

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. In Western Australia, there is no express right to protest, but an implied right to protest flows from the Australian Constitution, which courts have found contains an implied right to freedom of political communication. 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
- 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, or are about to commit any offence, or you may be able to assist in the investigation of an offence or suspected offence.¹ 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.²

Police can also ask for proof of identity and ask you to remove any face coverings 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, as police have the power to detain you while they attempt to verify your identity.** 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.³

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 when the police decide whether or not to charge you or other people. If police place you under arrest, they

¹ *Criminal Investigation (Identifying People) Act 2002 (WA)*, section 16(2).

² *Criminal Investigation (Identifying People) Act 2002 (WA)*, section 16(3) and 16(4).

³ *Criminal Investigation (Identifying People) Act 2002 (WA)*, sections 16(4), 16(5), 6 and 3 (definition of official details).

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.⁴

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.

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 or someone else.⁵ 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. If police want to conduct an interview, you have the right to these communications and police must provide you with reasonable facilities to contact people.⁶

If you require an interpreter or other professional to sufficiently understand spoken English, police must not interview you until this assistance is available.⁷ Under police policy, you may have an interview friend or support person if you have a disability or specific cultural need.

There is a custody notification system in WA for Aboriginal and Torres Strait Islander people. If you are an Aboriginal and/or Torres Strait Islander person, immediately after you have been detained in police custody at a police facility, the police must notify the Aboriginal Legal Service of Western Australia (ALSWA) and provide them with details including your name, and where and why you have been detained. The police must allow an ALSWA representative to speak with you on the phone as soon as ALSWA requests this.⁸

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 samples (swabs or hair samples).

⁴ *Criminal Investigation Act 2006 (WA)* section 138(2)(b).

⁵ See *Criminal Code Act Compilation Act 1913 (WA)* sections 172 and 178.

⁶ *Criminal Investigation Act 2006 (WA)* ss 137(3)(c), 138(2)(c).

⁷ *Criminal Investigation Act 2006 (WA)* s 138(2)(d).

⁸ *Police Force Regulations 1979 (WA)* reg 703.

DNA samples can be taken by police from anyone charged with a “serious offence”.⁹ In this context, a serious offence means an offence carrying a penalty of 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.¹⁰

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.¹¹

Your Place

Police can search your place 3 different ways:

- With your consent (they turn up at your place and ask to come in, and you agree). You don't have to consent;
- With a Search warrant (approved by a Justice of the Peace [JP]);
- Police reasonably suspect that violence is happening or about to happen in your home, want to look for a suspect, want to look for a person who has a thing relevant to an offence, or you are under arrest for a serious offence. They can enter without a warrant in these situations.

Your Car

Police can search your car if you consent, or they have a valid warrant. Police have the power to search a vehicle without a warrant 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.¹²

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 strip search if they reasonably suspect that you have something relevant to an offence, or something otherwise prohibited. Police may also declare an area a ‘safeguarded place’ and advise people entering the place that they will be ordered to leave if they do not consent to a search.

There are rules about how police conduct strip searches (it should be in private and conducted by someone of the same sex). If a person is not in custody, police can only strip search them if they reasonably believe it is necessary in

⁹ *Criminal Investigation (Identifying People) Act 2002* (WA) sections 52C and 52A.

¹⁰ *Criminal Investigation (Identifying People) Act 2002* (WA) sections 66(2)(c) and 69.

¹¹ For more detailed information, Legal Aid Western Australia has produced this useful fact sheet: https://www.legalaid.wa.gov.au/sites/default/files/inline-files/Police_powers_search_0.pdf.

¹² See Part 4A, Divisions 3 and 4 of the *Misuse of Drugs Act 1981* (WA).

the circumstances.¹³ Most activists are not strip searched, but there is unfortunately a history of WA police very occasionally strip searching some activists for deterrence reasons.

There are limited laws and publicly available policies regarding police searches of non-binary, intersex or transgender people. However, according to the WA Custodial Operations Manual, if you are taken into custody and you identify as trans, non-binary or intersex, you will be asked for your preferred gender of a prison officer to search you.

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;
- Be released and charged at a later date;
- Receive an infringement notice;
- Be charged and released on bail;
- Be charged and brought before a bail justice.

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.

You will need to sign a form acknowledging your bail conditions. 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

¹³ *Criminal Investigation Act 2006 (WA)* s 70.

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 1998* (WA) 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, or if there are reasonable grounds for believing that recording is in the public interest.¹⁴ 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 device or note if its already live/public. If the police confiscate your phone and ask for your PIN code, you could question whether they have obtained a data access order from a Magistrate compelling you to provide the code. If they have obtained a data access order, non-compliance with a requirement in the order is an offence, and some climate activists have been convicted under this provision.¹⁵ 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 WA police is using their [online complaint form](#) or writing to the WA Police Conduct Investigation Unit, and 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.

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

¹⁴ *Surveillance Devices Act 1998* (WA) sections 5(3)(d), 26 and 27.

¹⁵ *Criminal Investigation Act 2006* (WA) section 61. There is a similar provision in the Commonwealth *Crimes Act 1914* (Cth) section 3LA(5), but this would rarely be applicable to activists and is most often used in the investigation of terrorism or 'motorcycle gangs'. See also <https://womensagenda.com.au/latest/joana-partyka-to-appeal-conviction-as-climate-protestors-face-increasing-pressure/>

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, or are using or about to use any violence.¹⁶ A move on notice must be in writing, and the police cannot require you to stay away from a place for more than 24 hours.

POSSIBLE OFFENCES

Failure to comply

Being issued 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.¹⁷ However, you will not be in breach of a move on notice if you can show that you are taking reasonable steps to comply with the order and move out of the area.

Obstruction of a public officer

Hindering or obstructing a public officer or a person lawfully assisting them is an offence.¹⁸ This includes police, and other government workers, but generally not private contractors.

Unlawful assembly

Unlawful assemblies involve three or more people gathering for a common purpose (for example, a protest) and conducting themselves in a way which makes other people reasonably fear that the peace will be disturbed.¹⁹ A more serious charge might be brought if police claim you are engaging in unlawful assembly and order you to disperse, but you do not comply.

Riot

The basis of a riot is an unlawful assembly. Riot occurs where those gathered actually do disturb the peace (for example, use violence).²⁰ More serious riot offences involve situations where 12 or more people are present and the group either refuses police directions to disperse or damage any property.

Out-of-control gathering

Most protests will not constitute out-of-control gatherings because they are primarily for the purpose of political advocacy, protest or industrial action. However, it is worth being aware that there is a small chance that a protest organiser could be charged with organising an out-of-control gathering where the gathering involves more than 12 people, is causing or is likely to cause fear or alarm or substantial interference with lawful activity, and at least two people are engaging in other prohibited conduct like trespass, obstructing traffic, damaging property etc.²¹

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.²² Police don't need to give you a warning first, but often they 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.²³

¹⁶ *Criminal Investigation Act 2006* (WA) section 27(1).

¹⁷ This constitutes disobeying a lawful order issued by a statutory authority under the *Criminal Code Act Compilation Act 1913* (WA) section 178.

¹⁸ *Criminal Code Act Compilation Act 1913* (WA) section 172.

¹⁹ *Criminal Code Act Compilation Act 1913* (WA) section 62.

²⁰ *Criminal Code Act Compilation Act 1913* (WA) section 65.

²¹ *Criminal Code Act Compilation Act 1913* (WA) section 75A.

²² *Criminal Code Act Compilation Act 1913* (WA) section 70A(1).

²³ *Criminal Code Act Compilation Act 1913* (WA) section 74A(1).

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.²⁴ There are also offences for obstructing a railway.²⁵

Acts with intent to injure a mine

It is an offence to unlawfully obstruct a shaft or passage of a mine, the working of any appliance relating to a mine, or interfere with a rope or similar material being used in the mine.²⁶ The maximum penalty is 7 years imprisonment.

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.

RECENT DEVELOPMENTS

Recently, WA police officers have employed some new tactics against climate activists. Several activists have been issued with non-association orders, barring them from associating with other members of the group. Numerous activists have had their homes raided by police and their electronic devices seized in relation to offences they might commit in the future. One of these raids was instigated after activists used removeable spray chalk on the footpath. Others have been intercepted by police and had their devices seized while travelling to the Burrup Peninsula, despite no evidence that they were planning to engage in protest action on that occasion. One activist has been convicted for failing to comply with a data access order and provide police with her passwords.

The ABC reported that these tactics — data access orders and non-association orders — are usually used against persons suspected of terrorist activities or motorcycle gangs.²⁷ Counter-terrorism police have sometimes been to disrupt planned peaceful protest and investigate climate activists in WA. On one occasion, police ordered the ABC to hand over footage of climate protestors. Despite initially contesting the order, the ABC eventually provided police with the footage.

There appears to be some evidence that police are seeking to charge climate protestors with more serious offences for deterrence reasons. Two activists were charged with aggravated burglary, an offence carrying a penalty of 20 years imprisonment, for setting off a stink-bomb during Woodside's Annual General Meeting.

In 2015, the Western Australian government tried to introduce a new offence for physically preventing lawful activity, which many activist groups, as well as human rights experts, believed would criminalise many forms of peaceful protest. The bill was abandoned with a change of government, however concerns remain that anti protest laws may be introduced.

While these developments may seem concerning, it is worth remembering that most of these activists have not yet been convicted or have avenues to appeal their convictions from lower courts at the time of writing. The greater impact of deterrence and chilling of dissent remains, however, and must be challenged.

²⁴ *Road Traffic Code 2000* (WA) r 201.

²⁵ *Criminal Code Act Compilation Act 1913* (WA) sections 462 and 451.

²⁶ *Criminal Code Act Compilation Act 1913* (WA) section 456.

²⁷ See their Four Corners episode, 'Escalation', for a discussion of these tactics <https://www.youtube.com/watch?v=6ZG1REfQey4>.

COMMON CONCERNS

Many people new to activism have serious concerns about having a criminal record and the impacts this 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 fairly 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 a personal decision, 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 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.²⁸

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 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.

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 prepared by organisations including: activistrights.org.au, counteract.org.au, legal aid, the Environmental Defenders Office 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 Act Compilation Act 1913 (Criminal Code)*; *Bail Act 1982*; *Police Force Regulations 1979*; *Evidence Act 1906*; *Misuse of Drugs Act 1981*; *Surveillance Devices Act 1998*; *Road Traffic Code 2000*.

²⁸ *Spent Convictions Act 1998* (WA) section 6(4).