

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

January 2024

### 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. Australian courts have determined that Australians have an implied right to freedom of political communication flowing from the Constitution, which goes some way towards supporting protest activities. In South Australia, the Public Assemblies Act 1972 (SA) sets out a process for holding public assemblies and peaceful gatherings in the state. Following the process will exempt participants in public assemblies from offences which might otherwise apply in a public place, but it does not contain an explicit right to protest. Moreover, the onus is on the group to give notice of the public assembly.

We do have rights and we can assert them as informed community members, but we shouldn't expect them to be respected without question. It is useful to be informed about 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 (excluding your name, address and date of birth)
- Know why you are being arrested
- Privacy & protection from mass media
- Medical treatment
- To call a friend, relative or lawyer
- 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, are committing, or are about to commit any offence, or you may be able to assist in the investigation of an offence or suspected offence.<sup>1</sup> If you refuse to give your name and address or give false details when the police have a right to ask for them and you do not have a reasonable excuse for refusing to cooperate, you will be committing an offence and could be charged.

If police reasonably suspect you have given false details, they can also ask for proof of identity. **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 to see their police identification, or to tell you their surname, rank and identification number for use in court later. They are legally obliged to tell you.<sup>2</sup>

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<sup>1</sup> Summary Offences Act 1953 (SA) ss 74A(1), 74A(5).

<sup>2</sup> Summary Offences Act 1953 (SA) ss 74A(4).

## ANSWERING POLICE QUESTIONS

You have the right to remain silent.<sup>3</sup> Anything you say to the police can be used as evidence against you or others in court, or when the police decide whether to charge you or others. If police place you under arrest, they must tell you that you do not have to answer their questions and that anything you say or do could become evidence used against you if you are later charged with an offence.<sup>4</sup>

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, no matter whether you are under arrest, a suspect, or simply a witness. It is best to 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, or “I will not answer questions without a lawyer present”.

**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, and police must try to source one of these people to represent your interests.<sup>5</sup>

## BEING ARRESTED

Arrest is the process by which police can lawfully take you into their custody. In South Australia, police can arrest you if they find you committing, or have reasonable cause to suspect that you have committed, or are about to commit, an offence. Police are not required to give you a warning prior to arresting you, but often they will. Police must make it clear, using words or actions, that they are arresting you. You should always ask the police officer; “Am I under arrest?” and “What for?” Remember what they say. It is necessary for police to inform you of the reason for the arrest.<sup>6</sup> Police can use force that they consider reasonably necessary while arresting you, including handcuffs. If you are not under arrest, you are free to go, so make sure you check if you are not sure.

## HINDERING OR RESISTING ARREST

A police officer may charge you with hindering or resisting arrest if you try to stop them from arresting you or someone else.<sup>7</sup> Usually, hindering police involves physically preventing them from doing something, but in rare cases, even acting as a lookout and warning others about police presence could be considered hindering arrest. Similarly, resisting arrest usually requires active resistance, but there is some risk of being charged by going limp or engaging in passive resistance. This is a relatively minor charge but carries a maximum penalty of \$2,500 or 6 months imprisonment.

## CONTACTING LEGAL ADVICE AND SUPPORT

You have the right to contact a friend or relative if you have been arrested.<sup>8</sup> If they don't answer, you should be allowed to call someone else. Police can refuse to offer you a phone call if they believe it could cause or contribute to offending or tampering with evidence (e.g., deleting a video or messages from your phone).

If you have been arrested on suspicion that you have committed an offence, you can also have a lawyer or support person present in any interview. Remember, you do not have to submit to an interview and can always exercise your

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<sup>3</sup> *Summary Offences Act 1953* (SA) ss 79A(1)(iii). For more information, check out this resource: <https://www.peacefulpurposetraining.org/right-to-silence>.

<sup>4</sup> *Summary Offences Act 1953* (SA) ss 79A(3).

<sup>5</sup> *Summary Offences Act 1953* (SA) s 79A(1a).

<sup>6</sup> <https://www.gotocourt.com.au/criminal-law/sa/getting-arrested/#:~:text=In%20order%20to%20lawfully%20arrest,the%20reason%20for%20the%20arrest.>

<sup>7</sup> *Summary Offences Act 1953* (SA) s 6.

<sup>8</sup> *Summary Offences Act 1953* (SA) s 79A(1)(a).

right to silence. If you require an interpreter or other professional to sufficiently understand spoken English, it is your right to have one attend any interview.<sup>9</sup>

There is a custody notification system in SA for Aboriginal and Torres Strait Islander people. Police must ask you whether you are an Aboriginal and/or Torres Strait Islander person as soon as practicable after you have been detained in a police facility.<sup>10</sup> If you identify yourself, the police must notify the Aboriginal Legal Rights Movement.

## PHOTOGRAPHS, IDENTIFYING PARTICULARS AND DNA

If you are suspected of committing an offence, the police may make an order to have a forensic procedure performed on you, to get things like your fingerprints, photographs and a DNA sample.<sup>11</sup> The police can carry out a forensic procedure without your consent and obstructing them is an offence.<sup>12</sup> The procedure must be done humanely, but police can use reasonable force.

## SEARCHES

Police do not have an automatic right to search you and must follow certain rules.

### Your Place and Your Things

Police can search your place with your consent (if they turn up at your place and ask to come in, and you agree). You don't have to consent. Police can also search your place with a search warrant (usually a general search warrant issued by the Commissioner of Police) if they reasonably suspect that you have stolen goods, you have committed a crime or plan to commit a crime, have anything that may be used in committing a crime, or if they want to collect evidence of a crime that has been committed.<sup>13</sup> The police can seize things they find in your home with a valid warrant.

The police might ask to go through your phone or computer without a warrant. You can say no, but the police can access your phone or computer with a search warrant if they believe it contains evidence of a crime, and they will likely seize it in the meantime while they apply for the warrant.<sup>14</sup>

### Your Car

Police can search your car with your consent, if they have a valid warrant, or without a warrant if they reasonably suspect that there are stolen goods, something illegal to have in your possession or evidence relating to an offence in it.<sup>15</sup>

### Yourself

Police can search your person if they have a valid warrant, or without a warrant if they reasonably suspect that you have stolen goods, something illegal to have in your possession or evidence relating to an offence on your person.<sup>16</sup> Before a basic search or a strip (or 'intimate') search is carried out, the person searching you should, if possible:

- identify themselves;
- tell you the reason for the search;
- ask you whether you agree to the search;

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<sup>9</sup> *Summary Offences Act 1953* (SA) s 79A(1)(b)(ii).

<sup>10</sup> *Summary Offences Regulations 2016* (SA) reg 33C(1).

<sup>11</sup> *Criminal Law (Forensic Procedures) Act 2007* (SA) s 19.

<sup>12</sup> *Criminal Law (Forensic Procedures) Act 2007* (SA) s 32.

<sup>13</sup> *Summary Offences Act 1953* (SA) s 67(4)(a).

<sup>14</sup> For more information, check out these resources: <https://www.peacefulpurposetraining.org/seized-property>; <https://www.peacefulpurposetraining.org/arrest>.

<sup>15</sup> *Summary Offences Act 1953* (SA) s 68(1)(a).

<sup>16</sup> *Summary Offences Act 1953* (SA) s 68(1)(b).

- advise you that the search can still be carried out even if you do not agree, and that reasonable force may be used.

Police have power to conduct a strip search if they reasonably suspect that you have something relevant to an offence, or something otherwise prohibited. There are rules about how police conduct strip searches (it should be in private and conducted by someone of the same sex or gender identity, and if you are a minor, usually in the presence of an adult relative or friend, unless the search is considered urgent). Generally, strip searches can only be carried out in custody. In South Australia, it is usually a requirement for an intimate search to be recorded, but any intrusive aspect will not be recorded if the person being searched objects.<sup>17</sup> An intrusive search can only be conducted by a medical practitioner or a registered nurse, and the person being searched must be allowed a reasonable opportunity to arrange (at their expense) for a medical practitioner or registered nurse of their choice to witness the search.

Most activists are not strip searched, but there is unfortunately a history of police very occasionally strip searching for deterrence reasons.

## GETTING OUT OF CUSTODY

After an arrest, a person can be detained by a police officer for up to four hours if police suspect they have committed a serious offence (this means an indictable offence or an offence punishable by imprisonment for two years or more). A magistrate can authorise a person's detention for a further four hours. 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;
- Be released and charged at a later date;
- Receive an infringement notice;
- Be charged and released on bail;
- Be charged and brought before a Magistrate.

## BAIL

Bail is simply an undertaking (promise) that you will appear in court on the day your charge is listed. In South Australia, police must decide whether to grant you bail as soon as reasonably practicable.<sup>18</sup> Being granted bail means you will be released into the community on the condition that you appear in court as promised. 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.

You will need to sign a form acknowledging your bail conditions in order to be released. If you breach any of the conditions, your 'guarantor' (someone over 18 who agrees to support your bail application and ensure you comply with your bail conditions) may be liable to pay a sum of money to the state. If you do not agree to the bail conditions or you are refused bail, you will be held in custody until you can be brought before a Magistrates Court to make a bail application.

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<sup>17</sup> *Summary Offences Act 1953 (SA)* ss 81(3)(d), 81(3)(e).

<sup>18</sup> *Bail Act 1985 (SA)* s 13(1)(a).

## 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 2016 (SA) makes it an offence to record private conversations without consent.<sup>19</sup> But there is an exception, which allows recording if it is necessary to protect a person's lawful interests or that person consents (expressly or impliedly) to the recording.<sup>20</sup> 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 search warrant compelling you to provide the code (they likely have not but will likely seize the property in the meantime. Always have a pin on your phone.

## COMPLAINTS AGAINST THE POLICE

If you have been injured by a police officer:

- see a doctor immediately, 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 the SA police is using the Office of Public Integrity's (OPI's) [online complaint form](#) or [downloading a form](#) and mailing it to the OPI. You can also complain to the SA police directly [via email](mailto:SAPOLIS@police.sa.gov.au) at SAPOLIS@police.sa.gov.au. There are further steps from there. You can also complain about the Federal Police. 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.

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<sup>19</sup> Surveillance Devices Act 2016 (SA) s 4(1).

<sup>20</sup> Surveillance Devices Act 2016 (SA) s 4(2).

## Protesting in a public place and ‘move on’/loitering 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 or about to be breaching the peace, hindering or obstructing the free passage of pedestrians or vehicles, intending to commit an offence, have just committed or are committing an offence, or that the safety of a person in the vicinity is in danger.<sup>21</sup> Failing to comply with an officer’s request to stop loitering or disperse is an offence punishable by a fine (maximum \$1250) or three months imprisonment.

## POSSIBLE OFFENCES

Being told to move on or stop loitering isn’t a criminal charge and won’t appear on your criminal record. Failure to comply with the request is an offence, so you can be arrested and charged for breaching a request to disperse or stop loitering.

### Obstruction of a public officer

Hindering or resisting a police officer in the execution of their duty is an offence.

### Being on premises for an unlawful purpose

Entering, or being present on premises for an unlawful purpose or without lawful excuse is guilty of an offence.<sup>22</sup>

### Trespass - you commit trespass by:

1) going into a place without lawful excuse, 2) interfering with the enjoyment of the place by the occupier and 3) staying in a place after being asked to leave by an authorised person, which is usually the owner/occupier or someone acting on their behalf (e.g., police).<sup>23</sup> There are additional offences if you use offensive language or fail to give an authorised person your name and address. If you request, the person asking you to leave must show you proof that they are an authorized person (e.g., that they own the property).

### Disorderly conduct or language

A person who, in a public place or a police station behaves in a disorderly or offensive manner or fights with another person, or uses offensive language, is guilty of an offence.<sup>24</sup>

### Obstructing a public place (or road or railway)

A person who intentionally obstructs the free passage of a public place (this includes a road) is guilty of an offence.<sup>25</sup> The maximum penalty for this offence is now \$50,000 or imprisonment for three months (see ‘Recent Developments’ below). There is a separate offence for obstructing railways and similarly tracks, punishable by \$10,000 or 2 years imprisonment. Note that local councils also have laws relating to use of and conduct on the road, but council staff cannot arrest you.

### Disrupting public meetings

Public meetings are political, religious, social or other meeting, congregation or gathering that the public or a section of the public are permitted to attend, whether on payment or otherwise. It is an offence to behave in a disorderly, indecent, offensive, threatening or insulting manner, or use threatening, abusive or insulting words, or obstruct or interfere with a person seeking to attend the meeting, or any of the proceedings at the meeting, or a person presiding at the meeting in the organisation or conduct of the meeting, in, at or near a place where a public meeting is being held.<sup>26</sup>

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<sup>21</sup> Summary Offences Act 1953 (SA) s 18.

<sup>22</sup> Summary Offences Act 1953 (SA) s 17.

<sup>23</sup> Summary Offences Act 1953 (SA) s 17A.

<sup>24</sup> Summary Offences Act 1953 (SA) s 7.

<sup>25</sup> Summary Offences Act 1953 (SA) s 58.

<sup>26</sup> Summary Offences Act 1953 (SA) s 18A(1).

## Riot

A riot occurs when 12 or more people present in a place use or threaten violence for a common purpose and the conduct of them (taken together) would cause a reasonable person at the scene to fear for their personal safety.<sup>27</sup> Riot is a very serious offence and would unlikely apply to peaceful protest activities.

## Postinging

The maximum penalty for postinging, or posting a 'bill' (or sticker) on property without the consent of the owner or occupier of the property, is \$10,000.<sup>28</sup> This would be imposed very rarely.

## Minor offences and expiation notices (fines)

Activists might receive an on-the-spot fine, also called an expiation notice, for specific minor offences categorised as 'expiable offences' (for example, obstructing a road). You would receive a document alleging that you have committed an offence with a fee to pay to settle the offence without facing prosecution. You have a number of options to deal with this.<sup>29</sup>

## 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. Assaulting police carries heavy penalties in South Australia.

## RECENT DEVELOPMENTS

In May 2023, the South Australian government passed legislation<sup>30</sup> which dramatically increased the maximum penalty for the offence of obstructing a public place from \$750 to \$50,000 and added a possible penalty of 3 months imprisonment. This legislation was introduced shortly after three days of actions by Extinction Rebellion, one of which involved a woman abseiling over a city bridge.

The amendments also provide that an offence can be committed if a person 'indirectly' obstructs the free passage of a public place,<sup>31</sup> and make it possible for a court to order that the offender cover the reasonable costs incurred by an entity 'dealing with the obstruction'.<sup>32</sup> This means that the police could apply to the courts to order an activist to cover their costs in responding to a protest activity and charge these costs on top of any fines or jail sentence. These laws have been harshly criticised by human rights organisations and highlight the need for activists to stay vigilant and where possible, push back against efforts by the state to curtail the right to protest.

## 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?

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<sup>27</sup> *Criminal Law Consolidation Act 1935 (SA)* s 83B.

<sup>28</sup> *Local Nuisance and Litter Control Act 2016 (SA)*.

<sup>29</sup> See *Expiation of Offences Act 1996 (SA)*. See also this excellent and detailed resource for more information: <https://www.peacefulpurposetraining.org/expiation-notices>.

<sup>30</sup> *Summary Offences (Obstruction of Public Places) Amendment Bill 2023 (SA)*.

<sup>31</sup> *Summary Offences Act 1953 (SA)* s 58(1a).

<sup>32</sup> *Summary Offences Act 1953 (SA)* s 58(1b).



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 (i.e., they find you guilty, but your conviction is recorded as “spent”). Factors that the court takes into account could include: 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, while 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 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 most violent offences, particularly if involving a child, most sexual offences and all sexual offences against children.<sup>33</sup> 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.

## **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.

**This resource is not a substitute for legal advice.** The content was prepared by legal activists adapting the fantastic resources on the [Peaceful Purpose Training](#) website with the assistance of lawyers. For free legal advice of a general nature, contact the [Legal Services Commission of South Australia](#) on 1300 366 424 on weekdays between 9am and 4:30pm, or speak with their lawyers during business hours by clicking on the Legal Chat Icon on their [website](#).

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

Legislation referenced: *Summary Offences Act 1953 (SA)*; *Criminal Law (Forensic Procedures) Act 2007 (SA)*; *Child Safety (Prohibited Persons) Act 2016 (SA)*; *Criminal Law Consolidation Act 1935 (SA)*; *Local Nuisance and Litter Control Act 2016 (SA)*; *Expiation of Offences Act 1996 (SA)*.

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<sup>33</sup> See *Child Safety (Prohibited Persons) Act 2016 (SA)*.