



Environmental Defenders Office

Protest and Police Powers in Western Australia

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The Right to Protest in Western Australia

There is no express right to protest or to hold a peaceful assembly in Western Australia ('WA'). The right to protest comes from the implied freedom of political communication found in the Australian Constitution. This means that the government cannot make laws that prohibit or significantly impede a person's right to protest.

Planning a Protest in Western Australia

The *Public Order in Streets Act 1984* (WA) regulates the holding of public meetings and processions in streets in WA. A public meeting or procession is defined in the Act and simply involves 3 or more people who either move together (for a procession) or meet for the purpose of communicating or expressing a view (for a meeting).

There is no offence of holding a public meeting or procession without a permit. However, a permit ensures that so long as the public meeting or procession is held in accordance with the terms of the permit, participants cannot be guilty of an offence relating to the regulation of traffic or pedestrians or relating to the obstruction of a street.¹ Therefore, a permit provides protection from certain criminal charges.

To apply for a permit you must give notice to the Commissioner of Police. This must be given to the Commissioner no less than 4 days before the event. Lodge your application for a permit with the police station that covers the area you intend your protest to be in. If the protest you are planning goes through several police districts, you can lodge your application directly with the State Traffic Intelligence, Planning and Coordination Unit (STIPCU).

The notice must contain the following information:

- a) the date of the proposed public meeting or procession;

¹ *Public Order in Streets Act 1984* (WA) s 4.

- b) the time at which the public meeting or procession will assemble and the time at which it will disband;
- c) the place in which the public meeting or procession will be held, and the boundaries of the area to be occupied by the public meeting;
- d) in the case of a procession, the route that it will follow, the extent to which it will occupy any street through which it will pass, the places (if any) at which it will halt and the time for which it will remain stationary in each such place;
- e) the name and address of the person or body by whom or which the notice is given;
- f) the name and address of the person or body by whom or which the public meeting or procession is being, or is to be, held or conducted;
- g) the purpose of the public meeting or procession;
- h) an estimate of the number of persons who will participate in the public meeting or procession; and
- i) particulars of such other matters as may be prescribed.

The *Public Meetings and Processions Regulation 1984* (WA) sets out a pro-forma or an example of a form that can be used to provide to the police as an application for a permit. See here: [Microsoft Word - PublMeetingsAndProcessionsRegs1984_01-a0-09.docx \(legislation.wa.gov.au\)](#).

When providing your notice to the Commissioner, it will be helpful to include as much detail as possible. Consider organising the following to support your notice:

- Assign police liaisons who are responsible for communicating with the police on the day,
- Create a covid-19 safety plan including face masks and hand sanitizer to be distributed, covid marshals and QR check in codes, if necessary,
- Ensure there is first aid equipment available, and people trained in first aid assigned a role,
- Ensure safety risks are considered and if necessary, risk-mitigation plans put in place,
- Any further permits and approvals obtained, for e.g., from councils.

The Commissioner can either grant a permit, grant a permit subject to certain conditions and limitations or refused to grant a permit. The Commissioner cannot refuse to grant a permit unless they have reasonable ground for apprehending the public meeting or assembly may:

- a) occasion serious public disorder, or damage to public or private property
- b) create a public nuisance;
- c) give rise in any street to an obstruction that is too great or too prolonged in the circumstances; or
- d) place the safety of any person in jeopardy.

If a permit is refused or too onerous conditions or limitations are placed on a permit, an organiser can apply for a review of the decision of the Commissioner by the State Administrative Tribunal.²

Police Powers

The law provides police with certain powers above that of the general population to ensure that they can responsibly enforce the law. These powers can only be exercised in specific circumstances. Having a basic awareness of these powers can help you to stay safe and avoid negative

² *Public Order in Streets Act 1984* (WA) s 8.

consequences during police interactions. The following powers are some that are likely to be exercised by the police during a protest or demonstration.

In WA, police powers are mainly regulated by the *Criminal Investigation Act 2006 (WA)* and the *Criminal Investigation (Identifying People) Act 2002 (WA)*. The following powers are worth noting.

Requirement to disclose name, address, etc...³

A police officer can require you to disclose your full name, date of birth and address if the police officer reasonably suspects that you have committed, are committing or are about to commit an offence, or that you may be able to assist in the investigation of an offence.

If you fail to comply or provide false personal details you may be committing an offence with a maximum penalty of 12 months imprisonment.

Directions to move on⁴

A police officer may order a person to move on if the officer reasonably suspects the person:

- is doing or about to do an act that involves the use of violence, will cause a person to use violence or cause a person to fear violence, or
- is committing a breach of the peace, or
- is hindering, obstructing or preventing any lawful activity, or
- intends to commit an offence or, has just committed or is committing an offence.

The police officer can order the person to go beyond a reasonable distance from the place or part of the place set by the officers and not return for a period not exceeding 24 hours. The order must be in writing on a prescribed form.

Search and seizure powers without a warrant

A police officer may do a basic or strip search of a person in the following circumstances:

- if the officer reasonably suspects that the person:
 - has anything in his or her possession or under his or her control that is relevant to an offence.⁵
 - has something prohibited by a prohibited behaviour order, an interim control order or a control order in his or her possession.⁶
 - has proceeds of crime in his or her possession.⁷
- where a senior police officer has declared an area to be a safeguarded place and informs persons within that place or those entering that place that they must consent to a search or will be ordered to leave.⁸

³ *Criminal Investigation (Identifying People) Act 2002 (WA)* s 16.

⁴ *Criminal Investigation Act 2006 (WA)* s 27.

⁵ *Criminal Investigation Act 2006 (WA)* s 68; *Misuse of Drugs Act 1981 (WA)* s 23.

⁶ *Criminal Investigation Act 2006 (WA)* ss 69A, 69B.

⁷ *Criminal Property Confiscation Act 2000 (WA)* s 73(4).

⁸ *Criminal Investigation Act 2006 (WA)* s 69.

- There are specific rules governing strip searches. Importantly, unless a strip search is being done on someone in custody, it must not be done unless the searcher reasonably suspects that a strip search is necessary in the circumstances.⁹

If a police officer finds something on a person that is relevant to an offence, the police officer may seize that thing.

What to Do in the Event of an Arrest and Your Right to Silence

Power of Arrest

A police officer may arrest someone if they reasonably suspect that the person has committed, is committing or is about to commit a serious offence.¹⁰ In addition, a police officer may arrest someone for an offence that is not a serious offence if the officer reasonably suspects that the arrest is necessary to:

- ensure the personal details of the person is obtained,
- stop the person from continuing the offence or committing another offence,
- ensure the person will not endanger another person's property or safety,
- ensure the person will not interfere with witnesses or obstruct the course of justice,
- ensure the person will not conceal or disturb a thing relevant to the offence, or
- ensure the safety of the person.

Right to Silence

If you are involved in a protest it is possible that you may have a direct interaction with police.

It is important to remember when interacting with police that you have a right to silence, that is a right to not incriminate yourself. This means that you don't have to answer all the questions that the police ask you. This silence cannot be held against you if you are charged with an offence and your matter goes to court. The right to silence is subject to limited qualifications. In WA, an important qualification is if a police officer reasonably suspects that you have committed, are committing or are about to commit an offence or may be able to assist in the investigation of an offence they can request your name, date of birth, and current address.¹¹ It is important to seek legal advice about your specific circumstances should this arise.

Anything that you do say or do while interacting with police can ultimately form a part of the evidence used against you if you are charged with an offence.

Police caution

When you are under arrest and the police want to question you, they are required to caution you that you do not have to do or say anything and that anything that you do or say can be used in evidence against you.¹²

⁹ *Criminal Investigation Act 2006 (WA)* s 70.

¹⁰ *Criminal Investigation Act 2006 (WA)* s 128.

¹¹ *Criminal Investigation (Identifying People) 2002 (WA)* s 16.

¹² *Criminal Investigation Act 2006 (WA)* s 138(2)(b).

Right to communicate with friend, relative, guardian or independent person and Australian legal practitioner

As an arrested person, before any investigative procedure, such as an interview, you have the right to communicate with a friend or relative to inform them of your whereabouts and a legal practitioner of your choice. The police must give you reasonable facilities to enable you to communicate with this person.¹³

Additional rights

If you are unable to communicate or understand spoken English sufficiently for any reason the police must ensure that you are not interviewed until an interpreter or other qualified person is available.¹⁴ There are no strong legal protections afforded to people with psychiatric or intellectual disabilities when in police custody, however police policy dictates that children, people with physical, intellectual or psychiatric disabilities, people with a specific cultural need or people who are not proficient in English may have an interview friend.¹⁵

Power to take identifying particulars

If you are in police custody, the police have the power to take your fingerprints, palm prints and photograph for the purposes of identification. If you have been charged with a serious offence they may also have the right to take your DNA. The police will ask for your consent. However, if you do not consent the police have the power to take these identifying particulars against your will.¹⁶

Power to undertake a basic search, strip search or internal forensic procedure¹⁷

If you are in police custody, an authorised officer may, as often as is reasonably necessary, do a basic search or strip search you for a security risk item. A security risk item is defined as anything that could be used to endanger yourself or any other person, assist you or another person to escape or that could adversely affect the security of the place where you are kept.

Bail

If police arrest you, they will take you back to the police station to charge you. Once the charge paperwork has been completed at the police station, the police decide whether to release you.¹⁸ The police can release you without bail and tell you to attend court on a certain day to face your charges,¹⁹ they can release you on bail subject to certain conditions or they can refuse to release you.

Police bail

¹³ *Criminal Investigation Act 2006* (WA) ss 137(3)(c), 138(2)(c).

¹⁴ *Criminal Investigation Act 2006* (WA) s 138(2)(d).

¹⁵ See Australian Government, Australian Institute of Criminology, 'Police Interviews with vulnerable adult suspects' (Web Page, 1 July 2011) <<https://www.aic.gov.au/publications/rip/rip21>>.

¹⁶ *Criminal Investigation (Identifying People) Act 2002* s 49.

¹⁷ *Criminal Investigation Act 2006* (WA) s 135.

¹⁸ *Bail Act 1982* (WA) s 6.

¹⁹ *Bail Act 1982* (WA) s 6A.

If police decide to release you on bail, this is known as police bail. The police can impose conditions on you such as a requirement that you be of good behaviour, that you comply with a curfew or a place restriction. It is always a requirement of bail that you attend court on your next court date. If you receive bail you have to sign a form acknowledging your bail conditions before you are released. This form is called a bail undertaking.²⁰

Release application before the court

If police refuse to release you or you refuse to sign your bail acknowledgment, you are taken before the court to apply for bail. The police must take you before the court as soon as possible after they decide to not release you on bail, however depending on what time you were arrested this may not be until the next day.

You will be given the opportunity to speak to a solicitor, either of your own choosing, or a Legal Aid solicitor, to represent you on your release application. You can also self-represent. If you make a release application, the court can decide to dispense with bail and release you,²¹ release you unconditionally (without any conditions), impose bail conditions and release you, or refuse you bail.²² If you are refused bail by the court you will be taken to a correctional centre and be held in custody until your matter is finalised or another release application is made, this is known as 'remand'.

Determining whether to grant bail

When determining whether or not to grant you bail the Court has to consider whether there are reasonable grounds to believe if released the community that you will:²³

- Fail to attend Court,
- Interfere with witnesses or obstruct the course of justice,
- Commit another offence, continue or repeat the offence that they have been charged with or
- Endanger another person's safety or property.

If the Court believes that there is a low risk, or that certain conditions can be imposed to mitigate any risk then they will release you on bail subject to conditions or unconditionally. If the Court believes that there are no conditions to mitigate those risks then you will be held on remand.²⁴

Bail conditions

Bail conditions are designed to be restrictive, however, they should not be more onerous than necessary to address the bail risks.²⁵ If you believe your bail restrictions are more onerous than necessary you can apply to the Court to vary your conditions. Therefore, it is important to remember even if you do not agree with the police bail conditions, you can ask the Court to change them in the days after your release. Not agreeing with the police bail conditions should not be a reason to refuse to sign your bail acknowledgment.

²⁰ *Bail Act 1982 (WA)* s 28.

²¹ *Bail Act 1982 (WA)* s 7A.

²² *Bail Act 1982 (WA)* Schedule 1, Part C, cl 1.

²³ *Bail Act 1982 (WA)* Schedule 1, Part C, cl 1.

²⁴ *Bail Act 1982 (WA)* Schedule 1, Part C, cl 1.

²⁵ *Bail Act 1982 (WA)* s 17(2).

Transgender, intersex and non-binary people in custody

Police searches and custody

There is no clear legal basis to say that a non-binary, intersex, or transgender person must be searched by a member of the police of the sex of their choosing or of the sex that they identify with. The law says that if practicable a person must be searched by a police officer of the same sex as the person searched.²⁶ Internal police policy may indicate that transgender, non-binary and intersex people be searched by their preferred gender.

There is also no publicly available police policy concerning how transgender, non-binary and intersex people should be treated in police custody.

Correctives searches and custody

The WA Custodial Operations Manual states that where a prisoner identifies as trans, non-binary or intersex they will be asked when entering custody what their preferred placement is. They will also be asked the preferred gender of a Prison Officer conducting a search.

They will be searched by a prisoner officer of the preferred gender they documented upon reception.

Inmates may be allocated to a prison according to their legally recognized gender until a placement decision has been reached. Upon initial placement they shall be offered a single cell and access to a separate shower and toilet facility. The Superintendent or Deputy Superintendent will determine the placement of the inmate, considering the nature of the current offence and the inmate's criminal and custodial history, perceived risks to the safety of the prisoner and other prisoners and any intelligence reports.

An inmate is entitled to appeal any Superintendent's placement decision to the Assistant Commissioner.²⁷

²⁶ *Criminal Investigation Act 2006 (WA)* s 71(2).

²⁷ Government of Western Australia Department of Justice Corrective Services, Commissioner's Operating Policy and Procedure, '4.6 Trans, Gender Diverse and Intersex Prisoners'.

Common Offences

The following table outlines some examples of offences that a person might be charged with during a protest or demonstration.

Offence	Description	Maximum penalty
Unlawful assembly²⁸	<p>An unlawful assembly is when 3 or more people get together with a common purpose (for example, a protest or demonstration) and conduct themselves in a manner which causes other people present to fear on reasonable grounds that those assembled will disturb the peace or provoke others to disturb the peace.</p> <p>If a police officer orders those who are in an unlawful assembly to disperse and they do not disperse, they may be guilty of a more serious offence.²⁹</p>	<ul style="list-style-type: none"> • 12 months imprisonment or \$12,000 fine. • If police officer orders dispersal and no compliance: 3 years imprisonment.
Riot³⁰	<p>An unlawful assembly may become a riot when they actually do disturb the peace (i.e. actual violence is used). Participants may be guilty of an offence.</p> <p>Riots are considered more serious when there are 12 or more people present and they refuse directions from a police officer to disperse or they destroy or damage any property as a result of the riot.</p>	<ul style="list-style-type: none"> • 5 years imprisonment. • When 12 or more people and no compliance with police orders or damage to property: 10 years imprisonment.
Out-of-control gathering³¹	<p>If you organize an out-of-control gathering, you may be guilty of an offence. An out-of-control gathering is a gathering that causes or is likely to cause fear or alarm, substantial interference with lawful activities of any person or the peaceful passage of any person or their enjoyment of an area. It involves 12 or more persons, in which 2 or more persons engage in conduct that includes:</p> <ul style="list-style-type: none"> - trespassing, - behaving in a disorderly manner - unlawfully destroying or damaging property or threatening to do so, - assaulting or threatening to assault another person or taking part in a fight, 	<ul style="list-style-type: none"> • 12 months imprisonment or \$12,000 fine.³²

²⁸ *Criminal Code Act Compilation Act 1913 (WA) s 62.*

²⁹ *Criminal Code Act Compilation Act 1913 (WA) s 64.*

³⁰ *Criminal Code Act Compilation Act 1913 (WA) s 65.*

³¹ *Criminal Code Act Compilation Act 1913 (WA) s 75A.*

³² *Criminal Code Act Compilation Act 1913 (WA) s 75B.*

	<ul style="list-style-type: none"> - doing an obscene act or indecent act in a public place or in the sight of any person who is in a public place, - emitting, or causing to be emitted, unreasonable noise, - driving a motor vehicle so as to cause excessive noise or smoke, - unlawfully lighting fires or unlawfully using fireworks, - throwing any object or releasing any material or thing in a manner that is likely to endanger the life, health or safety of any person, - causing an obstruction to traffic or to the movement of pedestrians, - depositing litter or breaking glass or other material - contravening the Liquor Control Act 1988 or the Misuse of Drugs Act 1981, or - being intoxicated by liquor or an intoxicant in a public place. <p>An out-of-control gathering does not include a gathering on licensed premises, a public meeting or procession for which a permit has been issued or a gathering primarily for the purpose of political advocacy, protest or industrial action. Although, many protests would be captured by an exclusion it is still important to keep this offence in mind.</p>	
<p>Trespass³³</p>	<p>If you enter a place without consent you could be committing the offence of trespass. Your access to an area can be revoked by either express or implied refusal or withdrawal of access, for example by a locked door or the owner, manager or occupier asking you to leave. If you remain after you have been asked to leave, you will be committing a trespass.</p> <p>If you trespass on any premises you may be guilty of an offence.</p> <p>An owner, manager or occupier of land can request that a trespasser give their name and address to the owner. Failure to comply with this or providing a false name or address may be an offence.³⁴</p>	<ul style="list-style-type: none"> • 12 months imprisonment or \$12 000 fine. • Failure to provide name: \$500 fine.
<p>Obstructing public officer³⁵</p>	<p>A person who prevents, hinders or resists a public officer, or a person lawfully assisting a public officer, in the</p>	<ul style="list-style-type: none"> • 3 years imprisonment.

³³ Criminal Code Act Compilation Act 1913 (WA) s 70A.

³⁴ Criminal Code Act Compilation Act 1913 (WA) s 70B.

³⁵ Criminal Code Act Compilation Act 1913 (WA) s 172.

	<p>performance of that public officer's duties may be guilty of an offence.</p> <p>A public officer includes a police officer.</p> <p>To resist is to oppose some course of action that the public officer is trying to execute. In most circumstances the police will charge you with resist when you are resisting an arrest. This can involve pulling away from the police or even going limp or not pulling you're arms out from under you when the police are trying to effect an arrest.</p> <p>To hinder is to make the public officer's job more difficult.</p>	
Disorderly behaviour in public³⁶	A person may be guilty of an offence if they use insulting, offensive or threatening language or conducts themselves in an insulting, offensive or threatening manner.	<ul style="list-style-type: none"> • \$6,000 fine.
Obstruction of vehicles and pedestrians³⁷	A pedestrian may be guilty of an offence if they unreasonably obstruct or prevent the free passage of any other pedestrian or vehicle upon a path or carriageway.	<ul style="list-style-type: none"> • \$100 fine (two penalty units).
Obstruction of railways³⁸	<p>A person who by any unlawful or omission to do any act it is their duty to do, causes a railway to be obstructed may be guilty of an offence.³⁹</p> <p>A person who unlawfully, and with intent to obstruct the use of a railway or to injure any property on a railway does the following may be guilty of a more serious offence:</p> <ul style="list-style-type: none"> - Deals with the railway or anything on the railway to endanger the free and safe use of the railway, or - Interferes with any light or signal on the railway, or - Does not do an act it is their duty to do which causes the free and safe use of the railway to be endangered. 	<ul style="list-style-type: none"> • 2 years imprisonment. • More serious offence: 20 years imprisonment.
Acts with intent to injure mine⁴⁰	A person who unlawfully, and with intent to injure a mine or obstruct the working of a mine does the following may be guilty of an offence:	<ul style="list-style-type: none"> • 7 years imprisonment.

³⁶ *Criminal Code Act Compilation Act 1913 (WA) s 74A.*

³⁷ *Road Traffic Code 2000 (WA) r 201.*

³⁸ *Criminal Code Act Compilation Act 1913 (WA) ss 451, 462.*

³⁹ *Criminal Code Act Compilation Act 1913 (WA) s 462.*

⁴⁰ *Criminal Code Act Compilation Act 1913 (WA) s 456.*

	<ul style="list-style-type: none">- Causes water to run into the mine, or- Obstructs any shaft or passage of the mine, or- Obstructs the working of any machine, applicant or apparatus used with the mine, whether the thing is completed or not, or- With intent to render it useless, injures or unfastens a rope, chain or tackle which is used in or upon the mine or used with the mine.	
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Assistance from the EDO

If you are charged with a criminal offence as the result of your participation in a protest concerning the environment, the EDO's Defending the Defenders (DTD) team may be able to assist you. The DTD are criminal lawyers who provide specialist legal advice and information about the laws that regulate protest activities concerning the environment. In addition, the DTD provides legal representation to those who have been charged with criminal offences arising from their participation in such activities.

Please get in contact via email at defenders@edo.org.au.

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