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THE RIGHT TO PEACEFUL ASSEMBLY

Explainer: The Human Rights obligations
of Governments across Australia





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As an organisation committed to the protection of internationally recognised human rights, Australian Lawyers for Human Rights (ALHR) is deeply troubled by the evermore draconian anti-protest measures being rolled out throughout Australia. We fear that these measures are legitimising increasingly aggressive and violent police responses to people exercising their internationally recognised human rights to peaceful assembly and freedom of expression.

HUMAN RIGHTS TREATY OBLIGATIONS

As a party to the core United Nations human rights treaties, Australia has recognised the freedom to peacefully assemble as a fundamental human right and accepted binding international legal obligations to protect it.

These obligations are articulated in:

- articles 21 and 22 of the International Covenant of Civil and Political Rights (ICCPR);
- article 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- 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), article 21 of the Convention on the Rights of Persons with Disabilities (CRPD) and article 7 of the Convention on the Elimination of all forms of Discrimination Against women (CEDAW).



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GENERAL COMMENT NO. 37

In July 2020 the United Nations Human Rights Committee (UNHRC) released *General Comment No.37 on Article 21 (Right of Peaceful Assembly)*. This provides comprehensive guidance on the scope and content of the right to peaceful assembly and the obligations of ICCPR State parties, including Australia.

General Comment 37 specifically confirms that:

- The right of peaceful assembly extends to all gatherings for peaceful purposes and protects peaceful assemblies wherever they take place.
- Peaceful protests are protected under article 21 whether they are stationary, such as pickets, or mobile, such as processions or marches. Online mobilisation and digital assemblies are also protected.
- Assemblies must be allowed to be held within sight and sound of their target.
- States have an obligation not to interfere with peaceful assemblies without compelling justification, they are obligated to facilitate them.
- Any restrictions on peaceful assembly must be legal, necessary and proportionate in the context of a society based on democracy, the rule of law, political pluralism and human rights - as opposed to being merely reasonable or expedient. "Public order" cannot be used to justify overbroad restrictions.
- Authorities should first apply least-intrusive limitations on assemblies, prohibition should be a last resort.



- Restrictions on assemblies must not be based on the message of the assembly or the degree of public support for the purpose of the gathering.
- An assembly cannot be deemed violent or non-peaceful just because it involves disruption of movement or civil disobedience.
- There is a presumption in favour of considering assemblies to be peaceful. Isolated acts of violence by some participants should not be attributed to others, to the organisers or to the assembly.
- Assemblies may only be dispersed by law enforcement agencies in exceptional cases.
- Law enforcement officials should seek to de-escalate situations that might result in violence. They are obliged to exhaust non-violent means and to give prior warning if it becomes absolutely necessary to use force. Any use of force must comply with the fundamental principles of legality, necessity, proportionality, precaution and non-discrimination. Those using force must be accountable for each use of force.
- Notification regimes that require people to apply for permission or authorisation to organise an assembly are contrary to the idea that peaceful assembly is a basic right.
- A failure to notify the authorities of an upcoming assembly, where required, does not render the act of participation in the assembly unlawful, and must not in itself be used as a basis for dispersing the assembly or arresting the participants or organisers.



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CONSTITUTIONAL RIGHTS TO FREEDOM OF POLITICAL COMMUNICATION

The High Court of Australia has acknowledged in various decisions that an implied freedom of communication exists under the Constitution in relation to political and government matters. It has confirmed that this implied freedom extends to state and local political and government matters.[1]

Any law that effectively burdens this implied freedom of communication must be:

- reasonably appropriate and adapted to advance a legitimate object;
- and must be a proportionate response to the purpose sought to be achieved.[2]

In considering whether a law satisfies this threshold the High Court has considered whether the measures are suitable, necessary and adequate in their balance[3].

Laws that cast a disproportionately wide net over peaceful protest activity may - when challenged in court - be found not to be reasonably appropriate, proportionate, adequate in their balance, nor adapted to advance a legitimate purpose that is compatible with the maintenance of our system of representative government.



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WHERE DOES THAT LEAVE US?

The use of excessive force to disperse peaceful protesters, fuelled by draconian laws restricting the right to freely and peacefully assemble, moves Australia ever further away from international human rights law.

We need our elected representatives to show leadership in upholding democracy, the rule of law, protecting civil liberties and resisting draconian or authoritarian measures.

By aligning federal, state and territory laws with international human rights standards, Australia can better protect everyone equally, uphold our democratic way of life and foster a safer and more inclusive society.

NOTES

1. Unions New South Wales & Ors v New South Wales (2013) 304 ALR 266.
2. Kathleen Clubb v Alyce Edwards & Anor; John Graham Preston v Elizabeth Avery & Anor [2019] HCA 11 (10 April 2019); McCloy v New South Wales [2015] HCA 34; LibertyWorks Inc v Commonwealth of Australia [2021] HCA 18.
3. LibertyWorks Inc v Commonwealth of Australia [2021] HCA 18 [46]
4. Kvelde v State of New South Wales [2023] NSWSC 1560