



Submission to NSW Review of the Crimes Act 1900

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Table of contents

About Amnesty International	3
Summary	4
International Legal Human Rights Framework	5
Concerns Regarding Policy Objectives and Design	8
Recommendations	10

About Amnesty International

Amnesty International is a movement of 10 million people which mobilises the humanity in everyone and campaigns for change so we can all enjoy our human rights. Our vision is of a world where those in power keep their promises, respect international law and are held to account.

We are impartial and independent of any government, political persuasion or religious belief and do not receive funding from governments or political parties.

Amnesty International is a proud people-powered movement founded on the work of volunteers and activists all around the world. More than 500,000 Amnesty International supporters live in Australia.

1 Summary

1.1 Amnesty International Australia welcomes the opportunity to provide this submission to the New South Wales Government's Review of the Roads Act 1993.

1.2 The Roads and Crimes Legislation Amendment Bill 2022 (NSW), amending section 144 G in Part 9 Division 7 of the Roads Act 1993 (NSW) and inserting Part 4AF into the Crimes Act 1900 (NSW), was passed in NSW Parliament in April 2022 following protests in Sydney by climate activists, with the stated objective to strike a balance between the right to protest and the public's right to move freely.¹ The amended bill significantly expanded provisions criminalising damage or obstruction to major infrastructure, with protestors facing up to a \$22,000 fine and/or prison for a maximum of two years.² In practice, it effectively criminalised all protests without authorisation on public roads, bridges, tunnels, rail lines and industrial estates throughout the state

1.3 All governments, including NSW, bear a responsibility to uphold and protect the right to protest. This means they should not interfere with protest unless there is a legitimate threat to the safety and rights of others. If police try to stop or limit a protest, that intervention must be proportionate and necessary, or in other words, must do more good than harm and must be the least rights-restricting option.

1.4 Authorities should instead find ways to make these spaces safer, by communicating with those organising the protest and providing services like traffic management and access to first-aid services. However, in many cases, intervention from state authorities is what causes otherwise peaceful disruptions to become dangerous and violent.

1.5 NSW's anti-protest laws have curtailed the fundamental right to protest and have a chilling effect on democracy and our capacity to enact societal change.

1.6 Amnesty International Australia has consistently voiced concerns that these laws have given power to police to an unprecedented extent in New South Wales, fostering an atmosphere of intimidation and surveillance over protesters. These measures are disproportionate and contravene international human rights law, notably regarding freedom of expression and peaceful assembly. They threaten everyone, from climate activists to anti-war demonstrators, with hundreds of arrests, including minors, made under these laws.

1.7 Protests have historically played a pivotal role in protecting human rights globally and in Australia. They have been instrumental in driving significant advances in human rights in NSW, from the 1965 Freedom Ride led by Charlie Perkins, which spotlighted systemic racism against Aboriginal peoples, to the pioneering activism of the 78ers during Sydney's inaugural Mardi Gras, catalysing progress in LGBTQIA+ rights, with lasting impacts to this day. These incidents

¹ Roads and Crimes Legislation Amendment Act 2022 No 7
<https://legislation.nsw.gov.au/view/pdf/asmade/act-2022-7>

² Roads and Crimes Legislation Amendment Bill 2022, First Reading
<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-123848'>

underscore the state's rich tradition of harnessing protest to effect profound change.

1.8 The ability to protest safely is an issue that intersects with the right to be free from discrimination. People who face inequality and discrimination, based on their age, race, gender identity and many other factors, face even more dangers to their right to protest. It is crucial that everyone can protest safely and without discrimination.

1.9 According to Amnesty International Australia's annual Human Rights Barometer, 67% of respondents support the right to protest.³

1.10 Amnesty International Australia believes the current laws are not fit for purpose because they do not strike this balance, but rather unfairly restrict the right to protest, having an unacceptable freezing effect on the ability of the NSW community to participate in democracy and exercise their right to freedom of expression and assembly.

1.11 Since 2022, Amnesty International Australia has joined over a hundred human rights groups, community organisations, unions, and legal experts in calling on the NSW Government to uphold the fundamental right to protest and to revoke its anti-protest laws.

1.12 In particular, we endorse the recommendations outlined in submissions to this review by the Human Rights Law Centre and the Australian Democracy Network.

2 International human rights framework

2.1 When participating in a protest, individuals are exercising a range of universally recognised human rights. These encompass not only the rights to freedom of expression and peaceful assembly but also fundamental rights vital for facilitating peaceful protests. These include the right to life, freedom of association, privacy, and protection from arbitrary arrest and detention, as well as from torture and other forms of ill-treatment or punishment. Therefore, rather than being consolidated under a single law or treaty, the right to protest finds protection under international human rights law through provisions enshrined in various international and regional treaties, each guaranteeing these distinct yet interrelated rights. Collectively, they afford protestors comprehensive protection.

2.2 Australia is a party to seven core international human rights treaties. The right to freedom of assembly and association is contained in Articles 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). They are also covered under Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 15 of the Convention on the Rights of the Child (CRC) and Article 21 of the Convention on the Rights of Persons with Disabilities (CRPD).

2.4 Article 21 of the ICCPR mandates that all governments ensure and respect the right to peaceful protest and establish a conducive environment within their jurisdictions for exercising and

³ Human Rights Barometer 2023

<https://drive.google.com/file/d/1tOBQss0enDBW57GxIFQf5pi0Y42FKVmH/view?usp=sharing>

enjoying this right.⁴ As a signatory to the ICCPR, Australia is obligated to uphold and safeguard all rights for every individual within its jurisdiction, regardless of citizenship.

2.3 Article 21 of the Covenant “protects peaceful assemblies wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof. Such assemblies may take many forms, including demonstrations, protests, meetings, processions, rallies, sit-ins, candlelit vigils and flash mobs. They are protected under article 21 whether they are stationary, such as pickets, or mobile, such as processions or marches”.⁵

2.4 The rights to freedom of expression, peaceful assembly, and freedom of association are not absolute and can be subject to limitations. Article 21 of the ICCPR stipulates: “The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”⁶

2.5 Article 21 mandates that all restrictions on the right to protest be imposed through law or an administrative decision based on law. Therefore, laws affecting the right to peaceful assembly must be clear and easily understood by everyone, including protesters, law enforcement, and the general public. Vagueness and ambiguity increase the likelihood of inconsistent application, misinterpretation, or misunderstanding of the law in practice. Furthermore, Article 21 stipulates that any restriction on the right to protest must be necessary and proportionate in a society founded on principles of democracy, the rule of law, political pluralism, and respect for human rights.⁷

2.6 A limitation on the right to protest must constitute an appropriate response to a compelling social need, serving as the least intrusive means to accomplish a legitimate objective. Furthermore, it must be proportionate to that objective.⁸

2.7 Article 21 permits limitations on the right to protest on public order grounds. However, it's vital to note that "public order" in international law does not solely refer to 'law and order' or the prevention of public disorder. Instead, public order encompasses the entirety of rules necessary for the effective functioning of society or the foundational principles upon which society is built.⁹

2.8 Article 21 allows for a limitation on the right on public safety grounds. However, this justification can only be invoked if it can be demonstrated that a specific protest poses a genuine and significant risk to the safety, life and security of individuals or a significant risk of substantial

⁴ Article 21, ICCPR

<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-right>
[S](#)

⁵ General Comment No. 37 on Article 21 (Right of peaceful assembly)

<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-37-article-21-right-peaceful>

⁶ Ibid 4

⁷ Ibid 4

⁸ Ibid 4

⁹ Ibid 4

property damage. The risk must be tangible and substantial, not merely speculative or possible.¹⁰

2.9 Under Article 4 of the ICCPR, states can enact measures deviating from specific obligations outlined in the Covenant, such as the freedom of assembly and association 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. Such measures may only be taken 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.¹¹

2.10 The legal foundation of the right to protest in NSW lies in the common law right to peaceful assembly, originating from the Magna Carta. This right receives additional safeguarding under the Australian Constitution through the implied freedom of political communication.¹² Under domestic law, limitations on this constitutionally protected freedom of political communication must meet the criteria of being "reasonably appropriate and adapted" to serve a legitimate objective to be considered valid.¹³

2.11 In conclusion, Amnesty International Australia underscores the significance of safeguarding civil disobedience within the framework of international law, particularly in light of the university protests advocating for human rights in the Occupied Palestinian Territories.

2.12 Peaceful assemblies, including in instances where they break a domestic law which conforms with international human rights law, should not be rendered subject to the threat of custodial criminal sanctions. Pressing charges against peaceful protesters breaking a domestic law (which conforms with international human rights law) may only be a measure of last resort, potentially justified only in extremely limited circumstances. Law enforcement and judicial authorities should take into account the different elements of the act of civil disobedience on a case-by-case basis to ensure no undue restrictions on the rights of peaceful assembly and freedom of expression are imposed. These elements include the intention of participants (for example, to protest or express political or social dissent, to get the attention of the general public and contribute to the public debate, or to stop or prevent human rights abuses) and the overall disruptive impact (causing temporary as opposed to permanent damage, or the extent of harm to other people's rights and property).

¹⁰ Ibid 4

¹¹ International Covenant on Civil and Political Rights, Article 4

<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-right>
[S](#)

¹² Protest law in New South Wales, Parliamentary Research Service

<https://www.parliament.nsw.gov.au/researchpapers/Documents/Protest-law-in-New-South-Wales.pdf>

¹³ Australian Law Reform Commission: Justifying limits on rights and freedoms

<https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-a-lrc-report-129/2-rights-and-freedoms-in-context/justifying-limits-on-rights-and-freedoms-2/>

3 Concerns regarding policy objective and design

3.1 The stated policy objectives of the Roads and Crimes Legislation Amendment Bill 2022 aimed to strike a balance between the right to protest and the public's right to move freely, as well as to prevent damage or disruption to key infrastructure such as the Sydney Harbour Bridge, along with other bridges, tunnels, and roads.¹⁴ While these objectives are valid, the Bill also requires scrutiny regarding its compatibility with international human rights law.

3.2 The NSW Government must ensure that the Bill, in both its design and implementation, does not violate obligations under the ICCPR and other treaties. Human rights and legal experts have voiced concern over the amendments to the Bill, which were introduced and passed in the NSW Parliament in a mere 30 hours without any chance for Parliamentary scrutiny or community consultation.¹⁵ The hurried process has led to wide-ranging and ambiguous interpretations, particularly regarding the definition of a "road."

3.3 Article 21 of the ICCPR specifies that any restrictions must be deemed "necessary in a democratic society". Limitations should address an urgent societal need and represent the least intrusive means to achieve the intended goal.¹⁶ However, when introducing the amendments to the legislation, the NSW Attorney General stated that restrictions on the right to protest aimed to prevent traffic disruptions on major bridges and roads. Merely seeking to prevent the obstruction of roads or bridges does not inherently constitute a necessary limitation on the right to protest. International law protects the right to protest, even if it causes temporary disruptions to road, traffic, and pedestrian movements, as long as they remain peaceful. Additionally, the Attorney General did not articulate the urgent social need the law was intended to address, beyond preventing temporary disruption, nor did he inform the Parliament about less intrusive alternatives considered to achieve its policy objective.¹⁷

3.4 The penalties under these anti-protest laws - a maximum of up to two years imprisonment and a fine of up to \$22,000 - raised significant concerns about proportionality. Under international law, the proportionality of a restriction on the right to protest is determined by weighing its detrimental effect against any benefits. The expanded provisions in the Bill are so sweeping that almost any protest activity on roads without prior approval risks being criminalised.

3.5 Amnesty International Australia also has expressed concerns regarding the requirement for police approval, which has the potential to undermine the fundamental right to protest. Part 4 of the Summary Offences Act 1998 (NSW) establishes a notification system aimed at fostering

¹⁴ Roads and Crimes Legislation Amendment Bill 2022

<https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3963>

¹⁵ 'Chilling effect': Supreme Court overturns NSW's tough anti-protest laws

<https://www.smh.com.au/national/nsw/chilling-effect-supreme-court-overturns-nsw-s-tough-anti-protest-laws-20231213-p5erbl.html>

¹⁶ Ibid 4

¹⁷ Roads and Crimes Legislation Amendment Bill 2022, First Reading

[https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/"HANSARD-1323879322-123848'](https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/)

consultation between protest organisers and police.¹⁸ Though theoretically optional, it protects protesters and organisers from certain offences if authorised. It also prevents police from directing protesters who are obstructing traffic.¹⁹ Under the Act, courts can issue orders authorising or prohibiting public assemblies, but they have themselves called the term “prohibition” misleading as it doesn't stop gatherings but removes immunity from certain offences. Concerns arise as the system may effectively compel prior notification, with penalties including imprisonment. This limits spontaneous protests, raising issues of practicality and appropriateness in New South Wales' notification system.

3.6 While international law recognises the value of organisers engaging in dialogue with authorities as a good practice to ensure preparedness for protests, it emphasises that organisers must not be compelled to seek approval. Additionally, international law recognises that notification procedures should accommodate spontaneous protests, acknowledging the importance of allowing individuals to express dissent and assemble peacefully without undue hindrance.²⁰

3.7 In October 2022, Dominique Jacobs and Helen Kvelde, supported by their legal representatives at the Environmental Defenders Office, launched a constitutional challenge against Section 214A of the Crimes Act 1900. They argued that the amendment was unconstitutional as it “impermissibly burdened the implied freedom of political communication”, and that to uphold the Australian Constitution, the NSW Government must allow communities to peacefully protest government policy in public spaces.

3.8 In examining the validity of section 214A of the Crimes Act, Justice Walton at the NSW Supreme Court stepped through the settled three-part test to establish whether a law contravenes the implied freedom of political communication. These includes examining whether a) the law effectively burdens the implied freedom in its terms, operation or effect, b) whether the purpose of the law is legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? c) whether the law is reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

3.9 The Court declared that subsection 214A(1)(c), so far as the provision criminalises conduct that causes the closure of part of a major facility, and subsection 214A(1)(d) impermissibly burden the implied freedom of political communication contrary to the Commonwealth Constitution and are therefore invalid.²¹

¹⁸ Summary Offences Act 1988

<https://legislation.nsw.gov.au/view/html/inforce/current/act-1988-025>

¹⁹ Protest law in New South Wales [electronic resource] / Tom Gotsis, Rowena Johns

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fcatalog%2F01348108%22;src1=sm1>

²⁰ Ibid 4

²¹ Kvelde v State of New South Wales [2023] NSWSC 1560

<https://www.hrlc.org.au/human-rights-case-summaries/2024/01/30/-kvelde-v-state-nsw>

4 Recommendation

4.1 Amnesty International Australia recommends that the NSW Government take the following actions:

- Repeal the amendments to the Crimes Acts, Part 4AF, and commit to upholding, protecting, and facilitating the public's rights to peaceful assembly in NSW, in line with international human rights law.
- Enact a Human Rights Act that will provide comprehensive protections of human rights, including the right to protest, in the state. A Human Rights Act in New South Wales would mandate state governments and agencies, including the police, to consider and respect people's human rights when developing laws, policies, and delivering services.
