



Legal Observers NSW submission to the review of s214A Crimes Act

Legal Observers NSW is an independent grassroots collective that monitors the policing of protests. We have fielded observer teams at over 60 protests since the introduction of the Roads and Crimes Legislation Amendment Act ('the Act') and produced reports on the policing of several significant protests, including the weekly pro-Palestine rallies, the Port Botany protests in November 2023 and March 2024 and several queer rights protests.

The stated policy objective of the introduction of 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. Our observations at protests over the last 2 years lead us to conclude that the Act is not appropriately adapted to meet this policy objective.

LONSW has instead found that:

1. NSW Police have used the threat of the new offences to intimidate and constrain protest contrary to the stated intention of the Act to strike a proper balance between the right to protest and other uses of public space.
2. The repeated and systematic misrepresentation of the Form 1 system has the effect of denying protest organisers the right to protest urgent matters without facing the possibility of charges under the 2022 laws.
3. Policing of protest has grown increasingly violent and invasive, with police more readily conducting home visits, property searches, deploying arrest powers and excessive use of force. This has had a particular impact on gender-diverse people who have been subject to harassment in police custody.

The broad effect of the Act encourages the use of police repression in response to members of the public who choose to express their dissent to government policy and actions. Such an effect cannot be tolerated by the people of New South Wales and should not be accepted by its government. `

Police have used the threat of the new offences to intimidate and constrain protest contrary to the stated intention of the Act to strike a proper balance between the right to protest and other uses of public space

Legal Observers NSW has both witnessed and received reports from several protest organisers about incidents of police using the threat of the new laws to intimidate and constrain protest.

IMARC

A significant instance of this was a series of visits to over 100 homes in NSW in the leadup to the IMARC conference in Sydney in November 2022. These homes were based on the identification of 93 persons of interest by NSW Police, with 28 people spoken to by Police. Police identified individuals involved in the 2019 Melbourne protests, members of Blockade Australia subject to current court-imposed bail conditions and potential Blockade IMARC protestors.

The Minister for Police at the time [stated](#) that the people visited “were advised that if a Form 1 had not been submitted to the NSW Police Force as outlined in the Summary Offences Act 1988, then this event may constitute an unauthorised public assembly” and “warnings were given with regards to the provisions of the new legislation under Section 144G of the Roads Act 1993, in addition to the Form 1 process in NSW”.

In [video footage](#) of one of these interactions captured on 26 October 2022 during a police visit to the home of a student climate activist in Sydney, police made several misleading statements about the nature of a Form 1, telling people that “it is an offence to protest without completing a Form 1”. Individuals were told that “if you attend any unplanned protest or disruption event in Sydney between 2-4 November you may be committing an offence and will be arrested”. This is a concerning misrepresentation of protest rights in NSW. It is not an offence in and of itself to protest without a Form 1, nor is it an offence to participate in ‘unplanned’ protests. Submitting a Form 1 can provide protestors protection from obstruction offences that may occur during a protest, but that doesn’t mean protests that don’t have a Form 1 are illegal or an offence in themselves. The Form 1 regime’s purported purpose was to facilitate large gatherings, but instead has been used by NSW Police to criminalise protests that don’t obtain a Form 1.

Those questioned included a 16 year old on their way home from a peaceful climate rally, the relatives of activists and university climate collective members. Several people were told that the police would keep coming back to their home until they were there to answer their questions. The vast majority of those questioned had no intention to protest at IMARC, with some not even knowing it was on.

Five activists across NSW were pulled over by police seemingly based on number plate identification and had their cars searched, with one having their car defected despite it having been recently serviced. Police justified the search as based on the suspicion that the relevant individuals would engage in unlawful assembly based on having previously participated in protest.

Police also misrepresented the nature of the Form 1 regime to IMARC protest organisers who submitted a Notice of Intention, stating that they would be unable to receive the protections of the Form 1 framework due to putting it in less than 7 days before the protest. Police told organisers that they could be subject to obstruction offences and would not have Form 1 protections, despite police having stated their non-objection to the protest.

Misrepresentation of the Form 1 regime and the threat of the new laws

Legal Observers NSW has documented several instances of this kind of police misrepresentation of the Form 1 regime. Being able to wield the threat of the new laws have given police more capacity to intimidate and constrain protests based on these misrepresentations. NSW Police have repeatedly stated in writing that in order for a protest to be authorised under the Summary Offences Act, organisers must submit a Notice of Intention to police more than 7 days prior to the event.

This is an unambiguous misrepresentation of the Form 1 system. NSWCCCL President at the time, Josh Pallas, has stated that “failure to 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 reasoning for this is extracted from a 10 December 2022 [letter](#) sent from Mr Pallas to Commissioner Karen Webb:

Section 26, which allows a court to authorise a public assembly for which you did not receive seven days’ notice but only on the proviso that you have not already given notice to the organiser that you do not oppose the public assembly, fortifies this conclusion. If you were unable to authorise an assembly for which seven days’ notice had not already been given, that aspect of s. 26 would have no work to do which would be an absurd outcome and one which the common law would seek to avoid.

Secondly, s. 23(1)(f)(ii) provides an alternate avenue for approval if you have not been given notice of the proposed assembly seven days prior. This is through the processes set out in s. 26 of the Summary Offences Act 1988 (NSW) whereby a court can grant authorisation of the assembly, if seven days’ notice has not been served on you and you have not otherwise authorised the assembly (as you have the power to do under s. 23(1)(f) as discussed above). This pathway is also expressed in clear and unambiguous terms.

... Raul Bassi v Commissioner of Police (NSW) [2020] NSWCA 109... also expressly contemplates that an assembly can be authorised despite a Form 1 falling short of providing seven days’ notice of the proposed assembly and adds weight to our analysis.

Despite this being brought to the attention of NSW Police, the practice has been ongoing.

A ‘Public Assembly Information Sheet’ (Figure 1) sent to organisers of a First Nations vigil for Cassius Turvey held at Sydney Town Hall on 2 November 2022 clearly mis-stated the Form 1 system as requiring 7 days notice in order for a protest to be authorised. Police told organisers that the protest would not have the protections of the Form 1 system because the Notice of Intention to hold the protest was submitted less than 7 days before the date of the vigil. The vigil was organised rapidly as a response to the murder of Cassius. Police told organisers that if their protest blocked the footpath, they could be subject to obstruction offences.

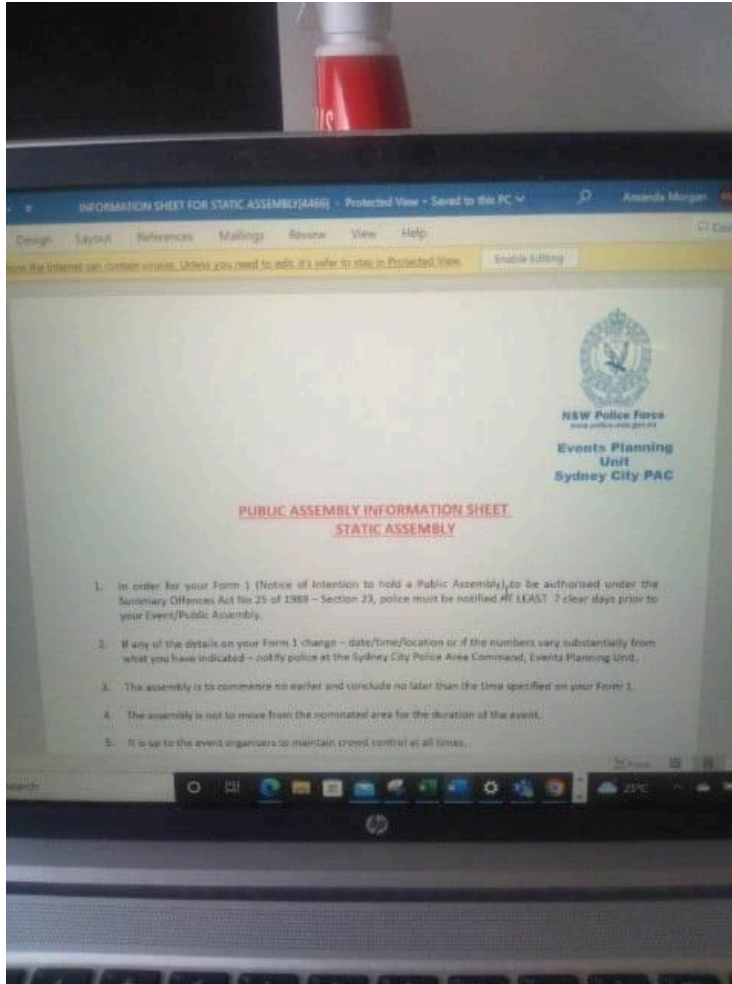


Figure 1: Public Assembly Information Sheet

An email from Sergeant Jeannie Assaf on 8 November 2022 (Figure 2) stated that 'A Form 1 requires 7 days notice'. No other reason was given for opposing the Form 1.

From: #SYDCITYEVENTS <SYDCITYEVENTS@police.nsw.gov.au>
Date: Thu, Dec 8, 2022 at 1:36 PM
Subject: RE: Attached Image [SEC=OFFICIAL]
To: [REDACTED]

Good Afternoon [REDACTED]

Thank you for your email. The NSW Police Force has not refused your Form 1. In previous correspondence and communication, we informed you that the public assembly is 'Unauthorised.'

A Form 1 requires 7 days notice. 'Notice of Intention to Hold a Public Assembly', Schedule 1 - Summary Offences Act 1988. If you are going ahead on 17th December, we need to get as much detail as possible, especially re numbers so that I can try facilitate.

Regards,



Jeannie Assaf
Sergeant
Sydney City Police Area Command
192 Day Street Sydney NSW 2000
P: [REDACTED] E: [REDACTED]

Figure 2: Email from Sargeant Jeannie Assaf of Sydney City Police Area Command

An email from Inspector Kimberley Penfold on 24 August 2023 (Figure 3) stated that an Action for Public Housing march was 'an unauthorised protest due to the insufficient notification provided'.

From: Kimberley Penfold [REDACTED]
 Date: Thu, Aug 24, 2023 at 10:49 AM
 Subject: Action for Public Housing 25/08/2023 [SEC=OFFICIAL]
 To: [REDACTED]

Hello [REDACTED]

As stated on the telephone call, we will assist in facilitating the protest along Redfern Street. This is an unauthorised protest due to the insufficient notification provided. As such, and in order to ensure public safety and that of the police, the procession can be facilitated via the footpath, with all participants adhering to pedestrian rules. Please advise Redfern Police Station of any changes to timings or anticipated numbers via ph 83035199.

Regards,

Kimberley Penfold
 Inspector
 Duty Officer – Professional Standards
 South Sydney PAC
 1 Lawson St, Redfern NSW 2016
 Ph: [REDACTED] E/N: [REDACTED]

Figure 3: Email from Inspector Kimberley Penfold of South Sydney Police Area Command

Most recently, on 11 October 2023 NSW Police Deputy Commissioner David Hudson [stated to media](#) that a 7 day timeframe was required for police to authorise a protest. The Police Minister also [stated](#) on 10 October 2023 that “the process to complete a Form 1 generally takes about a week”.

The repeated and systematic misrepresentation of the Form 1 system has the effect of denying protest organisers the right to protest urgent matters without facing the possibility of charges under the 2022 laws.

Legal Observers NSW further 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, including at recent street marches for Palestine. *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 ‘substantially in accordance’ with a Notice of Intention and how this provision is interpreted by police on the ground. The capacity to wield the threat of the 2022 laws gives police greater ambit to put this inappropriate pressure on organisers.

Policing of protest has grown increasingly violent, with police more readily deploying arrest powers and excessive use of force, having a particular impact on gender-diverse people who have been subject to harassment in police custody

Since the introduction of the 2022 laws, Legal Observers NSW has observed increasingly violent policing of protests, both in relation to protests where individuals were allegedly in breach of the laws and in relation to protests notified to police and acting in compliance with the law. The laws seem to have given police greater confidence that they are justified in using arrest powers and excessive force against protestors.

Policing of the Port Botany protests

Legal Observers NSW fielded a team of observers at a protest near Port Botany on November 21 2023. We observed police issue move on orders to protestors located near the entrance of the Port despite no traffic being observed to be obstructed by the protest and no visible safety risk to any person. Police had blocked off the entrance to the Port before protestors arrived. Police then proceeded to surround protestors in a formation that made it difficult for protestors to leave when the move on order was issued and created crowd crush conditions as protestors attempted to comply with the move on order. A very young child in a pram was caught up in the area surrounded by police and police ignored protestors' cries that there was a baby in the crowd and for the police to allow protestors to leave. The pram had to be lifted by protestors above the crowd for the child to be removed from the crush safely. Police saw this and continued to crush the crowd. Police proceeded to arrest protestors in the area they had surrounded, using excessive force including wrist holds that made protestors scream in pain. Documented injuries and impacts include soft tissue injuries, bruising and asthma attacks. 23 people were charged with s214A(1)(b) of the Crimes Act following the protest.

Legal Observers NSW also fielded observers to a subsequent action at Port Botany on March 24 2024. Under similar circumstances to the first action, and with the Port entrance blocked by police before protestors gathered in front of it, police issued a move on order to protestors which was barely audible even to observers standing less than 5 meters away. Most people in the 200+ crowd did not hear the move on order being issued and several of those arrested were not aware the order had been issued. Police moved in to arrest protestors less than 10 minutes after the move on order was issued. Police used excessive force, throwing several protestors to the ground, using restraint techniques associated with restraint asphyxia, grabbing protestors by the neck and violently pushing many. Police put cuffs on one protestor so tightly that their hands went numb and refused to remove the cuffs for 20 minutes after the protestors made them aware they were in pain. Injuries were again sustained by several protestors as a result of police conduct, including significant bruising and swelling from protestors being thrown to the ground by police. 19 people were charged with s214(1)(b) of the Crimes Act following the protest.

Policing of street marches

Legal Observers NSW has further observed a marked increase in violent policing at street marches which are notified to police and compliant with the law. We set out two recent case studies from protests where Legal Observers NSW has fielded observing teams.

Street march in Sydney CBD 23 March 2024

A street march was held in Sydney CBD on 23 March 2024 and notified to police well in advance by organisers, with police raising no objection to the protest. The protest proceeded following the route specified in the notice of intention. Three people engaged in a “die in” on the march route, wherein protesters splashed a water based red solution on themselves to symbolise blood. The solution contained water, corn syrup and red food dye, was non-toxic and clearly not real blood as it was too bright and too watery and within bottles. As they splashed the solution on themselves, a small amount got on one of the police officers, which was used as a justification to charge all three people with assaulting a police officer. It was obvious to everyone present that getting any solution on any police officer was clearly accidental, not intended to cause harm or intimidation, and the vast majority of the solution which was sprayed went onto the protesters themselves, which would indicate that the solution was not dangerous.

The police moved in quickly to make arrests, violently grabbing and shoving protesters, which resulted in another officer getting the solution on her uniform. This would not have happened if the police had not used unnecessary force against the people still holding the bottles of solution (which were plastic squeeze bottles like those that might be used for BBQ sauce).

Furthermore, the person who suffered the most heavy handed arrest was not observed to throw the solution on anything at all before being placed under arrest. He had a bottle of the solution in his hand but had not yet done anything with it before being forcefully grabbed and picked up by a group of four or five officers who carried him by his limbs. He was put on the ground on Pitt St pedestrian mall, wherein an officer placed a knee on his back with considerable pressure despite him already being on the ground, completely surrounded by officers, and totally incapacitated. This is despite not having been observed to engage in any conduct that would constitute the legal definition of assault. The protestor subsequently had to attend hospital due to being briefly unconscious following these actions from police.

Rally in Surry Hills Friday 1 March 2024

On the eve of Mardi Gras, Pride in Protest (PiP) lead a rally of approximately 300 people at Taylor Square. Police were observed kettling, shoving and grabbing protesters throughout the rally. At Taylor Square police kettled protesters into a metal barricade, pushed protesters onto one another, and continued to manhandle protesters who had already moved off the street. It was reported that a police officer grabbed a protester by the throat. As the rally dispersed, police officers got in a car and followed a small group of protesters to Museum Station. The officers attempted to stop the people from entering the station and told them they wanted to speak with

them. The people refused and continued into the station where police followed them and made a transphobic comment about their name.

Impacts on gender-diverse people

The intensified policing of protest following the introduction of the laws has had a particular impact on gender-diverse people, for whom interactions with police often carry a greater risk of violence and harassment.

The following story was shared with Legal Observers NSW by Pride in Protest. Kai is a trans protestor who was arrested in Port Botany in November 2023 and charged under the anti-protest laws. They had been arrested previously at a protest, many years ago, under their pre-transition name ('deadname'). They legally changed their name as part of their gender transition three years ago.

Upon being arrested at Port Botany Kai gave the police their details including their current legal name. Despite this, the entire time in police custody, police officers insisted on using their deadname for all interactions. They requested their name be changed in their paperwork multiple times, and police officers refused. They told police they had an ID listing their correct name in their bag, but they were ignored. They were pressured by police into signing documents listing the wrong name. They found the process humiliating, violent and malicious. At each court appearance following the arrest, their matter was listed under their deadname. They found it deeply distressing to have to keep responding to their deadname. Their lawyer requested for their name to be changed by the court on several occasions, beginning from their very first court appearance, when they were told that no, the court would not correct their name. In March 2024 – after they had been told their name should have now been corrected – they answered a knock on their door late at night to find a police officer, asking for them yet again under their deadname, for a bail check.

They responded with their correct name, provided their NSW Government ID to back this up, and a back-and-forth ensued. They were conscious that this officer was armed, far larger than them, and that they were home alone. Kai was forced to argue about their name and gender identity with an armed police officer, in the middle of the night, as a result of the anti-protest laws.

In the months since their arrest, Kai has had to take quite a few days off work to attend court, and quite a few more days off as mental health leave as a direct result of the immense stress of the anti-protest laws charges. They ended up dipping into negative leave balance. Kai has gender affirming surgery scheduled for later this year – which was scheduled a year in advance to allow time for leave accrual and savings. Now that they have had to use all of their leave because of the anti-protest laws case, they are seriously considering cancelling or pushing back their surgery because they do not have the leave they will need to recover. The anti-protest laws are driving state-sanctioned transphobia and may deny Kai their transition care.

Legal Observers NSW has further received reports from a protestor arrested at the March 2024 Port Botany protest that they were called homophobic slurs by a police officer in custody. At least one other protestor arrested at the November 2023 Port Botany protest was misgendered by police in custody and has been misgendered during bail checks by police.

Conclusion

Based on our observing of protest policing over the last 2 years, the 2022 laws are not achieving their stated policy objective of 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 laws have given police greater power to intimidate and constrain protests in a way that seriously impacts the capacity of the community to use public space for protest assemblies. This has proven to be true even in cases where community members attempt to engage in the Form 1 system that is meant to facilitate protest. The laws have also led to an increase in police arrest powers and use of force, even in relation to authorised public assemblies. The Parliament's signaling of less tolerance for protest in introducing and urgently passing these laws has markedly reduced the space available for protest in NSW.

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