



**Redfern
Legal
Centre**

31 May 2024

Director,
Law Enforcement and Crime Team
Policy Reform and Legislation Branch
Department of Communities and Justice
Locked Bag 5000
Parramatta NSW 2124

By email: policy@dcj.nsw.gov.au

Dear Director,

Please find enclosed a submission by Redfern Legal Centre on the review of the *Roads Act 1993* (NSW) pt 9 div 7 and the *Crimes Act 1900* (NSW) pt 4AF.

We welcome the opportunity to meet with the department to discuss our submission.

Yours faithfully,

Camilla Pandolfini
Chief Executive Officer
Redfern Legal Centre



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Legal
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Submission to Department of Communities and Justice, *Review of Crimes Act 1900 pt 4AF* (31 May 2024).

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Date

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Table of Contents

1. Introduction	4
2. RLC’s Work in Police Accountability	4
3. Summary	5
4. Terms of Reference	6
(a) Do the policy objectives of the <i>Roads Act 1993</i> (NSW) pt 9 div 7 and the <i>Crimes Act 1900</i> (NSW) pt 4AF remain valid?.....	6
(i) The policy objectives.....	6
(ii) The policy objectives do not remain valid.....	6
(iii) <i>Summary Offences Act 1988</i> (NSW).....	7
(iv) Police powers.....	9
(b) Do the terms of the <i>Roads Act 1993</i> (NSW) pt 9 div 7 and the <i>Crimes Act 1900</i> (NSW) pt 4AF remain appropriate in securing its policy objectives?.....	10

1. Introduction

Redfern Legal Centre (RLC) is a non-profit community legal centre that provides access to justice. Established in 1977, RLC was the first community legal centre in NSW and the second in Australia. We provide free legal services and education to people experiencing disadvantage in our local area and statewide. We work to create positive change through policy and law reform work to address inequalities in the legal system, policies and social practices that cause disadvantage.

We provide effective and integrated free legal services that are client-focused, collaborative, non-discriminatory and responsive to changing community needs - to our local community as well as state-wide. Our specialist legal services focus on tenancy, credit, debt and consumer law, financial abuse, employment law, international students, First Nations justice, police accountability, and we provide outreach services including through our health justice partnership.

2. RLC's Work in Police Accountability

RLC has a long history of providing free and confidential legal advice to people living in New South Wales about police powers, access to police records, and police complaints. We also provide advice on decision-making by government agencies and complaints processes administered by government. Since RLC was founded in 1977, police accountability has been one of our core areas of advice. We are the only community legal centre in New South Wales with a specialised police accountability practice.

Our submission is informed by the experiences of our clients, the majority of whom are people who have had contact with the New South Wales Police Force and the criminal justice system. Some of our clients have been affected by the *Roads and Crimes Legislation Amendment Act 2022* (NSW), which commenced on 1 April 2022.

We have provided input into similar Inquiries in the past, such as:

- Redfern Legal Centre, Submission to Legislative Council Portfolio Committee No 2 – Health, Parliament of New South Wales, *Inquiry into the Equity, Accessibility and Appropriate Delivery of Outpatient and Community Mental Health Care in New South Wales* (10 October 2023) <https://rlc.org.au/sites/default/files/2023-11/2023.10.23%20RLC%20Sub_Mental%20health%20Inquiry%20-%20Formatted_0.pdf>;
- Michael Grewcock and Vicki Sentas, *Rethinking Strip Searches by NSW Police* (Report, August 2019) <https://rlc.org.au/sites/default/files/attachments/Rethinking-strip-searches-by-NSW-Police-web_0.pdf0>;
- Aboriginal Legal Service (NSW/ACT) and Redfern Legal Centre, Submission to Department of Justice (NSW), *Review of the Surveillance Devices Amendment (Police Body-Worn Video) Act 2014* (14 June 2018) <<https://rlc.org.au/sites/default/files/attachments/Department-of-Justice-NSW-Surveillance-Device-Amendment-Act-14-June-2018.pdf>>; and
- Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, December 2017) <https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf>.

3. Summary

RLC's experience in providing advice and assistance to people who choose to exercise their common law right to peaceful assembly and constitutional right to implied freedom of political communication, which often results in interactions with the New South Wales Police Force and criminal justice system, means that we are ideally placed to provide input into this review.

The policy objectives of the *Roads and Crimes Legislation Amendment Act 2022* (NSW) aimed to balance the right to protest with the rights of others and prevent disruptions to major facilities. The Act did not seek to prohibit protests outright and emphasised the importance of balancing freedoms with public safety and the rights of individuals to conduct lawful activities without obstruction.

The *Roads Act 1993* (NSW) part 9 division 7 and the *Crimes Act 1900* (NSW) part 4AF restrict protests in public places. The severe penalties are disproportionate to the inconveniences caused and undermine fundamental democratic rights and civil liberties. The right to peaceful assembly is essential for a thriving democracy and to uphold freedom of political communication, and to draw attention to social and political issues.

The *Summary Offences Act 1988* (NSW) Part 4 does not provide sufficient protections for fundamental assembly and political communication rights.

Data demonstrates that protest organisers have limited success in having their protests, or public assemblies, authorised with only 22.22% of applications made under the *Summary Offences Act 1988* (NSW) pt 4 over the last 21 years resulting in public assemblies being authorised. These rights are further diminished by the inability to appeal court decisions prohibiting protests.

The NSW Police Force has the power to maintain public safety without the need for the *Roads Act 1993* (NSW) pt 9 div 7 and the *Crimes Act 1900* (NSW) pt 4AF. The special powers NSW Police have under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 6A div 3, to respond to riots or civil disturbances by establishing roadblocks, stopping and searching people and vehicles without a warrant, requiring disclosure and proof of identity, seizing and detaining vehicles, mobile phones, and other things, and issuing directions for groups of people to disperse, should not be used to respond to peaceful protests.

In *Kvelde v New South Wales* [2023] NSWSC 1560 the Supreme Court of NSW declared the *Crimes Act 1900* (NSW) ss 214A(1)(c)–(d) partially and wholly invalid because of the sections' impact upon the implied constitutional freedom of political communication. The same argument could be made of the *Roads Act 1993* (NSW) s 144G(1). This is because both the *Roads Act 1993* (NSW) s 144G(1) and the *Crimes Act 1900* (NSW) ss 214A(1)(c)–(d) excessively burden the right to freedom of political communication and thwart legitimate protests. We recommend that both sections should be repealed.

4. Terms of Reference

(a) Do the policy objectives of the *Roads Act 1993* (NSW) pt 9 div 7 and the *Crimes Act 1900* (NSW) pt 4AF remain valid?

(i) The policy objectives

The policy objective of the *Roads and Crimes Legislation Amendment Bill 2022* (NSW), amending *Roads Act 1993* (NSW) pt 9 div 7 and *Crimes Act 1900* (NSW) pt 4AF, was not to prohibit protests but to balance the peoples' democratic right to protest with the rights of others to move freely and conduct lawful activities, and to prevent costly disruptions to major facilities.

This is evident from the Attorney-General's second reading speech of the *Roads and Crimes Legislation Amendment Bill 2022* (NSW) on 30 March 2022.

The bill in no way seeks to impose a general prohibition on protests. The Government supports the rights of all individuals to participate in lawful protest. Freedom of assembly and speech have long been recognised by Australian courts as important rights that are integral to a democratic system of government; however, the right to protest must be weighed against the right of other members of the public to move freely and not be obstructed in public places. There are plenty of other ways for individuals to express their strongly held views, and the Government will not stand by as the few seek to disrupt and dispossess the rights of many. Part 4 of the Summary Offences Act 1988, for example, contains a scheme to facilitate lawful protests under which the commissioner of police, the Supreme Court or the District Court can authorise a protest. The scheme encourages cooperation between police and protest organisers and seeks to strike a balance between the freedom of assembly and speech of protesters, on the one hand, and the rights of other members of the public not to have their lawful activity impeded, on the other hand.

The Shadow Attorney-General concurred.

Our role here is to find the balance and protect the majority. It is all about proportionality. It is about a proper response. People do and should have the right to protest, the right to object, the right to assemble, and the right to disrupt and to disobey, but not to an unlimited degree, and that is the crux of this matter—not when the cost is too high, and not when such activities impinge unnecessarily on others' rights. The bill does not deal with students wanting to protest about climate change. This is about serious, costly disruption to major infrastructure facilities, roads, tunnels and the like. The Opposition will make sure, tonight and tomorrow in the Legislative Council and as we supervise the regulations made by the Government in the coming months, if there are any, that this is what it is about.

(ii) The policy objectives do not remain valid

The common law right to freedom of peaceful assembly and the implied constitutional right to freedom of political communication are fundamental to democracy.¹ Indeed, '[p]eaceful assemblies are protected by the implied freedom of political communication because they are an essential form

¹ Tom Gotsis and Rowena Johns, 'Protest Law in New South Wales' (Research Paper No 3, Parliamentary Research Service, Parliament of New South Wales, February 2024) 5 [2] <<https://www.parliament.nsw.gov.au/researchpapers/Documents/Protest-law-in-New-South-Wales.pdf>>, citing *Commissioner of Police v Rintoul* [2003] NSWSC 662, [5] ('Rintoul'); *Brown v Tasmania* (2017) 261 CLR 328, [88].

of political communication'.²

These rights are not absolute and are subject to lawful constraints and exceptions,³ for example, by not supporting activities that constitute a criminal offence.⁴

There are examples, however, of NSW Police and prosecutors overstating the seriousness of the disruption created by protests in order to satisfy the elements of this offence.⁵ Many peaceful assemblies in a public place may cause some disruption but often not enough to reach the seriousness threshold of the offence.

We do not believe that the policy objectives of the *Roads Act 1993* (NSW) pt 9 div 7 and the *Crimes Act 1900* (NSW) pt 4AF remain valid. We have previously indicated our concerns regarding these laws in an open letter signed by 39 legal, human rights and community organisations.⁶⁷ The laws are incompatible with democratic rights and fundamental civil liberties,⁸ unduly focus on the absolute need for public spaces to be unobstructed, and unjustly limit the democratic will of the people and their need to assemble publicly free from fear, reprisals, and legal consequences.⁹

The penalties of a \$22,000 fine,¹⁰ two years imprisonment, or both for seriously disrupting or obstructing vehicles or pedestrians attempting to use major bridges, tunnels or roads¹¹ under the *Roads Act 1993* (NSW) s 144G(1), and seriously disrupting or obstructing persons attempting to use a major facility¹² or causing its closure under the *Crimes Act 1900* (NSW) s 214A(1), are severe and disproportionate¹³ to the inconveniences caused to the point where the common law and constitutional rights are being undermined.¹⁴

(iii) *Summary Offences Act 1988* (NSW)

The *Summary Offences Act 1988* (NSW) pt 4 was ostensibly legislated to encourage cooperation between the NSW Police Force and peaceful protesters¹⁵ and its purpose is 'not to prohibit public assemblies but ... to facilitate them'.¹⁶ The *Summary Offences Act 1988* (NSW) s 24, aims to protect a person from being prosecuted for certain offences and for participating in an 'authorised public assembly'.¹⁷

In order for a public assembly to be authorised under the *Summary Offences Act 1988* (NSW) s 23(1), it requires:

² Gotsis and Johns (n 1) 10 [2.4].

³ Ibid 5–6 [2.1], quoting *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564.

⁴ Ibid 5–6 [2.1].

⁵ *Glover v R; Coco v R* [2023] NSWDC 322, [8], [29].

⁶ 'Threats of 2 Years Jail for Road Disruption and Visa Cancellations an Unconscionable Attack on Protest Rights', *CounterAct* (Web Page, 31 March 2022) <<https://counteract.org.au/wp-content/uploads/2022/03/Open-Letter-Anti-Protest-Laws-2.pdf>>

⁷ 'Concern Raised Around New Protest Laws Passed in NSW', *Redfern Legal Centre* (Web Page, 23 June 2022) <<https://rlc.org.au/news-and-media/news/concern-raised-around-new-protest-laws-passed-nsw>>

⁸ Gotsis and Johns (n 1) 44 [6.1.2].

⁹ 'Concern Raised Around New Protest Laws Passed in NSW' (n 7).

¹⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

¹¹ *Roads Act 1993* (NSW) s 144G(6); *Roads Regulation 2018* (NSW) reg 48A.

¹² *Crimes Act 1900* (NSW) s 214A(7).

¹³ 'Harsh New Protest Laws Passed in NSW', *Redfern Legal Centre* (Web Page, 4 April 2022) <<https://rlc.org.au/news-and-media/news/harsh-new-protest-laws-passed-nsw>>;

¹⁴ Gotsis and Johns (n 1) 6 [2.1].

¹⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 31 May 1988, 807 (John Dowd, Attorney General) cited in Gotsis and Johns (n 1) 10 [3.1.1].

¹⁶ *Commissioner of Police v Gabriel* [2004] NSWSC 31, [1], quoted in Gotsis and Johns (n 1) 10 [3.1.1].

¹⁷ *Commissioner of Police v Rintoul* (n 5) [24], cited in Gotsis and Johns (n 1) 12 [3.2], 13 [3.3.1], 16 [3.3.1.2]–[3.3.1.3].

- written and signed notice of the public assembly to be served on the NSW Police Force, detailing the date, time, location, purpose, and expected number of participants at the public assembly;¹⁸ and,
- depending on when the notice is served, for the NSW Police Force to ‘not oppose the holding of the public assembly’;¹⁹ or
- the District or Supreme Court to issue a prohibition order if notice was served at least seven days before the public assembly,²⁰ or
- the District or Supreme Court to issue an authorisation order if notice was served at less than seven days before the public assembly.²¹

RLC’s clients, who have organised public assemblies, have instructed that they have been pressured by the NSW Police Force to accept conditions on their intended public assemblies; otherwise, they will be opposed. Not only does the *Summary Offences Act 1988* (NSW) s 23 make no provision for such bargaining, but it is unreasonable for organisers to be expected to notify participants of such conditions and it is unreasonable for participants to be expected to be aware of them.

RLC’s clients have also provided instructions about the NSW Police Force demanding that they are given at least seven days’ notice of a public assembly otherwise they will not authorise it. This is also an incorrect interpretation about the way that the *Summary Offences Act 1988* (NSW) s 23(1)(f) operates because it conflates the power that the NSW Police Force has merely to oppose with the power of the Court to authorise a public assembly.²²

While it is legally correct that a public assembly can lawfully occur without the *Summary Offences Act 1988* (NSW) pt 4 being engaged,²³ in practice such public assemblies are shut down. This was the case during the COVID-19 lockdown when the Government used Public Health Orders, which should have been limited to controlling risks to public health,²⁴ to shut down protests.²⁵

We are concerned that these laws require a person or organisation to obtain authorisation from the NSW Government for a protest that may be about a NSW Government law or practice.²⁶

Data demonstrates that the NSW Police Force unfairly restricts people's rights and that the *Summary Offences Act 1988* (NSW) s 24 indeed imposes ‘substantial limitations ... on the implied freedom [of political communication]’²⁷ as stated in obiter dictum by Walton J in *Kvelde v New South Wales* [2023] NSWSC 1560.

Between 1 January 2003 and 14 November 2023, 18 applications were made under the *Summary Offences Act 1988* (NSW). The NSW Police Force made applications for prohibition orders for 16 (88.88%) of these, were successful in 12 (75.00%), and both of the two (11.11%) authorisation orders sought by organisers were unsuccessful. This means that only four (22.22%) of the 18 applications made under the *Summary Offences Act 1988* (NSW) pt 4 resulted in public assemblies being

¹⁸ *Summary Offences Act 1988* (NSW) s 23(1)(a)–(e), cited in Gotsis and Johns (n 1) 12 [3.2].

¹⁹ *Summary Offences Act 1988* (NSW) s 23(1)(f), cited in Gotsis and Johns (n 1) 13 [3.2].

²⁰ *Summary Offences Act 1988* (NSW) ss 22, 23(1)(f)(i), cited in Gotsis and Johns (n 1) 13 [3.2]. See also *Kvelde v New South Wales* [2023] NSWSC 1560, [276] (‘*Kvelde*’).

²¹ *Summary Offences Act 1988* (NSW) s 23(1)(f)(ii), 26, cited in Gotsis and Johns (n 1) 13 [3.2]. See also *Kvelde* (n 20) [276].

²² *Kvelde* (n 20) [277], cited in *ibid* 7, 9, 18, 20.

²³ Gotsis and Johns (n 1) 12 [3.2].

²⁴ *Public Health Act 2010* (NSW) s 3.

²⁵ Redfern Legal Centre, ‘COVID-19 Laws Should Not Prevent the Public’s Right to Protest’ (Media Release, 15 October 2020) <https://rlc.org.au/sites/default/files/attachments/161010-covid-19-protest-rights_FIN.pdf>.

²⁶ ‘Harsh New Protest Laws Passed in NSW’ (n 13).

²⁷ *Kvelde* (n 20) [275].

authorised.²⁸ This demonstrates that the *Summary Offences Act 1988* (NSW) pt 4 does not uphold the common law right to peaceful assembly and constitutional right to implied freedom of political communication. There is no right to appeal these decisions by the court,²⁹ unless on preliminary technical issues.³⁰

An authorisation under the *Summary Offences Act 1988* (NSW) pt 4 also does not protect a person from being charged with the offences under the *Roads Act 1993* (NSW) s 144G(1) and *Crimes Act 1900* (NSW) s 214A(1) of seriously disrupting or obstructing vehicles or people attempting to use major bridges, tunnels or roads, major facilities or causing their closure. Instead, such conduct is only permitted with the consent or authority of public authorities or the owners of such private major facilities.³¹

(iv) Police powers

The NSW Police Force does have a role to play in protecting property and ensuring that public assemblies do not endanger the safety of the public.³² NSW Police, however, already had adequate power to deal with breaches of the peace. For example, police have the power to:

- arrest without a warrant,³³
- issue Court Attendance Notices and penalty notices unless it is in relation to an industrial dispute, genuine demonstration or protest, procession, or organised assembly,³⁴ and
- powers to search for and seize things without warrant, including ‘anything that is intended to be used to lock-on or secure a person to any plant, equipment or structure’.³⁵

The NSW Police Force also has special powers to respond to ‘riots or other civil disturbances posing a significant threat to public safety’.³⁶ These special powers allow them to: establish roadblocks, stop and search vehicles without a warrant, stop and search persons without a warrant, require persons to disclose and provide proof of their identity, seize and detain a vehicle, mobile phone, or other thing, and issue directions for groups of people to disperse.³⁷

²⁸ Gotsis and Johns (n 1) 23–4 [3.3.5].

²⁹ *Summary Offences Act 1988* (NSW) s 27(2); *Gibson v Commissioner of Police* [2020] NSWCA 160, [18]; Gotsis and Johns (n 1) 24 [3.4].

³⁰ *Bassi v Commissioner of Police* (NSW) [2020] NSWCA 109, [45]–[50]; *Gibson* (n 29) [37]–[41], cited in Gotsis and Johns (n 1) 24 [3.4].

³¹ *Crimes Act 1900* (NSW) s 214A(6); *Roads Act 1993* (NSW) s 144G(3).

³² Gotsis and Johns (n 1) 36 [5.2].

³³ *Law Enforcement (Powers and Responsibilities) Act 2022* (NSW) ss 4(2), 99(1), cited in Gotsis and Johns (n 1) 36 [5.2.1].

³⁴ *Criminal Procedure Act 1986* (NSW) s 339, cited in Gotsis and Johns (n 1) 37 [5.2.1].

³⁵ *Law Enforcement (Powers and Responsibilities) Act 2022* (NSW) s 45A, quoted in Gotsis and Johns (n 1) 36 [5.2.1].

³⁶ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 87A (definition of ‘public disorder’). See also Gotsis and Johns (n 1) 37 [5.2.2].

³⁷ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 87I–87M, cited in Gotsis and Johns (n 1) 39 [5.2.2.2].

(b) Do the terms of the *Roads Act 1993 (NSW)* pt 9 div 7 and the *Crimes Act 1900 (NSW)* pt 4AF remain appropriate in securing its policy objectives?

While the constitutional validity of the *Roads Act 1993 (NSW)* s 144G was not a question before the Supreme Court in *Kvelde v New South Wales* [2023] NSWSC 1560, the declaration³⁸ that the *Crimes Act 1900 (NSW)* s 214A(1)(c), as it relates to the partial closure of major facilities, is partially invalid, and that the *Crimes Act 1900 (NSW)* s 214A(1)(d), which prohibits a person from conduct that causes other persons attempting to use the major facility to be redirected is wholly invalid because they impermissibly burdened the implied constitutional freedom of political communication,³⁹ could be argued to be equally applicable to the *Roads Act 1993 (NSW)* s 144G(1) because it too ‘impermissibly burdens the implied freedom of political communication contrary to the *Commonwealth Constitution*’.⁴⁰

While the Supreme Court held that the *Crimes Act 1900 (NSW)* s 214A(1) had a rational connection to its legitimate purpose of restricting a person’s conduct which disrupts or obstructs,⁴¹ this does not justify criminalising otherwise lawful conduct that merely causes inconvenience for others.⁴² Both the *Roads Act 1993 (NSW)* s 144G(1)⁴³ and *Crimes Act 1900 (NSW)* s 214A(1)(c)–(d) place a ‘direct and substantial’⁴⁴ burden on the constitutional right to freedom of political communication, which exceeds what is necessary to fulfil their purpose⁴⁵ and ‘have a chilling effect on political communication via protests and public assemblies’.⁴⁶

The Court’s view that ‘the adverse effect of s 214A on the implied freedom in terms of deterring otherwise lawful protests significantly outweighs the benefit sought to be achieved by more effectively deterring any conduct that may disrupt major facilities themselves. It does represent overreach from the legislative purpose’,⁴⁷ could be equally argued with respect to the *Roads Act 1993 (NSW)* s 144G(1).

The *Roads Act 1993 (NSW)* s 144G(1) does not remain appropriate in securing its policy objectives. The *Crimes Act 1900 (NSW)* ss 214A(1)(c)–(d), which now contain editorial notes about their invalidity, also do not remain appropriate in securing their policy objectives. The laws should be repealed following the Supreme Court of New South Wales declaration⁴⁸ that s 214A(1)(c), as it relates to the partial closure of major facilities, is partially invalid, and s 214A(1)(d) is wholly invalid.⁴⁹ ‘Such laws are incompatible with the democratic right to protest and our fundamental civil liberties’.⁵⁰

³⁸ *Kvelde* (n 20) [576]–[578].

³⁹ *Ibid* [519], [564]–[565], [578], cited in Gotsis and Johns (n 1) 51 [7.3.4].

⁴⁰ *Kvelde* (n 20) [578].

⁴¹ *Ibid* [463], cited in Gotsis and Johns (n 1) 50 [7.3.3];

⁴² *Kvelde* (n 20) [434], [436].

⁴³ *Ibid* [519], [564]–[565], [578];

⁴⁴ *Ibid* [363].

⁴⁵ *Ibid* [486], [498], cited in Gotsis and Johns (n 1) 50–1 [7.3.3].

⁴⁶ *Kvelde* (n 20) [486].

⁴⁷ *Ibid* [517], quoted in Gotsis and Johns (n 1) 51 [7.3.3].

⁴⁸ *Kvelde* (n 20) [576]–[578].

⁴⁹ *Ibid* [519], [564]–[565], [578], cited in Gotsis and Johns (n 1) 51 [7.3.4].

⁵⁰ ‘Harsh New Protest Laws Passed in NSW’ (n 13); ‘Concern Raised Around New Protest Laws Passed in NSW’ (n 7).