

Human
Rights
Law
Centre.

REVIEW INTO THE ROADS ACT 1993 (NSW)

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Human Rights Law Centre.

Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4450
F: + 61 3 8636 4455
E: david.mejia-canales@hrlc.org.au
W: www.hrlc.org.au

Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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1. Context

1.1 Introduction

On 1 April 2022, the Parliament of New South Wales enacted the *Roads and Crimes Legislation Amendment Bill 2022* (NSW), amending both the *Roads Act 1993* (NSW) and the *Crimes Act 1900* (NSW).

The *Roads and Crimes Legislation Bill 2022*, among other things, amended section 144 G in Part 9 Division 7 of the *Roads Act 1993* to expand the provisions that criminalise damage or obstruction to the Sydney Harbour Bridge and other major bridges and tunnels to also include roads.

A major bridge, tunnel or road would be defined as one that is prescribed by regulation.

The amending legislation was introduced with the explicit intention of preventing or curtailing the use of non-violent direct-action tactics on roads and bridges by climate change protestors.¹ This action, in effect, criminalised all protests on public roads throughout New South Wales that have not received prior approval from New South Wales Police.

The right to peaceful protest² is a fundamental human right that allows us to express our views, shape our societies and press for social and legal change. Participating in peaceful protest is a way for all of us to have our voices heard and be active in public debate.

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.

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, air and, water rights, an end to police violence and against the ongoing structural racism that continue to lock them out of justice.

1.2 The legal foundation of the right to protest in New South Wales

In New South Wales the right to protest is based on international human rights law, the common law and the implied protection for political communication in the *Constitution*.³

¹ New South Wales, *Parliamentary Debates*, Legislative Council, 30 March 2022, Roads and Crimes Legislation Amendment Bill 2022, Mr Mark Speakman, <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-123848'>>.

² In this submission the 'right to protest' and the 'right to peaceful assembly' are used interchangeably. Any references to the right to protest are taken to mean the right to peaceful assembly contained in Article 21 of the International Covenant on Civil and Political Rights unless otherwise stated.

³ Tom Gotsis, Rowena Johns, *Protest Law in New South Wales* (Research Paper: 2024-03, February 2024) 5-6.

1.2.1 The right at international human rights law

The right to peaceful assembly and association is proclaimed in the *Universal Declaration of Human Rights*.⁴

Australia recognised the importance of the right to protest when it became a signatory to the International Covenant on Civil and Political Rights (*ICCPR*).⁵ The *ICCPR*, among other things, provides for the rights to freedom of expression, peaceful assembly and the freedom of association.

Under international human rights law, States and their agencies have a duty to respect, ensure, and protect all of the rights contained in the *ICCPR* to all people within its jurisdiction, including citizens, non-citizens, people seeking asylum or refuge, or stateless persons.⁶

The right to peaceful assembly protects assemblies wherever they take place, be it outdoors, indoors, online, in public or private spaces, or any combination of these.⁷

An assembly can also take many forms, including demonstrations, protests, pickets, parades, meetings, processions, rallies, sit-ins, vigils, or flash mobs.⁸

All assemblies enjoy protection under the *ICCPR* as long as they remain peaceful regardless if they are, or could be, temporarily disruptive.⁹

1.2.2 The right at common law

Australia's common law tradition recognises the freedoms of expression and assembly.¹⁰

Common law freedoms only apply insofar as laws do not infringe upon them.¹¹ The High Court has deliberated on the conditional nature of these freedoms in *Lange v Australian Broadcasting Corporation*:¹²

“Under a legal system based on the common law, ‘everybody is free to do anything, subject only to the provisions of the law’, so that one proceeds ‘upon an assumption of freedom of speech’ and turns to the law ‘to discover the established exceptions to it.’”¹³

The right to protest receives limited protection in Australia's Constitution. The High Court has interpreted the Constitution to imply the existence of a freedom of political communication, even though this is not explicitly stated in its text.

The High Court reasoned that the free exchange of political communication is fundamental to the system of representative and accountable government that the Constitution establishes and therefore must be protected from undue interference.

⁴ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), see Article 19 (freedom of expression) and Article 21 (right to peaceful assembly).

⁶ 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) 4-8.

⁷ *Ibid* 4-8.

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ *South Australia v Totani* [2010] HCA at 30-39; *Evans v New South Wales* (2008) 168 FCR 576 at 594-596 [72]- [77].

¹¹ Tom Gotsis, Rowena Johns (n 3) 5.

¹² *Ibid*.

¹³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.

In its 2017 decision in *Brown v Tasmania (Brown)*, the High Court considered the freedom's application to laws restricting protest rights. In *Brown*, the Court stated that:¹⁴

“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, laws that prevent or deter political communication will limit the implied freedom and must be justified and proportionate to achieve a legitimate objective to be constitutionally valid.

1.3 Limiting the right to protest

The rights to freedom of expression, peaceful assembly and freedom of association are not absolute, meaning that they can be limited.

Article 21 of the *ICCPR* provides that:

“The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”

Article 21 requires all restrictions on the right to protest be imposed through law or an administrative decision based on law.¹⁵ Therefore laws affecting the right to peaceful assembly must be clear and easily understood by everyone including, protesters, police, and the general public.¹⁶ Vagueness and ambiguity make it more likely that a law will be applied inconsistently, misapplied, or misunderstood in practice.

Article 21 requires that any restriction on the right to protest must be necessary and proportionate in a society based on democracy, the rule of law, political pluralism and respect for human rights.¹⁷ A limitation on the right to protest must be an appropriate response to a pressing social need, be the least intrusive measure to achieve a legitimate objective and moreover they must be proportionate to that objective.¹⁸

Article 21 also provides that a limitation on the right to protest is permitted on public order grounds, however public order at international law does not refer to 'law and order' or the prohibition of public disorder. Public order is the sum of all of the rules that ensure the proper functioning of society or the fundamental principles on which society is founded.¹⁹

Similarly, Article 21 provides for a restriction on the right for public safety grounds. This ground can be invoked only if it can be established that a particular protest creates a real *and* significant risk to the safety, life, and security of people, or a real *and* significant risk to serious damage to property.²⁰ The risk to public safety cannot be notional, or probable but rather be real as well as significant.

As noted above, under Australian law, restrictions to our constitutionally protected freedom of political communication must be "reasonably appropriate and adapted" to achieving a legitimate objective to be valid.

¹⁴ *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [88].

¹⁵ Human Rights Committee (n 6) 39.

¹⁶ *Ibid.*

¹⁷ *Ibid* 40.

¹⁸ *Ibid.*

¹⁹ *Ibid* 44.

²⁰ *Ibid* 43.

2. Policy Objectives of the Amendment

2.1 The policy objectives of Part 9, Division 7

In principle, preventing damage or disruption to the Sydney Harbour Bridge, other major bridges, tunnels and roads is a valid policy objective. Similarly, achieving a balance between the use of public spaces for peaceful protests and ensuring the public's right to move freely through public spaces is also a valid policy objective.

Recognising the validity of these policy objectives, for the limitations imposed by Part 9, Division 7 of the *Roads Act* on the right to peaceful assembly to be compatible with international human rights law they must be scrutinised for their legality, necessity and proportionality.

2.1.1 Legality

To not violate Article 21 authorities must demonstrate that any of the imposed restrictions meets the requirement of legality, that is they were imposed through law or administrative decisions based on law. Furthermore, the law must be sufficiently precise to allow all people to regulate their conduct.²¹

The amending legislation was lawfully enacted. However, the amendment to the *Roads Act* was introduced into Parliament and came into operation in approximately 30 hours.²² It is arguable that a law made with such haste could not have been subjected to the required parliamentary scrutiny and debate, particularly as the law significantly restricts a fundamental democratic freedom for all people in New South Wales.

Furthermore, the extremely broad definition of a 'road', as one that is prescribed by regulation is too broad and vague for a person to know with certainty whether they are on a road that is prescribed and if so if obstructing that road could attract a significant penalty, including imprisonment.

2.1.2 Necessity

Article 21 stipulates that any restrictions must be deemed "necessary in a democratic society." Any limitations must address an urgent societal need and should represent the least intrusive means to achieve the intended goal.²³

In introducing the amending legislation, the then Attorney General, The Honourable Mark Speakman, noted in his Second Reading Speech that the limitations on the right to protest contained in Part 9, Division 7 were intended to deter actions that close or obstruct roads and bridges that cause traffic diversions, and economic loss.²⁴

Seeking to limit or prevent the obstruction of roads, bridges or similar infrastructure is not on its own a necessary limitation on the right to protest as international law protects protests that cause temporary disruption to road, traffic and pedestrian movements so long as they remain peaceful.²⁵

In expanding the operation of Part 9, Division 7 Part of the *Roads Act*, Mr Speakman did not clearly outline what urgent social need the law was intended to remedy, beyond preventing temporary disruption to some. Furthermore, Mr Speakman did not inform Parliament what, if any, other less intrusive limitations were explored to achieve the expansive limitations that the amending legislation on public roads.

²¹ Ibid 39.

²² *Kvelde v State of New South Wales* [2023] NSWSC 1560, 9

²³ Human Rights Committee (n 3) 16.

²⁴ New South Wales, *Parliamentary Debates*, Legislative Council (n1).

²⁵ Human Rights Committee (n 3) 16.

2.1.3 Proportionality

Part 9, Division 7 expanded the significant penalties that existed for major disruptions on the Sydney Harbour Bridge, other major bridges, and tunnels to also include roads. These include a maximum of up to two years imprisonment and a fine of up to \$22,000.

To determine the proportionality of a restriction on the right to protest at international law a value assessment must be made weighing the nature and detrimental impact of the limitation on the right to protest against any benefits. If the detriment outweighs the benefit, at international law, the restriction is disproportionate and not permitted.²⁶

The expanded provisions in the *Roads Act* are so broad that almost all protest activity on roads without prior approval risks criminal sanction.

The provisions do not allow for a differentiated or individualised assessment of the conduct of people participating in peaceful protests at major facilities, like roads and ports. Rather the restriction on the right to protest applies to all peaceful protests on roads, bridges, tunnels and major facilities at all times.

Blanket restrictions such as these are presumptively disproportionate at international law.²⁷

Part 9 Division 7 of the *Roads Act*, while in pursuit of a legitimate policy objective does not appear to be reasonably adapted in pursuit of that objective.

Mr Speakman's Second Reading Speech does not articulate whether a value assessment was made as to whether a broad limitation on the right to protest was justified in this instance.

Furthermore, Mr Speakman did not demonstrate that the restriction was both necessary for, and proportionate to, at least one of the permissible grounds for restrictions in Article 21.

While acknowledging that Mr. Speakman's comments might not fully encapsulate policy intent, it's crucial to recognise that the amendments both to the *Crimes Act* or the *Roads Act* did not emerge from a comprehensive and meticulous law reform process. Consequently, the absence of clearly articulated policy intent exacerbates the existing concerns surrounding the proportionality of the amendments.

2.2 Notification system for protest in New South Wales

Part 4 of the *Summary Offences Act 1998* (NSW) establishes a notification system that, at least theoretically, is not mandatory but aims to encourage consultation and cooperation between protest organisers and police.

If a protest is authorised under the notification in the *Summary Offences Act* it protects protesters and organisers from being charged with offences, including those in Part 9, Division 7 of the *Roads Act* on the meeting of certain conditions and also precludes police officers from issuing a direction to protesters who are obstructing traffic.²⁸

Part 4 empowers courts to issue orders which 'authorise' or 'prohibit' public assemblies. However, courts themselves have described the use of the term 'prohibition' in the Act as misleading. Particularly as prohibition orders do not actually prevent a protest or gathering from taking place but rather it withholds the protection from immunity for certain offences.²⁹

The key steps in Part 4 of the *Summary Offences Act* are as follows:³⁰

²⁶ Ibid 40.

²⁷ Ibid 36.

²⁸ Tom Gotsis, Rowena Johns (n 3) 15.

²⁹ Ibid 17.

³⁰ Ibid 12-13.

- (a) Protest organisers provide the Commissioner of Police with written notice of a public assembly and provide all required details (s 23(1)(a)-(d)).
- (b) The assembly is authorised if one of the following occurs:
 - (i) The assembly is not opposed by the Police Commissioner (s 23(1)(f)).
 - (ii) The Police Commissioner starts legal proceedings and a court does not issue an order prohibiting the assembly (s 23(1)(f)(i)).
 - (iii) Protest organisers initiate legal proceedings and a court issues an order authorising the assembly (s 23(1)(f)(ii)).
- (c) If a public assembly that has been authorised and is held substantially in accordance with the authorisation then protest participants are not liable for any offence relating to participating in an ‘unlawful assembly’³¹ or obstructing any person, vehicle or vessel in a public place (s 24).

Protesters and protest organisers are increasingly concerned that prior notification systems are being used not just to inform authorities of protests, but to permit them. While the notification system outlined in Part 4 of the *Summary Offences Act* is technically optional, in practice it may not be.

The penalties outlined in Part 9, Division 7 of the *Roads Act*, which include up to two years imprisonment for blocking a road without prior authorisation are severe. These penalties effectively compel protest organisers to seek authorisation for protests in public spaces, particularly those near or on roads, from police, or risk facing severe financial ruin or jail.

Particularly concerning is the fact the prior notification system in place in New South Wales effectively does not allow for spontaneous protests or assemblies for which notification is not practicable or appropriate.

2.3 Notification systems at international law

Having to apply to authorities for a permit to protest undermines the right to protest.

International human rights law recognises that it is good practice for protest organisers to establish dialogue with authorities to promote preparedness, de-escalate tensions and resolve disputes, however they must not be compelled to do so.³²

At international law, a notification procedure for protests, if one exists at all, must also be necessary, proportionate and justifiable in a democratic, pluralistic society that respects human rights.³³ International law prohibits a notification procedure becoming, in its operation or its effect, a system of permitting protests.³⁴

Finally, to be compliant with international human rights law a notification procedure must accommodate spontaneous protests and assemblies while also excluding assemblies whose impact is expected to be minimal.³⁵

The notification system outlined in Part 4 of the *Summary Offences Act* ostensibly aims to facilitate consultation and cooperation between protest organisers and police. However, the practical effect of this system is one of permitting protests.

³¹ An unlawful assembly doesn’t mean one that isn’t authorised under Part 4, rather Part 4 shields participants of an authorised assembly from being charged with participating in an unlawful assembly, a distinct offence in s545C of the *Crimes Act 1900* (NSW). Per, *Ibid.*

³² Human Rights Committee (n 3) 70-73.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

This practice undermines the fundamental principle that notification systems should not serve as a mechanism for permitting protests, but rather as a means of facilitating dialogue and ensuring safety for all, including protesters, bystanders and the general public.

Additionally, the lack of provision for spontaneous protests further restricts the exercise of this fundamental right.

In light of international human rights law, which emphasises the necessity of ensuring that any limitation on the right to protest is proportionate and justifiable in a democratic society, it is imperative that the notification system in New South Wales be re-evaluated to align with these principles while also being able to accommodate spontaneous protests and assemblies.

3. Protecting protest in New South Wales

3.1 A Human Rights Act for New South Wales

Despite the right to protest being guaranteed by international human rights laws, New South Wales is not properly fulfilling its obligations to respect, ensure, and protect our right to protest and facilitate its enjoyment to all people. Protest in New South Wales is also being restricted through law enforcement measures that target protesters and protest organisers, including the use of covert surveillance and crowd control weapons.

These measures erroneously treat protests as inconvenient nuisances to be minimised or threats to be extinguished.

Protests by their very nature activate various fundamental human rights including the right to privacy or the freedoms of speech and movement. To properly protect our right to protest other human rights must also be protected. Particularly as protests are a mechanism through which people and communities recognise and actualise a broader spectrum of economic, social, cultural, and environmental rights.

The various anti-protest laws and measures in effect in New South Wales, which conflict with Australia's obligation to uphold the right to protest according to international law, should be amended to make them compatible with human rights law or be repealed if they cannot be amended. However, whilst essential, amending or repealing incompatible legislation alone would not prevent the possibility of similar or worse laws being introduced in the future.

To protect our rights, long-lasting solutions must also be prioritised.

The absence of a Human Rights Act in New South Wales results in the inconsistent protection of our right to protest but also of the other fundamental human rights guaranteed by international law.

A Human Rights Act in New South Wales would require the state and local governments and their agencies, including the police, to properly consider the human rights implications of laws and policies and of their service delivery.

A Human rights Act in New South Wales would also require courts and tribunals to, wherever possible, consider and interpret laws in a way that is compatible with human rights. It would also strengthen the law-making process as a Human Rights Act would also require parliaments to consider the human rights impacts of new legislation.

4. Recommendations

The right to peaceful protest stands as a cornerstone of democratic societies. New South Wales has a duty to ensure the protection of the right to protest and only impose limitations in accordance with international human rights law and principles.

In light of this, the Human Rights Law Centre issues the following recommendations:

4.1 The Roads Act should be amended

The amendments to the *Roads Act* and associated amendments to the *Roads Regulation 2008* resulting from the *Roads and Crimes Legislation Act (2022)* should be repealed.

4.2 New South Wales' protest notification system should be considered

Despite the notification system outlined in Part 4 of the *Summary Offences Act* not being within the scope of this review, it warrants further consideration as its practical effect is one of permitting protests and not merely facilitating them. Any consideration of the notification system should prioritise whether it is effective for meeting its stated objectives in a way that is compatible with human rights law and principles.

4.3 New South Wales needs a Human Rights Act

New South Wales needs a Human Rights Act to comprehensively protect all human rights, not just the right to protest. A Human Rights Act would provide a legal framework to ensure the protection and promotion of rights across various domains.