AUSTRALIAN DEMOCRACY NETWORK

Submission Guide NSW Protest Laws Review

How to use this submission guide

- Individual submissions with concerns specific to your organisation or your individual situation are most effective. Template submissions will sometimes be counted as a single unit so it is best to draft a unique submission, even if it's only a page or two.

- Two submissions have to be made:
    - One regarding s144G of the Roads Act https://www.nsw.gov.au/have-your-say/review-of-roads-act-1993
    - One regarding s214A of the Crimes Act https://www.nsw.gov.au/have-your-say/review-of-crimes-act-1900

  Submissions close on 1 June.

  The general principles you apply in each submission may be similar, but there are specific questions that apply to each of these provisions. This submission guide sets out a guideline for the two submissions.

- Submissions should address
    - Whether the policy objectives of the 2022 laws remain valid
    - Whether the 2022 laws remain appropriate for securing these objectives
    - For submission to Crimes Act 1900 s214A review only - the implications of the Kvelde v NSW Supreme Court decision for s214A

  Framing your arguments in this language will mean the Department considers them.

- This submission guide provides guidelines for both the Roads Act and Crimes Act submissions and is structured as follows:
    - Background information about the policy objective
    - General arguments regarding the validity of the policy objective and how appropriate the laws are to securing it
    - Suggestions about useful points your submission can make and case studies that would be useful to illustrate your arguments

We suggest you use this guide to help structure your submission and the arguments you might consider making - the arguments made in this guide are not prescriptive, and you may choose to focus on different issues depending on what is most relevant for your organisation.

- The points you make in your submission can also be used for social media content and to encourage the communities you're involved in to make a submission.

AUSTRALIAN DEMOCRACY NETWORK

s144G Roads Act Submission

Policy objective: Striking a proper balance between the right to protest and the right of members of the public to move freely and not be obstructed in public places.

The stated policy objective of the 2022 amendments to s144G was striking a proper balance between the right to protest and the right of members of the public to move freely and not be obstructed in public places. This is evidenced in the statements of the Attorney-General and the Shadow Attorney-General at the time in Second Reading Speech debates for the amendments:

> "The bill in no way seeks to impose a general prohibition on protests. The Government supports the rights of all individuals to participate in lawful protest. Freedom of assembly and speech have long been recognised by Australian courts as important rights that are integral to a democratic system of government; however, the right to protest must be weighed against the right of other members of the public to move freely and not be obstructed in public places." Mark Speakman

> "People do and should have the right to protest, the right to object, the right to assemble, and the right to disrupt and to disobey, but not to an unlimited degree, and that is the crux of this matter—not when the cost is too high, and not when such activities impinge unnecessarily on others' rights. The bill does not deal with students wanting to protest about climate change. This is about serious, costly disruption to major infrastructure facilities, roads, tunnels and the like." Michael Daley

In balancing these rights, the government must have particular regard to the significance of the right to peaceful protest for the realisation of democracy. The freedom of assembly and freedom of political communications have been long recognised as fundamental to realising the Australian Constitution and upholding democracy. Peaceful protest is crucial for realising all of our human rights. Australia has a long and proud history of protests which have led to significant change, including preserving Tasmania's Franklin River, worker's rights, the apology to the Stolen Generations, the right to vote for women, and the advancement of LGBTIQ+ rights. The right to protest is particularly important for Aboriginal and Torres Strait Islander people and their ongoing calls for justice. Since colonisation, Aboriginal and Torres Strait Islander communities have fearlessly used protest as a way to fight for their right to self-determination, their land and water rights, an end to police violence and against the ongoing structural racism that locks them out of justice.

New South Wales has a long and proud history of protests movements which have won significant change. The first Aboriginal Day of Mourning in Gadigal/Sydney in 1938, the Freedom Rides in 1965, and the enduring legacy of the first Mardi Gras in 1978 - a protest against police violence by LGBTIQ+ communities - stand as testaments to the power of protest and collective action in the state. The ongoing fight to safeguard the environment and combat climate change continues to underscore the importance of protest in effecting change in New South Wales.

Article 21 of the International Covenant on Civil and Political Rights (ICCPR) requires all governments to guarantee and respect the right to peaceful protest and to create an enabling environment within their jurisdictions for the exercise and enjoyment of the right.[1] Governments and their agencies are required to protect all forms of peaceful protest regardless of wherever it happens or what form it takes.[2] These protections are owed to all people, not just citizens, and must be provided to everyone free from discrimination of any kind.[3] Australia has an obligation to comply with international law and realise its principles in legislation. Over 120 community organisations including the Australian Council of Social Service, Community Legal Centres NSW, Australian Services Union NSW ACT and NSW Council for Civil Liberties have called for Australian governments to respect these fundamental protest rights through the Declaration of our Right to Protest.[4]

Contrary to its stated policy objective, the Act imposes disproportionate penalties on the freedom of assembly and freedom of political communication. As recognised by Justice Adamson in Commissioner of Police v Langosch, because public spaces are shared spaces, it is 'of the nature of a protest that others will be affected and that their routines will be, at least ephemerally, interrupted.'

The Act introduces a sentence of imprisonment and 10-fold greater fines for conduct such as causing pedestrians to be redirected or part of a major road being closed.[5] These kinds of interruptions arise as part of the ordinary exercise of freedom of assembly and can be said to be a relatively insignificant imposition on the rights of the public to move freely. The restriction

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[1] Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (Article 21), 129th sess, UN Doc CCPR/C/GC/37 (17 September 2020) 24.
[2] Human Rights Committee, General Comment No. 37 (n i) 6-7, 16
[3] Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (Article 21), 129th sess, UN Doc CCPR/C/GC/37 (17 September 2020) 6.
[4] Declaration of Our Right to Protest, 2023 https://australiandemocracy.org.au/protest-rights-declaration
[5] s144G(2)

on this freedom is even more significant in the case of s144G due to the fact that it applies to major roads and bridges, which are public thoroughfares frequently used for the purpose of protest.

S144G(2) automatically defines conduct that causes part of a road to be closed or pedestrians to be redirected as serious disruption for the purposes of the offence. Restricting these kinds of interruptions to major facilities was found in Kvelde to impermissibly burden the freedom of political communication - this conclusion must ring even louder for s144G given its application to the most common sites of protest, roads. Several roads classified as major roads for the purposes of s144G have a long history of being used for protest, including City Rd and Broadway. The marches that have taken place on these roads include Invasion Day, Trans Day of Resistance and School Strike for Climate. Furthermore, conduct that would otherwise be lawful, such as dropping a banner from a publicly accessible area of the Sydney Harbour Bridge with the effect that security decides to close the area and redirect pedestrians, is captured by s144G(2). The impermissible burden on the freedom of political communication created by s144G(2) is discussed in detail in a dedicated section below.

The Act's disproportionate emphasis on keeping public spaces free of obstruction inappropriately constrains the ability of the community to assemble in public spaces and use public spaces for political communication. In doing so, it effectively denies the community the right to engage in protest without risking significant penalties.

Useful points to make

- *Why protests that take up public space are important for your community and the issues you work on*
- *The effect the 2022 laws have had on your capacity to engage in street protests - including*
    - *How policing has changed*
    - *Harassment from police*
    - *Freezing effect*
    - *Impacts on vulnerable populations such as those on temporary visas*

Useful case studies:

- *Protests taking place on bridges and major roads - e.g City Rd, Broadway, Sydney Harbour Bridge*
- *Protests which have seen significant street mobilisations*

Protections offered by the Summary Offences Act

The freedoms of assembly and freedom of political communication cannot be said to be sufficiently ensured by the existence of the Summary Offences Act (SOA) protections for authorised protests ('the Form 1 regime'). Section 24 of the SOA protects participants in an authorised public assembly from being charged with any offence relating to participating in an unlawful assembly or the obstruction of any person, vehicle or vessel in a public place. As the protections are addressed only to these offences, the Form 1 regime does not itself protect protest participants from being charged with seriously disrupting a major bridge, tunnel or road under s144G(1)(b).

The extension of the Form 1 protections to s144G offences is achieved by s144G(3), which provides that nothing in this section prohibits conduct in accordance with the consent or authority of TfNSW, the NSW Police Force or other public authority. As the Form 1 regime is the only available way of attaining Police consent for a protest, s144G(3) can be read as protecting protests which are an authorised assembly under the SOA. S144G imposes a higher burden on protests to be protected than the Summary Offences Act, requiring the consent of the Police where the SOA required only that Police do not oppose the protest and that the protest be held 'substantially in accordance' with the Form 1 Notice of Intention. There has been no judicial confirmation of the meaning of 'consent' under s144G(3) and it therefore remains unclear whether protests which seriously disrupt a major road, bridge or tunnel, including causing part of it to be closed or pedestrians to be redirected, can invoke the protections of the SOA.

To the extent that it does offer protection from obstruction of a major bridge, tunnel or road, the provision suffers from 'substantial limitations in providing a means of reducing the burden on the implied freedom [of political communication]', as pointed out by Justice Walton in Kvelde. The protections are only activated if the Commissioner of Police does not oppose the public assembly or a Court authorises the public assembly. Independent accounts of police negotiations in relation to the Summary Offences Act protections show that Police practice around the Form 1 system frequently improperly constrains the right to protest.

Legal Observers NSW has documented[6] several instances of Police exerting pressure on organisers to accept conditions that go far beyond what is required to strike a proper balance

[6] Misuse of the Form 1 System by NSW Police 2022-24, Legal Observers NSW https://legalobserversnsw.org/2024/05/06/misuse-of-the-form-1-system-by-nsw-police-2022-24/

between the right to protest and other uses of public space. This has included police using 10 minute delays to the running order of a protest to begin putting pressure on organisers by stating that they risked not being in compliance with their Notice of Intention, including at recent street marches for Palestine. In one instance in November 2023, police made Form 1 authorisation conditional on a climate group not using a skeleton prop in their march due to the proximity of anti-war rallies nearby. Several instances have also been recorded of police making Form 1 approvals conditional on compliance with a long list of conditions including obtaining permission from the local government authority and minimum numbers of rally marshals being present to 'control the protest rally'.

Spontaneous and urgent protests

The Form 1 regime is particularly poorly adapted to protecting protests undertaken with urgency, as pointed out by Justice Walton in Kvelde at [277]. In the event that a protest organiser provides less than 7 days' notice to Police, the Commissioner can oppose the holding of the public assembly, denying it the related protections. In deciding to do so, the Commissioner must be guided by the statutory intention of the Summary Offences Act to facilitate protest and be guided by the balancing exercise between the right of free speech and other considerations as set out by Justice Hamilton in Gabriel.

However, several instances have been documented of Police misrepresenting the effect of this provision as requiring that seven days' notice be given in order for a protest to be authorised - and automatically opposing protests that do not fulfil this requirement. This includes the official Sydney City PAC Public Information Sheet stating that 'In order for your Form 1 to be authorised... police must be notified at least 7 days prior to your event',[7] communications from senior offices stating that approval was conditional on a 7 day notification,[8] and NSW Policy Deputy Commissioner David Hudson claiming a 7 day timeframe was required for police to authorise a protest.[9] The NSW Council of Civil Liberties has written to the Police Commissioner regarding these ongoing Police representation of the Summary Offences Act protections and received no reply. NSWCCL President at the time, Josh Pallas, stated that "failure to authorise a public assembly on the basis that insufficient notice has been given to you and your officers flies in the face of the parliamentary intention and the proper balancing exercise that your

[7] Misuse of the Form 1 System by NSW Police 2022-24, Legal Observers NSW https://legalobserversnsw.org/2024/05/06/misuse-of-the-form-1-system-by-nsw-police-2022-24/
[8] Misuse of the Form 1 System by NSW Police 2022-24, Legal Observers NSW https://legalobserversnsw.org/2024/05/06/misuse-of-the-form-1-system-by-nsw-police-2022-24/
[9]https://www.theguardian.com/australia-news/2023/oct/11/pro-palestine-rally-sydney-sunday-protest-march-nsw-premier-chris-minns

office is expected to undertake pursuant to the principles contained within the case law." The practice has been ongoing since this matter was raised with NSW Police in December 2022.

The right to protest involves the exercise of spontaneous protests, particularly given the fact that protests are often responding to political and social matters that arise rapidly and without warning. The Form 1 regime is not adequately adapted to protect the right to spontaneous protests in the context of the substantial penalties of s144G and s214A.

'Substantially in accordance' requirement

The protections of the Form 1 regime apply only insofar as a protest is being held 'substantially in accordance' with the Notice of Intention submitted to Police. This means that a protest risks losing Form 1 protections if members of the crowd decide to deviate from the agreed protest route or stage a sit-in. In this circumstance, even protest-goers who are engaging in the protest in a way that is 'substantially in accordance' with the Notice of Intention would be at risk of being in breach of s144G. Plainly, it is unacceptable that members of the public could be subject to serious penalties for conduct that they have no part in. This has particularly serious implications for protests that might face counter-protestors or agitators who could join a march posing as participants and then undertake actions contrary to the Notice of Intention, thus exposing all protest-goers to the risk of being in breach of s144G.

Furthermore, it is clearly an unacceptable burden for protest-goers to have to know the conditions in the Notice of Intention so as to be able to comply with them sufficiently to protect themselves from the serious penalties of s144G. Freedom of assembly must include the freedom to spontaneously join a protest and to arrive at a protest without having first consulted the exact conditions under which it is being held.

It is also unclear what threshold is required for a protest to stop being held 'substantially in accordance' with the Notice of Intention. Legal Observers NSW has documented several instances of Police using 10 minute delays to the running order of a protest to begin putting pressure on organisers by stating that they risked not being in compliance with their Notice of Intention. *Antaw v R* has been the sole Court decision on the matter, and concerned a protest which continued hours after the finishing time stated in the Notice and during which tents were erected on the road. Clearly, there is a gap between what is judicially considered to be 'substantially in accordance' with a Notice of Intention and how this provision is interpreted by Police on the ground.

The Summary Offences Act protections cannot therefore be said to offer protections for the right to protest that mitigate the restrictive effects of s144G, both due to the limitations of the regime itself and the way it is in practice used to constrain, rather than facilitate, protests, especially in cases where protests are undertaken as a matter of urgency.

Useful points to make:

- *The effect of the Form 1 regime on capacity to organise urgent protests*
- *How the threat of the s144G charges has impacted capacity to organise*

Useful case studies:

- *Form 1 regime being used to constrain protests*
- *Form 1 approval being denied to protests*
- *Need for urgent and spontaneous protests to be able to occur - examples of urgent and spontaneous protests*

Section 144G(2)

The effect of 144G(2) on the freedom of assembly and freedom of political communication is especially significant. The decision in Kvelde[10] indicates that s144G(2) may impermissibly burden the implied freedom of political communication. The reasoning applied by the Court in finding s214A(1)(d) invalid may be applied in major respects to s144G(2).

Both provisions relate to instances where a person's conduct causes pedestrians to be redirected. In s214A(1)(d) this is expressed as a prohibition on conduct that 'causes persons attempting to use the major facility to be redirected', separate to the concurrent prohibition on conduct that 'seriously disrupts or obstructs persons attempting to use the major facility'. S144G(2) prohibits conduct such as entering, remaining, climbing on, jumping or otherwise trespassing on a bridge, tunnel or major road that causes part of that bridge, tunnel or major road to be closed or causes pedestrians to be redirected by extending the circumstances in which a person 'seriously disrupts or obstructs vehicles or pedestrians' within the meaning of s144G(1)(b) to cover these outcomes.[11]

[10] Section 214A(1)(c), as it relates to the partial closure of major facilities, and section 214A(1)(d) impermissibly burdened the implied freedom of political communication, contrary to the Australian Constitution Kvelde v State of New South Wales [2023] NSWSC 1560 at [519], [564]-[565] and [578]

[11] It may be noted that in Kvelde the Court distinguished s144G(2) from s214A by reference to the fact that s144G(2) provides an expanded meaning for the expression 'seriously disrupts or obstructs', whereas

The constitutional validity of s144G(2) was not before the court in Kvelde. However, the conclusions reached by the Court in the process of determining s214A(1)(d) to be invalid may be used to consider the validity of s144G(2). The 3-part test developed by the High Court to establish whether a law contravenes the implied freedom of political communication and applied in Kvelde may be run in relation to s144G(2).

1. Does the law effectively burden the implied freedom in its terms, operation or effect?

The Court found that section 214A(1)(d) prohibited the 'prototypical peaceful protest activity' of an assembly of people near a major facility causing people attempting to use the facility to be redirected, even where the redirection was slight. The court noted that such conduct '…may cause inconvenience, but is not otherwise unlawful.' In those instances, the burden on the implied freedom of political communication was 'direct and substantial.' Kvelde v State of New South Wales [2023] NSWSC 1560 at [363].

S144G is distinguished from s214A(1)(c) and (d) by the fact that some of the conduct it prohibits is unlawful under existing provisions. Remaining on a major road in such a way that pedestrians are redirected could amount to obstructing the path of a pedestrian in a way covered by existing offences in s236(2) of the Road Rules 2014 and Section 6 of the Summary Offences Act. However, there are many circumstances where such conduct would not be captured by existing offences. For example, someone could drop a banner from the viewing deck of the Sydney Harbour Bridge pylon and security forces could respond by closing part of the Bridge and asking pedestrians to walk a different way. There is no prohibition against dropping a banner from a publicly accessible area of the Sydney Harbour Bridge - it is otherwise lawful conduct that is only prohibited by s144G(2). Thus s144G(2) prohibits peaceful protest activity that causes inconvenience, but is not otherwise unlawful, creating a direct and substantial burden on the freedom of political communication.

2. If 'yes' to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

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s214A(1)(d) is distinct from the notion of seriously disrupts or obstructs in 214A(1)(b). With respect to the Court's conclusion, the effect of s144G(2) is that redirecting pedestrians or causing part of a major road, bridge or tunnel to be closed is considered to be a serious disruption in and of itself, meaning the effect of the two provisions is identical.

The Court found that Section 214A had a legitimate purpose. That legitimate purpose was to increase deterrents to unlawful conduct causing damage, serious disruption or obstruction to major facilities and, more generally, to the broader community. The legitimate purpose of section 214A, however, did not extend to the criminalisation of otherwise lawful conduct that 'merely' caused inconvenience. In particular, it did not extend to people near a major facility being incidentally redirected or to the partial closure of a facility that does not affect its operation. Kvelde v State of New South Wales [2023] NSWSC 1560 at [434] and [436].

s144G was brought into place in 2018 following an incident where a member of the public climbed on the Bridge, causing traffic to be stopped. The purpose of the legislation was to prevent conduct causing serious disruption or obstruction on the Sydney Harbour Bridge.[12] This purpose was extended by the 2022 amendments to include preventing serious disruption or obstruction on major bridges, tunnels and roads. Following the reasoning in Kvelde, the provisions in s144G(2) cannot be said to form part of this legitimate purpose. Analogously to s214A(1)(c) and (d), s144G(2) concerns conduct that merely causes inconvenience rather than being a serious disruption.

3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government

The court answered question 3 'no'. A 'structured proportionality analysis' was used to determine whether the restriction which section 214A imposed on the implied freedom of political communication was justified. The structured proportionality analysis adopted by the court involved answering the following 3 questions, which effectively become questions 3(a)-(c):

(a) Is the law suitable to achievement of [its] purpose, in the sense of having a rational connection to that purpose?

(b) Is the burden on the freedom necessary, in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom?

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12 https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-77267'

(c) Is the law adequate in its balance, that is to say, not unduly burdensome on the freedom taking account of the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom?

Question 3(a) was answered 'yes'. The prohibitions under section 214A(1)(a)-(d) were suitable for achieving the provision's legitimate purpose. Question 3(b) was answered 'no'. Section 214A(1)(c) (insofar as it relates to partial closure) and section 214A(1)(d), impose a significantly greater burden on the implied freedom than is necessary to achieve the legitimate purpose of the law. The court considered that they have a 'chilling effect' on political communication that is conducted via protests and public assemblies. It was possible for alternative laws to have imposed a significantly lesser burden on the implied freedom and still have achieved Parliament's legitimate purpose. For example, the court said that one of the alternative laws proposed by Ms Kvelde and Ms Jacobs (that is, creating an offence of engaging in unlawful conduct that causes damage or serious disruption to major facilities) had 'substance' and 'may be reasonably expected to have imposed a significantly lesser burden upon the implied freedom and still achieved Parliament's purpose to the same or a similar effect.' Accordingly, section 214A(1)(c) (with respect to partial closure) and 214(1)(d) failed this stage of the structured proportionality analysis. (*Parliamentary Research Paper*)

The above analysis may be said to apply equally to s144G(2) due to the purpose and burdens of that provision being the same as 214A(1)(c) and (d). Indeed, the reasoning of the Court may be said to lead even more persuasively to a conclusion that s144G(2) impermissibly burdens the freedom of implied communication than in the case of the s214A provisions, as s144G(2) concerns the use of public roads and thoroughfares which have been an important site of street protest.

Useful case studies:

- *Protests which have caused pedestrians to be redirected or part of a road to be closed*

Policy objective: Prevent serious disruption to traffic

International law protects disruptive protests as long as they remain peaceful.[13] 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

[13] Human Rights Committee, General Comment No. 37 (n i) 16

or pedestrian movement or daily activities does not amount to "violence" at law.[14] Tolerance of disruption to ordinary life is necessary in a democratic society if our rights to peaceful protest, association, and expression are to have true value.

Prosecutors have historically overstated the seriousness of the disruption created by protests in order to meet the criterion of the offence. This was evidenced in the case of Deanna 'Violet' Coco who was charged with disrupting vehicles on Sydney Harbour Bridge under the pre-amendment version of s144G of the Roads Act. The initial sentence of 15 months imprisonment with a non-parole period of 8 months was overturned on appeal with the judge finding that the disruption caused by the incident was not to the extent claimed by the prosecution, and there was no evidence of Ms Coco's actions constituting a danger to the community.[15] The effect of the laws is that incidents of disruption that do not meet the seriousness threshold of the laws are being pursued by NSW Police as if they do - creating costly litigation and a drain on police and legal resources.

Useful points to make:

- *Why serious disruption is important for protests to be effective*
- *How the threat of the laws has been used to constrain protests that would not create a serious disruption to traffic*

Policy objective: Protect the capacity for the community to engage in protests concerning industrial action, industrial disputes and industrial campaigns

"The nature of people associating under the banner of a union to make a political or industrial point should be a valid form of protest and workers should not be arrested for getting together and making that point".[16]

Section 5A was inserted into s144G in 2022 to ensure that individuals could continue to engage in industrial campaigns that involved some form of obstruction to major roads, tunnels or bridges. In putting forward the provision, members of the then Labor Opposition invoked the importance of industrial protests being able to take place freely and without authorisation from the Police:

[14] Human Rights Committee, General Comment No. 37 (n i) 7
[15] Glover v R; Coco v R [2023] NSWDC 322 at [8], [29].
[16] Second Reading debate, Legislative Council, Mark Buttigieg

In the real world a trade union does not always go cap in hand to the police with a nice little form asking, "Can we please do this between such and such a time on such and such a road because we'd like to make a point?" It sometimes works that way, yes, but often it does not. I was involved in many protests where we would have a snap rally or march to Hyde Park to make a point. I remember one time we marched there with a coffin when we were protesting about mesothelioma, without any permission whatsoever. But we were able to make our point without getting arrested. The legislation in its current form would penalise unions for doing that. SR LC Mark Buttigieg

Useful points to make:

- *Industrial issues are of equal importance to other issues that provoke protest, including climate change and First Nations justice*
- *The urgency issue in relation to protest applies equally to non-union protests*
- *Unions have frequently campaigned on political issues - apartheid, Vietnam War*

Useful case studies:

- *Unions joining broader social and political protests*
- *Unions taking organisational positions on social and political issues*

Recommendations

1. Roads Act s144G should be amended to its pre-2022 form
2. Roads Act s144G(2) should be repealed
3. A review should be carried out into introducing a Human Rights Act for NSW to ensure the right to protest is protected
4. A review should be undertaken of the Summary Offences Act protections for protest and whether their operation facilitates the exercise of the right to protest

AUSTRALIAN DEMOCRACY NETWORK

s214A Crimes Act Submission

Policy objective: Striking a proper balance between the right to protest and the right of members of the public to move freely and not be obstructed in public places.

The stated policy objective of the introduction of s214A was striking a proper balance between the right to protest and the right of members of the public to move freely and not be obstructed in public places. This is evidenced in the statements of the Attorney-General and the Shadow Attorney-General at the time in Second Reading Speech debates for the amendments:

> "The bill in no way seeks to impose a general prohibition on protests. The Government supports the rights of all individuals to participate in lawful protest. Freedom of assembly and speech have long been recognised by Australian courts as important rights that are integral to a democratic system of government; however, the right to protest must be weighed against the right of other members of the public to move freely and not be obstructed in public places." Mark Speakman

> "People do and should have the right to protest, the right to object, the right to assemble, and the right to disrupt and to disobey, but not to an unlimited degree, and that is the crux of this matter—not when the cost is too high, and not when such activities impinge unnecessarily on others' rights. The bill does not deal with students wanting to protest about climate change. This is about serious, costly disruption to major infrastructure facilities, roads, tunnels and the like." Michael Daley

In balancing these rights, the government must have particular regard to the significance of the right to peaceful protest for the realisation of democracy. The freedom of assembly and freedom of political communications have been long recognised as fundamental to realising the Australian Constitution and upholding democracy. Peaceful protest is crucial for realising all of our human rights. Australia has a long and proud history of protests which have led to significant change, including preserving Tasmania's Franklin River, worker's rights, the apology to the Stolen Generations, the right to vote for women, and the advancement of LGBTIQ+ rights. The right to protest is particularly important for Aboriginal and Torres Strait Islander people and their ongoing calls for justice. Since colonisation, Aboriginal and Torres Strait Islander communities have fearlessly used protest as a way to fight for their right to self-determination, their land and water rights, an end to police violence and against the ongoing structural racism that locks them out of justice.

New South Wales has a long and proud history of protests movements which have won significant change. The first Aboriginal Day of Mourning in Gadigal/Sydney in 1938, the Freedom Rides in 1965, and the enduring legacy of the first Mardi Gras in 1978 - a protest against police violence by LGBTIQ+ communities - stand as testaments to the power of protest and collective action in the state. The ongoing fight to safeguard the environment and combat climate change continues to underscore the importance of protest in effecting change in New South Wales.

Article 21 of the International Covenant on Civil and Political Rights (ICCPR) requires all governments to guarantee and respect the right to peaceful protest and to create an enabling environment within their jurisdictions for the exercise and enjoyment of the right.[17] Governments and their agencies are required to protect all forms of peaceful protest regardless of wherever it happens or what form it takes.[18] These protections are owed to all people, not just citizens, and must be provided to everyone free from discrimination of any kind.[19] Australia has an obligation to comply with international law and realise its principles in legislation. Over 120 community organisations including the Australian Council of Social Service, Community Legal Centres NSW, Australian Services Union NSW ACT and NSW Council for Civil Liberties have called for Australian governments to respect these fundamental protest rights through the Declaration of our Right to Protest.[20]

Contrary to its stated policy objective, the Act imposes disproportionate penalties on the freedom of assembly and freedom of political communication. As recognised by Justice Adamson in Commissioner of Police v Langosch, because public spaces are shared spaces, it is 'of the nature of a protest that others will be affected and that their routines will be, at least ephemerally, interrupted.'

The Act introduces a sentence of imprisonment and 10-fold greater fines for conduct such as causing pedestrians to be redirected or part of a road being closed.[21] These kinds of interruptions arise as part of the ordinary exercise of freedom of assembly and can be said to be a relatively insignificant imposition on the rights of the public to move freely. Indeed, the

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[17] Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (Article 21), 129th sess, UN Doc CCPR/C/GC/37 (17 September 2020) 24.
[18] Human Rights Committee, General Comment No. 37 (n i) 6-7, 16
[19] Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (Article 21), 129th sess, UN Doc CCPR/C/GC/37 (17 September 2020) 6.
[20] Declaration of Our Right to Protest, 2023 https://australiandemocracy.org.au/protest-rights-declaration
[21] s144G(2)

judgement in Kvelde confirmed that such a restriction in s214A impermissibly burdened the freedom to political communication (this is considered in detail in the section addressing the impact of Kvelde).

The Act's disproportionate emphasis on keeping public spaces free of obstruction inappropriately constrains the ability of the community to assemble in public spaces and use public spaces for political communication. In doing so, it effectively denies the community the right to engage in protest without risking significant penalties.

Useful points to make:

- *Why protests at major facilities are a necessary part of the exercise of the right to protest*

Useful case studies:

- *Protests taking place at major facilities eg ports, railway stations*

Protections offered by the Summary Offences Act

The freedoms of assembly and freedom of political communication cannot be said to be sufficiently ensured by the existence of the Summary Offences Act (SOA) protections for authorised protests ('the Form 1 regime'). Section 24 of the SOA protects participants in an authorised public assembly from being charged with any offence relating to participating in an unlawful assembly or the obstruction of any person, vehicle or vessel in a public place. As the protections are addressed only to these offences, the Form 1 regime does not itself protect protest participants from being charged with seriously disrupting a major bridge, tunnel or road under s214A.

The extension of the Form 1 protections to s214A offences is achieved by s214A(6), which provides that nothing in this section prohibits conduct in accordance with the consent or authority of TfNSW, the NSW Police Force or other public authority. As the Form 1 regime is the only available way of attaining Police consent for a protest, s214A(6) can be read as protecting protests which are an authorised assembly under the SOA. S214A(6) imposes a higher burden on protests to be protected than the Summary Offences Act, requiring the consent of the Police where the SOA required only that Police do not oppose the protest and that the protest be held 'substantially in accordance' with the Form 1 Notice of Intention. There has been no judicial confirmation of the meaning of 'consent' under s214A(6) and it therefore

remains unclear whether protests which seriously disrupt a major road, bridge or tunnel, including causing part of it to be closed or pedestrians to be redirected, can invoke the protections of the SOA.

To the extent that it does offer protection from obstruction of a major bridge, tunnel or road, the provision suffers from 'substantial limitations in providing a means of reducing the burden on the implied freedom [of political communication]', as pointed out by Justice Walton in Kvelde. The protections are only activated if the Commissioner of Police does not oppose the public assembly or a Court authorises the public assembly. Independent accounts of police negotiations in relation to the Summary Offences Act protections show that Police practice around the Form 1 system frequently improperly constrains the right to protest.

Legal Observers NSW has documented[22] several instances of Police exerting pressure on organisers to accept conditions that go far beyond what is required to strike a proper balance between the right to protest and other uses of public space. This has included police using 10 minute delays to the running order of a protest to begin putting pressure on organisers by stating that they risked not being in compliance with their Notice of Intention, including at recent street marches for Palestine. In one instance in November 2023, police made Form 1 authorisation conditional on a climate group not using a skeleton prop in their march due to the proximity of anti-war rallies nearby. Several instances have also been recorded of police making Form 1 approvals conditional on compliance with a long list of conditions including obtaining permission from the local government authority and minimum numbers of rally marshals being present to 'control the protest rally'.

Spontaneous and urgent protests

The Form 1 regime is particularly poorly adapted to protecting protests undertaken with urgency, as pointed out by Justice Walton in Kvelde at [277]. In the event that a protest organiser provides less than 7 days' notice to Police, the Commissioner can oppose the holding of the public assembly, denying it the related protections. In deciding to do so, the Commissioner must be guided by the statutory intention of the Summary Offences Act to facilitate protest and be guided by the balancing exercise between the right of free speech and other considerations as set out by Justice Hamilton in Gabriel.

[22] Misuse of the Form 1 System by NSW Police 2022-24, Legal Observers NSW https://legalobserversnsw.org/2024/05/06/misuse-of-the-form-1-system-by-nsw-police-2022-24/

However, several instances have been documented of Police misrepresenting the effect of this provision as requiring that seven days' notice be given in order for a protest to be authorised - and automatically opposing protests that do not fulfil this requirement. This includes the official Sydney City PAC Public Information Sheet stating that 'In order for your Form 1 to be authorised... police must be notified at least 7 days prior to your event',[23] communications from senior offices stating that approval was conditional on a 7 day notification,[24] and NSW Policy Deputy Commissioner David Hudson claiming a 7 day timeframe was required for police to authorise a protest.[25] NSWCCL President at the time, Josh Pallas, stated that "failure to authorise a public assembly on the basis that insufficient notice has been given to you and your officers flies in the face of the parliamentary intention and the proper balancing exercise that your office is expected to undertake pursuant to the principles contained within the case law." The practice has been ongoing since this matter was raised with NSW Police in December 2022.

The right to protest involves the exercise of spontaneous protests, particularly given the fact that protests are often responding to political and social matters that arise rapidly and without warning. The Form 1 regime is not adequately adapted to protect the right to spontaneous protests in the context of the substantial penalties of s214A.

'Substantially in accordance' requirement

The protections of the Form 1 regime apply only insofar as a protest is being held 'substantially in accordance' with the Notice of Intention submitted to Police. This means that a protest risks losing Form 1 protections if members of the crowd decide to deviate from the agreed protest route or stage a sit-in. In this circumstance, even protest-goers who are engaging in the protest in a way that is 'substantially in accordance' with the Notice of Intention would be at risk of being in breach of s214A. Plainly, it is unacceptable that members of the public could be subject to serious penalties for conduct that they have no part in. This has particularly serious implications for protests that might face counter-protestors or agitators who could join a march posing as participants and then undertake actions contrary to the Notice of Intention, thus exposing all protest-goers to the risk of being in breach of s214A.

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[23] Misuse of the Form 1 System by NSW Police 2022-24, Legal Observers NSW https://legalobserversnsw.org/2024/05/06/misuse-of-the-form-1-system-by-nsw-police-2022-24/

[24] Misuse of the Form 1 System by NSW Police 2022-24, Legal Observers NSW https://legalobserversnsw.org/2024/05/06/misuse-of-the-form-1-system-by-nsw-police-2022-24/

[25] https://www.theguardian.com/australia-news/2023/oct/11/pro-palestine-rally-sydney-sunday-protest-march-nsw-premier-chris-minns

Furthermore, it is clearly an unacceptable burden for protest-goers to have to know the conditions in the Notice of Intention so as to be able to comply with them sufficiently to protect themselves from the serious penalties of s214A. Freedom of assembly must include the freedom to spontaneously join a protest and to arrive at a protest without having first consulted the exact conditions under which it is being held.

It is also unclear what threshold is required for a protest to stop being held 'substantially in accordance' with the Notice of Intention. Legal Observers NSW has documented several instances of Police using 10 minute delays to the running order of a protest to begin putting pressure on organisers by stating that they risked not being in compliance with their Notice of Intention. *Antaw v R* has been the sole Court decision on the matter, and concerned a protest which continued hours after the finishing time stated in the Notice and during which tents were erected on the road. Clearly, there is a gap between what is judicially considered to be 'substantially in accordance' with a Notice of Intention and how this provision is interpreted by Police on the ground.

The Summary Offences Act protections cannot therefore be said to offer protections for the right to protest that mitigate the restrictive effects of s214A, both due to the limitations of the regime itself and the way it is in practice used to constrain, rather than facilitate, protests, especially in cases where protests are undertaken as a matter of urgency.

Useful points to make:

- *The effect of the Form 1 regime on capacity to organise urgent protests*
- *How the threat of the s214A charges has impacted capacity to organise*

Useful case studies:

- *Form 1 regime being used to constrain protests*
- *Form 1 approval being denied to protests*

Policy objective: Prevent serious disruption to traffic

International law protects disruptive protests as long as they remain peaceful.[26] 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.[27] Tolerance of

[26] Human Rights Committee, General Comment No. 37 (n i) 16
[27] Human Rights Committee, General Comment No. 37 (n i) 7

disruption to ordinary life is necessary in a democratic society if our rights to peaceful protest, association, and expression are to have true value.

Prosecutors have historically overstated the seriousness of the disruption created by protests in order to meet the criterion of the offence. This was evidenced in the case of Deanna 'Violet' Coco who was charged with disrupting vehicles on Sydney Harbour Bridge under the pre-amendment version of s144G of the Roads Act. The initial sentence of 15 months imprisonment with a non-parole period of 8 months was overturned on appeal with the judge finding that the disruption caused by the incident was not to the extent claimed by the prosecution, and there was no evidence of Ms Coco's actions constituting a danger to the community.[28] The effect of the laws is that incidents of disruption that do not meet the seriousness threshold of the laws are being pursued by NSW Police as if they do - creating costly litigation and a drain on police and legal resources.

Useful points to make:

- *Why serious disruption is important for protests to be effective*
- *How the threat of the laws has been used to constrain protests that would not create a serious disruption to traffic*

Policy objective: Protect the capacity for the community to engage in protests concerning industrial action, industrial disputes and industrial campaigns

"The nature of people associating under the banner of a union to make a political or industrial point should be a valid form of protest and workers should not be arrested for getting together and making that point".[29]

Section 5A was inserted into s144G in 2022 to ensure that individuals could continue to engage in industrial campaigns that involved some form of obstruction to major roads, tunnels or bridges. In putting forward the provision, members of the then Labor Opposition invoked the importance of industrial protests being able to take place freely and without authorisation from the Police:

> In the real world a trade union does not always go cap in hand to the police with a nice little form asking, "Can we please do this between such and such a time on such and such a road because we'd like to make a point?" It sometimes works that way, yes, but

[28] Glover v R; Coco v R [2023] NSWDC 322 at [8], [29].
[29] Second Reading debate, Legislative Council, Mark Buttigieg

> often it does not. I was involved in many protests where we would have a snap rally or march to Hyde Park to make a point. I remember one time we marched there with a coffin when we were protesting about mesothelioma, without any permission whatsoever. But we were able to make our point without getting arrested. The legislation in its current form would penalise unions for doing that. SR LC Mark Buttigieg

Useful points to make:

- *Industrial issues are of equal importance to other issues that provoke protest, including climate change and First Nations justice*
- *The urgency issue in relation to protest applies equally to non-union protests*
- *Unions have frequently campaigned on political issues - apartheid, Vietnam War*

Useful case studies:

- *Unions joining broader social and political protests*
- *Unions taking organisational positions on social and political issues*

Implications of Kvelde

The finding of the unconstitutionality of s214A(1)(c) and (d) in Kvelde requires that the law at least be amended to remove these sections. The burden on government resources and taxpayer funds to run a defence in the constitutional challenge has already been significant and the legislation cannot be allowed to remain in its current form.

The judgement in Kvelde also affirms the need for careful consideration and proper consultation regarding the introduction of any legislation affecting the right to protest. The urgent manner in which the 2022 amendments were brought forward and the lack of review afforded to them directly contributed to the improper over-reach of s214A(1)(c) and (d). Legislative decision-making must be guided by a regard for fundamental rights and take place with the involvement of the community.

Recommendations

1. Crimes Act s214A should be repealed
2. Barring repeal of the entire section, s214(1)(c) and (d) should be repealed
3. A review should be carried out into introducing a Human Rights Act for NSW to ensure the right to protest is protected

4. A review should be undertaken of the Summary Offences Act protections for protest and whether their operation facilitates the exercise of the right to protest