

Declaration of our right to protest



Human
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Global Climate Strike in Gadigal (Sydney), September 2019
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The right to peaceful protest is a fundamental human right that allows us to express our views, shape our societies and press for social and legal change. Participating in peaceful protest is a way for all of us to have our voices heard and be active in public debate, no matter our bank balance or our political connections.

Peaceful protest is crucial for realising all of our human rights.ⁱ 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.

All Australian governments have an obligation to guarantee the right to protest and to protect protesters. However, state governments around the country have passed harsh, repressive and undemocratic anti-protest laws.

This declaration, grounded in human rights law, asserts the fundamental right to protest and offers practical steps to safeguard the right from further erosion.

1/ We must protect the right to protest.

All governments and their agencies have a duty to guarantee the right to peaceful protest. This includes preventing others, including police, from interfering with or violating their enjoyment of the right.

Article 21 of the International Covenant on Civil and Political Rights (ICCPR) requires all governments to guarantee and respect the right to peaceful protest and to create an enabling environment within their jurisdictions for the exercise and enjoyment of the right.ⁱⁱ Governments and their agencies are required to protect all forms of peaceful protest regardless of wherever it happens or what form it takes.^{iv} These protections are owed to all people, not just citizens, and must be provided to everyone free from discrimination of any kind.^v

2/ Governments must accept that public protest involves some level of disruption.

Temporary disruption to everyday life should not be used as an excuse to deny protection to protests.

International law protects disruptive protests as long as they remain peaceful.^{vi} 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^{vii} - mere disruption of vehicular or pedestrian movement or daily activities does not amount to "violence" at law.^{ix}

Authorities must treat measures like street closures or redirecting traffic as necessary tools to protect people participating in protests, and not as an excuse to limit, disperse or curtail a peaceful protest. This includes an obligation to protect protesters that use peaceful collective civil disobedience or direct-action tactics.^x

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.



Left: School Strike 4 Climate in Boorloo (Perth), Australia, March 2023

Photo: © Greenpeace / Steven Alyan

Top Right: Invasion Day Rally, Naarm (Melbourne), Australia, January 2023

Photo: © Human Rights Law Centre / Thomas Feng

3/ Laws affecting the right to protest must be clear.

Where a law or administrative decision affects the right to protest it should be drafted clearly and precisely.

The ICCPR requires that any restriction on the right to protest be imposed through law or administrative decisions based on law.^{xii} Laws affecting the right to protest must be precise and clearly outline what conduct is and is not permitted so that anyone taking part in a protest can regulate their behaviour accordingly.^{xiii} Laws affecting the right to protest that are vague or ambiguous can be applied inconsistently, misapplied, or misunderstood in practice.

The mere act of organising or participating in a peaceful protest must not be criminalised under counter-terrorism laws.^{xiv}

6/ Participating in a protest is not an invitation to surveillance.

Police services, including private contractors, are required to guarantee the right to privacy.

Surveillance of protesters must not occur unless it is strictly necessary, proportionate and supervised by courts.^{xviii} If surveillance is required at all, it must be targeted and only used when there is a reasonable suspicion that some may be engaging in or planning to commit serious criminal offences.^{xix}

Police services, including any private companies that they contract, must develop publicly available policies and frameworks that contain safeguards and limitations on the use of surveillance tools, like audio and video recording, digital surveillance, or location tracking used during protests to monitor protesters and protest organisers.^{xx} These policies must be compatible with human rights standards^{xo} and include a presumption in favour of protesters being able to access, rectify, or expunge any of their personal data, except when this would frustrate criminal investigations or prosecutions.^{xxii}

Facial recognition technology to monitor peaceful protests and protesters must not be used. These technologies are indiscriminate and untargeted and significantly risk the enjoyment of human rights, particularly the right to privacy.^{xxiii} These technologies are also prone to errors^{xxiv} and may perpetuate and amplify discrimination as they can be used to profile people on the basis of their ethnicity, race, origin, gender, disability or other characteristics.^{xxv}

Any surveillance or data gathering by police must not intimidate or discourage protesters from exercising their rights.^{xxvi}

5/ Protesters must have all their human rights protected.

To fully protect the right to protest, all other human rights must also be protected.

The ICCPR requires that all governments and their agencies guarantee and protect all of the human rights enjoyed by protesters, including the right to privacy,^{xi} the right to be free from arbitrary arrest and detention, and the right to be free from cruel, inhuman or degrading treatment or punishment.^{xvii}

The human rights and freedoms guaranteed to all people under the ICCPR are not extinguished if a protest is declared unlawful or is dispersed.

ⁱ Article 21 (2) provides an exhaustive list of the permissible restrictions on the right to protest. These are, national security if a restriction is needed to preserve the existence of the nation, its territorial integrity or political independence. Public safety, if it can be established that a protest creates a real and significant risk to the safety or lives of people or to protect property from serious damage. Public order, if a protest threatens the very functioning of society or the fundamental principles on which it is founded- the preservation of 'public order' does not refer to the preservation of 'law and order'. The preservation of public health, if it can be demonstrated the restriction is needed to deal with a serious threat to health. The protection of morals, if this reason is used at all it should not be used to protect understandings of morality deriving from a single social, philosophical or religious tradition. See: Human Rights Committee, General Comment No. 37 (n i) 36-69.



7/ Independent monitoring of protests must be facilitated.

Independent protest observers are fundamental to protecting the right to protest.

Journalists, human rights defenders and independent observers are critical for the enjoyment of the right to protest. They are protected by the ICCPR^{xxvii} because they are engaged in the promotion and defence of human rights, by documenting, reporting, and seeking information on potential violations.^{xxviii}

Journalists, human rights defenders and independent observers may not be prevented or limited in exercising their functions, including when they are monitoring the actions of police and other law enforcement officials.^{xxix} Similarly, they must not face reprisal or harassment and their equipment must not be interfered with, confiscated or damaged.^{xxx} Their right to monitor protests is not extinguished if a protest is dispersed or declared unlawful.^{xxxi}

8/ Protests should not be restricted based on their message except where that message could harm others.

Laws restricting protest should not restrict specific ideas, messages, or discriminate based on the viewpoints taken by protesters except in very narrow circumstances.

In some circumstances a law limiting a particular message or idea is required, provided that the limitation is lawful, necessary, proportionate, and justifiable in a democratic society. For example, the right to protest can be limited if it is being used as propaganda for war or for the advocacy of national, racial or religious hatred that incites people to discrimination, hostility, or violence.^{xxxi}

9/ Police must not interfere with the right to protest unless it is absolutely necessary.

Police services must respect and protect the right to protest for all without discrimination and in accordance with human rights law.

Police services have an obligation to respect and ensure the right to protest and to protect protesters. They must not employ indiscriminate policing tactics, like mass arrests or containments except when it is strictly necessary and proportionate to do so.^{xxiv}

Police officers should de-escalate all situations that might result in violence and exhaust all non-violent means, including by giving prior warning, before resorting to the use of force.^{xxv} Any use of force by police must comply with the fundamental principles of legality², necessity,³ proportionality,⁴ precaution⁵ and non-discrimination,⁶ and be the minimum force required to achieve a legitimate purpose.^{xxvi} Any officer that uses force must be accountable for each use of force, uniformed police officers should always display easily recognisable identification during protests.^{xxvii}

Police cannot demand pledges or commitments from individuals to refrain from organizing or participating in future protests. Similarly, requiring participants or organisers to contribute to the costs of policing or any other public service associated with a peaceful protest is generally not compatible with the ICCPR.^{xxix}

If individuals engage in violent behaviour during a protest, police must differentiate between those individuals and other participants; the right to protest of those not involved in violence must not be affected.

^{xl} Individuals are responsible for their own behaviour, not the collective.

The use of less-lethal weapons, particularly those with wide-area effects like tear gas, are indiscriminate and must be considered a measure of last resort.^{xl} Their use must be accompanied by clear warnings which give adequate opportunity for participants to disperse.^{xl}

10/ Giving prior notice to authorities about a protest must be optional.

A permit should not be a precondition to enjoying the right to protest.

Having to apply to authorities for a permit to protest undermines the right to protest.^{xlvi} While it is good practice for protest organisers to establish dialogue with authorities to promote preparedness, de-escalate tensions and resolve disputes, they must not be required to do so.^{xlv}

A notification procedure for protests, if one exists at all, must be necessary, proportionate and justifiable in a democratic, pluralistic society that respects human rights.^{xlvi} A notification procedure must not become, in practice, a system of authorising protests.^{xlvi}

Authorities must accommodate spontaneous protests for which notification is not practicable or appropriate.^{xlvi}

² The use of force must be regulated by domestic law in accordance with international law. See: United Nations Office of the High Commissioner for Human Rights, *Guidance on less-lethal weapons in law enforcement*, UN Doc HR/PUB/20/1 (2020) 2.4.

³ Law enforcement officials can only use force when, in the circumstances, it is absolutely necessary in order to achieve a lawful and legitimate law enforcement objective. See: Office of the High Commissioner for Human Rights, *Guidance on less-lethal weapons in law enforcement* (n2) 2.8.

⁴ The type and level of the force used and the harm that may reasonably be expected to result from it must be proportionate to the threat posed or to the offence that an individual or group is committing or is about to commit. Force used must never be excessive in relation to the legitimate objective to be achieved. See: Office of the High Commissioner for Human Rights, *Guidance on less-lethal weapons in law enforcement* (n2) 2.10.

⁵ Law enforcement operations and actions must be planned and conducted while taking all necessary precautions to prevent or minimise the risk of recourse to force and to minimise the severity of any injury that may be caused. See: Office of the High Commissioner for Human Rights, *Guidance on less-lethal weapons in law enforcement* (n2) 2.6.

⁶ Law enforcement officials must not discriminate against any person on the basis of race, ethnicity, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, disability, property or birth, or other similar criteria. Law enforcement must have a heightened level of care and precaution with respect to individuals who are known, or are likely to be especially vulnerable to, the effects of the use of force or of a particular weapon. See: Office of the High Commissioner for Human Rights, *Guidance on less-lethal weapons in law enforcement* (n2) 2.11.

Endnotes

¹ Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (Article 21), 129th sess, UN Doc CCPR/C/GC/37 (17 September 2020) 1-3.

² Ibid 24.

³ United Nations General Assembly, Human Rights Council, Thirty-first session, *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, A/HRC/31/66, 13.

⁴ Human Rights Committee, General Comment No. 37 (n i) 6-7, 16.

⁵ Ibid 6.

⁶ United Nations General Assembly, *Joint report* (n iii) 14-16.

⁷ Human Rights Committee, General Comment No. 37 (n i) 16.

⁸ Ibid 7.

⁹ Ibid 15.

¹⁰ Ibid 24.

¹¹ Ibid 16, see also: United Nations Human Rights Committee, *Concluding observations on the initial report of Macao, China, adopted by the Committee at its 107th session (11-28 March 2013)* CCPR/C/CHN-MAC/CO/1, 16, and *Frumkin v. Russia* (application No. 74568/12), judgment of 5 January 2016, 97.

¹² International Covenant on Civil and Political Rights art 21; see also: Human Rights Committee, General Comment No. 37 (n i) 39.

¹³ Human Rights Committee, General Comment No. 37 (n i) 39.

¹⁴ Ibid 68.

¹⁵ International Covenant on Civil and Political Rights art 21 (2).

¹⁶ Ibid 17.

¹⁷ Ibid 9.

¹⁸ Human Rights Council, *Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peaceful protests* Report of the United Nations High Commissioner for Human Rights, 44th sess UN doc A/HRC/44/24 (24 June 2020) 26; see also: Human Rights Council, *Rights to freedom of peaceful assembly and association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, 41st sess UN doc A/HRC/41/41, 57.

¹⁹ Human Rights Council, *Impact of new technologies on the promotion and protection of human rights* (n xviii) 26.

²⁰ Human Rights Council, *Impact of new technologies on the promotion and protection of human rights* (n xviii) 31-37; Human Rights Committee, General Comment No. 37 (n i) 61-62, 93-94; Swiss Confederation Federal Department of Foreign Affairs, *International Code of Conduct for Private Security Service Providers* (2010).

²¹ Human Rights Committee, General Comment No. 37 (n i) 61; see also Human Rights Committee, *Concluding observations on the fourth periodic report of the Republic of Korea*, 11th sess, UN Doc CCPR/C/KOR/CO/4, 42-43.

²² Human Rights Council, *Impact of new technologies on the promotion and protection of human rights* (n xviii) 36.

²³ Ibid 26.

²⁴ Ibid 31-33.

²⁵ Ibid.

²⁶ Human Rights Committee, General Comment No. 37 (n i) 94.

²⁷ Ibid 30; see also *Zhagiparov v Kazakhstan* (CCPR/C/124/D/2441/2014), 13.2-13.5.

²⁸ *Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, GA Res 66/164 UN Doc A/RES/66/164 (10 April, adopted 19 December 2011) 2. See also: *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, Art 1-8.

²⁹ Human Rights Committee, General Comment No. 37 (n i) 30.

³⁰ Ibid.

³¹ Ibid.

³² *International Covenant on Civil and Political Rights*, art (1)

³³ Ibid art (2).

³⁴ Human Rights Committee, General Comment No. 37 (n i) 82-84.

³⁵ Ibid 78.

³⁶ Ibid.

³⁷ Ibid 89.

³⁸ Ibid 66.

³⁹ Ibid 64.

⁴⁰ United Nations Office of the High Commissioner for Human Rights (n 2) 6.3.

⁴¹ Human Rights Committee, General Comment No. 37 (n i) 87.

⁴² Ibid.

⁴³ Ibid 70.

⁴⁴ Ibid 75.

⁴⁵ Ibid 70-73; *International Covenant on Civil and Political Rights* Art 21

⁴⁶ Ibid 72.

⁴⁷ Ibid 70-72.



Right: School Strike for Climate, Gadigal (Sydney)
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Above: Invasion Day Rally, Naarm (Melbourne), Australia, January 2023
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