AUSTRALIAN DEMOCRACY NETWORK

s214A Crimes Act Submission

Policy objective: Striking a proper balance between the right to protest and the right of members of the public to move freely and not be obstructed in public places.

The stated policy objective of the introduction of s214A in the Roads and Crimes Legislation Amendment Act 2022 ('the Act') was striking a proper balance between the right to protest and the right of members of the public to move freely and not be obstructed in public places. This is evidenced in the statements of the Attorney-General and the Shadow Attorney-General at the time in Second Reading Speech debates for the amendments:

> "The bill in no way seeks to impose a general prohibition on protests. The Government supports the rights of all individuals to participate in lawful protest. Freedom of assembly and speech have long been recognised by Australian courts as important rights that are integral to a democratic system of government; however, the right to protest must be weighed against the right of other members of the public to move freely and not be obstructed in public places." Mark Speakman

> "People do and should have the right to protest, the right to object, the right to assemble, and the right to disrupt and to disobey, but not to an unlimited degree, and that is the crux of this matter—not when the cost is too high, and not when such activities impinge unnecessarily on others' rights. The bill does not deal with students wanting to protest about climate change. This is about serious, costly disruption to major infrastructure facilities, roads, tunnels and the like." Michael Daley

In balancing these rights, the government must have particular regard to the significance of the right to peaceful protest for the realisation of democracy. The freedom of assembly and freedom of political communications have been long recognised as fundamental to realising the Australian Constitution and upholding democracy. Peaceful protest is crucial for realising all of our human rights. Australia has a long and proud history of protests which have led to significant change, including preserving Tasmania's Franklin River, worker's rights, the apology to the Stolen Generations, the right to vote for women, and the advancement of LGBTIQ+ rights. The right to protest is particularly important for Aboriginal and Torres Strait Islander people and their ongoing calls for justice. Since colonisation, Aboriginal and Torres Strait Islander communities have fearlessly used protest as a way to fight for their right to self-determination, their land and water rights, an end to police violence and against the ongoing structural racism that locks them out of justice.

New South Wales has a long and proud history of protests movements which have won significant change. The first Aboriginal Day of Mourning in Gadigal/Sydney in 1938, the Freedom Rides in 1965, and the enduring legacy of the first Mardi Gras in 1978 - a protest against police violence by LGBTIQ+ communities - stand as testaments to the power of protest and collective action in the state. The ongoing fight to safeguard the environment and combat climate change continues to underscore the importance of protest in effecting change in New South Wales.

Per the UNHRC, in order to uphold the right to peaceful assembly restrictions on peaceful assembly must be 'necessary and proportionate in the context of a society based on democracy, the rule of law, political pluralism and human rights, as opposed to them being merely reasonable or expedient'.[1] Contrary to its stated policy objective, the Act imposes disproportionate penalties on the freedom of assembly and freedom of political communication. As recognised by Justice Adamson in Commissioner of Police v Langosch, because public spaces are shared spaces, it is 'of the nature of a protest that others will be affected and that their routines will be, at least ephemerally, interrupted.' The UNHRC has further clarified that 'assemblies are a legitimate use of public and other spaces, and since they may entail by their very nature a certain level of disruption of ordinary life, such disruptions must be accommodated unless they impose a disproportionate burden'.[2] As the Act limits the right to protest solely on the basis of the imposition some protests pose on other users of public space, its restriction of the right to protest cannot be said to be necessary and proportionate and is therefore not a valid policy objective.

The Act introduces a new offence with a sentence of imprisonment and large fines for conduct such as causing pedestrians to be redirected or part of a road being closed.[3] These kinds of interruptions arise as part of the ordinary exercise of freedom of assembly and can be said to be a relatively insignificant imposition on the rights of the public to move freely. Indeed, the judgement in Kvelde confirmed that such a restriction in s214A impermissibly burdened the freedom to political communication (this is considered in detail in the section addressing the impact of Kvelde).

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[1] Human Rights Committee, General Comment 37, Art. 21 (Hundred and twenty-ninth session, 2020), Right of Peaceful Assembly, U.N Doc. CCPR/C/GC/37 (2020) paragraph 40.
[2] Human Rights Committee, General Comment 37, Art. 21 (Hundred and twenty-ninth session, 2020), Right of Peaceful Assembly, U.N Doc. CCPR/C/GC/37 (2020) paragraph 47.
[3] s214A Crimes Act

The Act's disproportionate emphasis on keeping public spaces free of obstruction inappropriately constrains the ability of the community to assemble in public spaces and use public spaces for political communication. In doing so, it effectively denies the community the right to engage in protest without risking significant penalties.

Impact on community capacity to participate in protests

Since the introduction of the Act, there has been a marked increase in police intimidation of protestors as well as use of police powers and excessive force against protest-goers. In the leadup to the IMARC conference in Sydney in November 2022, over 100 homes were visited by NSW Police. 28 people were spoken to by police and the Minister for Police at the time stated that individuals were given "warnings with regards to the provisions of the new legislation under Section 144G of the Roads Act 1993".[4] Warnings given by police included misleading statements about it being an offence to attend protests unless they have completed a Form 1, as captured in video footage sent to Legal Observers NSW.[5] The individuals questioned included a 16 year old home from a peaceful climate rally, university climate collective members and relatives of activists. The Act has therefore given police an instrument for intimidating protestors with misrepresentative threats of arrest ahead of significant political events.

Additionally, the serious nature of the offences introduced by the Act has given police greater impetus to use arrest powers and force in relation to protestors. Legal Observers NSW has captured several instances of violent policing of protests under the pretext of the laws, most recently in November 2023[6] and March 2024[7] at protests at Port Botany where several protestors sustained soft tissue injuries, bruising and asthma attacks due to police arrests that utilised excessive force to detain protestors. A young child in a pram was caught up in a police-caused crowd crush and had to be passed over the heads of protestors away from danger.[8] Police violence has extended to protests that were entirely lawful and had been notified to police. This includes an incident at a street march in Sydney CBD on 23 March 2024 during which police violently arrested protestors for peaceful action where they splashed a red

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4 https://www.parliament.nsw.gov.au/hp/housepaper/28960/QuestionsAndAnswers-LA-181-20221221-Proof.pdf

5 https://drive.google.com/file/d/1dzQMSZNC50B_B2RBE1EXSq8f_fadurLs/view?usp=sharing

6 https://www.instagram.com/p/Cz8ECeKrHfm/?img_index=1

7 https://www.instagram.com/p/C47YatsrpoG/?img_index=1

8 https://www.abc.net.au/news/2023-11-22/nsw-port-botany-protest-arrests-zim-sydney-port-botany/103134228

solution on themselves to symbolise blood, dragging protestors by the throat and placing a knee of their backs.[9] One protestor had to attend hospital due to being briefly unconscious following police actions. The increase in police use of arrest powers and use of force as a result of the latitude given for these actions by the laws has a significant impact on the capacity of communities in NSW to participate safely in protest.

The impact of the Act is particularly significant in creating higher barriers to participation in protest for communities for whom interaction with the criminal justice system is more likely to result in significant negative effects, including First Nations communities and gender diverse people. The introduction of the Act gave police greater leeway to carry out arrests and impose significant bail conditions on protestors. This has led to a documented rise in police harassment of gender-diverse people, with at least three incidents of police harassment of gender-diverse people associated with the latest arrests at Port Botany reported by Legal Observers NSW.[10] This has included protestors being called slurs in custody and misgendered by police during bail checks at their home. The barriers for participation in protest are therefore heightened for gender-diverse people as they now face increased risk of police encounters that are harassing and discriminatory. Furthermore, the serious nature of the offences introduced by the Act creates greater capacity for the imposition of bail conditions in relation to these offences, increasing interactions with police and the criminal justice system, which pose particular risks for First Nations and gender-diverse people.

Several other groups in the community experience heightened barriers for protest participation where penalties for protest and protest policing increase, including people on temporary visas who risk deportation if they are found guilty of a criminal offence and people whose work requires them to gain approval from a licensing body, such as teachers, social workers and nurses. For example, the Department of Education and Training requires anyone applying to be a teacher to undergo a national criminal history check for any charges or convictions for offences that carry a penalty of 12 months imprisonment or longer. Therefore even someone charged under the 2022 Act offences and found not guilty would have to disclose this to the Department and to potential employers. Prior to the 2022 Act, there was a very limited set of circumstances in which someone at a street march could be charged with an offence carrying 12+ month imprisonment, confined mostly to assaulting someone or disrupting the Sydney Harbour Bridge. Under the current legislation, community members attending a street march

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9 https://legalobserversnsw.org/wp-content/uploads/2024/03/policing-of-weekly-pro-palestine-street-marches-in-sydney.pdf

10 Refer Legal Observers NSW submission to this review

which, for example, deviates from the route notified to police and therefore loses the protections of the Form 1 system, could be charged with the anti-protest offences, impacting their employment prospects in the future. This creates a serious freezing effect on the capacity for communities to feel safe participating in protest.

Protections offered by the Summary Offences Act

The freedoms of assembly and freedom of political communication cannot be said to be sufficiently ensured by the existence of the Summary Offences Act (SOA) protections for authorised protests ('the Form 1 regime'). Section 24 of the SOA protects participants in an authorised public assembly from being charged with any offence relating to participating in an unlawful assembly or the obstruction of any person, vehicle or vessel in a public place. As the protections are addressed only to these offences, the Form 1 regime does not itself protect protest participants from being charged with seriously disrupting a major bridge, tunnel or road under s214A.

The extension of the Form 1 protections to s214A offences is achieved by s214A(6), which provides that nothing in this section prohibits conduct in accordance with the consent or authority of TfNSW, the NSW Police Force or other public authority. As the Form 1 regime is the only available way of attaining Police consent for a protest, s214A(6) can be read as protecting protests which are an authorised assembly under the SOA. S214A(6) imposes a higher burden on protests to be protected than the Summary Offences Act, requiring the consent of the Police where the SOA required only that Police do not oppose the protest and that the protest be held 'substantially in accordance' with the Form 1 Notice of Intention. There has been no judicial confirmation of the meaning of 'consent' under s214A(6) and it therefore remains unclear whether protests which seriously disrupt a major road, bridge or tunnel, including causing part of it to be closed or pedestrians to be redirected, can invoke the protections of the SOA.

To the extent that it does offer protection from obstruction of a major bridge, tunnel or road, the provision suffers from 'substantial limitations in providing a means of reducing the burden on the implied freedom [of political communication]', as pointed out by Justice Walton in Kvelde. The protections are only activated if the Commissioner of Police does not oppose the public assembly or a Court authorises the public assembly. Independent accounts of police negotiations in relation to the Summary Offences Act protections show that Police practice around the Form 1 system frequently improperly constrains the right to protest.

Legal Observers NSW has documented[11] several instances of Police exerting pressure on organisers to accept conditions that go far beyond what is required to strike a proper balance between the right to protest and other uses of public space. This has included police using 10 minute delays to the running order of a protest to begin putting pressure on organisers by stating that they risked not being in compliance with their Notice of Intention, including at recent street marches for Palestine. In one instance in November 2023, police made Form 1 authorisation conditional on a climate group not using a skeleton prop in their march due to the proximity of anti-war rallies nearby. Several instances have also been recorded of police making Form 1 approvals conditional on compliance with a long list of conditions including obtaining permission from the local government authority and minimum numbers of rally marshals being present to 'control the protest rally'.

Spontaneous and urgent protests

The Form 1 regime is particularly poorly adapted to protecting protests undertaken with urgency, as pointed out by Justice Walton in Kvelde at [277]. In the event that a protest organiser provides less than 7 days' notice to Police, the Commissioner can oppose the holding of the public assembly, denying it the related protections. In deciding to do so, the Commissioner must be guided by the statutory intention of the Summary Offences Act to facilitate protest and be guided by the balancing exercise between the right of free speech and other considerations as set out by Justice Hamilton in Gabriel.

However, several instances have been documented of Police misrepresenting the effect of this provision as requiring that seven days' notice be given in order for a protest to be authorised - and automatically opposing protests that do not fulfil this requirement. This includes the official Sydney City PAC Public Information Sheet stating that 'In order for your Form 1 to be authorised… police must be notified at least 7 days prior to your event',[12] communications from senior offices stating that approval was conditional on a 7 day notification,[13] and NSW Policy Deputy Commissioner David Hudson claiming a 7 day timeframe was required for police to authorise a protest.[14] NSWCCL President at the time, Josh Pallas, stated that "failure to

[11] Misuse of the Form 1 System by NSW Police 2022-24, Legal Observers NSW https://legalobserversnsw.org/2024/05/06/misuse-of-the-form-1-system-by-nsw-police-2022-24/
[12] Misuse of the Form 1 System by NSW Police 2022-24, Legal Observers NSW https://legalobserversnsw.org/2024/05/06/misuse-of-the-form-1-system-by-nsw-police-2022-24/
[13] Misuse of the Form 1 System by NSW Police 2022-24, Legal Observers NSW https://legalobserversnsw.org/2024/05/06/misuse-of-the-form-1-system-by-nsw-police-2022-24/
[14] https://www.theguardian.com/australia-news/2023/oct/11/pro-palestine-rally-sydney-sunday-protest-march-nsw-premier-chris-minns

authorise a public assembly on the basis that insufficient notice has been given to you and your officers flies in the face of the parliamentary intention and the proper balancing exercise that your office is expected to undertake pursuant to the principles contained within the case law." The practice has been ongoing since this matter was raised with NSW Police in December 2022.

The right to protest involves the exercise of spontaneous protests, particularly given the fact that protests are often responding to political and social matters that arise rapidly and without warning. The Form 1 regime is not adequately adapted to protect the right to spontaneous protests in the context of the substantial penalties of s214A.

'Substantially in accordance' requirement

The protections of the Form 1 regime apply only insofar as a protest is being held 'substantially in accordance' with the Notice of Intention submitted to Police. This means that a protest risks losing Form 1 protections if members of the crowd decide to deviate from the agreed protest route or stage a sit-in. In this circumstance, even protest-goers who are engaging in the protest in a way that is 'substantially in accordance' with the Notice of Intention would be at risk of being in breach of s214A. Plainly, it is unacceptable that members of the public could be subject to serious penalties for conduct that they have no part in. This has particularly serious implications for protests that might face counter-protestors or agitators who could join a march posing as participants and then undertake actions contrary to the Notice of Intention, thus exposing all protest-goers to the risk of being in breach of s214A.

Furthermore, it is clearly an unacceptable burden for protest-goers to have to know the conditions in the Notice of Intention so as to be able to comply with them sufficiently to protect themselves from the serious penalties of s214A. Freedom of assembly must include the freedom to spontaneously join a protest and to arrive at a protest without having first consulted the exact conditions under which it is being held.

It is also unclear what threshold is required for a protest to stop being held 'substantially in accordance' with the Notice of Intention. Legal Observers NSW has documented several instances of Police using 10 minute delays to the running order of a protest to begin putting pressure on organisers by stating that they risked not being in compliance with their Notice of Intention. *Antaw v R* has been the sole Court decision on the matter, and concerned a protest which continued hours after the finishing time stated in the Notice and during which tents were erected on the road. Clearly, there is a gap between what is judicially considered to be

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'substantially in accordance' with a Notice of Intention and how this provision is interpreted by Police on the ground.

The Summary Offences Act protections cannot therefore be said to offer protections for the right to protest that mitigate the restrictive effects of s214A, both due to the limitations of the regime itself and the way it is in practice used to constrain, rather than facilitate, protests, especially in cases where protests are undertaken as a matter of urgency.

Policy objective: Prevent serious disruption to traffic

International law protects disruptive protests as long as they remain peaceful.[15] Temporary disruptions caused by protest do not undermine the duty that governments and their agencies have to guarantee the right to protest and to protect protesters - mere disruption of vehicular or pedestrian movement or daily activities does not amount to "violence" at law.[16] Tolerance of disruption to ordinary life is necessary in a democratic society if our rights to peaceful protest, association, and expression are to have true value.

Prosecutors have historically overstated the seriousness of the disruption created by protests in order to meet the criterion of the offence. This was evidenced in the case of Deanna 'Violet' Coco who was charged with disrupting vehicles on Sydney Harbour Bridge under the pre-amendment version of s144G of the Roads Act. The initial sentence of 15 months imprisonment with a non-parole period of 8 months was overturned on appeal with the judge finding that the disruption caused by the incident was not to the extent claimed by the prosecution, and there was no evidence of Ms Coco's actions constituting a danger to the community.[17] The effect of the laws is that incidents of disruption that do not meet the seriousness threshold of the laws are being pursued by NSW Police as if they do - creating costly litigation and a drain on police and legal resources.

[15] Human Rights Committee, General Comment No. 37 (n i) 16
[16] Human Rights Committee, General Comment No. 37 (n i) 7
[17] Glover v R; Coco v R [2023] NSWDC 322 at [8], [29].

Policy objective: Protect the capacity for the community to engage in protests concerning union activity

Section 5A was inserted into s144G in 2022 to ensure that individuals could continue to engage in industrial campaigns that involved some form of obstruction to major roads, tunnels or bridges. In putting forward the provision, members of the then Labor Opposition invoked the importance of industrial protests being able to take place freely and without authorisation from the Police:

> In the real world a trade union does not always go cap in hand to the police with a nice little form asking, "Can we please do this between such and such a time on such and such a road because we'd like to make a point?" It sometimes works that way, yes, but often it does not. I was involved in many protests where we would have a snap rally or march to Hyde Park to make a point. I remember one time we marched there with a coffin when we were protesting about mesothelioma, without any permission whatsoever. But we were able to make our point without getting arrested. The legislation in its current form would penalise unions for doing that. SR LC Mark Buttigieg

The points made regarding the need for urgent protests to be able to take place without police authorisation is just as significant for community protests, as explored above. This reinforces the conclusion that the laws impermissibly constrain the right to protest.

Furthermore, the industrial carve-out contained in the laws does not extend to a number of important union activities. Unions have a long history of leadership on social and political issues. The ACTU backed trade boycotts with South Africa during apartheid, with the Seamen's Unions of Australia and the Waterside Workers' Federation enforcing embargoes against South African ships at the docks.[18] The ACTU also backed an embargo on exporting war materials to Japan, Germany and Spain in the 1930s, and this was enforced by dockworkers from several unions.[19] Indeed, Mark Buttigeig recognised the political nature of unions in the Second Reading speech for the 2022 laws, stating "the nature of people associating under the banner of a union to make a political or industrial point should be a valid form of protest and workers should not be arrested for getting together and making that point".[20]

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[18] https://archives.anu.edu.au/exhibitions/struggle-solidarity-and-unity-150-years-maritime-unions-australia/campaign-against

[19] https://commonslibrary.org/against-fascism-and-war-pig-iron-bob-and-the-dalfram-dispute/

[20] Second Reading debate, Legislative Council, Mark Buttigieg

The industrial carve-out in the laws does not, on its face, capture union activity that falls outside the boundaries of an industrial campaign or industrial dispute. Therefore if unions were to take up issues like apartheid or military exports today, their actions on these issues would not be protected from the 2022 Act provisions by the industrial carve-out. Indeed, five members of the Maritime Union of Australia, including the Sydney Branch Secretary and several delegates, have been charged under s214A of the Crimes Act following an anti-war action at Port Botany. The industrial carve-out is therefore insufficient to protect union activity as per the stated purpose articulated by Mark Buttigeig and others in the introduction of the laws, meaning the laws do not meet this stated policy objective.

Implications of Kvelde

The finding of the unconstitutionality of s214A(1)(c) and (d) in Kvelde requires that the law at least be amended to remove these sections. The burden on government resources and taxpayer funds to run a defence in the constitutional challenge has already been significant and the legislation cannot be allowed to remain in its current form.

The judgement in Kvelde also affirms the need for careful consideration and proper consultation regarding the introduction of any legislation affecting the right to protest. The urgent manner in which the 2022 amendments were brought forward and the lack of review afforded to them directly contributed to the improper over-reach of s214A(1)(c) and (d). Legislative decision-making must be guided by a regard for fundamental rights and take place with the involvement of the community.

Recommendations

1. Crimes Act s214A should be repealed
2. Barring repeal of the entire section, s214(1)(c) and (d) should be repealed
3. A review should be carried out into introducing a Human Rights Act for NSW to ensure the right to protest is protected
4. A review should be undertaken of the Summary Offences Act protections for protest and whether their operation facilitates the exercise of the right to protest