

YOUR RIGHTS - A SHORT GUIDE FOR ACTIVISTS IN NSW – APRIL 2023

RIGHT TO PROTEST

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. There is a common law right to peaceful assembly in NSW.

In practice, however, civil and human rights organisations are increasingly concerned about repression of peaceful protest in NSW in recent years and has included: introduction of legislation with high penalties, including jail terms; surveillance of protesters and advocates, raids, and extraordinarily punitive bail conditions. In the last year sadly, we have seen a steep escalation with a number of peaceful activists handed jail sentences. At the time of writing these have all been overturned on appeal, or negotiated to lower charges thanks to effective legal representation.

This short guide is designed to help you understand your rights, responsibilities, and police powers, and we do not want to deter you from acting collectively for justice. Civil disobedience has a proud history, and well organised protests with good legal support can manage and inform risk very well. It is still unheard of for activists to receive a jail sentence for a first offence, many first-time offenders still receive no criminal record (Section 10) and fines are generally lower, or reduced on appeal.

There is a range of ‘protest’ activities that you can participate in lawfully, and some that may be considered “civil disobedience” - ie, breaking a law non-violently, for a moral or ethical purpose.

YOUR RIGHTS

Remain silent	Get medical treatment
Have an adult present if you are under 18	Call a lawyer, friend or relative
Know the reason why you are under arrest	Have access to an interpreter

There are also various ways protestors can cooperate with police if they wish. Section 23 of the *Summary Offences Act* allows for organisers to lodge a form (known as a Form 1), and notify police of their intention to hold a “public assembly”.^[1] This is NOT asking permission to protest, nor do you have to – it simply means that simple protest marches and rallies within the law should be afforded a level of protection from charges such as blocking roads. Police do have an opportunity to challenge Form 1 applications and have done so on occasion recently in NSW.

Some groups will designate a ‘police liaison’ role to advocate for safety, communicate & de-escalate police.

DO I HAVE TO TELL THE POLICE MY NAME / ADDRESS? In many instances, no. Police can require you to identify yourself if they believe you could assist with their investigation into a serious offence.^[2] They can also require you to identify yourself if they intend to give you a direction to leave a particular place.

You should give the police your name and address in the circumstances above, and also whilst driving. It is an offence not to do so, or to give police false details.^[3] If they do not appear to have a

legitimate reason, you can politely ask, “on what basis are you asking me?” Use your discretion as to whether it is useful to comply.

DO I HAVE TO ANSWER POLICE QUESTIONS? Generally speaking you have the right to remain silent, and anything you do say can be used by police against you. If you decide to exercise your right to silence it is important you tell the police this clearly and then do *not* answer any further questions. It is important not to answer some questions and not others.

The big exception to this rule is if the police ask for your name and address in the circumstances above, or if you are under arrest.

CAN THEY TELL ME TO ‘MOVE ON’? Yes. In NSW the police have broad ‘move on’ powers.^[4] The police can ask you, as an individual, or as a group, to “move on” from a public place when they believe on reasonable grounds that you are: obstructing another person; obstructing traffic; harassing or intimidating another person; or causing or are likely to cause fear in another person.

The direction must be for the purpose of reducing or eliminating the obstruction, harassment, intimidation or fear - it’s not intended for interrupting genuine protest. It is the experience of activists, however, that move on orders are often issued for the purpose of breaking up protest events. If you are directed to move on (and are not participating in an authorised protest in a public place) then the police can direct you to leave the area, must give clear instructions, specifying time, the location referred to, the reason, and warn you that not complying with the direction is an offence^[8]

CAN THEY STOP AND SEARCH ME? In a number of circumstances, the police can stop and search you. Police are allowed to search you if they have a search warrant or if you agree to be searched (**Note:** you should always ask police whether they are directing you, or if it is voluntary, you do not have to participate).

They are also allowed to search you *without your consent* if they believe you have an object on you that is dangerous, connected with an offence, stolen goods^[10] or - importantly - if they believe you have “lock on” equipment on you *and* they believe that equipment could present a serious safety risk.^[11] They can then confiscate and destroy any equipment they find.

CAN THEY SEARCH/TAKE MY PHONE If they believe evidence of a crime is on your phone they can take it. You should ensure you have it PIN protected (not face or fingerprint) though, because they require a court order/warrant to search it.

WHAT TYPES OF SEARCHES ARE THERE? Police are required to conduct all searches in the least invasive way possible. However, we unfortunately know that police do not always comply with this requirement. On site before entry into a police van, this will include a pat down outside your clothes. You should only be searched by a police officer of the same gender as you, and can request this.¹²

It is important not to resist or try to obstruct a search or you could be charged. Strip searches (which occasionally take place in custody) are only supposed to occur if they believe you may have drugs or weapons. If you think you have been searched unlawfully, or in a way that was undignified or humiliating, seek assistance below.

CAN I FILM POLICE? Yes, if you are in a public place you are allowed to film or photograph events. If you witness an incident it is particularly important to capture it if you can and advise relevant people.

ARREST PROCESS - You have the right to know why you are being arrested and the arresting officer’s name, badge number and place of duty. 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. Police are obliged to inform you of the reason for the arrest.

Security guards - have no more powers than ordinary citizens. They have no power to search or question you. They can detain you using reasonable force if they see you committing an offence until police arrive.

Photos, fingerprints and DNA - If you are over 14 and you have been charged with a criminal offence, the police can take your fingerprints or a photograph of your face while you are in custody but only if this is necessary to work out your identity. If you are under 14, police need to apply for a court order to do this.

If police want to take your fingerprints or photograph and you are not in police custody, they must apply for a court order if you are under 18. Also police can ask you to consent to a DNA sample (known as a forensic procedure). If the police ask you to consent to a forensic procedure, you should tell the police "I do not consent, but I will comply", and do not resist. After the procedure, you should seek legal advice.

POSSIBLE CHARGES

TRESPASSING – Entering or remaining on inclosed lands without a lawful excuse. 'Inclosed lands' means any land, either public or private that is surrounded by a fence, wall or other erection, or partly by a natural feature ie river, that makes the land's boundaries recognisable. Inclosed lands also include certain premises. You will be trespassing on inclosed lands if you: enter onto inclosed lands without the consent of the owner/occupier/person apparently in charge of those lands AND/OR remain without consent after being asked to leave AND do not have a lawful excuse.

For example, you may have been able to enter a shop or bank, but if asked to leave by security or manager or a person apparently in charge, and you do not, you may be committing the offence.

FAILURE TO COMPLY WITH A DIRECTIVE - A police officer can give directions in a variety of circumstances. This includes issuing directions if they believe a person is obstructing traffic, intimidating someone else etc The police can also direct a person to 'move on' (referred above) It is an offence not to comply with a direction from the police, unless you have a reasonable excuse. You could certainly ask, "on what basis are you requiring me to follow this directive?"

RESIST OR HINDER POLICE - A person cannot resist or hinder a police officer in the execution of their duties. A person cannot get in the way of a police officer who is attempting to arrest someone else or carry out another police duty. This includes the police and other government workers. Active resistance is required for this charge. Lying down/going limp SHOULD not result in a charge but there is a pattern of police doing this recently. This can be challenged.

OBSTRUCTING TRAFFIC - A person cannot, without reasonable excuse, wilfully prevent, in any manner, the free passage of a person, vehicle or vessel in a public place (s6 of Summary Offences Act 1988 (NSW)). This is a low level 'summary offence' (minor charge)

However it is important to differentiate this from new laws (2022) under S144G of the Roads Act:

Damage, disruption or obstruction of Sydney Harbour Bridge and other major bridges, tunnels and roads

A person must not enter, remain on, climb, jump from or otherwise trespass on any part of the SH Bridge or any other major bridge, tunnel or road if that conduct– (a) causes damage to the bridge, tunnel or road, or (b) seriously disrupts or obstructs vehicles or pedestrians attempting to use the bridge, tunnel or road. The penalties are high and include possible jail. [Detail here](#) & [roads here](#)

Damage or disruption to a major facility was also introduced under Section 214A of the Crimes Act and relates to obstructive activities at or near major facilities (such as ports, railway stations) and includes similar high penalties.

There are also long standing charges relating to specific infrastructure such as Ports, Parliament, Opera House, Federal facilities etc which you should seek advice on. We have just included a small example of common charges and you can find more in [our handbook](#).

AVOIDING CHARGES is important as well - both for yourself and fellow activists. Police can charge you with using offensive language or assaulting an officer, which could occur accidentally in jostling, and you should always check you do not have drugs or something viewed as a weapon on you.

IN CUSTODY - you are considered to be in police custody from the point of arrest, or them advising you, that you can't leave. You can be processed in several different ways. In some instances you may be dropped somewhere and given a Court Attendance Notice with your charge on it, and other times you will be taken into temporary lock up at the police station. There is a limit of 6 hours you can be kept in custody (with conditions) which your support team should challenge if breached.

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 or regularly report to the police station.

If you do not agree to the bail conditions or you are refused bail, you will be taken to court to have bail determined by a magistrate. You will be held in police custody until the court is available. This can mean being held in police custody overnight. Some people opt to prioritise release, even with unreasonable conditions, and challenge them afterwards.

There has been an increase in punitive bail conditions, well outside of the intent of the Bail Act - which is simply to ensure your attendance at court and we recommend you seek legal support and consider challenging them if you wish.

COURT - EDO are able to help environmental activists, and redirect others to representation

COMMON CONCERNS - are often held by people new to activism about having a criminal record and impacts that may have on employment, including working with children, or travel. 1000's of people in recent years - including teachers, doctors, lawyers and other professionals have participated in peaceful civil disobedience actions with minor consequences. There are very few whose employment has been impacted, and many examples of people with arrest records traveling overseas, continuing working with children, and non citizens participating in civil disobedience without additional consequence. However, you should always assess the risks for yourself.

WHO SHOULD I CALL? If you are at an action that has organised legal support, check if they have a main number. Otherwise:

- Environmental Defenders Office Hotline: 1300 257 716
- Aboriginal Legal Service if you are Aboriginal or a Torres Strait Islander 1800 765 767
- Youth Hotline if you are under 18 on 1800 10 18 10

This has been prepared for NSW activists by CounterAct and checked by lawyers. It is not legal advice and you should contact a lawyer for advice. Further detail handbook on website.

[1] *Summary Offences Act 1988* S23 [2] *LEPRA*, s11 [3] *LEPRA*, s12,s13 [4] *LEPRA*, s197(1) [5] *LEPRA*, s198A [6] *LEPRA*, s200(2) [7] *LEPRA*, s200(4) [8] *LEPRA*, s197 & s198 [9] *LEPRA*, s199,s202,s203 [10] *LEPRA*, s27 [11] *LEPRA*, s45A,s45B