

## YOUR RIGHTS – A SHORT GUIDE FOR ACTIVISTS IN WESTERN AUSTRALIA

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### OUR RIGHTS

Our rights to protest, demonstrate and take part in political activities are recognised by the *International Declaration of Human Rights (1948)* as well as the *International Covenant on Civil and Political Rights (1966)* and other covenants.

In Australia, these international human rights are seldom enforceable in the face of the state. We do have these rights and we can assert them as citizens and activists, but we shouldn't expect them to be respected without question. However, it is useful to be informed of your basic rights and to hold the police accountable whilst participating in peaceful protest activities. Dissent is important for democracy!

### YOU HAVE A RIGHT TO

Remain silent & refuse to answer questions	Medical treatment
Know why you are being arrested	To call a friend, relative or lawyer
Privacy & protection from mass media	An interpreter if required

### NAME AND ADDRESS

Police have the right to ask for your name, address, and date of birth only *if they reasonably believe that you have committed, or are about to commit any offence, or you may be able to assist in the investigation of an offence*<sup>1</sup>. If you refuse to give your name and address when the police have a right to ask for it and you do not have a reasonable excuse for refusing to cooperate, you will be committing an offence and could be charged.

Police can also ask for proof of identify where it is reasonable in the circumstances. **If you are arrested and want to be processed quickly, it is highly recommended that you carry current photo ID.** If the police ask you for your name and address, you can ask the police officer for their name, rank and station for use in court later. They are legally obliged to tell you their surname and rank<sup>2</sup>.

### ANSWERING POLICE QUESTIONS

You have the right to remain silent. Anything you say to the police can be used as evidence against you or others in court, or in the police decision whether or not to charge you or other people.

Be aware that aside from the requirement to give your name and address and date of birth, you are not required to answer any police questions either before or after your arrest. You can politely explain that you are exercising your right to silence, and you will not be answering any questions. It is important to exercise your right to say NO COMMENT, and not answer occasional questions.

**If you are under 18 years of age** - the police **should not** question you unless your parents, a guardian or an independent person is present during questioning.

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<sup>1</sup> Criminal Investigation (Identifying People) Act 2002, section 16

<sup>2</sup> Criminal Investigation (Identifying People) Act 2002, section 6 and section 3 definition of official details

## **BEING ARRESTED**

Arrest is the process by which police can lawfully take you into their custody.

Police are not required to give you a warning prior to arresting you, but often they will.

Police must formally tell you they are arresting you. You should always ask the police officer; “Am I under arrest?” and “What for? Remember what they say. In most cases, it is necessary for police to inform you of the reason for the arrest.

## **HINDERING OR RESISTING ARREST**

A police officer may charge you with obstruction/hinder/resisting arrest if you try to stop them from arresting you. It is an offence to actively resist or hinder a legal arrest (yours or another’s). There is a risk of being charged by going limp/passive resistance. It is a minor charge.

## **CONTACTING LEGAL ADVICE AND SUPPORT**

The police will usually give you an opportunity to contact a friend, relative or lawyer if you have been arrested. There is a custody notification system in WA for Aboriginal people soon to be implemented, so the Aboriginal Legal Service should be notified on your request. (Oct 2019)

## **PHOTOGRAPHS AND “IDENTIFYING PARTICULARS” AND DNA**

For almost all offences, the Police may request ‘Identifying Particulars’. These include palm prints, fingerprints, footprints, photographs and measurements, and DNA sample (swabs or hair sample)<sup>3</sup>

DNA samples can be taken by police from anyone charged with a “serious offence”. Serious offence in this law means an offence the statutory penalty for which is imprisonment for 12 months or more, which is almost all offences in WA (except disorderly conduct). The police will first seek consent, and if you do not consent, then the police have the power to take the identifying details without your consent. If later the charge is dropped or you are found not guilty, you have the right to have your DNA sample destroyed and removed from the police database.

## **SEARCHES**

Police do not have an automatic right to search you. Police must follow certain rules when searching you, including respecting your dignity; limiting any public search to a pat down search, if possible, and having a police officer of the same sex carry out the search, unless an immediate search is required.

### Your place

Police can search your place 3 different ways:

- 1) With your consent (they turn up at your place and ask to come in, and you agree). You don’t have to consent.
- 2) With a Search warrant (approved by a JP)
- 3) Police reasonably suspect that violence is happening or about to happen in your home. They can enter without a warrant in this situation.

### Your Car

Police have power to search a vehicle if they reasonably suspect that the car will be used to facilitate an offence or to help someone leave after committing an offence. Police can search the vehicle to prevent it being used for an offence or to get away after an offence. Police have powers under the Misuse of Drugs Act to search your car if they reasonably suspect that there is anything to do with a drugs offence in the vehicle.

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<sup>3</sup> Criminal Investigation (Identifying People) Act 2002 section 47 and definition of serious offence

## Yourself

Before a basic search or a strip search is carried out, the person searching you must, if possible:

- identify themselves
- tell you the reason for the search
- ask you whether you agree to the search
- advise you that the search can still be carried out even if you do not agree, and
- advise you that it is an offence to try to stop the search being done.

Police have power to conduct a basic strip search if they reasonably suspect that you have something relevant to an offence. There are rules about how police conduct strip searches (it should be in private and conducted by someone of the same sex). Most activists are not strip searched, but there is unfortunately a history of WA police very occasionally strip searching some activists for deterrence reasons.

## **GETTING OUT OF CUSTODY**

After an arrest, a person can be detained by a police officer for a “reasonable time”. In WA this generally means six hours and an extension can be granted for another six by a senior officer. Any longer than 12 hours requires approval of a magistrate. Make a note of the name of the arresting officer and the time you were taken into custody and released.

Just because you have been arrested doesn't mean that you will necessarily be charged. You may be:

Released without charge	Charged and released on bail
Released and charged at a later date	Charged and brought before a bail justice
Receive an infringement notice	

If you are being released, you will be asked to confirm that:

- The police have not taken anything from you
- You have been treated reasonably
- You have received your police charge sheets

You can raise any issues with your treatment at this point. You do not have to sign or confirm anything if you do not want to.

## **BAIL**

Bail is simply an undertaking (promise) that you will appear in court on the day your charge is listed. Bail may be granted with a set of conditions, including for example a condition that a person:

- not enter or go within a certain distance from a particular place;
- not attend a particular event;
- not associate with particular people
- report to the police station.

If you do not agree to the bail conditions or you are refused bail, you may make an application to the court for an order granting or varying bail. The court will then hear and make a ruling on the application. Activists in other states have stayed in custody overnight to see a magistrate at the earliest opportunity, however in WA, there is provision for a JP to sign on your behalf for later court.

## **KEEPING RECORDS**

If you are arrested, or you have been a witness to arrests or police violence involving other activists, keep a record of every detail: what, when, where etc. Write everything down as soon as possible and ensure you have contact details for witnesses. This information can be of critical importance in subsequent legal proceedings, either against you (for example, when you are charged with an offence), or against the police (for example, if you are issuing a complaint or suing them for injuring you or unlawfully arresting you).

There is no law that prevents you from videotaping or taking photographs while protesting if these events are taking place outdoors in a public place.

### **Do I need police consent before filming at a public protest?**

No. Community protests are generally public events, not private conversations. So, it is not an offence to record these public events.

The Surveillance Devices Act WA 1998 makes it an offence to record private conversations without consent. But there is an exception, which allows recording if it is necessary to protect a person's lawful interests and that person consents (expressly or impliedly) to the recording. So, this means that you can lawfully record an incident if you're worried that Police are using or threatening excessive force.

### **Can Police take my phone or camera when I've recorded Police violence?**

Police are authorised to seize evidence of crimes. So, if police believe you have filmed activists committing an offence, the police may be entitled to seize your phone/camera. You could attempt to negotiate with police to provide them with the footage rather than the camera or note if its already live/public. If the police confiscate your phone and request that you provide them with the PIN code, you could question whether they have obtained a data access order from a Magistrate compelling you to provide the code. Always have a pin on your phone.

## **COMPLAINTS AGAINST THE POLICE**

If you have been injured by a police officer:

- see a doctor immediately, and ensure that they provide you with a written medical report describing your injuries, and photograph your injuries
- write down as much information as you can about the person or people who injured you including name, rank, police station, etc.
- write down the name of the last person to see you before you were injured and the first person to see you afterwards,

Police are under instructions to wear their identity badges at all times, but sometimes do not do so during demonstrations. The first avenue for complaints against police is the WA Police Service Police Conduct Investigation Unit, and further steps from there. Community activists are often frustrated by these processes.

## **COMMON CHARGES AND INTERACTIONS WITH THE POLICE**

Whilst it is not required, it is common practice for the police to enter into dialogue with people committing acts of political civil disobedience before arresting and charging them. Activists often have people in the role of "police liaison" to assist in clear communications and asserting rights.

**Protesting in a public place and 'move on' powers** A public place is any place that the public can enter, with or without payment. A police officer can ask you to leave a public place (move on) if they

reasonably suspect you are: Breaching the peace, Hindering, obstructing or preventing any lawful activity that is being, or is about to be, carried out by another person, Intending to commit an offence, Have just committed or are committing an offence.

## **POSSIBLE OFFENCES**

A move on notice isn't a criminal charge and won't appear on your criminal record. Failure to comply with a move on notice *is* a criminal offence, so you can be arrested and charged for breaching a move on notice.

### **Obstruction of a public officer**

Hindering or obstructing a public officer is an offence. This includes Police, and other government workers, but generally not private contractors.

### **Trespass - there are two ways you can commit trespass:**

1) going into a place without lawful excuse, or 2) staying in a place after being asked to leave. Police don't need to give you a warning first, but often will.

**Disorderly behaviour in Public** -To behave in a disorderly manner includes: a) to use insulting, offensive or threatening language; b) to behave in an insulting, offensive or threatening manner

### **Cause a traffic hazard or obstruction**

A person shall not unreasonably obstruct or prevent the free passage of any other pedestrian or a vehicle upon a path or carriageway.

## **CHARGES TO AVOID**

Include offensive language, weapons charges and assault. Being mindful of how your behaviour impacts other people, and the broader campaign at actions is useful, even if you feel passionate about the issue. Examples of where people have gotten charges they didn't anticipate could be swearing at an officer, having something like a camping or climbing knife on them, having drugs on them, or flailing when being arrested, and accidentally assaulting an officer.

## **COMMON CONCERNS**

Many people new to campaigning and activism have serious concerns about having a criminal record and the impacts that may have on employment, including working with children, or travel. 100's of people in recent years - including teachers, doctors, lawyers and other professionals have participated in peaceful civil disobedience actions with relatively minor consequences, and have retained employment. However, you should always assess the risks for your own situation.

### **What are the impacts of a criminal record?**

It depends on your circumstances, but often the impacts of a criminal record are often over-stated. Whilst some employment applications may require you to disclose your interactions with the justice system, many employers tend to be more concerned about issues relating to dishonesty or violence. That said, it is important you make a decision for yourself, and some government departments or employers may not look kindly upon civil disobedience activities.

### **Will I always get a criminal record if I have been arrested and charged?**

The Courts will always have the discretion as to whether or not a conviction will be recorded against you. Often people without prior charges, and who have committed low level offences may not have

a conviction recorded (ie, they find you guilty but your conviction is recorded as “spent”) Factors that the Court takes into account are: the nature of the offence; the offender's character and age; and the impact that the recording of a conviction will have on the offender's economic or social wellbeing or chances of finding employment.

### **Will I still be able to travel overseas?**

Most likely, yes, if you have been charged with minor offences. The examples of people who have been able to travel even though they have a criminal record includes peace activists who have been charged with trespass under Commonwealth laws and other offences at joint US-Australian military exercises and were granted entry to the United States. These activists chose to disclose their criminal record. Other activists have travelled without incident throughout Asia, Europe and the United States, some disclosing their records, others were not required to.

Some countries, including Australia, require you to disclose any past arrests or convictions on visa applications. Laws vary from country to country and can change in the current international climate.

**Will I still be able to get a working with children's check?** Working with children checks are a pre-requisite for a range of professions, such as childcare teachers. Some offences will automatically disqualify you from obtaining a working with children check, such as violence, sexual assault and sexual offences against children. A range of activists who have been charged with minor civil disobedience offences have had no issue getting working with children checks. At the time of writing we are not aware of people with minor civil disobedience offences being refused working with children's permits.

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*REMEMBER - it is up to you whether or not you choose to participate in civil disobedience activities. The risks of interaction with the police and justice system are often over-stated, particularly in relation to risk to working with children, visas and travel, however it is your personal decision, and you need to feel comfortable with it.*

*NOTE: This document was prepared by adapting documents including: [activistrights.org.au](http://activistrights.org.au), [counteract.org.au](http://counteract.org.au), legal aid, and research checked by local lawyers in Western Australia. **It is not legal advice.***

***Whilst some similar penalties and processes apply in other states, this is information specific to WESTERN AUSTRALIA and should not be used elsewhere.***

WA legislation referenced - Criminal Investigation (Identifying People) Act 2002; Criminal Investigation Act 2006; Criminal Code; Bail Act