



## Protest and Police Powers in New South Wales

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### The Right to Protest in NSW

There is no express right to protest in NSW. The right to protest comes from the implied freedom of political communication found in the Australian Constitution. This means that the government cannot make laws that prohibit or significantly impede a person's implied right to protest.

### Public Assemblies

Part 4 of the *Summary Offences Act 1988* (NSW) contains provisions that facilitate the right to protest in NSW. It does not, however, expressly provide a right to protest, nor does it prohibit protesting. The aim of Part 4 is to encourage cooperation between protesters and the police in planning a public assembly. A public assembly is a public demonstration or protest.

Once the process (as explained below) to authorise a public assembly has been complied with, there are three potential outcomes:

1. If the NSW Commissioner of the Police (**'the Commissioner'**) does not oppose the public assembly, then it is authorised.<sup>1</sup>
2. If at least 7 days' notice is given to the Commissioner, and the Commissioner is opposed to the public assembly, the Commissioner must apply to the Court to prohibit the public assembly. The Court then decides to either authorise or prohibit the public assembly.<sup>2</sup>
3. If less than 7 days' notice is given to the Commissioner, and the Commissioner opposes it, the public assembly organisers must apply to the Court to authorise the

<sup>1</sup> *Summary Offences Act 1988* (NSW) s 23(1)(f).

<sup>2</sup> *Summary Offences Act 1988* (NSW) s 23(1)(f)(i).

public assembly. The Court then decides to either authorise or prohibit the public assembly.<sup>3</sup>

## **An authorised or prohibited public assembly – what is the difference?**

### *Authorised Public Assembly*

An authorised public assembly is:

- Where a Form 1 is not opposed by the Commissioner, or
- The public assembly is authorised by a Court.

Protesters in an authorised public assembly are afforded certain legal protections. That is, the police cannot charge protesters of an authorised assembly with participating in an unlawful assembly, or of obstructing people, vehicles, or vessels in a public place.<sup>4</sup>

Such protections are only provided where the public assembly is conducted substantially in accordance with the details that have been supplied to the police. For example, you cannot be charged with obstructing traffic during a protest when the police were informed of the route of the procession and that route was taken. However, you could be charged with obstructing traffic if you decide to take a different route that the police did not agree to.

While the terminology “unauthorised public assemblies” is not used in the legislation and used sparingly in caselaw, it is referred to in a policy context to describe a public assembly with no Form 1 submitted. As with a prohibited public assembly, this does not mean the public assembly is illegal, rather that the above protections do not apply.

### *Prohibited Public Assembly*

A prohibited public assembly is where, in response to a Form 1, the Commissioner applies to the Court for it to be prohibited and the Court makes such an order. A prohibited public assembly is not illegal (the use of ‘prohibited’ in the Act is quite misleading). There is no prohibition on members of the public gathering in a public place to express their political views. However, it means that the protesters will not be afforded the legal protections that are afforded in an authorised assembly and could be charged by the police with offences of obstructing people, vehicles, or vessels and unlawful assembly.<sup>5</sup>

## **Process for authorising a Public Assembly**

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<sup>3</sup> *Summary Offences Act 1988* (NSW) s 26

<sup>4</sup> *Summary Offences Act 1988* (NSW) s 24.

<sup>5</sup> See for e.g. *Commissioner of Police v Langosch* [2012] NSWSC 499 [19]; *Commissioner of Police v Jackson* [2015] NSWSC 96 [13]; *Commissioner of Police (NSW) v Bainbridge* [2007] NSWSC 105 [15]; *Commissioner of Police v Ridgewell* [2014] NSWSC 1138 [3], [4]. For thoroughness, we note that engaging in a prohibited assembly may risk a contempt of court charge. However, current court commentary suggests this is unlikely interpreting the term “prohibited” to mean protesters won’t be afforded the legal protections set out above.

To authorise a public assembly, notice must be given in writing of an intention to hold a public assembly. It must be addressed and delivered to the Commissioner. To effect formal 'delivery' the notice can be delivered to a NSW Police Officer.

The form [Notice of Intention to Hold a Public Assembly \(nsw.gov.au\)](https://www.nsw.gov.au/notice-of-intention-to-hold-a-public-assembly) is located on the NSW Police website.

The notice must contain the following details:

- a) The date of the proposed public assembly;
- b) If the public assembly is not a procession, a statement specifying the time and place where people intend to gather to participate in the assembly;
- c) If the public assembly is a procession, a statement specifying the time of the procession and the route. It should contain details about where a procession may stop along its route;
- d) The purpose of the public assembly;
- e) The number of people anticipated to participate in the assembly; and
- f) Any other details that would be relevant.<sup>6</sup>

The notice must be signed by a person who indicates that they take responsibility for organising and conducting the assembly and provide an address for service if any issues arise.

When providing your notice to the Commissioner, it will be helpful to include as much detail as possible. Consider organising the following to support your notice:

- Assign police liaisons who are responsible for communicating with the police on the day,
- Ensure there is first aid equipment available, and people trained in first aid,
- Ensure safety risks are considered and, if necessary, risk-mitigation plans put in place,
- Any other permits and approvals obtained, for example, from councils to gather on council land.

## Police Powers

The law provides police with certain powers above that of the general population to ensure that they can responsibly enforce the law. These powers can only be exercised in specific circumstances. Having a basic awareness of these powers can help you to stay safe and avoid negative consequences during police interactions. The following powers are some that are likely to be exercised by the police during a protest or demonstration.

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<sup>6</sup> *Summary Offences Act 1988 (NSW)* s 23.

When exercising the below powers (other than special powers to prevent or control public disorder and the power to make a public safety order), a police officer must identify themselves (the name of the police officer and his or her place of duty) and their reason for exercising the power.<sup>7</sup> When police officers are giving you a direction/requirement/request to do something they are required by law to first give you a warning. They must inform you that you must comply or there may be a legal consequence.<sup>8</sup> It also should be noted that a direction/requirement/request to a group of people is not required to be repeated to each person in the group.<sup>9</sup> A police officer is authorised to use reasonable force to exercise their powers.<sup>10</sup>

### **Power to give directions in a public place <sup>11</sup>**

A police officer can give a direction to a person in a public place if they believe on reasonable grounds that the person is:

- a) obstructing another person or traffic; or
- b) harassing or intimidating another person; or
- c) causing or is likely to cause fear to another person; or
- d) intending to unlawfully supply any prohibited drug; or
- e) obtaining, procuring or purchasing any prohibited drug.

This direction is commonly known as a 'move on direction', which specifies that a person must cease the behaviour and/or leave a certain area. It is an offence if you do not comply with a direction given under this power and persist in the conduct or behaviour. It carries a maximum penalty of \$220.<sup>12</sup>

Police officers are not authorised to issue a move on direction in relation to an "apparently genuine demonstration or protest" unless traffic is obstructed.<sup>13</sup> As noted above, even if traffic is being obstructed, police cannot issue move on directions to people participating in an authorised protest, provided they comply with the specific plan that was approved by police.

It should also be noted that police must comply with certain safeguards when giving a 'move on direction':<sup>14</sup>

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<sup>7</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 202.

<sup>8</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 203.

<sup>9</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 202(3).

<sup>10</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 230.

<sup>11</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 197.

<sup>12</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 199.

<sup>13</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 200.

<sup>14</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) sch 3 s 5.

- a) the police officer must provide evidence that they are a police officer (if not in uniform) as well as their name and place of duty and the reason for the direction being given; and
- b) they must warn a person that the person is required by law to comply with a direction, requirement or request.

### **Power to give direction to groups of people<sup>15</sup>**

A police officer can give a single direction to a group of people and is not required to repeat the direction to each person for it to be lawful.

### **Requirement for identity to be disclosed<sup>16</sup>**

A police officer can require a person to disclose their identity, that is their name and address, if the officer suspects on reasonable grounds that the person can assist in the investigation of an indictable offence (an indictable offence is generally an offence that carries a maximum penalty of two years imprisonment or more. It does not include offences such as obstructing traffic, offensive language, offensive conduct etc.).

You may be required to disclose your identity even if you are the driver or passenger in a vehicle, on the same grounds as above.<sup>17</sup>

A police officer may require you to disclose your identity to them if they propose to give you a move on direction.<sup>18</sup>

If a person does not disclose their identity or provides false identity information, they may be guilty of an offence with a maximum penalty of \$220.<sup>19</sup>

### **Power to require a person to remove face coverings.<sup>20</sup>**

A police officer can require a person to remove any face covering where they have been required to identify themselves. If you fail to comply with this direction, you may be guilty of an offence with a maximum penalty of \$220. In the case of drivers or passengers in a vehicle the maximum penalty is \$5,500 or 12 months imprisonment, or both.<sup>21</sup>

A police officer exercising this power must "as far as is reasonably practicable":

1. ask for the person's cooperation; and
2. conduct the viewing of the person's face in a way that:
  - a. Provides reasonable privacy if requested; and

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<sup>15</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 198A.

<sup>16</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 11, 12.

<sup>17</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 14, 15.

<sup>18</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 11(2).

<sup>19</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 12.

<sup>20</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 19A, 19B.

<sup>21</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 19B(1)(a).

- b. Is as quick as is reasonably practicable.<sup>22</sup>

### **Power to stop and search persons without a warrant<sup>23</sup>**

A police officer can stop and search a person (and detain them or anything in their possession) if the officer suspects on reasonable grounds that the person has in his or her possession, or under his or her control:

- a) anything stolen or otherwise unlawfully obtained,
- b) anything used or intended to be used in or in connection with the commission of a relevant offence,
- c) a dangerous article that is being (or was) used in or in connection with the commission of a relevant offence (this offence only applies to people who are in a public place),
- d) a prohibited plant or a prohibited drug.<sup>24</sup>

Although you must comply with a lawful search it is advisable not to verbally express your consent to a search if asked by a police officer “Is it OK if I search you?”. This is because if a police officer does not have reasonable grounds to search you, your consent to the search can make an otherwise unlawful search lawful.<sup>25</sup> If asked, you could respond with “I do not consent, but I will cooperate”.

### **Power to stop and search vehicles without a warrant<sup>26</sup>**

A police officer can stop and search a vehicle if the officer suspects on reasonable grounds any of the following:

- a) that the vehicle or the occupants have anything stolen;
- b) that the vehicle has been used or will be used in connection with an offence;
- c) that the vehicle contains anything used or intended to be used in connection with an offence;
- d) that the vehicle is in a public place and contains a dangerous object that has been used or will be used in relation to an offence;
- e) that the vehicle or occupants have an illegal substance; or
- f) circumstances in the area mean there is a serious risk to public safety and the search may lessen that risk.

### **Special powers to prevent or control public disorder<sup>27</sup>**

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<sup>22</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 19A(3).

<sup>23</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 21.

<sup>24</sup> in contravention of the *Drug Misuse and Trafficking Act 1985*.

<sup>25</sup> *DPP v Leonard* (2001) 53 NSWLR 227.

<sup>26</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 36, 36A.

<sup>27</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 87D – 87N.

The Commissioner or Deputy or Assistant Commissioner can give an authorisation for the use of special powers if they have reasonable grounds for believing that there is a large-scale public disorder occurring or a threat of such a disorder occurring in the near future. It must be reasonably necessary to use those powers to prevent or control the threat.

Once this authorisation is given, police have the power to do the following (without needing the normal pre-requisite of reasonable suspicion) within the prescribed area to prevent public disorder:

- a) Place or establish a cordon or roadblock;
- b) Stop and search vehicles;
- c) Search persons;
- d) Obtain the identity of a person;
- e) Seize and detain property; and / or
- f) Disperse groups.

### **Power to make a Public Safety Order<sup>28</sup>**

A public safety order is an order made by a senior police officer that prohibits a specified person or class of people from attending a specified public event or entering certain premises.

A senior police officer must not make a public safety order that would prohibit a person or class of persons from being present at any public event or premises if they believe that non-violent advocacy, protest, or dissent is likely to be the primary purpose for their presence at the event.

It is an offence to contravene a public safety order, with a maximum penalty of 5 years imprisonment.

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<sup>28</sup> Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) s 87R.

