



Say it loud: Protecting Protest in Australia



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Human Rights Law Centre

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Introduction

The ability to speak out publicly, to draw attention to a cause, to agitate for change, to protest, is an essential component of a democracy.

The freedom to assemble and protest allows Australians to express their views on issues important to them and to press for legal and social change. Australia has a proud history of protests leading to significant change, including the preservation of Tasmania's Franklin River, the apology to the Stolen Generations, and the advancement of LGBTIQ rights by groups like Sydney's '1978ers', who started the annual Mardi Gras parade. Attending a protest is a way for people to have their voices heard and participate in public debate.

Protests can take many forms. They may be planned or spontaneous. They may be someone silently holding a placard, a small group 'sitting' in or a march of thousands. Protests may capture the public's attention through being remarkable, or they may be simple and modest in scale. Because they seek to capture attention and demand change, they may be uncomfortable and inconvenient. In some cases, protests can create risks for the safety of the public or the protesters themselves.

Governments must take positive steps to promote protest rights and must respond to particular protests in a way that accommodates the right to engage in peaceful protest, and that strikes a proportionate balance with public order and safety, and the rights of others.

Peaceful protest is protected under international human rights law and protests engage overlapping areas of Australian law: criminal law, local government regulations, planning controls, and environmental law. Laws that affect people's ability to protest freely also engage federal constitutional law through the implied freedom of political communication. In Victoria and the Australian Capital Territory, Australia's international human rights obligations have been enshrined in domestic human rights legislation, expressly protecting freedoms of expression and assembly.

In Tasmania, New South Wales and Western Australia, governments have in recent times proposed or introduced laws directed to curbing protest rights, known as 'anti-protest laws'. Common elements of the laws are vague and ill-defined offences, excessive police powers, disproportionately harsh penalties, and the prioritisation of forestry and mining operations over the rights of individuals to access public land and protest. Independent human rights experts have been troubled by this trend, with a recent report by the United Nations Special Rapporteur on the situation of human rights defenders describing alarm at "the trend of introducing constraints by state and territory governments on the exercise of this fundamental freedom."¹ Australia is not alone – internationally there is a worrying trend of introducing legislation to restrict protest, including in the United States where at least eighteen states have seen such laws introduced or proposed.²

In 2017, the High Court of Australia decided a landmark case dealing with an anti-protest law: *Brown v Tasmania*.³ With a majority of the court finding aspects of Tasmania's *Workplaces (Protection from Protesters) Act 2014* unconstitutional, the case is the most explicit guidance so far from Australia's highest court on the constitutional protection for protest.

Recent laws impacting on protest rights and the new decision in *Brown* means the time is ripe for a distilled set of principles to guide lawmakers, government, civil society and protesters on how to protect protest in Australia.

This report outlines ten principles guiding how protest should and can be protected and regulated. These principles are rooted in Australia's Constitution, international law, common law, and general democratic principles. They also draw on international and domestic best practice. They provide a blueprint for a democracy in which the freedoms of expression and assembly are respected and protected.

Principles

This report sets out ten principles to guide the protection of protest.

Ten principles to protect protest in Australia

1	Protest activities are protected by the Australian Constitution and international law.	6	Lawmakers and governments (including police) should take positive steps to promote freedoms of expression and assembly.
2	Any regulation of protest must be limited to what is necessary and proportionate.	7	Notification procedures should facilitate, not restrict, peaceful protest.
3	As far as possible, protesters should be able to choose how they protest.	8	Lawmakers and governments should not prohibit protest based on its message, except in narrow circumstances where that message causes harm to other people.
4	Laws affecting protest should be drafted as clearly and carefully as possible.	9	Other human rights of protesters must be respected, including privacy, equality and freedom from inhuman or degrading treatment.
5	Laws regulating protest should not rely on excessive police discretion, and where discretion is necessary it should be properly guided by the law.	10	The use of force by authorities should only occur in exceptional circumstances and as a last resort.



Principle 1

Protest activities are protected by the Australian Constitution and international law

The right to protest peacefully is one of the defining features of a liberal democracy. Encompassed in the act of protest are several fundamental democratic rights: freedom of expression, freedom of assembly, and freedom of association. Peaceful protest is part of the free flow of information and ideas, which can be picked up by the public and the press, and considered by government. It allows civil society to come together and broaden political impact, particularly to voice the concerns of minority or less powerful individuals and groups. The exercise of these rights by the public also operates as a critical mechanism to hold the government, as well as other powerful groups or interests, to account.

The High Court has ruled that Australia's Constitution protects the 'freedom of political communication', because the Constitution is premised on a democratic system of government. This means laws and government decisions that overly restrict political communication are constitutionally invalid.

Political communication includes both verbal and non-verbal communication, such as demonstrations and other protest activity.⁴ In its 2017 decision *Brown v Tasmania*, the High Court squarely considered the freedom's application to laws restricting protest. The Court said:⁵

"The implied freedom protects the free expression of political opinion, including peaceful protest, which is indispensable to the exercise of political sovereignty by the people of the Commonwealth. It operates as a limit on the exercise of legislative power to impede that freedom of expression."

For this reason, a law that prevents or deters protest will limit the freedom and must be justified and proportionate to a legitimate objective. In *Brown v Tasmania*, Tasmania's 'anti-protest' laws were ruled to be unconstitutional and invalid in their application to forestry land.

Protest also receives protection under international law. The *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is a party, provides for the rights to freedom of expression (article 19), peaceful assembly (article 21) and freedom of association (article 22). Therefore, Australia has obligations under international law to respect, protect and promote the rights of people within Australia's jurisdiction to organise and participate in protests.

Australia's common law tradition also protects protest. The common law recognises freedoms of expression and assembly.⁶ Where legislation impacts upon freedoms of expression and assembly, the "principle of legality" operates under the Australian common law, which means that laws affecting protest should be interpreted narrowly, in favour of protest rights, unless there is a clear, unambiguous intention from Parliament to restrict rights.⁷

In some Australian states, protest is also expressly protected by legislation. For example, section 5 of Queensland's *Peaceful Assembly Act 1992* provides that "a person has the right to assemble peacefully with others in a public place". In Victoria and the Australian Capital Territory, human rights legislation expressly protects and promotes the rights to assembly and expression.⁸

Other state laws recognise the freedom to protest by providing exemptions from certain offences for those participating in public assemblies, such as New South Wales' *Summary Offences Act*.⁹

"Assemblies are an equally legitimate use of public space as commercial activity or the movement of vehicles and pedestrian traffic. Any use of public space requires some measure of coordination to protect different interests, but there are many legitimate ways in which individuals may use public spaces. A certain level of disruption to ordinary life caused by assemblies, including disruption of traffic, annoyance and even harm to commercial activities, must be tolerated if the right is not to be deprived of substance."

United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai and United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns.¹⁰



Principle 2

Any regulation of protest must be limited to what is necessary and proportionate

The ability to protest is important, however, rights to freedom of expression, peaceful assembly and freedom of association are not absolute rights. These rights may be subject to limitations, where these limitations are necessary and proportionate to achieve a legitimate aim.

For example:

- The freedom of political communication allows for measures that limit political communication if they are “reasonably appropriate and adapted” to a legitimate aim.
- Under the ICCPR, article 19(3) provides that freedom of expression can be subject to restrictions which are provided by law and that are necessary to respect of the rights or reputation of others, or for the protection of national security or of public order, or of public health or morals. Article 21 provides that the right of peaceful assembly can only be subject to restrictions imposed on a similar basis.
- The rights under the *Victorian Charter of Human Rights and Responsibilities Act 2006* and the *Australian Capital Territory’s Human Rights Act 2004* may be restricted by law only by such reasonable limits as can be demonstrably justified in a free and democratic society. Determining whether a limit is reasonable involves taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation

and its purpose and whether there are any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

- In Queensland, the *Peaceful Assembly Act 1992* provides that the right to assemble peacefully is subject only to such restrictions as are necessary and reasonable in a democratic society in the interests of public safety; or public order; or the protection of the rights and freedoms of other persons.¹¹

Under constitutional law and international law, proportionality is the key to working out if a restriction on a right is justified.

Laws and regulations which affect protest will not always directly target or regulate protest activity (in contrast to specific ‘anti-protest’ laws). Rather, a range of general laws affect the ability of people to engage in protest activities, such as road and traffic laws, planning and environmental law, local government regulations, and laws governing police powers. Where a law limits a person’s ability to enjoy their freedoms of expression or assembly, that limitation must be justified and proportionate, whether or not the law is directly targeted at protest.

The purpose of any law or government action restricting protest should be clear and precise. The United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association (UN Special Rapporteur) has stated that arguments need to be specific; they cannot be made in the abstract “or by indicating general, unspecified risks, but must be made in an individualized

fashion, applied in the particular case or with a specific justification.”¹²

Several kinds of purpose are well accepted as legitimate objectives which may justify limitations on rights of expression, association and assembly.

Proportionality

The legal test of proportionality is used to analyse whether a restriction on protest activity is permissible.

Proportionality generally requires three questions to be asked about the reason for, evidence in support of, and design of, any restriction on a fundamental right:

1. Does the restriction have a legitimate objective?
2. Is there a rational connection between this purpose and the restriction (that is, are the measures likely to be effective to achieve the stated purpose?)
3. Is the restriction necessary and proportionate: does it strike a reasonable balance between the purpose and the means adopted? Factors to consider here include whether there are less restrictive ways to achieve the same aim, or effective safeguards in place to prevent against unnecessary effects on individuals.

Public health and safety

Protecting the health and safety of protesters and others is recognised as a legitimate reason to restrict freedoms of expression, association and assembly under international law,¹³ and the constitutional freedom of political communication.¹⁴

It is well accepted under the law that speech rights can be restricted to prevent incitement to violence, even where a person contends that the content of their message is political. The High Court has confirmed that keeping public places free from violence is a legitimate purpose for a law limiting the freedom of political communication. In *Coleman v Power*, an offence of using “insulting words” to a person in a public place was interpreted narrowly to only apply to words intended to, or reasonably likely to, provoke unlawful physical retaliation, and was ruled to be consistent with the freedom only on that basis.¹⁵

Broader public safety concerns may also be legitimate. For example, in a case concerning by-laws which restricted preaching, canvassing, haranguing and handing out printed material in Adelaide’s Rundle Street Mall, the High Court ruled that preventing obstruction of roads and securing their safe use was a legitimate basis on which to limit freedom of political communication.¹⁶

Protecting the rights and freedoms of others

International law specifies that freedom of expression can be limited when necessary to respect the rights of others, including their rights to privacy, dignity and equality. In fact, nations are required under international law to prohibit the advocacy of national, racial or religious hatred.¹⁷ Australia’s High Court has also accepted that protecting other people’s rights and freedoms can be a legitimate purpose justifying limits on the freedom of political communication.¹⁸ For example, a number of judges recognised the interest of Australians in being undisturbed by unsolicited, seriously offensive material in their personal domain, and ruled that a law criminalising the sending of offensive letters was valid as it justifiably restricted the freedom of political communication.¹⁹ In recent times, a number of Australian states and territories have introduced safe access zones for women accessing reproductive health services. These laws limit protest rights outside abortion clinics in order to protect and promote women’s access to health, privacy and dignity (see the case study on page 17).

Democratic institutions and processes

Laws protecting democratic institutions and processes may also lawfully limit the freedom of political communication, or individual human rights under international law, if appropriately targeted and proportionately designed. For example, the High Court has ruled that electoral laws which regulate political donations may lawfully limit freedom of political communication for the purpose of preventing corruption and undue influence in the state government and overcoming perceptions of corruption and undue influence.²⁰

International law permits freedom of expression to be restricted where necessary to protect “public order”, which means “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.”²¹ The restriction must be in response to a pressing public or social need. The concept of public order can be understood to include the systems of democracy.

If the purpose of the law does not sit clearly in the well-recognised categories listed above, lawmakers should consider carefully whether the law is directed at a substantial and pressing concern, that would justify restricting a fundamental democratic freedom, and not simply the pursuit of convenience or efficiency.²³

The duck-shooting case



In 1994, Laurie Levy, an anti-duck-shooting activist, was arrested and charged after entering an area where ducks were being hunted in and around Lake Buloke in Donald, Victoria. The law under which Levy was charged, the *Wildlife (Game) (Hunting Season) Regulations 1994 (Vic)*, prohibited entry to hunting areas at certain times, unless a person

had a hunting licence. Levy complained to the High Court that the regulations prevented him from protesting against laws which allowed hunters to shoot ducks, and from being publicly seen protesting and helping the birds, and was therefore unconstitutional for infringing the freedom of political communication. Levy was unsuccessful: the High Court decided that, while the regulation did restrict the freedom, it was compatible with it.

This case was the first time that the High Court recognised that non-verbal conduct is protected by the freedom of political communication. Chief Justice Brennan stated that denying a person the opportunity to make a protest through non-verbal conduct would be as offensive to the freedom of political

communication as banning political speech-making on that topic.²⁴ This was a milestone for the protection of protest under the Constitution.

However, the court also decided that a law prohibiting particular non-verbal conduct for a legitimate purpose other than suppressing its political message is permitted, if the prohibition is appropriate and adapted (that is, proportionate) to that purpose.²⁵ In this case, the court accepted that there was a real risk to human safety arising from protesters confronting duck shooters, particularly given the probability that conflict would arise.²⁶ Therefore, the court concluded that the regulation was appropriate and adapted to the legitimate purpose of ensuring the greater safety of persons in hunting areas.²⁷



Principle 3

As far as possible, protesters should be able to choose how they protest

Meaningful exercise of the rights to freedom of expression, peaceful assembly and freedom of association encompass each person's choice over how to enjoy those rights.²⁸ There is no one way to hold a protest. For example, sit-ins, marches and silent vigils are different choices available to those seeking to communicate a public message.

In particular, protests should generally be allowed to take place within "sight and sound" of their target.²⁹ This target may be the audience for the political communication (for example, to influence politicians and/or government) or the subject matter of the communication (for example, "on-site" protests where protesters seek to be seen or filmed at an important location to draw attention to the subject of their protest).

However, in some circumstances, the government or law enforcement may place prior restrictions on how a protest can be held by prohibiting activities of a certain manner, timing or location. As noted above, a number of laws regulate general conduct for other public purposes, but may impact on a chosen method of protest. For example, laws of trespass on private land, offences relating to obstruction of traffic, laws on obscenity and late night noise regulations are restrictions that would impede the way a person may choose to protest.³⁰ Other time, place or manner restrictions may apply specifically to protest activity, such as police determining an alternate route of a protest march.

Time, place or manner restrictions should not be applied in a way that suppresses or undermines the political message or

expressive value of the protest.³¹ The conduct of Russian authorities in relation to multiple protests on a range of issues, considered in the European Court of Human Rights case of *Lashmankin*, provides a stark example of such suppression. For example, gay pride activists were told to assemble at the outskirts of the city and not the city centre, whereas pro-government demonstrations were allowed to proceed in the time, place and manner of their choosing. In these circumstances, the court ruled that the Russian authorities had violated protesters' rights by using restrictions to arbitrarily and discriminatorily intervene in the protests.³²

Where applied, any time, place or manner restrictions must be in good faith, in accordance with law, and conform to the principle of necessary and proportionate limitation (see **Principle 2** above). Where there are restrictions on time or place of a protest, suitable alternatives should be available to protesters, such that the message that the protest seeks to convey is still capable of being effectively communicated to those to whom it is directed.³³

It is important to note that protest often relies on being out of the ordinary, that is, disruptive to routine, to capture public attention and prompt consideration of the protesters' message. As part of a democratic society, there needs to be tolerance for some inconvenience, including the contravention of general regulations that may ordinarily apply to public conduct or gatherings. Police should carefully consider the rights of protesters when deciding whether

to intervene and enforce laws. Where protesters contravene general laws or regulations in the course of peaceful protest activities, they should not be subject to any aggravated penalties simply because the acts were conducted in the context of a protest.³⁴

Apparel and masks

Certain apparel and masks can have expressive value for those participating in a protest. A popular example is the Guy Fawkes mask, which is particularly prevalent among youth and student protest movements worldwide – described by the UN Special Rapporteur as potentially “as much a political statement – a way of identifying with one’s fellow demonstrators and a worldwide movement – as it is an attempt to conceal identity.”³⁵ Police and lawmakers should generally not interfere with this mode of expression. The exceptions are when the mask is worn for the purpose of preventing the identification of a person whose conduct creates probable cause for arrest, and when the mask creates a clear and present danger of imminent unlawful conduct.³⁶ Any limitation on anonymity should be justified on the basis of individualised suspicion of a serious criminal offence.³⁷ The UN Special Rapporteur has expressed concern at laws banning peaceful protesters from wearing masks, and has stated that there may be legitimate reasons to hide one’s face, including fear of retribution.³⁸

Accordingly, new Victorian laws giving police greater powers in respect of masked protesters, and increasing penalties for certain offences where the defendant wore a mask, are concerning.³⁹ They are drafted in terms that exceed what is necessary to prevent violence and criminal conduct, and deter the wearing of masks for expressive purposes.⁴⁰

Importance of location to environmental protests

On-site protest is a valuable tool in advocacy for environmental legislative and policy reform by raising public awareness of an environmental issue. It has a special importance in Australian history. Most notably, the protests against the damming of the Franklin River in 1983 led to the enactment of the *World Heritage Properties Conservation Act 1983* (Cth) which prevented construction of the dam.

The potency of on-site protest was recognised by the High Court in *Brown v Tasmania*. Justice Gageler noted that the case confirmed the “communicative power of on-site protests” through the “the generation of images capable of attracting the attention of the public and of politicians to the particular area of the environment which is claimed to be threatened and sought to be protected.”⁴¹ Similarly, Justice Nettle wrote that in the plaintiff Bob Brown’s experience, “on-site protests against forest operations and the broadcasting of images of parts of the forest environment at risk of destruction are the primary means of bringing such issues to the attention of the public and parliamentarians. Media coverage, including social media coverage, of on-site protests enables images of the threatened environment to be broadcast and disseminated widely, and the public is more likely to take an interest in an environmental issue when it can see the environment sought to be protected.”⁴²

Accordingly, restrictions that prevent the public from accessing environmental locations, particularly public land, for the purpose of peaceful protest should be avoided unless it is strictly necessary for maintenance of public safety or another compelling purpose and such limitation is necessary and proportionate as per Principle 2.

FLASHPOINT/

New South Wales introduces aggravated offences affecting environmental protests



In New South Wales, the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* introduced a new offence of “aggravated unlawful entry on inclosed lands”, where a person, while on inclosed lands, interferes with any “business or undertaking” on those lands.⁴³ Inclosed lands include any public land inclosed or surrounded by a fence, wall, building or some natural feature.⁴⁴ This offence carries a steep penalty, up to \$5,500. The 2016 Act also expanded an existing offence of “interfering with a mine” which carries a maximum penalty of 7 years imprisonment and expanded associated police discretion in respect of search and ‘move on’ powers.

This legislation was introduced with the stated intention of deterring protesters from engaging in activities claimed to threaten safety and disrupt business activities, specifically mining and coal seam gas.⁴⁵ It was introduced despite concern from environmental organisations and others (including the Human Rights Law Centre⁴⁶) that it would unreasonably restrict peaceful on-site protests which cause any disruption to mining or forestry operations, such as picketing in front of gates to mining sites. These concerns remain, however the constitutional validity of the laws has not yet been tested.⁴⁷

Sabotage: new offences in the Commonwealth Criminal Code



In June 2018, the Commonwealth Parliament passed the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*, which inserted a number of new sabotage offences into the Criminal Code, replacing the sabotage offences previously in the *Crimes Act*.

There is a real risk that the broad language of these offences criminalises peaceful protest. For example, it is an offence punishable by 20 years in prison if a person engages in conduct that results in *damage to public infrastructure*,

where they intend that the conduct will *prejudice Australia's national security*. "Public infrastructure" is defined broadly, including for example infrastructure and premises that *relate to* providing the public with utilities or services of any kind, as well as Commonwealth government buildings and infrastructure. This means that the laws will apply to a significant number of places within Australia such as roads, retail shops, and train stations. Conduct will result in "damage to public infrastructure" if it limits access to it or any part of it

by persons who are ordinarily entitled to access it. The definition of "national security" is similarly broad, extending not just to defence and territorial integrity, but also to political, military and economic relations with other countries.

The combined breadth of these definitions means the offences will capture peaceful protest far beyond what is necessary to protect national security. It is not difficult to imagine a protest – such as a blockade, a lock-on, or even a well-attended demonstration – that temporarily blocks access to a Commonwealth building, where the protesters intend to have some impact on an international issue and could prejudice our political or economic relations with a particular country or countries. One example given by civil society is a group of people blockading a public highway to prevent the export of uranium sold to the government of another country, with a view to ending uranium exports entirely. The breadth of these key terms means that there are serious risks that it violates the freedom of political communication.

The Bob Brown case: an unclear and broad law is ruled to be unconstitutional



The Human Rights Law Centre's Emily Howie with Bob Brown and Jessica Hoyt

In a 2017 landmark case for protest rights in Australia, two protesters, Bob Brown and Jessica Hoyt, challenged Tasmanian "anti-protest" laws⁶³ in the High Court, arguing that they breached the freedom of political communication.⁶⁴ The laws empowered police to "move on" protesters if the police officer "reasonably believe[d]" that the person had or would contravene provisions which prohibited protesters from engaging in certain conduct on a business premises or business access area on forestry land. The court ruled that the relevant sections of the laws were unconstitutional.

Clarity

The definition of business premises in the laws included "forestry land", which was an area of land on which forest operations were being carried out. In Tasmania, that could cover a potentially very large area of land, and it would not always be obvious (through the use of signs, barricades or similar) where the relevant area would begin or end. A "business access area" was as much of the area of land outside the business premises that was reasonably necessary to enable access to the business premises. Because of the uncertainty around what a "business premises" was, it was also difficult to determine what a "business access area" might be.



Principle 5

Laws regulating protest should not rely on excessive police discretion, and where discretion is necessary it should be properly guided by the law

Where laws governing protest activities or public gatherings afford police officers broad powers to arrest, search, issue 'move on' orders, confiscate property and disperse groups, this can have profound implications for the right to protest. When these powers are exercised (or not exercised) on a discretionary basis, concerns arise in relation to the appropriateness of conduct by the police. Where police exercise discretion inappropriately or inconsistently, it can escalate tension and increase risks of conflict with protesters.⁵⁷

For these reasons, laws should not confer more discretion than reasonably necessary.⁵⁸

However, it is not possible nor desirable to eliminate police discretion from laws that regulate protest. Discretion allows police to apply regulations

more flexibly and reasonably based on individual facts and circumstances. The key is for any discretion to be appropriately constrained, and for police to have proper guidance on appropriate decision-making. This may be through a combination of regulations, internal procedures, protocols and training.

In exercising discretion, police should be guided by a human rights approach to policing and should:

- recognise the rights of protesters, including the State's duty to facilitate peaceful protest;
- opt for less rights-restrictive measures where possible (including refraining from use of force);⁵⁹
- only decide to terminate protest in rare circumstances. During protests,

minor infringements and disorderly behaviour should be tolerated;⁶⁰

- ensure any discretionary action taken is necessary and proportionate in the circumstances;
- ensure that they are not arbitrary, discriminatory or unlawful in the exercise of discretion;⁶¹
- where possible, consult legal advisers prior to making any decision that would impair rights, in particular, where decisions made would be out of line with other regulations or protocol.⁶²

The remaining principles in this report provide further specific guidance on the best practice policing of public assemblies.

It was primarily because of vagueness about where the law applied that the law was found to be unconstitutional in its application to forestry land. The court decided that it would often be difficult for police and protesters to determine what the boundaries of business premises and access areas were, and whether protesters were on them. The judges ruled that confusion around the geographical scope of the law would be likely to lead to errors in its application. Lawful protests would be prevented or terminated, and other protesters would be deterred. Because the law would deter protests of all kinds (including lawful and peaceful protests that were not disruptive), the cost to the

freedom of political communication was considered to be too high.

Discretion

Another reason that the law was ruled unconstitutional was the breadth of powers given to police. The court identified the problem that the trigger for a protester's removal from an area was not a violation of particular prohibitions, but rather the officer's reasonable belief that the protester had committed or was committing a contravention. Under this discretion, the police officer was authorised to remove someone even if their belief, though reasonable, was wrong. This problem with the law was

made even worse by the harshness of the criminal consequences which flowed automatically from an exercise of the police discretion, including that protesters would be excluded from relevant areas for the next four days and would commit a criminal offence merely by being present on the land in that extended period of time. Further, it would not be practically possible to seek judicial review of the police officer's direction before the protest was brought to an end.



Principle 6

Lawmakers and governments (including police) should take positive steps to promote freedoms of expression and assembly

Under international law, States owe to all people within their jurisdiction duties to protect and promote freedoms of expression, association and assembly. This means that governments have a positive duty to facilitate peaceful protest, for example, by protecting individuals from being prevented from exercising their right to protest by other groups or private companies.

States must also take active steps to prevent police or other public officials from violating these rights. This includes having effective laws and policies in place, as well as the necessary education and training, that span across the planning stage of protest activity, the protest itself and afterwards.

As best practice, lawmakers should give effect to these duties through express legal recognition of the right to peaceful protest, subject to proportionate limitation in accordance with international human rights law.⁶⁵

Before the protest...

On the ground, the logistics of an assembly may be the most important thing for governments and police to work with protest organisers on to properly facilitate protest, particularly large-scale protests. Can the activity occur in the time, place and manner chosen by organisers? How can the safety of protesters, other participants and bystanders be protected? Are traffic diversions required? Are there amenities and services such as bathrooms, seats, and paramedics available? Will clean up services be required after the event?⁶⁶

The facilitation of protest (even where it causes certain disruption) is compatible with the function of law enforcement to maintain public safety and public order, particularly if there are good channels of communication and trust between protesters and police.⁶⁷ Especially in the case of protests which are planned in advance, the “negotiated management” approach, which seeks agreement with protesters rather than compulsion,⁶⁸ has helped to maintain peace in protests that otherwise raised risks of clashes with police (see further on this in the section on special events at page 13). It is critical that police are genuine in negotiations with protesters.⁶⁹ This requires police to engage with organisers of protests with the aim of building agreement on base logistics of the protest, parameters for acceptable conduct and a positive relationship that promotes communication. This approach also encourages a level of self-regulation; protesters know in advance where the line will be drawn in exercise of police powers and discretions, and the likely consequences if that line is crossed. Protesters should be encouraged to work with police and the authorities on a voluntary basis; organisers of protests should not be compelled to negotiate or suffer retribution or adverse consequences for refusing to negotiate.⁷⁰

Notification procedures are one way in which protests can be facilitated and negotiation between protest organisers and police can commence (see **Principle 7** below). However, where a protest is spontaneous or otherwise not notified, government and law enforcement should still protect and facilitate that protest.⁷¹

Clear and accessible information should be readily available to protesters, whether or not they notify authorities in advance. For example, the National Capital Authority, the Commonwealth body responsible for planning and management of national land in the Australian Capital Territory, has published guidelines and has a telephone service for advice about holding protests within the areas around parliament and foreign embassies.⁷²

Counter protests

Facilitation of protest becomes more challenging where protests by groups with opposing views (counter protests) are planned or anticipated at the same time. Police should endeavour to facilitate the rights of each side in a safe manner and allow the two groups to assemble within “sight and sound” of each other whilst also maintaining physical separation of the groups.⁷³ Given the increased risk of escalation of violence and clashes between the different sides, this may require deploying additional personnel in order to maintain the safety of participants and bystanders. Police should have adequate training to address, and if required remove, non-peaceful counter protesters attempting to disrupt a protest. Participants of peaceful assemblies should not be subject to restrictions to their protest merely on the basis of potential disorder arising from hostility directed at them.⁷⁴

During the protest...

During the protest, police should seek to protect the safety of protesters. Protests often attract various people and different interest groups. As such, police should take special care in ensuring the safety of more vulnerable participants such as children, disabled and elderly.⁷⁵

This is best achieved through continuous and clear lines of communication from the police to protest organisers. It is also important that, if required, police can communicate with protesters directly. A good example is communicating if a protest route is diverted.⁷⁶ Mass texting, social media and electronic signage may be used to ensure protesters are informed and allowed to proceed with the protest in safe means.

After the protest...

Facilitation of protest rights extends to after the protest. It is important that any protest organisers are notified of arrests made and summons issued. Moreover, there should be a procedure by which complaints about police conduct can be made without serious expense or time typical of court procedures.⁷⁷

Additionally, debriefing after protests can present a valuable opportunity for fostering consistency in practice across the police force. In particular, engaging the organisers of the protest in the debriefing exercise allows for the police to reflect on lessons learnt from different views and bridge any mismatch in perceptions.⁷⁸

Special events

Special events, such as sporting events, meetings of global leaders or visits from major religious figures, are often also the site for protest activity, both large and small. These events often attract a large number of attendees (for example, the Olympic Games, or the 2007 visit to Australia by the Pope), or involve a large cast of prominent world leaders and dignitaries in a single location. These events are therefore seen as a valuable opportunity for protesters to advance their objective by catching the media's attention, potentially internationally, and communicating their message to attendees.

It is commonplace for parliaments to pass specific legislation to facilitate the event and ensure security and public order by imposing restricted access zones and increased police powers for the time around the special event. Such regulation introduced for and exercised around the special event must carefully balance the security concerns with the rights of protesters, particularly their ability to use public space.

The principles outlined in this report still apply in special events. It is vital that protest is not unnecessarily or disproportionately restricted: protest must still be able to occur before, during and after the special event in other parts of the city or the state or territory.⁷⁹ Restricting protesters' access to limited, clearly marked security areas, and additional police powers with the view of maintaining security, may be acceptable only if reasonably appropriate and adapted in accordance with **Principle 2**.⁸⁰ Additionally, permitted locations for protest must be reasonable and the laws must not endure beyond the period of the special event. Laws and regulations should not prohibit conduct that causes mere disturbance or "annoyance" to special event participants.⁸¹

Conduct of police and other law enforcement bodies are central to maintaining this balance in the way that protest is facilitated and monitored. The "negotiated management" approach discussed in **Principle 6** is a way of helping to strike the right balance between security and protesters' rights.

The 2014 G20 hosted in Brisbane provides a useful example of positive and negative protest responses.⁸² Prior to the event, there were concerns about risks of violence at protests at the event given the experience at previous G20 summits

in London and Toronto. In response, the Queensland Parliament passed specific laws to regulate and restrict protest around the event. Legal commentators and community groups, including the Human Rights Law Centre,⁸³ expressed concern over the excessive measures in the *G20 Safety and Security Act 2013 (Qld)*, which suspended the state law which expressly recognises the right to protest,⁸⁴ prohibited a wide range of items in regulated areas, created vague new offences, and increased discretionary police powers of search (including strip searches), seizure and arrest.⁸⁵ These concerns were amplified given high police presence; the event itself involved the use of 6,400 police from eight jurisdictions across Australia and New Zealand.⁸⁶ Taken cumulatively, these factors may have deterred potential participants from attending the protests.⁸⁷

However the actual *policing* at the event was considered a success by independent commentators and observers in facilitating peaceful protests relative to prior G20 summits.⁸⁸ Academics Tim Legrand and Simon Bronitt identify two key reasons for this: first, a human rights framework was central to training and planning of policing strategies, including free speech, safety from violence and the right to peacefully protest. The core message of the policing manuals, training and philosophy was that "irrespective of the noise and discomfort caused by protest messages...police are bound to uphold the human rights of everyone".⁸⁹ Second, the police engaged in dialogue with a large number of diverse issue-based community groups in the months leading up to the event to try to build mutual trust and promote understanding of protesters' rights and responsibilities and the role of police, including police negotiators.⁹⁰ This strategy was developed based on lessons learned from failures of policing at the previous London and Toronto events. Some groups however, did not feel that negotiations were in good faith and some protest organisers felt compelled to agree with terms set by the police.⁹¹

Police exercised restraint at the event. There are multiple reported incidents where police did not enforce restrictions under the Act, favouring de-escalation over strict enforcement. Where police did exercise powers, the Queensland Law Society reported that the majority of police powers exercised appeared to be under normal police legislation and not under the excessive special event legislation.⁹²



Principle 7

Notification procedures should facilitate, not restrict, peaceful protest

Many jurisdictions have adopted notification procedures for assemblies. These procedures are intended to allow authorities to facilitate the exercise of the right to freedom of peaceful assembly, and to take measures to protect public safety and order and the rights and freedoms of others.⁹³

Notification procedures are not preconditions to enjoying the freedom to engage in protest. Accordingly, it is important that notification procedures support protest rather than constrain it. Notification should generally be voluntary, and failure to comply with a notification procedure should not render a protest unlawful.

Australian jurisdictions adopt different approaches to notification procedures.⁹⁴ Some jurisdictions use a “traditional permit system”. For example, in Tasmania a permit is necessary: it is an offence to organise or conduct a demonstration or procession to take place wholly or partly on a public street without a permit, issued by a senior police officer.⁹⁵ A traditional permit system also applies in most parts of the Northern Territory.⁹⁶

In New South Wales, state-wide legislation creates a “modern permission system”, where permission for a demonstration offers additional protection in the form of a limited immunity from certain criminal charges and civil liability, and where refusal of permission either requires a court order or is subject to judicial review.⁹⁷ In jurisdictions using this system, a protest can still go ahead without a permit, but protesters and organisers will not enjoy the added protections that a permit brings. In Victoria, there is no

state-wide legislative notification procedure or permit system.

While the modern permission system appears to offer protection to protesters, activists have expressed concerns about it. A 1997 federal parliamentary committee inquiring into the right to protest found that there was “strong community resistance to the proposition that people should apply for a permit in order to exercise a democratic right,” and that many would choose not to seek a permit if they could.⁹⁸ This is a reminder that even when adopting a modern permission system, it is important that the emphasis is on the facilitating cooperation rather than granting or withholding permission.⁹⁹

Best practice in relation to notification procedures involves several features, identified by the UN Special Rapporteur:¹⁰⁰

1. The notice period specified in any law should be as short as possible, while allowing authorities time to plan – ideally no greater than 48 hours.¹⁰¹
2. Notification procedures should not be administered in such a way that they become, in reality, a request for authorisation (as opposed to notification).
3. They should also not be administered in a way that discriminates against particular views (see **Principle 8** below).
4. Paperwork or forms involved in notification procedures should be accessible and understandable to all, including people with a disability and people for whom English is a second language.

Crucially, laws must accommodate spontaneous assemblies for which notification is not practicable. ‘Snap rallies’ are a legitimate form of protest activity, and the basis for the protest may require prompt action by those wishing to engage public attention or demonstrate their views. Such assemblies should be exempted from any notification requirement, and notification procedures should not form an impediment to such assemblies.¹⁰²

CLOSE LOOK/**Notifications for public assemblies in New South Wales**

New South Wales is one jurisdiction with a “modern permission system” in place.

Part 4 of the *Summary Offences Act 1988* allows protest organisers to inform the Police Commissioner of their assembly by submitting a “Notice of Intention to Hold a Public Assembly”. If organisers give seven days’ notice and the Commissioner does not oppose the assembly it becomes an “authorised public assembly”. If an authorised assembly proceeds in line with the details included on the notice, participants are protected from criminal liability for offences relating to participating in an unlawful assembly or obstruction of people and vehicles.¹⁰³

If the Commissioner does not approve of the assembly, and has invited the organiser to confer on the assembly, the Commissioner may approach the court for an order “prohibiting” the assembly.¹⁰⁴ Further, if organisers give less than seven days’ notice, they must ask the court for “authorisation”.¹⁰⁵

The language of “prohibition” and “authorisation” adopted in the scheme is unhelpful – there is no legal barrier preventing a protest or demonstration that is not authorised under the legislation, it is only that participants will not enjoy the extra legal protection that the scheme provides. The scheme is really a notification scheme, not an authorisation scheme.

Some aspects of the scheme could be improved upon to better realise best practice. Organisers wishing to take

advantage of the protections must engage in legal proceedings if they give less than seven days’ notice – far longer than the maximum 48 hour period recommended by UN experts.

Because the legislation does not set out criteria to guide authorisation, the New South Wales Supreme Court has had to develop guidance. The court has said that proper exercise of the discretion requires the court to balance freedoms of expression and assembly against the competing rights of other citizens including avoiding injury to persons or property, or the right to pursue their own affairs unimpeded by others’ exercise of their rights, together with the interest of the community in maintaining public order.¹⁰⁶

However, court decisions on applications have been occasionally unpredictable. For example, it has been decided that a prohibition order will ordinarily require a real prospect of a breach of the peace to be established.¹⁰⁷ However, in relation to an application made in 2017 the judge concluded that the logistical challenges posed by the expected large crowd were “too large” and “too unknown” to deny police the powers they may need, even assuming that all participants would be well behaved, sober and conscious of the rights of others.¹⁰⁸ In some judgments making a prohibition order, the fact that an assembly is planned for a time of heavy traffic has been emphasised,¹⁰⁹ where elsewhere an assembly at peak time in an area of significant commuter traffic area did not lead to a prohibition order.¹¹⁰

In other cases, the courts have declined applications for authorisation on the basis of speculation that the particular cause may attract those who do not share the peaceful intentions of the applicant.¹¹¹ It is unfair to prevent people from engaging in peaceful assembly on the basis that others, with whom they are not working or associated, may engage in violent activity.¹¹² Internationally, this approach has been found to breach rights.¹¹³

Finally, while requiring protesters to give at least 7 days’ notice to avoid a court hearing, the Act allows the Commissioner to apply for a prohibition order at the last minute, posing difficulties for protesters who have given advance notice, made plans and face challenges preparing for a last minute court hearing. In 2017, a group called Keep Sydney Open served notice on 9 January of an assembly that was to take place on 21 January. At 4 pm, only two days before the proposed assembly the Police Commissioner sought a prohibition order. On 20 January, the Supreme Court made a prohibition order.¹¹⁴ The scheme would be improved by requiring the Commissioner to make an earlier application for a prohibition order.¹¹⁵



Principle 8

Lawmakers and governments should not prohibit protest based on its message, except in narrow circumstances where that message causes harm to other people

In general, laws restricting protest should not aim to restrict specific ideas or to discriminate based on the viewpoint taken by protesters.¹¹⁶

Consequently, laws which target the message of a protest either directly (also known as ‘content-based’ restrictions) or indirectly (for example, by regulating the conduct of the protest in a way that disproportionately affects a particular viewpoint) should be approached with great caution.¹¹⁷ As part of a democratic society, there should be tolerance for differing views.¹¹⁸ Protest can be particularly important to effectively communicate the issues facing, or advance views held by, a minority or an individual in an otherwise majoritarian political system.¹¹⁹

However, in certain circumstances, a law or regulation targeting a particular message is permitted, in line with the general requirement that this limitation on protesters’ rights is necessary and proportionate (set out in **Principle 2** above). Examples include hate speech, threatening or harassing conduct or measures undertaken to protect public health.

International law expressly requires States to enact content-based restrictions relating to incitement of violence and hate speech in order to protect rights of all people to equality and non-discrimination. The ICCPR provides that States must prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.¹²⁰ The *International Covenant on the Elimination of All Forms of Racial Discrimination* requires States to take action to combat racist hate speech

and participation in organisations and activities which promote and incite racial discrimination.¹²¹ The key consideration is whether the protester is engaging in this type of conduct. For example, a protester cannot chant statements which incite violence. However, it may be acceptable for a protester to chant in support of an organisation that represents such views.¹²²

In recent times, the emergence and growth of far-right organisations espousing views of racial, ethnic and religious superiority has seen an increased prevalence of public assemblies, rallies and protests by these groups. In such situations, expression, association and assembly rights must be balanced against the obligation on the State to protect the human rights of others, including freedom from racial or religious discrimination.¹²³

For example, Victoria has experienced an increase of far-right and anti-immigration assemblies organised by groups such as the United Patriots Front. Such events raise serious risks of unlawful racist and religiously-motivated hate speech, threats of violence and intimidation of minorities. In 2017 three members of the United Patriots Front were found guilty by the Melbourne Magistrates’ Court on a criminal charge under Victoria’s *Racial and Religious Tolerance Act 2011* for conducting and filming a mock-beheading outside Bendigo Council Offices, to register their objection to the council’s decision to approve a mosque in Bendigo.¹²⁴ Where far-right protests are met with anti-racist counter protests, there is a risk of physical violence between opposing protesters. Since 2016, there have been

more than 10 protests reported by media where protesters in support of far-right views have met with counter protest, often resulting in violence and arrests of protesters from both groups. (See also **Principle 6** on facilitation of counter protest.)

The difficulty for public authorities lies in deciding whether a planned event or assembly should be allowed to proceed (with potential enforcement of any violations of the law) or should be curtailed as a pre-emptive measure. Imminence of violence or breach of hate speech laws should be a guiding factor when deciding on whether to seek to prevent a planned assembly or intervene in one that is underway.¹²⁵

CLOSE LOOK/**Safe access to reproductive health clinics**

One example of a measure that is directed towards an important public policy goal, but that impacts protest activities, is legislation that creates a 'safe access zone' outside reproductive health clinics that provide abortions.

In recent years, Tasmania,¹²⁶ Victoria,¹²⁷ the Australian Capital Territory,¹²⁸ the Northern Territory,¹²⁹ and New South Wales¹³⁰ have introduced safe access zone laws which prohibit certain acts around abortion clinics including besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding a person from accessing the clinic, or communicating about abortion in a way that could cause anxiety and distress. Recording and filming without consent in safe access zones is also prohibited. This follows similar measures introduced in Canada¹³¹ and the US.¹³²

These laws have been directed at people who have, for decades, engaged in anti-abortion activities directly outside abortion clinics. By limiting communications in the zones, the laws limit the rights of these individuals to express themselves and gather specifically outside reproductive health clinics.

However, the activity of anti-abortionists outside health clinics has particular features which justify targeted geographic restrictions on it to pursue the accepted legitimate aims of public health and safety, and protecting the right of others (in this case, patients' rights to privacy, dignity and access to reproductive healthcare).¹³³

By locating themselves outside of clinics, anti-abortionists are able to identify,

and communicate directly with, patients seeking reproductive health services, including abortions. They use typical protest activities such as holding signs, chanting and leafleting but also engage in tactics such as displaying confronting and misleading images, handing out medically misleading information, physically obstructing patients, "kerbside counselling" (where they talk to patients about abortion without consent) and filming, abuse and intimidation of patients and staff.¹³⁴ On occasion conduct has included violence and even murder. The targets are those seeking and providing abortion services.

These activities impact on patients' privacy, health and dignity. Anti-abortionists confront women without their consent about a very personal decision, at the time when health services are being sought. The activities can cause significant distress, intimidation and anxiety. Women who want reproductive health services are not able to escape from being confronted; they are a captive audience. The evidence indicates that women experience significant distress but are unlikely to change their views on abortion.¹³⁵ Access to safe abortions is central to preventing women from being forced into unsafe options¹³⁶ yet protests and other activities, such as filming, immediately outside clinics deter and restrict access to healthcare.

Accordingly, while the laws restrict protest activity, they have been ruled to be a proportionate restriction on freedom of expression by both the British Columbia Supreme Court¹³⁷ and the British Columbia Court of Appeal,¹³⁸ in order to protect

women's reproductive choices and ensure access to medical care.

In Australia, the High Court will soon hear a challenge to Victoria's safe access zone laws on the grounds that a prohibition on communications about abortion likely to cause distress and anxiety infringes the freedom of political communication.¹³⁹ The Human Rights Law Centre supports the laws: our position is that the law limits political communication but is constitutional, because it is reasonably appropriate and adapted to achieve a compelling legitimate end. We also consider that the law is consistent with Australia's human rights obligations under international law. The manner in which the laws protect the health of the women seeking medical services, and rights to privacy, dignity and equality, are consistent with the limits allowed to freedom of expression and freedom of assembly.



Principle 9

Other human rights of protesters must be respected, including privacy, equality and freedom from inhuman or degrading treatment

Lawmakers, police and other authorities have a duty not only to protect the freedoms of assembly and expression, but also to respect the other rights and freedoms enjoyed by participants in a demonstration.¹⁴⁰

The rights to which people attending a protest are entitled include the rights to privacy, to freedom of movement, to liberty, to equality before the law, and to freedom from inhuman or degrading treatment. These rights are protected at international law,¹⁴¹ under the Victorian *Charter of Human Rights and Responsibilities*,¹⁴² the Australian Capital Territory's *Human Rights Act*,¹⁴³ in various statutes, and under the common law and the principle of legality. These rights are not only important in themselves: it should be remembered that if other rights are not adequately protected in the protest context, the rights to engage in expression and assembly will also be undermined. People should not have to risk having their fundamental rights interfered with simply because they choose to express their views in a protest.

Conduct by authorities that interferes with rights and freedoms, like stopping and searching protesters, cannot be used arbitrarily or in a discriminatory manner. The mere participation in a protest does not justify the use of such powers.¹⁴⁴ Legislators should design the laws conferring such powers on police so that they are limited to circumstances of necessity, and police guidelines and rulebooks should make these principles clear.

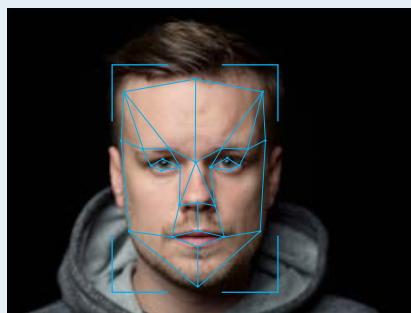
Different laws and practices can restrict the range of rights that protesters should enjoy. Common issues in relation to protest include:

- **Searches:** Police are empowered to search members of the public in certain circumstances. A search is an intrusive act which affects a person's right to privacy. This power should not be used on people on their way to, or at, a protest unless there is a clear and present danger of violence, and even then, searches must be carried out in a reasonable way.¹⁴⁵ Laws should be designed to build in an assessment of the necessity and proportionality of interference with a person and discretion should be limited.¹⁴⁶
- **Surveillance:** Sometimes police use surveillance and intelligence-gathering measures at and in the lead-up to protests. Surveillance techniques can interfere with the right to privacy. It should only be done when necessary and proportionate. Indiscriminate, untargeted surveillance of protesters and protest organisers will not be proportionate and should be prohibited.¹⁴⁷ Photographing or filming protests for intelligence-gathering purposes should not be routine, as it can discourage people from exercising their rights.¹⁴⁸ For example, it was recently reported that several New South Wales Police cars followed a bus tour for hours as city-based supporters of an environmentalist group met with mining-affected communities around the Hunter Valley in regional New South Wales.¹⁴⁹ Police stated that it was "appropriate for police to monitor the actions of protest groups during planned events. This is to ensure public order is maintained, as well as the safety of all parties." However, in the absence of any suspicion that a crime or violence was imminent, this level of surveillance is a disproportionate response to an exercise of political rights.
- **Crowd control:** Demonstrations can attract large crowds and inspire the heated expression of views, including opposing views in the same place. Police often respond to these conditions with crowd control measures, which may affect protesters' rights to freedom of movement and liberty. One example is "kettling" or "containment", where police contain demonstrators by surrounding them for a length of time, during which they are unable to leave – sometimes for hours on end without access to food or bathrooms. The UN Special Rapporteur opposes this practice.¹⁵⁰ In Canada, the Toronto police have decided to abandon kettling.¹⁵¹ Courts and other decision-makers have ruled kettling to be unlawful.¹⁵² Where police engage in this practice, they risk liability for false imprisonment.¹⁵³
- **Discrimination:** Often, demonstrations will advance minority rights or unpopular causes. Police powers should not be used to discriminate against certain groups. There is evidence that move-on orders have been used by certain police forces in a disproportionate way against Indigenous Australians,¹⁵⁴ including

at protests.¹⁵⁵ In one year in Western Australia, of the total move-on notices issued, 40% were issued to Aboriginal people.¹⁵⁶ Such practices constitute an infringement of the rights to equal enjoyment of rights, to expression and to gather in public.

In order to ensure that protesters' rights are protected, in these and other situations, states, territories and the federal government should enact meaningful privacy protection. Such robust protections should be implemented prior to the adoption of any biometric technologies, including facial recognition software, in the context of assemblies.¹⁵⁷ Police operational policies and guidelines should encourage policing strategies which do not unduly restrict rights. To ensure that police act appropriately, they should receive human rights training, and the police force should embed human rights expertise on an ongoing basis.

FLASHPOINT/ Plans for a national facial recognition database



In 2017, the Council of Australian Governments concluded an Intergovernmental Agreement, under which the states and territories agreed to contribute driver licence images to a national database, which will also include passport and visa photos, which may be used by various government agencies for facial recognition. The creation of this database comprising images of millions of innocent Australians poses the risk that law enforcement may be able to identify participants in rallies and demonstrations, potentially in real time.

Facial recognition technology, particularly real-time uses, risk transforming public spaces into what experts have called a “perpetual line-up”.¹⁵⁸ The use of facial recognition technology in the protest context could heighten the risks of participating in a protest – for example, a false positive on a demonstrator could lead to them being asked for identification, moved on, or even arrested by police. This risk is sharpened by concerns about the inaccuracies of some facial recognition technologies, particularly in their application to ethnic minorities.¹⁵⁹ More broadly, the fact that they may be identified by police could deter potential protesters from participating. It is concerning that early uses of the technology in the United Kingdom has included targeting persons protesting outside an arms fair.¹⁶⁰ London Metropolitan Police have also used it at large public gatherings, including the Notting Hill Carnival, a celebration of London's Caribbean communities.¹⁶¹



Principle 10

The use of force by authorities should only occur in exceptional circumstances and as a last resort

People participating in protests have a right to be safe and free from violence. Police may only use force in protest situations when strictly necessary and then only to the extent required for the performance of their duty.¹⁶²

Force includes physical contact with protesters; arrest; dispersal and move-on orders; deployment of horses and canines; the use of OC (pepper) spray and crowd control devices like long-range acoustic devices.

The dispersal of a protest is permitted only in rare cases,¹⁶³ such as when the protest itself incites discrimination, hostility or violence,¹⁶⁴ and then only the minimum force necessary should be used.¹⁶⁵ Force should generally not be used to disperse unlawful but non-violent protests. Mass arrests will usually be unlawful as an indiscriminate and arbitrary use of police power.¹⁶⁶

The use of weapons should be treated with caution by law enforcement. One way of ensuring this, adopted by Argentina, is to prohibit the carrying of firearms by any law enforcement official who may come into direct contact with participants in an assembly, in the exercise of their duties during the operation.¹⁶⁷ Law enforcement should be particularly careful when purchasing or engaging crowd-control weapons like water cannons, chemical irritants and acoustic weapons, which can have long-term detrimental health consequences¹⁶⁸ and which can affect protesters and passers-by who are not involved in any unlawful behaviour. These weapons should only be used as an absolute last resort, following proper training

and testing, and according to clear guidelines.¹⁶⁹

Moves to militarise local police forces can endanger the principle that the use of force is a last resort, as well as frighten and deter peaceful protesters. In 2006, the New South Wales Police Force established the Public Order and Riot Squad (PORS), in which each officer is armed with \$8,500 worth of gear, including pistols and stun guns, and receives military training.¹⁷⁰ This action was justified by the need to deal with national security threats and riots. However, the PORS was deployed more broadly than that in its first decade, including being deployed to local protests, and it has used physical force to break up those protests.¹⁷¹ The use of militarised force risks the introduction of unnecessary tension and violence to the protest arena. Centralised police forces like the PORS can also undermine attempts to develop local relationships between protest organisers and police forces.

In order to ensure that use of force is exceptional and proportionate, the UN Special Rapporteur has recommended that nations ensure that law enforcement officials have the equipment, training and instructions necessary to police assemblies wherever possible without recourse to any use of force; and that tactics in the policing of assemblies should emphasise de-escalation tactics based on communication, negotiation and engagement.¹⁷²

Specific law enforcement guidelines outlining the appropriate use of force are important. Police guidelines should for example, as in Victoria, identify that the use of force is to be avoided and

where that is not possible that only the minimum amount of force necessary should be used.¹⁷³ Cooperative, rather than adversarial, policing practices should be supported by training in “soft skills” like negotiation and mediation.¹⁷⁴

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- 29 *Ibid* [3.5], [33], [45], [101] and [123].
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- 31 Maina Kiai and Christof Heyns, above n 10, [34].
- 32 *Lashmankin and Others v. Russia* (European Court of Human Rights, Third Section, Applications nos. 57818/09 and 14 others, 7 February 2017).
- 33 OSCE/ODIHR and Venice Commission, above n 28, [45].
- 34 See Roger Douglas (2017) "Sentencing Political Offenders", *Australian Journal of Human Rights*, 1:1, 104, who argues that "the more the offence involves political communication, the more leniently it should be treated".
- 35 Maina Kiai, *Third Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly*, Maina Kiai, UN Doc. A/HRC/26/29 (14 April 2014) 11.

- 36 OSCE/ODIHR and Venice Commission, above n 28, 58.
- 37 ARTICLE 19, *The Right to Protest: Principles on Protection of Human Rights in Protests* (2015) 21 (Principle 9.3).
- 38 Maina Kiai, above n 35, 11.
- 39 *Crimes Legislation Amendment (Public Order) Act 2017* (Vic) which amended the *Control of Weapons Act 1990* (Vic).
- 40 The increased powers only apply where the person wearing a mask primarily to conceal their identity or to protect the person from effects of crowd-controlling substance. However, these circumstances remain too broad: it is legitimate to seek to be anonymous while expressing one's opinion, and also to protect oneself from substances such as OC (pepper) spray.
- 41 *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [191] (Gageler J).
- 42 *Ibid* [240] (Nettle J).
- 43 *Inclosed Lands Protection Act 1901* (NSW) s 4B.
- 44 *Ibid* s 3.
- 45 New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 March 2016, 7029 (Mr Anthony Roberts – Minister for Industry, Resources and Energy).
- 46 Hugh de Kretser, 'NSW anti-protest laws are part of a corrosive national trend', *Sydney Morning Herald* (online), 22 March 2016 <<https://www.smh.com.au/opinion/nsw-antiprotest-laws-are-part-of-a-corrosive-national-trend-20160322-gno10h.html>>.
- 47 In 2018, three environmental protesters challenged the constitutionality of the offence of interference of a mine (s 201 of the *Crimes Act 1990* (NSW)), however, the charges were dismissed on the facts, so the constitutional issue did not arise for the Court's determination: *Police v Hughes*, *Police v Luke*, *Police v Smiles*, Local Court of New South Wales Mudgee before Local Court Magistrate D Day, judgment dated 5 June 2018.
- 48 *World Youth Day Regulation 2008* (NSW), cl 7(1)(b), held to be beyond the regulation-making power in *Evans v New South Wales* (2008) 168 FCR 576.
- 49 *Crimes Act 1900* (NSW), s 201(1)(c), (d).
- 50 *G20 (Safety and Security) Act 2013* (Qld), s 74.
- 51 *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015* (WA), s 68AB.
- 52 *Bakir v Turkey* (European Court of Human Rights, Chamber, Application No 46713/10, 10 July 2018) [52]–[54].
- 53 *Brown v Tasmania* [2017] HCA 43 (18 October 2017), [73], [77]–[79], [84]–[86].
- 54 United Nations Human Rights Office of the High Commissioner, 'UN experts urge Tasmania to drop its anti-protest bill' (Media Release, 9 September 2014) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E>>; *Bakir v Turkey* (European Court of Human Rights, Chamber, Application No 46713/10, 10 July 2018) [68].
- 55 *Vural v Turkey* [2014] ECHR 1283 [66].
- 56 *Ibid* [95].
- 57 See OSCE/ODIHR and Venice Commission, above n 28, [10], [60], [91], [134], [147] and [149].
- 58 Joint Committee on Human Rights, *Demonstrating respect for rights? A human rights approach to policing protest*, House of Lords Paper 47, House of Commons Paper 320, Session 2008–09 (2009), [71], [76].
- 59 Maina Kiai and Christof Heyns, above n 10, [29]–[31];
- 60 Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, *Human Rights Handbook on Policing Assemblies*, (2016), <<https://www.osce.org/odihr/226981>>, 93; Maina Kiai and Christof Heyns, above n 10, 14.
- 61 Maina Kiai and Christof Heyns, above n 10, [43]; Victoria Police, "Human Rights Practitioner Guide", *Victoria Police Manual*, May 2018.
- 62 New South Wales Police Force, *NSW Police Force Handbook*, 2017, version as at 5 January 2017, <https://www.police.nsw.gov.au/data/assets/pdf_file/0009/197469/NSW_Police_Handbook.pdf> 364; Joint Committee on Human Rights, above n 58, [169].
- 63 *Workplaces (Protection from Protesters) Act 2014* (Tas).
- 64 *Brown v Tasmania* [2017] HCA 43 (18 October 2017).
- 65 OSCE/ODIHR and Venice Commission, above n 28, 13. See also, Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 20th sess., UN Doc A/HRC/20/27, (21 May 2012) [26].
- 66 See Geneva Academy, *Academy Briefing No. 5: Facilitating Peaceful Protests* (January 2014) <<https://www.geneva-academy.ch/joomlatools-files/docman-files/Facilitating%20Peaceful%20Protests%20.pdf>>. See also Maina Kiai and Christof Heyns, above n 10, [40].
- 67 Joint Committee on Human Rights, above n 58, [32].
- 68 Maina Kiai, *Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests*, 23rd sess, UN Doc A/HRC/22/28 (21 January 2013), [24]; Tim Legrand, & Simon Bronitt, "Policing the G20 protests: 'Too much order with too little law' revisited", *Queensland Review*, 22(1), 10.
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- 70 Maina Kiai and Christof Heyns, above n 10, [39].
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- 77 Joint Committee on Human Rights, above n 58, [157].
- 78 *Ibid* [159].
- 79 *Ibid* [10]–[12].
- 80 *Gibson v Commissioner of Police* [2007] NSWCA 251 (6 September 2007).
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- 84 *Peaceful Assembly Act 1992* (Qld).
- 85 *G20 Safety and Security Act 2013* (Qld). For a summary of the laws see Tamara Walsh, "Public Order' policing and the value of independent legal observers" *Current Issues in Criminal Justice*, vol 28, Number 1, July 2016, 34–35.
- 86 Tim Legrand and Simon Bronnitt, above n 68.
- 87 Caxton Legal Centre Inc, *Report to the Crime and Corruption Commission Queensland: Review of the G20 (Safety and Security) Act 2013*, April 2015, <<http://www.ccc.qld.gov.au/research-and-publications/browse-by-topic-1/legislation-reviews/g20/submissions/submission-caxton-legal-service-g20-review.pdf>>.
- 88 *Ibid*; Tamara Walsh, above n 85.
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- 93 Maina Kiai, above n 65, 8; OSCE/ODIHR and Venice Commission, above n 28, 63.
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- 95 *Police Offences Act 1935* (Tas) s 49AB.
- 96 See Environmental Defenders Office (NT) Inc, “*Environment Law in the Northern Territory / Fact Sheet Protests, Demonstrations, Rallies and Marches*” <http://edont.org.au/factsheets/protests-demonstrations-rallies-marches/setting-out-various-local-council-laws>.
- 97 *Summary Offences Act 1988* (NSW) Part 4.
- 98 Joint Standing Committee on the National Capital and External Territories, *A Right to Protest* (May 1997) xvii.
- 99 Ibid.
- 100 Maina Kiai, above n 65, 8-9; Maina Kiai and Christof Heyns, above n 10, Add 4-6; Maina Kiai, above n 35, 11. See also *Bukta and Others v. Hungary*, ECHR application No. 25691/04 (2007).
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- 103 *Summary Offences Act 1988* (NSW), s 24
- 104 Ibid s 25.
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- 106 *Commissioner of Police (NSW) v Gabriel* [2004] NSWSC 31 (30 January 2004) [4] (Hamilton J); *Commissioner of Police v Ridgewell* [2014] NSWSC 1138 (20 August 2014) [4] (Hidden J); *New South Wales Commissioner of Police v Bainbridge* [2007] NSWSC 1015 [16] (Adams J); *Commissioner of Police v Rintoul* [2003] NSWSC 662 (18 July 2003) [5] (Simpson J).
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- 108 *Commissioner of Police v Keep Sydney Open* [2017] NSWSC 5 (20 January 2017) [14] (Lindsay J).
- 109 *Commissioner of Police v Ridgewell* [2014] NSWSC 1138 (20 August 2014) [11]-[14] (Hidden J); *Commissioner of Police v Jackson* [2015] NSWSC 96 (20 February 2015) [74]-[83], [95] (Schmidt J).
- 110 *Commissioner of Police v Langosch* [2012] NSWSC 499 (14 May 2012) [29]-[31] (Adamson J).
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- 112 *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 All ER 529.
- 113 Ibid.
- 114 *Commissioner of Police v Keep Sydney Open* [2017] NSWSC 5 (20 January 2017); Daniel Meyerowitz-Katz and Benjamin Brady, “Protest Prohibited: Commissioner of Police v Keep Sydney Open” (2017) 31 *Law Society Journal* 90, detailing the logistical challenges in preparing for the hearing posed by the timing.
- 115 Indeed, this was the reasonable recommendation made by Keep Sydney Open’s lawyers after their experience with the scheme: Daniel Meyerowitz-Katz and Benjamin Brady, above n 114, 91.
- 116 *International Covenant on Civil and Political Rights*, art 4.
- 117 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ).
- 118 OSCE/ODIHR and Venice Commission, above n 28, [7], [80].
- 119 See Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No 129, 2016, 165 and footnote 13 therein.
- 120 *International Covenant on Civil and Political Rights*, art 20(2).
- 121 *International Convention on the Elimination of All Forms of Racial Discrimination*, art 4. See also United Nations Committee on the Elimination of Racial Discrimination, above n 18, [13].
- 122 *Bakir and Others v. Turkey and Imret v. Turkey* (no. 2) European Court of Human Rights, Second section, application nos 46713/10, 10 July 2018.
- 123 See Maina Kiai, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 32nd sess, UN Doc A/HRC/32/36 (10 August 2016) 16-18.
- 124 See James Oaten, ‘Far-right nationalists found guilty of inciting serious contempt for Muslims after mock beheading video’, ABC News (online), 5 September 2017 <<http://www.abc.net.au/news/2017-09-05/three-men-found-guilty-of-inciting-serious-contempt-for-muslims/8874804>>.
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- 128 *Health (Patient Privacy) Amendment Bill 2015* (ACT).
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- 131 *Access to Abortion Services Act*, RSBC 1996, c 1; *Safe Access to Abortion Services Act*, SO 2017, c 19; *Access to Abortion Act*, SNL 2016, c A-1.02; *Act respecting health services and social services*, RSQ, c S-4.2.
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- 133 *International Covenant on Civil and Political Rights*, arts 3, 7, 17; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) arts 3, 7, 12.
- 134 *Fraser v County Court of Victoria* [2017] VSC 83 (21 March 2017).
- 135 Diana Greene Foster et al., “Effect of abortion protesters on women’s emotional response to abortion”, *Contraception*, 2013, Volume 87, Issue 1, 81-87; Ronli Sifris and Tania Penovic, ‘Anti-Abortion Protest and the Effectiveness of Victoria’s Safe Access Zones: An Analysis’ (2018) *Monash University Law Review* (forthcoming).
- 136 Gilda Sedgh et al. “Abortion incidence between 1990 and 2014: global, regional, and subregional levels and trends” *The Lancet*, Volume 388, Issue 10041, 258 -267.
- 137 *R v Lewis* [1996] 1 SCR 921.
- 138 *R v Spratt; R v Watson* 2008 BCCA 340.
- 139 *Clubb v. Edwards & Anor* case no. M46/2018. Tasmania’s safe access laws are also being challenged by a separate litigant in *Preston v. Avery & Anor* case no. H2/2018.
- 140 *Code of Conduct for Law Enforcement Officials*, GA Res 34/169, UN GAOR, 34th sess, 106th plen mtg, UN Docs A/RES/34/169 (17 December 1979), art 2.
- 141 *International Covenant on Civil and Political Rights*, arts 7, 9, 12 and 17.
- 142 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8, 10, 12, 13 and 21.
- 143 *Human Rights Act 2004* (ACT) ss 8, 10, 12, 13 and 18.
- 144 Maina Kiai, above n 65, 11.
- 145 Maina Kiai and Christof Heyns, above n 10, 12.
- 146 *Gillan and Quinton v United Kingdom* [2009] ECHR 28 (12 January 2010).
- 147 ARTICLE 19, *The Right to Protest: Principles on Protection of Human Rights in Protests* (2015) 30 (Principle 14.1). Even targeted surveillance may violate the rights of protesters. In *Segerstedt-Wiberg v Sweden* [2006] Eur Court HR 597, the European Court of Human Rights ruled that systematic collection and storage of extensive personal data about affiliations and activities of protesters over many years as a method of surveillance of “political dissidents” by Swedish Secret Police to be a violation of protesters’ rights to privacy, freedom of expression and peaceful assembly. In contrast, in *Caripis v Victoria Police* [2012] VCAT 1472 (27 September 2012) a protester was unsuccessful in her bid to use the Charter to force police to destroy images and footage of her taken at a climate change protest.
- 148 OSCE/ODIHR and Venice Commission, above n 28, 83.
- 149 Joanne McCarthy, “The NSW Government’s anti-protest laws challenged after police target a Lock the Gate bus,” *Newcastle Herald* (online), 19 February 2018, <<https://www.theherald.com.au/story/5220991/police-state-questions-after-police-monitor-an-upper-hunter-guided-tour-bus/#slide=1>>.
- 150 Maina Kiai, above n 84, 11.

- 151 Jayme Poisson, Jennifer Yang and Brendan Kennedy, "Exclusive: Toronto police swear off G20 kettling tactic", *The Star* (online), June 22 2011, <https://www.thestar.com/news/gta/2011/06/22/exclusive_toronto_police_swear_off_g20_kettling_tactic.html>.
- 152 In Canada, the Office of the Independent Police Review Director found that Toronto police's kettling during the 2010 G20 of 400 people standing in "pouring rain" during a torrential thunderstorm over a four-hour period was "unreasonable, unnecessary and unlawful". The report concluded that the conduct infringed the constitutional right against arbitrary detention and was negligent: Office of the Independent Police Review Director, *Policing the Right to Protest: G20 Systemic Review Report* (May 2012), <http://www.oiprd.on.ca/EN/PDFs/G20-Systemic-Review-2012_E.pdf> 190. In the UK, it has been ruled that police can only use kettling "as a last resort catering for situations about to descend into violence": *The Queen on the application of Joshua Moos and Hannah McClure v The Commissioner of Police of the Metropolis* [2011] EWHC 957 at [56].
- 153 Note, however, that the European Court of Human Rights has decided that kettling in general does not constitute deprivation of liberty: *Austin v the United Kingdom* (2012) 55 EHRR 14.
- 154 Dennis Eggington and Kate Allingham, 'Move on Laws: A New Mechanism for Police Control' (2006) 6(23) *Indigenous Law Bulletin* 18.
- 155 CounterAct & Beeliar Legal Support, "The Policing of Beeliar Protests" (May 2017), <<http://counteract.org.au/wp-content/uploads/2017/05/report-into-policing-of-Beeliar-03052017-final-with-basic-graphics.pdf>>, 25-27.
- 156 Emma Wynne, 'Behaviour orders and move-on notices criticised for targeting vulnerable people,' *ABC Radio Perth* (online), 3 December 2013 <<http://www.abc.net.au/local/stories/2013/12/03/3904348.htm>>.
- 157 Maina Kiai and Christof Heyns, above n 10, 18.
- 158 Clare Garvie, Alvaro M. Bedoya and Jonathan Frankle, *The Perpetual Line-up: Unregulated Police Face Recognition in America*, 18 October 2016 <<https://www.perpetuallineup.org/report>>.
- 159 Ibid 53-57.
- 160 Big Brother Watch, *Face Off: The Lawless Growth of Facial Recognition in UK Policing*, May 2018, <<https://bigbrotherwatch.org.uk/wp-content/uploads/2018/05/Face-Off-final-digital-1.pdf>> 15, 31. For other examples, including the targeting of individuals with mental health issues without consideration of the impact of biometric surveillance itself on mental health of vulnerable individuals, see pp 27-28.
- 161 Ibid 25-26.
- 162 Code of Conduct for Law Enforcement Officials, GA Res 34/169, above n 140, art 3.
- 163 Maina Kiai and Christof Heyns, above n 10, 14
- 164 Ibid.
- 165 *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana (Cuba) from 27 August to 7 September 1990; principle 13. See *Balcik v Turkey* (2007) ECHR 25/02 (29 November 2007).
- 166 Maina Kiai and Christof Heyns, above n 10, 11.
- 167 Ibid, Add 7, citing Argentina's Minimum Criteria for the Development of Protocols for Action by the Federal Police and Security Forces during public demonstrations.
- 168 See Rohini J. Haar and Vincent Iacopino/Physicians for Human Rights and International Network of Civil Liberties Organizations, *Lethal in Disguise: The Health Consequences of Crowd-Control Weapons* (March 2016), <https://s3.amazonaws.com/PHR_Reports/lethal-in-disguise.pdf>.
- 169 Ibid 7.
- 170 Christina White, "An 'absolute right to do anything': Protest policing in NSW's last decade of a full-time riot squad", *Alternative Law Journal* (2017) 42(2) 112.
- 171 Ibid.
- 172 Maina Kiai and Christof Heyns, above n 10, 15.
- 173 For example, see Victoria Police, Policy Rules, Operational safety and equipment, *Victoria Police Manual*, May 2018, 3. See also New South Wales Police Force, above n 62, 359.
- 174 OSCE/ODIHR and Venice Commission, above n 28, 75.

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