful basis.

When exploring these types of challenges, it is useful to interrogate whether the search warrant, for example, meets the relevant requirements. In *Smethurst v Commissioner of Police*, the High Court found that a search warrant relied upon by the Australian Federal Police in raiding a journalist's home was invalid because the alleged criminal offence identified on the warrant was misstated and lacked sufficient precision.<sup>189</sup>

### Right to privacy challenges

The right to privacy is enshrined in various international treaties but is principally protected at a domestic level in Australia under the *Privacy Act 1988* (Cth), in privacy and health information legislation at a state/territory level, and in human

rights legislation in the Australian Capital Territory, Queensland and Victoria. However, there are limited avenues for enforcement under these various domestic privacy regimes.

The use of police surveillance technology against protesters could potentially be challenged as a breach of an individual's right to privacy. Under human rights legislation, for example, privacy provisions are generally framed in terms of an individual's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with,<sup>190</sup> and police are generally subject to certain obligations not to interfere with this right under these frameworks.



Stop Adani x GHD action, Sydney, Gadigal Country, October 2019.

In the Australian Capital Territory, the police's unlawful or arbitrary interference with a protester's right to privacy could ground a direct claim in the Supreme Court. In Queensland and Victoria, a claim alleging the breach of the right to privacy under human rights legislation could also be piggybacked onto another claim challenging the police use of surveillance or search powers, such as an administrative law challenge.

Beyond these statutory rights of action, there may be scope to explore the development of a common law tort for the serious invasion of privacy.

## Responding to misuse of bail conditions

If a protester is arrested during the course of a protest, they will normally be taken to a police station, charged, and then police will decide whether or not to release the protester either with or without bail, or to grant bail with certain bail conditions. Bail covers the period until the case goes to court.

If a protester is released with harsh bail conditions (noting some protesters have been issued with bail conditions that prevent them from leaving the house, not associating with the relevant protest movement, not associating with specific people, and giving communication devices to police), they may be able to seek to have bail conditions changed or removed by a court.

A protester may argue in front of a Magistrate that bail conditions should be varied or removed as:

- The conditions are oppressive or overly harsh such that they are not reasonable;
- The conditions are disproportionate to the offence;
- That the protester is not a threat/risk to individuals or the community;
- That the conditions are more onerous than are necessary;
- That the conditions are not reasonably practicable; and/or
- That the individual does not pose a bail concern.

For example, in an 8 February 2024 NSW Supreme Court decision (*R v Margaret Pestorius*) on the bail of an activist charged with unlawful assembly and behaving in an offensive manner in a public place, Justice Wright came to the conclusion that the person did not pose a bail concern simply on the basis of being part of protest

actions in the past and police bail was therefore not validly applied.

## Implied freedom challenges/ freedom of information processes

It may be useful to engage in freedom of information processes and additional correspondence with police to understand the legal basis they are relying on when using surveillance and data tracking technology against protesters.

In certain situations, even if the surveillance activity appears to be authorised by a particular piece of legislation, there may be grounds to challenge the validity of that application of the legislation on the basis that it impermissibly burdens the constitutionally implied freedom of political communication. This would be particularly relevant where the measures being taken appear to be for the purpose of preemptively policing or deterring protesters, and even potential protest participants, from participating in democratic processes and public life.



School Strike for Climate rally, 2019.

## 2. Policy & legislative pathways

### Using accountability mechanisms to secure reviews of police conduct at protests

State police accountability bodies can investigate allegations of police misconduct and issue recommendations on the basis of these investigations. Bringing complaints through these bodies can increase accountability for individual instances of misconduct and, in some states, has the potential to trigger systematic reviews of certain policing practices. However, the reach of existing police accountability bodies is limited and there is no independent body that is empowered to investigate all complaints against police, make disciplinary decisions and conduct public interest investigations.<sup>191</sup> In order to be compliant with its obligations under the ICCPR, Australia must ensure that perpetrators of human rights violations, and specifically those perpetrated by police authorities, are adequately held to account through independent, effective and impartial investigation into their conduct.<sup>192</sup> The establishment of independent police accountability bodies in each jurisdiction is a necessary step to enable effective accountability and comply with our human rights obligations.

### Changing policing practice

Protest policing in Western democracies contains a mix of policy approaches. The approach emphasising significant police presence, pre-emptive policing, the use of police weapons and high levels of surveillance is known as 'strategic incapacitation'.<sup>193</sup> Strategic incapacitation has increasingly become the default for protest policing practice in Australia, although it

exists alongside a 'negotiated management' approach that aims for protester-police communication and minimising police intervention in protest.

Melbourne Activist Legal Support have analysed the way strategic incapacitation of protests interferes with the right to peaceful assembly and shrinks the space available for democratic participation.<sup>194</sup> The assumption underlying strategic incapacitation is that disruptive protest is not a legitimate exercise of the right to public assembly and that the state is justified in seeking to intimidate and exercise violence on protesters who disrupt ordinary life. This policing approach is not in keeping with Australia's obligations under Article 21 of the ICCPR and should not be deployed. Instead, policing of protest should be guided by the duties of police and other public agencies to uphold the right to peaceful assembly. This can be facilitated by operating procedures and police policies clearly setting out the duties and responsibilities of police in responding to protests, as required by Article 21.<sup>195</sup>

### Regulating the use of dangerous police weapons at protests

Legislation regulating the use of dangerous police weapons at protests would serve to protect protesters from the growing risk of serious injury from police deployment of weapons at protests. This may include prohibiting the use of all types of explosive devices, such as stinger grenades and flash-bangs, OC aerosols, kinetic impact projectile weapons and police horses against people involved in peaceful assembly, including assembly that is disruptive. In the absence of legislation, police policy can be modified to eliminate or, at the very least, reduce, the use of dangerous police weapons at protests.



### Creating and upholding police obligations and creating mechanisms for redress

Robust state and federal human rights legislation would help enshrine the obligations of police to protect and uphold the right to peaceful assembly. This includes exercising their powers in such a way as to protect peaceful assembly in line with international human rights law and respecting the role of independent legal observers. Human rights legislation must be drafted and implemented in a way that ensures its incorporation into policing policy and practice. For example, Victoria's Charter of Human Rights and Responsibilities provides that it is unlawful for police to act in a way that is incompatible with a human right or fail to give proper consideration to a relevant human right when making a decision. However, there has not been any substantial development of human rights-based policies and guidance around the

use of force or the use of specific weapons or equipment by Victoria Police since the introduction of the Charter.<sup>196</sup>

Human rights legislation can also act as a mechanism to provide redress for individuals whose right to peaceful assembly and freedom of movement, expression or association have been unfairly restricted. To play this function, human rights legislation must give individuals access to effective remedies, including alternative dispute resolution regarding breaches of their rights, enable them to make a complaint to an independent body such as a court or tribunal, bring a judicial review action for a breach<sup>197</sup> and seek compensation when a court or tribunal determines that administrative action does not adequately address the harm the person has experienced.<sup>198</sup> Existing human rights legislation in Victoria, Queensland and the ACT requires amendment to provide adequate redress for breaches and serve as an effective mechanism for protecting the right to public assembly.



School Strike for Climate rally, Sydney, Gadigal Country.



# THEME 4: Government misuse of emergency powers

During extreme situations that pose a widespread threat to life or property (such as war, environmental disasters, pandemics, terrorism threats), Australian governments may use emergency powers that allow them to suspend their normal functions and act in ways that are considered to be beyond the scope of their powers in ordinary circumstance. However, the use of emergency powers often also results in temporary limitations to the human rights and democratic freedoms of citizens. It is therefore important that emergency powers are only used in extraordinary circumstances. Any restrictions on human rights should be, at a minimum:

1. provided for and carried out in accordance with the law;
2. directed toward a legitimate objective;
3. strictly necessary in a democratic society to achieve the objective;
4. the least intrusive and restrictive available to reach the objective;
5. based on scientific evidence and neither arbitrary nor discriminatory in application; and
6. of limited duration, respectful of human dignity, and subject to review.<sup>199</sup>

The Australian Constitution does not include any explicit framework for the creation or activation of emergency powers. Instead, these powers are provided for in various laws.<sup>200</sup>

‘States of Emergency’ are often principally managed by state and territory governments, and can have a chilling effect on protest. For example, during the

COVID-19 pandemic, state and territory Health Ministers used broad powers arising from Emergency Management Acts or Public Health Acts to limit the movement and assembly of people in order to reduce the risk to public health posed by the contagious virus.<sup>201</sup> These powers were enforced and frequently litigated by police, significantly restricting people’s ability to participate in the global Black Lives Matter protest movement in 2020.<sup>202</sup> Although international human rights law allows for restrictions on the right to peaceful assembly in situations that constitute a threat to the life of the nation, such as a public health emergency, all measures restricting assemblies must be strictly required by the exigencies of the situation.<sup>203</sup> In 2021, Amnesty International released a briefing outlining how the extension of police powers under the Public Health Act 2010 (NSW) had allowed NSW police to use disproportionate and unnecessary force against peaceful protesters during the COVID-19 pandemic.<sup>204</sup>

Federal laws also provide for significant powers and functions to be exercised to assist states and territories during times of emergency.<sup>205</sup> In 2020, in light of the COVID-19 pandemic, the National Emergency Declaration Act 2020 (Cth) was passed with the intention of streamlining the process of activating various emergency powers that are contained within separate legislative instruments. The Act allows the Governor-General to make a ‘national emergency declaration’ if the Prime Minister is satisfied that an emergency has recently

occurred, or is likely to occur, causing nationally significant harm to people, animals, property, the environment or essential services in Australian territory.<sup>206</sup> That declaration can then enliven emergency powers contained within various other Acts, including powers to do with aviation, pharmaceuticals, telecommunications and more. It has been criticised by the Australian Human Rights Commission for its lack of parliamentary oversight requirements, or other accountability and review mechanisms. The Law Council of Australia has also noted that, as the word 'emergency' is undefined in the Act, it is conceivable that the Governor-General could make such a declaration in response to protests or industrial action.<sup>207</sup> Terminating emergency powers once a threat is over is key to the protection of democratic freedoms.<sup>208</sup> The *National Emergency Declaration Act 2020* (Cth) is an example of government emergency powers broadening and calcifying, becoming a new norm despite a state of emergency no longer being in force.

Another area where this issue regularly arises is counter-terrorism. 'War on terror'

rhetoric has been used to justify societies being on perpetual 'emergency' footing, allowing governments to justify the continuation and expansion of powers and sanctions that were once thought to lie outside the rules of Australian liberal democracy, except during wartime.<sup>209</sup> Recent anti-war and pro-Palestine protests outside the Land Forces weapons expo in Melbourne saw police use anti-terror legislation to increase their search powers, allowing them to search any person or vehicle within the area surrounding the event.<sup>210</sup> The Supreme Court of Victoria authorised "special powers" under the *Terrorism (Community Protection) Act 2003* (Vic), granting officers the right to stop and search anyone within a specified area surrounding the exhibition centre. It was an offence to hinder a search or fail to comply with a direction to remove a face covering, or a direction to leave.<sup>211</sup> The Victorian Aboriginal Legal Service released a statement calling for Victoria Police to be transparent about its reasons for using anti-terrorism powers given there was no evidence that the expo may have been the subject of terrorist acts.<sup>212</sup>



Break the Poverty Machine rally at Parliament House, Canberra, 2021.

# CASE STUDIES

## **Black Lives Matter protest permit denied under broad emergency power laws in NSW**

In June 2020, activist groups were initially denied a permit to hold a Black Lives Matter protest in Sydney, after the NSW Supreme Court ruled it would be in breach of public health orders enlivened under COVID-19 emergency powers.

The rallies were organised as part of a global uprising against police brutality and the killing of George Floyd by police in the United States. Organisers in Sydney sought to draw attention to the high rate of Indigenous deaths in police custody.

Despite the initial protest ban, a last-minute Supreme Court appeal successfully allowed a permit to be granted and the rally went ahead. In a report, Amnesty International Australia criticised NSW police for having “used the powers granted to them under the Public Health Act 2010 to unduly restrict peaceful protesters' rights to freedom of expression and peaceful assembly.”<sup>213</sup>

## **Police threaten to use “extraordinary” powers against pro-Palestine protesters in NSW**

In October 2023, acting Police Commissioner publicly stated that NSW Police were considering authorising the use of emergency powers ahead of a planned rally calling for a humanitarian ceasefire in Gaza. The powers would allow police to search protesters without reason, and arrest and charge people who refuse to identify themselves.

The NSW Council for Civil Liberties stated that the Commissioner’s comments lacked legal justification, emphasising that police can only lawfully use their powers when there is a “threat of large-scale public disorder”, and adding that there was no clear threat of this.<sup>214</sup>

Though emergency powers were not enacted, the threat of their use creates a chilling effect which discourages the organising of protests, and creates confusion around legality for participants.

## **Unequal application of police powers in relation to Invasion Day, Pride in Protest march and Women's March during COVID-19 restrictions**

In January 2021, the NSW Health Minister imposed Public Health Orders (PHOs) that limited outdoor gatherings to under 500 people. Sydney's Invasion Day rally organisers sought an exemption from the PHOs on the basis that there had been eight days without community transmission in NSW and a cricket match of 10,000 people had been allowed to go ahead earlier in the month.<sup>215</sup> The exemption was not granted, and the Premier urged individuals to not attend the protest. When the protest occurred on 26 January, police formed lines between protesters to keep in groups of less than 500 and issued announcements to those present that they were in breach of the PHO, forcing organisers to call off the march to avoid mass arrests. A small breakaway march of less than 100 people through Hyde Park was met with move on orders and 5 arrests.<sup>216</sup>

A rally by Pride in Protest on 6 March initially had its Form 1 application challenged in the Supreme Court by NSW Police, before a last minute exemption was granted by the Health Minister. The protest was exempted from the Public Health order as long as protestors remained in 3 socially distanced groups of 500 and followed a COVID Safety Plan. Despite this, police issued move on orders to protestors during two points in the rally – first, when the rally briefly stopped on Oxford St at the corner of Hyde Park as part of the march route, and second, after the march had ended and less than 50 protestors were sitting in small groups in Hyde Park.

The Women's March which took place on 15 March was issued Form 1 approval by NSW Police on the condition that the protest remain under 500 people. Around 3,000 people attended, and police allowed protestors to march from Town Hall to Parliament House and remain there for about an hour before dispersing of their own accord. Police did not issue any move on orders and did not seek to enforce the PHO.<sup>217</sup>

# RECOMMENDATIONS

*To protect protest*

## 1. Legal pathways

### Human rights challenges

Where emergency powers are operating in a state or territory with legislated human rights protections (that is, Queensland, Victoria and the ACT), either a decision to enliven emergency powers or decisions made by public authorities during a state of emergency could be challenged on the basis that they are inconsistent with protected rights. Under the *Human Rights Act 2019* (Qld), the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT), public authorities must act compatibly with human rights, and human rights must be taken into account when making decisions.<sup>218</sup> This includes local and state government departments and agencies, as well as state/territory police.

The 'right to protest' is protected by a combination of legislated human rights.<sup>219</sup> In Victoria, it is most directly protected by section 16 of the Charter, which legislates the right to peaceful assembly (i.e. to gather in groups, whether in public or private) and the right to freedom of association (i.e. to meet other people and form a group to protect your common interests).<sup>220</sup> Similar provisions exist in the ACT and Queensland.<sup>221</sup> The right to freedom of expression is also protected in each of these three jurisdictions.<sup>222</sup> This right may be relevant to the organisation and implementation of protests, as it protects:

- The right to hold an opinion without others interfering
- in your thoughts or beliefs; and

- the right to express opinions freely and seek, receive and share information and ideas whether through conversation, writing or artistic expression.<sup>223</sup>



School Strike for Climate,  
Sydney / Gadigal Country, 2018.

These rights are not absolute. They can legally be constrained by reasonable, necessary and proportionate limitations that can be justified in a 'free and democratic society' based on 'human dignity, equality and freedom'.<sup>224</sup> During extreme situations, it is possible that limiting some people's rights by way of a State of Emergency declaration may be considered justifiable to ensure the health and safety of others. The following factors may be relevant when considering whether a limit is reasonable and justifiable:

- The nature of the human right
- The importance of preserving the human right
- The nature, purpose and extent of the limitation
- The importance of the limitation's purpose
- Whether the limitation helps to achieve its own purpose



- Whether there are any less restrictive and reasonably available ways to achieve the purpose the limitation seeks to achieve.<sup>225</sup>

The right to freedom of expression in particular may be subject to lawful restrictions in order to:

- respect the rights and reputation of other persons; or
- protect national security, public order, public health or public morality.<sup>226</sup>

In the ACT, human rights complaints may be brought to the ACT Human Rights Commission or directly to the Supreme Court by a person who is, or would be, a victim of a human rights contravention by a public authority.<sup>227</sup> In Queensland, a person can make a human rights complaint to the Queensland Human Rights Commission and seek a conciliated outcome. In Victoria, a person can make a human rights complaint to the Victorian Ombudsman for investigation. Otherwise, a person can only raise a human rights matter before a court or tribunal in those jurisdictions if they already have a separate claim that makes the act or decision of the public authority unlawful.<sup>228</sup> That means in these states, a human rights claim must be 'piggybacked' onto another claim.

If a state of emergency is declared and results in broad emergency powers which are used by police against protest participants and stifle protests, a human rights complaint or claim could potentially be brought to challenge a Minister's decision to make the declaration or a government agency's exercise of those powers. If it occurred in Victoria or Queensland, this would need to be piggybacked off another litigated claim, such as a discrimination claim, intentional tort claim or an administrative law challenge.

## Implied freedom challenges

It may be possible to argue that the use of an emergency power in a manner that stifles peaceful protest is invalid because it unlawfully burdens the implied freedom of political communication protected by the Constitution.

A court will first have to consider whether the particular law or use of an emergency power restricts or burdens protest activity as a form of political communication. If a burden is established, the court will assess whether the purpose of the law or the use of the emergency power can still be considered legitimate and compatible with the maintenance of Australia's constitutional system of democracy. If it is, the court will then have to consider whether the law or action is appropriate and adapted to achieve a legitimate purpose, or if it goes too far and isn't appropriate. If the law or the way it has been enlivened through the use of an emergency power burdens the implied freedom of political communication and doesn't pursue a legitimate purpose or isn't reasonably adapted to that purpose, the court could find that it is unlawful.

This is a multi-staged test and could be relevant if an emergency power is used inappropriately or disproportionately to prohibit or deter people from participating in protest activity as a form of political communication.

## Administrative law challenges

Where emergency powers are used by police against protesters or journalists, there may be grounds to challenge the validity of those powers and their execution. For example, if a government enlivenes emergency powers in order to control a protest, it may be useful to interrogate whether the criteria for such a

declaration set out in the state of emergency laws were actually met. If not, that government decision could be challenged in court on the basis that it was made unlawfully, or beyond power. Similarly, if police inappropriately rely on counter-terrorism or other special legislation to obtain search warrants or broad data access orders against protesters, there may be grounds to challenge the validity of the warrants.

## **2. Policy and legislative pathways**

### *Bringing emergency power regimes in line with international human rights obligations*

Under Article 21 of the ICCPR, states must not rely on derogation from the right of peaceful assembly in emergency situations if they can attain their objectives by imposing restrictions in terms of Article 21. Any departure from Article 21 obligations must only be undertaken in time of public emergency which threatens the life of the nation and must be strictly required by the

exigencies of the situation.<sup>229</sup> The emergency powers legislation regimes existing in Australia would require amendment to meet these standards.

### *Consideration of the impact of emergency powers on the right to peaceful assembly enshrined in human rights legislation that does not allow override in extraordinary situations*

Robust State and Federal human rights legislation would help ensure any limitations imposed on the right to peaceful assembly by emergency powers are reasonable and justified. In order to be effective in securing the right to peaceful assembly, this legislation must not be subject to override in emergency situations. Both the Queensland Human Rights Act and the Victorian Charter of Rights and Responsibilities allow parliaments to override the need for legislation to be compatible with human rights in exceptional circumstances.<sup>230</sup> The Queensland Parliament used this provision in 2024 to pass human-rights-incompatible legislation that enabled children to be detained in adult watch-houses.<sup>231</sup> The Queensland Human Rights Council has recommended that this provision should be abolished.<sup>232</sup>



School Strike for Climate Sit-Down, Melbourne / Naarm, 2019.

# THEME 5: Notification and pre-approval systems

Some states and other public authorities in Australia operate notification systems for protest activities. These systems typically require protest organisers to notify the police commissioner or other relevant authority of their intention to hold a public assembly if they are seeking for those participating in the assembly to be protected from adverse action such as criminal prosecution or removal from private land. There have been concerning calls from government representatives and police for permit and notification systems to be introduced in more states.<sup>233</sup> As these notification regimes play out alongside the over-policing and criminalisation of protest, police and governments have treated them more and more as de facto systems of mandatory authorisation and create a hostile environment that suppresses protests that may be particularly uncomfortable for governments or powerful interests.

In Queensland, a statutory regime encourages protest organisers to notify the Commissioner of the Queensland Police Service and any other relevant local authority of planned public assemblies.<sup>234</sup> The notice must include details such as the planned time and date, expected number of participants, the purpose of the assembly, a description of any sound amplification equipment that will be used and the route of any planned procession.

If the assembly is subsequently authorised, participants will be immune from prosecution for participating in the protest in line with what has been

authorised. However, without the authorisation, participants will be liable to civil claims or criminal charges associated with the obstruction of a public place. A similar regime operates in New South Wales and can give people the false impression that attendance at a protest is automatically unlawful if police authorisation has not been confirmed.<sup>235</sup>



School Strike for Climate Sit-Down  
Melbourne / Naarm, 2019.

The grounds for rejection of authorisation are often unspecified or overly broad, with the NSW and Queensland regimes not requiring any specific justification. In South Australia, police and other authorities may reject authorisation on the basis that the protest “would unduly prejudice the public interest”.<sup>236</sup> While judicial review serves to provide some checks and balances for police decisions regarding authorisation, initiating court proceedings to seek justification of a police decision is a high hurdle for communities engaging in protest.



In Tasmania, persons are prohibited from organising or conducting a demonstration without a permit if it is to be held, wholly or partly, on a public street, with a maximum penalty of \$2020.<sup>237</sup> Protest organisers are advised to lodge an application with police 12 weeks before the demonstration.<sup>238</sup>

Certain public places have specific regulation regimes that require protest and the distribution of flyers to be approved by the authority managing the relevant area. In Sydney, for example, public assemblies are punishable by a \$2200 fine if conducted in the foreshore area around Darling Harbour and Circular Quay without the authorisation of Place Management NSW. Rangers have the power to move on and

fine individuals who engage in a public assembly or hand out flyers. Similar restrictions apply in many public parks, for example the Sydney Botanic Gardens.<sup>239</sup>

In June 2024, the University of Sydney also introduced a policy requiring organisers to provide 72 hours' notice of any planned demonstrations and to seek prior approval for the planned use of equipment such as megaphones and projectors on campus grounds.<sup>240</sup> The policy gives campus security the power to disperse protests which have not provided notification or which involve the use of equipment that has not been pre-approved. The University of Newcastle and the University of Wollongong have subsequently introduced similar policies.



Anti-police violence x Mardis Gras rally, Sydney / Gadigal Country.  
Photographer: Chels Hood Withey



# CASE STUDIES

## **Uprising of the People charged \$8000 for permit for Invasion Day rally in the NT**

In January 2024, First Nations justice group Uprising of the People were charged with an \$8,000 "traffic control" fee five days out from a planned Invasion Day rally in Darwin city.<sup>241</sup>

A spokesperson for the local council stated that "any event or activity held within the Darwin municipality that is likely to disrupt traffic...requires traffic management in order to apply for a permit." Uprising of the People wrote on social media that the police were not "voluntarily offering their protection to allow this protest to happen safely".

The group were forced to crowdfund \$8000 for traffic control in order to obtain a protest permit, representing a significant barrier to their legally-protected right to protest

## **Voice campaigners moved on by council rangers under ban on flyering in Sydney foreshore area**

In October 2023, two campaigners for the Indigenous Voice to Parliament were moved on by council rangers after handing out flyers about the Voice in Circular Quay and Darling Harbour.<sup>242</sup> The move on order was issued on the basis that the distribution of printed materials and advertising is forbidden under the Place Management NSW Regulation 2022.

## NSW Supreme Court Blocks Rising Tide's Coal Port Protest in Newcastle, NSW

On Thursday 7 November, The NSW Supreme Court accepted the NSW Police's decision to deny Rising Tide – a grassroots climate action group – protections under the Summary Offences Act for their planned multi-day “protestival” at a coal port in Newcastle. The Summary Offences Act provides public assemblies with protections from obstruction offences and the use of move on orders in certain circumstances, but allows police to oppose these protections. If police oppose the protections, the Supreme Court can decide whether or not the protections should apply. The Rising Tide case demonstrates the limitations of the NSW notification process, which skews power in favour of police on balance with protest organisers. In denying the application, Justice Desmond Fagan characterised the disruption caused by the protest as “excessive”, accepting the evidence provided by the police.<sup>243</sup> There is an inherent disadvantage for protest organisers in these legal challenges, as it's very difficult to present a standard of evidence that trumps the assessment of disruption, safety, and risk presented by the police.



Stop Adani x GHD action, Sydney, Gadigal Country, October 2019.

# RECOMMENDATIONS

*To protect protest*

## 1. Legal pathways

### Human rights challenges

In Queensland, Australian Capital Territory and Victoria, individuals have a legally enshrined right to peaceful assembly and association in human rights legislation.<sup>244</sup> These state and territory human rights laws generally require that the actions and decisions of public entities, and the development and interpretation of legislation, are carried out in a manner that is compatible with the protected human rights. However, they recognise that it will sometimes be justified for rights to be subject to limitations in certain circumstances.

Where a notification regime is operating in a state or territory with legislated protections for the right to peaceful assembly and association, there may be grounds to challenge the notification requirements or their application on the basis that they are inconsistent with the protected right. For example, in the ACT, an individual impacted by a problematic protest notification regime could potentially make a complaint to the ACT Human Rights Commission about the way the regime has been implemented by an ACT government agency, bring a claim in the Supreme Court of the ACT against the relevant government agency for conduct that was incompatible with the right to peaceful assembly and association, or seek a court declaration that the relevant law is incompatible with a protected right.

In Queensland and Victoria, human rights complaints can be brought to the Queensland Human Rights Commission and Victorian Ombudsman respectively. However, under the *Human Rights Act 2019* (Qld) or the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic), a person can only raise human rights before a court by 'piggybacking' a human rights claim on separate proceedings. In these states, a human rights argument could potentially be piggybacked onto an administrative law challenge to a decision made by a public authority under the relevant notification regime.



School Strike for Climate,  
Sydney / Gadigal Country, 2018.

### Implied freedom of political communication challenges

If the terms of a government notification regime are clearly framed as a pre-approval system or if a regime operates in practice like a de facto pre-approval system, it may be possible to argue that it is invalid because it unlawfully burdens the implied freedom of political communication protected by the Constitution.



The court will have to consider:

- Whether the notification regime burdens the freedom in its terms, operation or effect;
- If yes, whether the purpose of the notification regime is legitimate (i.e. is it compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?); and
- If yes, whether the law is reasonably appropriate and adapted to advance that legitimate object in a way that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.<sup>245</sup>

If the legislated notification regime or the way it has been implemented burdens the implied freedom of political communication and doesn't pursue a legitimate purpose or isn't reasonably adapted to that purpose (e.g. goes too far), the court could find that it is unlawful.



School Strike for Climate, Sydney / Gadigal Country, 2018.

The Place Management NSW Regulation 2022 is particularly amenable to a political communication challenge, as it prohibits public assemblies unless authorised by Place Management NSW. The authorisation may be granted subject to conditions at the complete discretion of Place Management NSW.

### Administrative law challenges

If police or other relevant authority denies authorisation for a planned public assembly, there could be grounds to challenge the legal correctness of that decision in court.

It might be useful to request material under freedom of information laws to shed light on how and why an authority has reached its decision under a notification scheme.

## **2. Policy and legislative pathways**

### Bringing notification regimes in line with international human rights obligations

Under Article 21 of the *ICCPR*, notification systems are permissible to the extent necessary to assist the authorities in facilitating the smooth conduct of peaceful assemblies and protecting the rights of others.<sup>246</sup> Notification regimes should not function as authorization systems. Lack of notification does not absolve the authorities from the obligation, within their abilities, to facilitate the assembly and to protect the participants.<sup>247</sup> The lack of notification must not be used as a basis for dispersing the assembly, arresting participants or charging participants with criminal offences.<sup>248</sup>

Existing notification



regimes that prohibit a protest on the basis of it not being authorised, such as the Tasmanian regime, several university and council notification regimes and the Place Management Regulation NSW 2022, should be amended or repealed to be in line with this standard.

Article 21 obligations also include ensuring that the minimum period of advance notification should not be excessively long and that notification must not be required for spontaneous assemblies for which there is not enough time to provide notice. Notification regimes also shouldn't apply to assemblies which will have a minimal impact on others, for example because of their nature, location or limited size or duration.<sup>249</sup> No notification regimes in Australia currently meet these standards.

### Consideration the right to peaceful assembly in protest negotiation enshrined in human rights legislation

Consideration the right to peaceful assembly in protest negotiation enshrined in human rights legislation

Robust state and federal human rights legislation across Australia would help ensure police and councils take the right to peaceful assembly into account in administering notification regimes and provide an avenue for redress where this right is not adequately respected by authorities.



Pro-Palestine rally, Port Botany, 2023. Photographer: Kimberly Crofts.

# SUPPORT FOR GETTING CASES HEARD

When competing political, social and corporate interests lead to the undue repression of the right to protest, an independent judiciary can play an important role in upholding democratic principles and holding the powerful to account. Grata Fund has supported many public interest cases that have strengthened protections for human rights, climate justice and democratic freedoms, of which protest rights form an important part.

However, litigation is expensive and public interest litigants often face the enormous financial risk of being ordered to pay the other side's legal costs if they are unsuccessful.

Grata Fund is a charity that supports people and communities to advocate for their legal rights and a stronger democracy. We do this by removing the financial barriers, like adverse costs risk and disbursement costs, that prevent meritorious test cases in the public interest from going ahead.

If you or your organisation has been impacted by the anti-protest themes detailed in this report and you have received legal advice about challenging those issues through litigation, please contact us.

Before you submit your enquiry, please check that it meets the following requirements for consideration by Grata Fund:

- Are you an individual or member of a not-for-profit organisation that has been impacted by the anti-protest themes identified in this report?
- Does the protest issue you are experiencing impact vulnerable or marginalised groups of people (e.g. refugees and asylum seekers, people from the LGBTIQ community, people living with disability, women in all their diversity, First Nations communities, culturally and racially marginalised communities, elderly people)?
- Do you have, or have you made serious attempts, to get legal advice and representation?
- Would a legal challenge have systemic impact and benefit beyond your individual case and circumstances?
- Are you open to working with a broader campaign alliance on the protest issue alongside a litigated case?

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# APPENDIX A

Date	Action type	Source	Incident type
New South Wales			
01/03/2024	Street rally	<a href="#">LONSW</a>	Dangerous use of police equipment
21/11/2023	Blockade	<a href="#">LONSW</a>	Dangerous use of police equipment (handcuffs) / Excessive use of force
29/03/2021	Street march	<a href="#">LONSW</a>	Dangerous use of police equipment (horses)
25/07/2021	Street march	<a href="#">LONSW</a>	Dangerous use of police equipment (horses)
21/11/2023	Blockade	<a href="#">LONSW</a>	Dangerous use of police equipment (horses)
24/07/2021	Street rally	<a href="#">SMH</a>	Dangerous use of police equipment (horses)
27/07/2024	Street rally	<a href="#">LONSW</a>	Dangerous use of police equipment (OC spray) / Excessive use of force
28/06/2022	Street rally	<a href="#">LONSW</a>	Dangerous use of police equipment (OC spray) / Excessive use of force
06/06/2020	Street rally	<a href="#">ABC</a>	Dangerous use of police equipment (OC spray) / Excessive use of force
29/09/2024	Street rally	<a href="#">LONSW</a>	Dangerous use of police equipment (OC spray) / Excessive use of force
23/03/2024	Street march	<a href="#">LONSW</a>	Excessive use of force
25/03/2022	Direct action on infrastructure	<a href="#">LONSW</a>	Excessive use of force
22/02/2022	Direct action on road	<a href="#">LONSW</a>	Excessive use of force
04/04/2022	Direct action on infrastructure	<a href="#">LONSW</a>	Excessive use of force
21/11/2023	Blockade	<a href="#">LONSW</a>	Excessive use of force
23/03/2024	Street rally	<a href="#">LONSW</a>	Excessive use of force
1/03/2024	Street rally	<a href="#">LONSW</a>	Excessive use of force
25/02/2024	Street rally	<a href="#">LONSW</a>	Excessive use of force
25/02/2024	Street rally	<a href="#">LONSW</a>	Excessive use of force
21/11/2023	Blockade	<a href="#">LONSW</a>	Excessive use of force
21/11/2023	Blockade	<a href="#">LONSW</a>	Excessive use of force
24/03/2024	Blockade	<a href="#">LONSW</a>	Excessive use of force
10/12/2022	Direct action on infrastructure	<a href="#">Source</a>	Imprisonment sentence
08/07/2024	Direct action on infrastructure	<a href="#">The Guardian</a>	Imprisonment sentence
08/07/2024	Direct action on infrastructure	<a href="#">Blockade Australia</a>	Imprisonment sentence
28/03/2022	Direct action on infrastructure	<a href="#">ABC</a>	Imprisonment sentence
11/04/2022	Event disruption	<a href="#">Source</a>	Imprisonment sentence
22/11/2021	Direct action on infrastructure	<a href="#">ABC</a>	Imprisonment sentence
Various	Street rally	<a href="#">LONSW</a>	Inappropriate ID directions
21/11/2023	Blockade	<a href="#">LONSW</a>	Inappropriate move on orders
06/03/2021	Street march	<a href="#">LONSW</a>	Inappropriate move on orders
27/07/2024	Street rally	<a href="#">LONSW</a>	Inappropriate move on orders
29/06/2022	Street rally	<a href="#">LONSW</a>	Inappropriate move on orders
21/11/2023	Blockade	<a href="#">LONSW</a>	Inappropriate move on orders
1/03/2024	Street rally	<a href="#">LONSW</a>	Inappropriate restrictions and directions
06/06/2020	Street rally	<a href="#">ABC</a>	Kettling

21/11/2023	Blockade	<a href="#">LONSW</a>	Kettling
24/03/2024	Blockade	<a href="#">LONSW</a>	Kettling
25/03/2022	Direct action on infrastructure	<a href="#">LONSW</a>	Mistreatment in custody
19/06/2022	Direct action on infrastructure	<a href="#">LONSW</a>	Mistreatment in custody
26/11/2023	Direct action on infrastructure	<a href="#">LONSW</a>	Misuse of bail conditions
27/06/2022	Street rally	<a href="#">LONSW</a>	Mistreatment in custody
29/06/2022	Street rally	<a href="#">LONSW</a>	Mistreatment in custody
8/10/2019	Street rally	<a href="#">LONSW</a>	Misuse of bail conditions
Various	Direct action on road	<a href="#">LONSW</a>	Misuse of bail conditions
24/03/2024	Blockade	<a href="#">LONSW</a>	Mistreatment in custody
21/11/2023	Blockade	<a href="#">LONSW</a>	Mistreatment in custody
20/06/2022	Direct action on infrastructure	<a href="#">LONSW</a>	Misuse of bail conditions
06/11/2023	Street rally	<a href="#">LONSW</a>	Misuse of bail conditions
21/02/2023	Street rally	<a href="#">LONSW</a>	Misuse of bail conditions
15/03/2023	Bill posting	<a href="#">LONSW</a>	Misuse of bail conditions
21/11/2023	Blockade	<a href="#">LONSW</a>	Misuse of bail conditions
13/04/2022	Direct action on infrastructure	<a href="#">LONSW</a>	Misuse of bail conditions
25/03/2022	Direct action on infrastructure	<a href="#">LONSW</a>	Misuse of bail conditions
19/06/2022	Direct action on infrastructure	<a href="#">LONSW</a>	Misuse of bail conditions
24/03/2024	Blockade	<a href="#">LONSW</a>	Misuse of bail conditions
Various	Street rally	<a href="#">LONSW</a>	Misuse of search powers
06/03/2021	Street march	<a href="#">LONSW</a>	Misuse of search powers
01/11/2022	Street rally	<a href="#">LONSW</a>	Misuse of search powers
29/06/2022	Street rally	<a href="#">LONSW</a>	Misuse of search powers
26/01/2021	Street march	<a href="#">LONSW</a>	Obstruction of observers
25/07/2021	Street march	<a href="#">LONSW</a>	Obstruction of observers
11/09/2021	Street rally	<a href="#">LONSW</a>	Obstruction of observers
01/08/2021	Car convoy	<a href="#">LONSW</a>	Obstruction of observers
26/11/2023	Blockade	<a href="#">LONSW</a>	Obstruction of observers
21/11/2023	Blockade	<a href="#">LONSW</a>	Obstruction of observers
21-28/06/2022	Street march	<a href="#">LONSW</a>	Pre-emptive visits of activists
01/11/2022	Street rally	<a href="#">LONSW</a>	Pre-emptive visits of activists
27/07/2024	Street rally	<a href="#">LONSW</a>	Surveillance
18/11/2021	Direct action on infrastructure	<a href="#">LONSW</a>	Surveillance
27/03/2022	Direct action on infrastructure	<a href="#">LONSW</a>	Surveillance
19/06/2022	Direct action on infrastructure	<a href="#">LONSW</a>	Surveillance
06/03/2021	Street march	<a href="#">LONSW</a>	Thin blue line patch
25/07/2021	Street march	<a href="#">LONSW</a>	Thin blue line patch
21/11/2023	Blockade	<a href="#">LONSW</a>	Thin blue line patch



Queensland			
26/05/2024	Encampment	<a href="#">Action Ready</a>	Dangerous use of police equipment (OC spray) / Excessive use of force
12/07/2024	Street rally	<a href="#">Action Ready</a>	Excessive use of force / Failure to follow police ID requirements / Inappropriate ID directions / Mistreatment in custody / Misuse of permit regime / Obstruction of observers / Surveillance
01/06/2024	Picket	<a href="#">Action Ready</a>	Dangerous use of police equipment (handcuffs) / Excessive use of force / Failure to follow police ID requirements / Misuse of bail conditions / Misuse of search powers / Obstruction of observers
3/12/2023	Street rally	<a href="#">Action Ready</a>	Surveillance
10/11/2023	Street rally	<a href="#">Action Ready</a>	Surveillance
18/09/2023	Street rally	<a href="#">Action Ready</a>	Thin blue line patch
Tasmania			
30/04/2024	Forestry action	<a href="#">Source</a>	Imprisonment sentence
14/07/2023	Forestry action	<a href="#">ABC</a>	Imprisonment sentence
Northern Territory			
25/01/2024	Street rally	<a href="#">Source</a>	Misuse of permit regime
Western Australia			
8/5/2024	Street rally	<a href="#">Source</a>	Excessive use of force
Victoria			
01/07/2024	Blockade	<a href="#">Source</a>	Dangerous use of police equipment (OC spray) / Excessive use of force
02/11/2022	Street rally	<a href="#">MALS</a>	Pre-emptive visits of activists
03/11/2020	Street rally	<a href="#">MALS</a>	Kettling
04/02/2024	Street march	<a href="#">MALS</a>	Excessive use of force / Failure to follow police ID requirements / Overdeployment of police / Inappropriate move on orders
04/03/2024	Direct action on infrastructure	<a href="#">Source</a>	Imprisonment sentence
05/05/2024	Street rally	<a href="#">MALS</a>	Misuse of search powers
5/11/2023	Street rally	<a href="#">MALS</a>	Misuse of search powers
07/11/2023	Street rally	<a href="#">The Guardian</a>	Dangerous use of police equipment (OC spray) / Excessive use of force
09/06/2024	Street rally	<a href="#">Vice</a>	Dangerous use of police equipment (OC spray) / Excessive use of force
11/09/2024	Street rally	<a href="#">MALS</a>	Dangerous use of police equipment (flash bangs, KIPs, OC spray, tear gas & horses) / Excessive use of force
14/09/2019	Street rally	<a href="#">MALS</a>	Kettling
15/04/2024	Blockade	<a href="#">MALS</a>	Dangerous use of police equipment (handcuffs) / Excessive use of force / Overdeployment of police
18/03/2023	Street rally	<a href="#">MALS</a>	Dangerous use of police equipment (OC spray & horses) / Excessive use of force / Obstruction of observers
18/09/2021	Street rally	<a href="#">ABC</a> and <a href="#">NDTV</a>	Dangerous use of police equipment (OC spray) / Excessive use of force
19/01/2024	Picket	<a href="#">MALS</a>	Dangerous use of police equipment (OC spray) / Excessive use of force / Obstruction of observers / Overdeployment of police / Surveillance
19/05/2024	Street rally	<a href="#">MALS</a>	Dangerous use of police equipment (horses) / Excessive use of force / Obstruction of observers / Overdeployment of police
21/08/2021	Street rally	<a href="#">MALS</a>	Dangerous use of police equipment (KIPs) / Excessive use of force
21/08/2021	Street rally	<a href="#">BBC</a>	Dangerous use of police equipment (KIPs & OC spray) / Excessive use of force
22/09/2021	Street rally	<a href="#">MALS</a>	Dangerous use of police equipment (KIPs & tear gas) / Excessive use of force
23/03/2024	Street rally	<a href="#">ABC</a>	Dangerous use of police equipment (OC spray & horses) / Excessive use of force
23/10/2020	Street rally	<a href="#">SBS</a>	Dangerous use of police equipment (OC spray) / Excessive use of force
24/07/2024	Blockade	<a href="#">Sky News</a>	Dangerous use of police equipment (OC spray) / Excessive use of force
29/10/2019	Blockade	<a href="#">MALS</a>	Dangerous use of police equipment (OC spray) / Excessive use of force
Various	Street rally	<a href="#">MALS</a>	Surveillance

# APPENDIX B

The following offences restricting protest rights have been introduced or amended in the last 10 years.

## FEDERAL

- ss46–48 Building and Construction Industry (Improving Productivity) Act 2016 – prohibits and creates mechanism for injunctions on unlawful industrial action and unlawful picketing, with unlawful picketing described as any action aimed at stopping or limiting someone from entering or leaving a building or related site, if it's done to push for better employment conditions for workers in the construction industry – max fine for corporations \$313,000, max fine for individuals \$62,600
- ss474.46–48 Criminal Code Act 1995 – prohibits using phone or internet services to encourage people to trespass or commit crimes on farms or agricultural land – max penalty 12 months imprisonment for inciting trespass, max penalty 5 years imprisonment for inciting property damage or theft

## NEW SOUTH WALES

- S30 Major Events Act 2009 – prohibits entering a road that is closed for a major event, even in the case of a protest – max fine \$3,300
- S83 Forestry Act 2012 – prohibits refusing or failing to answer questions of an authorised officer and obstructing or hindering an authorised officer – max fine \$2,200
- s4B Inclosed Lands Protection Act 1901 – prohibits trespassing on inclosed lands on which any business or undertaking is conducted if, while doing so, someone interferes with a business or undertaking – max fine \$5,500, if on agricultural land max fine \$13,000 and/or 12 months imprisonment or \$22,000 and/or 3 years imprisonment if offender accompanied by 2 people or more
- s4C Inclosed Lands Protection Act 1901 – prohibits directing, inciting, counseling, procuring, commissioning or inducing the commission on agricultural land of an offence against s4B – max penalty \$22,000 fine or 12 months imprisonment
- S201 Crimes Act 1900 – prohibits hindering with equipment belonging to or associated with a mine, with the definition of a mine extending to a place at which works are being carried out to enable the extraction of resources
- s45A–45C Law Enforcement (Powers and Responsibilities) Act 2022 – gives police the power to search people or their vehicles as well as seize items without a warrant if a police officer suspects that a person may be seeking to interfere with a business or undertaking
- s200 Law Enforcement (Powers and Responsibilities) Act 2022 – gives police the power to issue directions in relation to protests if the police officer believes on reasonable grounds that the direction is necessary to deal with a serious risk to the safety of the person to whom the direction is given or to any other person or if the protest is obstructing traffic and it is not an authorised protest under the Summary Offences Act part

- 4s144G Roads Act 1993 – prohibits entering, remaining on, climbing, jumping from or otherwise trespassing on any part of the Sydney Harbour Bridge or any other major bridge, tunnel or road if that conduct seriously disrupts or obstructs vehicles or pedestrians, which includes pedestrians being redirected – max penalty \$22,000 fine and/or 2 years imprisonment
- s214A Crimes Act 1900 – prohibits entering, remaining on, climbing, jumping from or otherwise trespassing on any part of a major facility such as a port or railway station if that conduct seriously disrupts or obstructs persons attempting to use the major facility – max penalty \$22,000 fine and/or 2 years imprisonment

## TASMANIA

- s14B(2AA) and s14B(2AC) Police Offences Act 1935 – adds an aggravated offence for trespass that substantially impedes or prevents another person carrying out lawful work – max penalty \$10,100 or 12 months imprisonment for an individual and \$50,500 for a body corporate
- s14B(2AB) Police Offences Act – adds an aggravated offence for trespass that directly or indirectly causes a serious risk to the safety of the offender or another person – max penalty \$10,100 or 18 months imprisonment, or \$15,150 2 years imprisonment if the person has previously been convicted of a trespass offence

## VICTORIA

- s10KA Control of Weapons Act 1990 – gives police the power to direct a person wearing a face covering to leave a designated area if the police reasonably believe the person is using the face covering to conceal their identity or protect them from crowd-controlling substances and the person refuses to take it off, or if the police reasonably believe the person is about to engage in affray or violent disorder
- s10L Control of Weapons Act 1990 – prohibits a person from failing to comply with a direction given under s10KA – max penalty \$985 fine
- Sustainable Forest Timber Amendment (Timber Harvesting Safety Zones) Act 2022 – increases the penalties for hindering or obstructing an authorised officer, threatening or abusing an authorised officer, hindering or obstructing timber harvesting, contravening a banning notice or exclusion order – max penalty for most serious offences \$24,077 fine or 12 months imprisonment
- s88A Sustainable Forests Timber Act 2004 – gives police power to search a person and seize any prohibited thing, such as PVC pipes, on them if the police reasonably believe the person has committed or is about to commit an offence
- s94CA Sustainable Forests Timber Act 2004 – gives police the power to ban a person from a timber harvesting zone for a period of up to 28 days if they suspect on reasonable grounds that a person has committed or is committing a specified offence in the zone – max penalty for contravention of banning notice \$11,820 fine

## QUEENSLAND

- S17 Peace and Good Behaviour Act 1982 – gives police the power to make a public safety order banning an individual or group from going to certain places or events if their presence is a serious threat to public safety or security – max penalty for non-compliance \$46,440 or 3 years imprisonment
- Ss30, 32 and 53AA Police Powers and Responsibilities Act 2000 – gives police the power to search persons and vehicles without a warrant if they suspect the person has a dangerous attachment device, and to seize and dispose of dangerous attachment devices
- ss14A–14C Summary Offences Act 2005 – prohibits the use of certain lock on devices in protest activity – max penalty \$3,226 fine or 1 year's imprisonment
- s10A Summary Offences Act 2005 – prohibits assemblies of 3 or more people if the conduct of them taken together would cause a person to reasonably fear that unlawful violence will be used to a person or property or, if the conduct occurs on agricultural land, is likely to disrupt the operation of a business carried out on the land, among other things – max penalty 2 years imprisonment

## SOUTH AUSTRALIA

- s58 Summary Offences Act 1953 – prohibits directly or indirectly obstructing a place, makes a person who obstructs a public place criminally liable for obstructions that emergency services cause when responding to the original obstruction and allows for police and other emergency services to recover the cost of an obstruction – max penalty \$50,000 fine or 3 months imprisonment