*Sarah Moulds**

CLIMATE PROTEST, PUBLIC ASSEMBLIES AND THE LAW IN SOUTH AUSTRALIA

ABSTRACT

Across Australia, climate activists are testing not only the limits of what counts as lawful protest, but also the patience of commuters, as their actions shut down roads, block ports or disrupt businesses. Other groups are also taking to the streets to express their views on local, national and international issues, building on many decades of protest activity and civil disobedience that have been a feature of Australian democracy since colonisation. Authorities and legislators are responding with new police powers and increasingly harsh new penalties. The speed at which some of these new laws are made is alarming, and their impact on internationally and constitutionally recognised rights pertaining to freedom of political communication is often contested. This article explores the legislative amendments made in response to climate activist activity in South Australia in May 2023, and the ongoing legal implications for the community's right to take collective public action, including protest action. It compares legislative developments in South Australia with recent reforms in other Australian jurisdictions, discusses how the right to protest is conceptualised by Australian lawmakers and analyses how democratic listening strategies could play a role in securing a more sustainable, proportionate approach to legislating in this area.

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I Introduction

Across Australia, climate activists are experimenting with new ways to draw attention to the climate emergency confronting our society.[1] They are, for example, organising protests on university campuses,[2] suspending people from bridges over busy roadways[3] and throwing soup at art works in galleries.[4] There are differing views within the broader community as to whether the actions of climate protesters are justified, proportionate or urgently needed in response to the absence of effective domestic and international laws and policies responding to climate change.[5] Notably, however, the potential scale of the climate emergency has been articulated by scholars as accelerating 'in a way that is beyond society's capacity to manage'.[6] Justice Bromberg described the emergency in *Sharma v Minister for the Environment* as follows:

> As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience — quality of life, opportunities to partake in nature's treasures, the capacity to grow and prosper — all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what

1 See, e.g.: Justin Healey (ed), *Activism and Protest* (Spinney Press, 2020); M Hohenhaus et al, 'Climate Warriors Down Under: Contextualising Australia's Youth Climate Justice Movement' (2023) 2(1) *Climate Action* 45; Grace Arnot et al, '"It Shows We Are Serious": Young People in Australia Discuss Climate Justice Protests as a Mechanism for Climate Change Advocacy and Action' (2023) 47(3) *Australian and New Zealand Journal of Public Health* 100048:1–7; Francine Rochford, 'Morally Motivated Protest in the Face of Orthodoxy: Environmental Crisis and Dissent in Australian Democracy' in Benjamin J Richardson (ed), *From Student Strikes to the Extinction Rebellion: New Protest Movements Shaping Our Future* (Edward Elgar, 2020) 54; Frank Bongiorno, 'The Changing Nature of Protest in Australia: Historical Reflections' (2021) 92(1) *Australian Quarterly* 12; Patrick O'Keeffe, *Power, Privilege and Place in Australian Society* (Springer Nature, 2024) 289–311.

2 See, e.g., 'Police Overreach as Students Protest Against Climate Change', *Amnesty International* (Web Page, 21 May 2021) <https://www.amnesty.org.au/police-overreach-as-students-protest-against-climate-change/>.

3 See, e.g., 'Extinction Rebellion Protesters at Morphett St Bridge Cause Traffic Delays in Peak Hour', *ABC News* (online, 17 May 2023) <https://www.abc.net.au/news/2023-05-17/extinction-rebellion-protesters-adelaide-traffic-delays/102355334> ('Extinction Rebellion Protestors').

4 Yasmin Rufo, 'Activists Throw Soup on Van Gogh Painting Again', *BBC News* (online, 28 September 2024) <https://www.bbc.com/news/articles/c243v5m0r0lo>.

5 See, e.g., the various views along the age and political spectrums discussed in Bruce Tranter, 'Political Divisions Over Climate Change and Environmental Issues in Australia' (2011) 20(1) *Environmental Politics* 78.

6 Matthew J Hornsey et al, 'Intergroup Conflict Over Climate Change: Problems and Solutions' (2025) 55(2) *European Journal of Social Psychology* 243, 247.

> might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next.[7]

The nature and scale of the climate emergency provides the context from which to consider the diversity of public responses to government or corporate actions that negatively impact the natural environment. These range from conventional democratic representations (for example, through institutional processes like petitions, parliamentary committees or correspondence with members of parliament), to multi-media advocacy campaigns and shareholder activism, to collective action such as strikes, marches or other forms of protest activity.[8] This in turn gives rise to a range of government responses, on one hand including structural adjustments to state investments or government policy, and on the other, through criminalising forms of public protest (as discussed in detail below).[9]

Beyond climate activists, other groups are also taking to the streets to express their views on local, national and international issues, some of which are peaceful and others that are punctuated by acts of violence.[10] Other forms of protest, including acts of civil disobedience at high profile meetings or defying conventions at sporting events, build on many decades of protest activity and civil disobedience that have been a feature of Australian democracy since colonisation.[11] In response to rising mass protests on many fronts, the right to protest is also under attack internationally.[12] Governments across Australia are responding to these different forms of protest activity by introducing new laws, extending police powers and increasing penalties for existing offences.[13] The speed at which these new laws are being made

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7 *Sharma v Minister for the Environment* (2021) 391 ALR 1, 72–3 [293].

8 Robyn Gulliver, Kelly S Fielding and Winnifred R Louis, *Civil Resistance Against Climate Change* (International Centre on Nonviolent Conflict Press, 2021) 31–8.

9 Ibid 72–5. See also: Timothy Zick, *Managed Dissent: The Law of Public Protest* (Cambridge University Press, 2023); Brian Martin, 'Suppression of Dissent: What It Is and What to Do About It' (2012) 6(4) *Social Medicine* 246.

10 See, e.g., O'Keeffe (n 1). See also: Anna Walsh, 'Freedom of Expression, Belief and Assembly: The Banning of Protests Outside of Abortion Clinics in Australia' (2018) 25(4) *Journal of Law and Medicine* 1119; Eleanor Jones, 'Implementing Protest-Free Zones Around Abortion Clinics in Australia' (2014) 36(1) *Sydney Law Review* 169.

11 See, e.g.: Gary Osmond, 'Decolonizing Dialogues: Sport, Resistance, and Australian Aboriginal Settlements' (2019) 46(2) *Journal of Sport History* 288; Peter H Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (University of Toronto Press, 2005) 130–7; Victoria Haskins and Anne Scrimgeour, '"Strike Strike, We Strike": Making Aboriginal Domestic Labor Visible in the Pilbara Pastoral Workers' Strike, Western Australia 1946–1952' (2015) 88 (Fall) *International Labor and Working-Class History* 87.

12 See, e.g.: Zick (n 9); Illan rua Wall, 'The Right to Protest' (2024) 28(8–9) *International Journal of Human Rights* 1378.

13 Sarah Moulds, 'South Australia's Obstruct Public Place Laws: How Do They Fit within Australia's Anti-Protest Law Landscape?' (2023) 37(9) *Australian Environment Review* 187 ('Obstruct Public Place Laws'); Luke McNamara and Julia Quilter, 'Criminalising Protest through the Expansion of Police "Move-On" Powers: A Case

is alarming, as has been recently illustrated in South Australia ('SA'), where changes were made to the 'obstruction of public places' offence,[14] increasing penalties from $750 to $50,000 without consultation, and with only limited debate.[15]

Parts II and III of this article will explain the changes made to the laws in SA, and the ongoing legal implications for those in the community seeking to engage in collective public action, including protest action, to draw attention to policy issues they consider as requiring critical or urgent attention. Part IV compares legislative developments in SA with recent reforms in other Australian jurisdictions and discusses how the right to protest is conceptualised within Australia's constitutional landscape. Part V discusses how the right to protest is conceptualised by Australian lawmakers and how democratic listening strategies, coupled with other structural safeguards, could play a role in securing a more sustainable, proportionate approach to legislating in this area. Part VI concludes the article.

II The Right to Protest in Australia

Social division, exclusion and marginalisation are increasing within democracies like Australia,[16] which can lead to intergroup conflict, distrust in democratic institutions and social polarisation.[17] When this occurs, parliamentarians can struggle to generate and sustain the type of broadly shared social and political mandate needed to advance policy solutions to complex challenges like climate change.[18] We know

Study from Australia' (2019) 58 (September) *International Journal of Law, Crime and Justice* 22; David Baker, 'Public Order Policing Approaches to Minimize Crowd Confrontation during Disputes and Protests in Australia' (2020) 14(4) *Policing* 995; Greg Martin, 'Criminalizing Dissent: Social Movements, Public Order Policing and the Erosion of Protest Rights' in Leanne Weber, Elaine Fishwick and Marinella Marmo (eds), *The Routledge International Handbook of Criminology and Human Rights* (Taylor and Francis, 2017) 280.

14 *Summary Offences Act 1958* (SA) s 58 ('*Summary Offences Act*').

15 See: *Summary Offences (Obstruction of Public Places) Amendment Act* 2023 (SA); South Australia, *Parliamentary Debates*, House of Assembly, 18 May 2023, 3979 (Peter Malinauskas, Premier) ('*Parliamentary Debates*'). See also Moulds, 'Obstruct Public Place Laws' (n 13) 188–9.

16 Strengthening Democracy Taskforce, *Strengthening Australian Democracy: A Practical Agenda for Democratic Resilience* (Report, Department of Home Affairs (Cth), 15 July 2024); Mark Evans and Gerry Stoker, *Saving Democracy* (Bloomsbury Academic, 2022); R S Foa et al, *Global Satisfaction with Democracy* (Report, Centre for the Future of Democracy, January 2020); Patrick Dunleavy, Alice Park and Ros Taylor (eds), *The UK's Changing Democracy: The 2018 Democratic Audit* (LSE Press, 2018).

17 Hornsey et al (n 6).

18 See, e.g.: Alan Renwick, Meg Russell and Ben Lauderdale, 'What Kind of Democracy Do People Want, and How Should Policy-Makers Respond?', *The Constitution Unit Blog* (Blog Post, 23 November 2023) <https://constitution-unit.com/2023/11/23/what-kind-of-democracy-do-people-want-and-how-should-policy-makers-respond/>; Foa et al (n 16).

that those working within and alongside democratic institutions in Australia want to proactively engage with citizens, listen to their views on complex policy challenges and respect their diverse opinions.[19] However, younger generations of Australians — and many other groups within our community — are losing faith in conventional political and democratic processes to represent their views and to make the laws and policies needed to protect and promote their rights and interests.[20] As noted above, this is occurring at a time where the protection of the environment is considered by many international organisations, social scientists, judges and other experts as the most important socio-political issue of the 21st century.[21]

At the same time, Australian parliamentarians and law enforcers have adopted increasingly harsh responses to this form of political expression, increasing the scope of criminal offences and related penalties, and increasing the powers of police to deter, apprehend and detain participants.[22] As Luke McNamara et al explore, this helps build a discourse of criminalisation of collective public action against serious public threats such as climate change, which permeates a wide range of government and community responses to protest and protest related activity.[23] This has led the Human Rights Law Centre to publish a special report, entitled 'Protest in Peril: Our Shrinking Democracy', which observes:

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19 See, e.g., Inter-Parliamentary Union and United Nations Development Programme, *Global Parliamentary Report: Public Engagement in the Work of Parliament* (Report, 2022).

20 See, e.g.: Intifar Sadiq Chowdhury, 'Are Young Australians Turning Away from Democracy?' (2021) 56(2) *Australian Journal of Political Science* 171; Foa et al (n 16); Sarah Moulds, *Connected Parliaments: Reimagining Youth Engagement with Parliaments in Australia* (Report, Winston Churchill Trust Australia, 2022) ('*Connected Parliaments*').

21 See, e.g.: Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report* (Report, 2023); Albert J Gabric, 'The Climate Change Crisis: A Review of Its Causes and Possible Responses' (2023) 14(7) *Atmosphere* 1081; Amit Rawat, Dilip Kumar and Bhishm Singh Khati, 'A Review on Climate Change Impacts, Models, and Its Consequences on Different Sectors: A Systematic Approach' (2024) 15(1*) Journal of Water and Climate Change* 104; Richard Clark and Noah Zucker, 'Climate Cascades: IOs and the Prioritization of Climate Action' (2024) 68(4) *American Journal of Political Science* 1299; Lynne Keevers et al, 'Practices Supporting Community Recovery and Healing from Climate-Related Disasters: A Systematic Review' (2024) 21(6) *International Journal of Environmental Research and Public Health* 795.

22 See, e.g.: Moulds, 'Obstruct Public Place Laws' (n 13); O'Keeffe (n 1); Greg Martin (n 13); McNamara and Quilter (n 13); Michael Head, *Democracy, Protest and the Law: Defending a Democratic Right* (Taylor and Francis, 2024); Sam Alexander-Prideaux, 'Construing the Carve-Outs: Do NSW Anti-Protest Laws Protect Industrial Picketing?' (2024) 37(1) *Australian Journal of Labour Law* 1; Catherine Zhou, 'Prior Restraint and Protest Regulation' (2025) 48(1) *University of New South Wales Law Journal* 128.

23 See Luke McNamara et al, 'Theorising Criminalisation: The Value of a Modalities Approach' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 91.

> The steady erosion of our right to peacefully gather on public spaces should concern all of us. Our ability to peacefully protest is fundamental to safeguarding democracy and for holding those in power accountable. When this right is eroded or limited in a way that's not compatible with international human rights law and principles, it not only limits the ways that we can voice our grievances, but it also undermines the democratic checks and balances which are essential for a healthy society.[24]

The right to peacefully assemble is a fundamental human right recognised under art 21 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'), a key international treaty that aims to protect and promote civil and political rights globally.[25] Australia has signed and ratified the *ICCPR*, which gives rise to obligations under international law to implement these rights domestically and to periodically report to the United Nations ('UN') Human Rights Committee on its progress.[26]

Article 21 of the *ICCPR* explains that the right to peaceful assembly cannot be restricted, unless the restrictions are imposed by law and are shown to be

> necessary in a democratic society in the interests of national security or public safety, public order … the protection of public health or morals or the protection of the rights and freedoms of others.[27]

As the UN Human Rights Committee has explained:

> The fundamental human right of peaceful assembly enables individuals to express themselves collectively and to participate in shaping their societies. The right to peaceful assembly is important in its own right, as it protects the ability for people to exercise individual autonomy in solidarity with others. Together with other related rights, it also constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism.[28]

The rights to peaceful assembly and freedom of democratic expression also form part of the common law of Australia,[29] inherited from British jurisprudence dating as far back as 1215.[30] However, common law freedoms do not bestow positive,

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24 David Mejia-Canales, *Protest in Peril: Our Shrinking Democracy* (Report, Human Rights Law Centre, 2 July 2024) 5.

25 *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 21 ('*ICCPR*').

26 Ibid arts 2(2), 40. See also: Ryszard Piotrowicz and Stuart Kaye, *Human Rights in International and Australian Law* (Butterworths, 2000) 34; Brian Martin (n 9).

27 *ICCPR* (n 25) art 21.

28 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 [1].

29 See, e.g.: *South Australia v Totani* (2010) 242 CLR 1, 28–34 [30]–[39] (French CJ); *Evans v New South Wales* (2008) 168 FCR 576.

30 See, e.g., *Magna Carta 1215*, 17 John 1. See also Mejia-Canales (n 24) 6.

enforceable rights on individuals.[31] Instead, they operate as a type of 'base line' for the interpretation of other laws by the courts, and only apply insofar as they are not explicitly displaced by statute.[32] As the High Court of Australia observed in *Lange v Australian Broadcasting Corporation* ('*Lange*'):

> Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.[33]

While fundamental democratic rights and freedoms, including the right to peaceful assembly, underpin Australia's modern democracy, it may surprise many to learn that these rights and freedoms are not set out in our *Constitution*, or in any other piece of legislation at the federal level. Australia is routinely criticised for its failure to provide comprehensive legal protection for rights contained in the international conventions it has signed.[34] Unlike almost every other democracy, Australia does not have a bill of rights. South Australia does not have a human rights act or charter, although human rights laws that include specific protection for the right to peaceful assembly have been previously introduced into the South Australian Parliament.[35] Further, in April 2025, the South Australian Parliament's Social Development Committee recommended the South Australian Government enact human rights legislation, following consultation with the community.[36] Specific protections are in place in some states and territories, including in Victoria,[37] Queensland[38] and the Australian Capital Territory ('ACT').[39] Even in these jurisdictions, the right to peaceful assembly is not an absolute right, and can be limited by other laws.[40] In other words, Australians seeking to express their political or other opinions through peaceful protest remain subject to the criminal laws that apply to actions including

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31 Tom Gotsis and Rowena Johns, 'Protest Law in New South Wales' (Research Paper No 3, Parliament of New South Wales, March 2024) 5. See also Mejia-Canales (n 24) 6.

32 See, e.g., Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449.

33 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*'), quoting *A-G v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109, 283 (Lord Goff).

34 See, e.g., Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/47/8 (2 June 2021) 5 [66]–[68].

35 Charter of Human Rights and Responsibilities Bill 2020 (SA) cl 18. This Bill was introduced by the Hon Mark Parnell MLC on 2 December 2020 but lapsed before the Second Reading.

36 See Social Development Committee, Parliament of South Australia, *Inquiry into the Potential for a Human Rights Act for South Australia* (Report No 49, 29 April 2025).

37 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 16 ('*Charter Act*').

38 *Human Rights Act 2019* (Qld) s 22 ('*Qld Human Rights Act*').

39 *Human Rights Act 2004* (ACT) s 15 ('*ACT Human Rights Act'*).

40 Ibid s 28; *Charter Act* (n 37) s 7; *Qld Human Rights Act* (n 38) s 13.

obstructing public places, roads or thoroughfares, or causing disturbances in or around workplaces.

However, there are some limits on the types of laws Australian parliaments can make in response to protest activities. This is because the High Court has held, over a series of cases spanning many decades, that the *Constitution* contains an implied freedom of political communication, derived from the system of representative government secured by the text of the *Constitution* itself.[41] This implied freedom of political communication does not work as an enforceable legal right, but instead as a limit on the legislative power of the parliament.[42] It comes from the idea that the people of Australia must be able to communicate with each other about political matters, so that they can exercise their constitutional right to elect representatives to the parliament.[43] This means that while laws that limit or even remove the right to protest in Australia can be validly made, they must not disproportionately impact the right to communicate about political matters in our democracy. Over time, the High Court has developed a specific test for determining whether a law has a disproportionate impact on the implied freedom of political communication, framed as three questions:

1. Does the law effectively burden the freedom of political communication?
2. Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government?
3. Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government? [44]

These questions should be carefully considered beyond the strict limitation enforceable by the High Court when enacting or amending laws designed to curb, deter or respond to protest activity in Australia. However, as discussed below, they do not always receive the attention they deserve by governments impatient to rush through new laws in response to disruptive protest activity. It is also clear that the

41 See, e.g.: *Brown v Tasmania* (2017) 261 CLR 328, 363–4 [102]–[104] (Kiefel CJ, Bell and Keane JJ) ('*Brown*'); *McCloy v New South Wales* (2015) 257 CLR 178, 193–4 [2] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'); *Lange* (n 33) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Levy v Victoria* (1997) 189 CLR 579, 626 (McHugh J).

42 *Lange* (n 33) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

43 Ibid.

44 This reflects relevant principles developed in *Lange* (n 33) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) and *McCloy* (n 41) 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ) and restated in *Brown* (n 41) 363–4 [104] (Kiefel CJ, Bell and Keane JJ). Recent jurisprudence indicates that structured proportionality — an analytical tool often employed in answering the third question relating to the implied freedom — is not mandatory in every case, though the overarching three questions remain unaffected: see: *Babet v Commonwealth* (2025) 423 ALR 83; *Ravbar v Commonwealth* (2025) 423 ALR 241.

implied freedom of political communication (at least as currently articulated by the High Court) offers only tenuous protection for the rights of protesters, or the more broadly conceptualised freedom of expression described above.[45]

III Public Assemblies and the Law in SA

South Australia has a proud history of firsts when it comes to facilitating public participation in democratic decision-making. The State's early constitutional arrangements included suffrage for all adult males (including Aboriginal people).[46] Further, in 1894 the South Australian Parliament became the first colony in Australia, and the fourth place in the world, to grant women the right to vote. It was also the first in the world to grant women the right to stand as members of Parliament.[47]

In the 1970s, SA also made history by enacting the *Public Assemblies Act 1972* (SA) ('*Public Assemblies Act*') — law designed to actively protect the right to protest in the context of a growing popular movement opposing the Vietnam War in Australia.[48] Section 4 of the *Public Assemblies Act* sets out a process for applying to host a public gathering, including a protest march, that involves seeking approval from the Chief Secretary, the Commissioner of Police or the clerk of the relevant local council at least four days before the date of the assembly.[49] Pursuant to s 4(6), an objection may be made by or on behalf of the Chief Secretary, the Commissioner of Police or the relevant council on the ground that the proposed assembly would, if effectuated, unduly prejudice any public interest.[50] If an objection has been made to a proposed assembly, the proponents or potential participants of the assembly can apply to a judge of the local or district criminal court to examine the grounds of the objection and, if the judge is not satisfied that proper ground for any objection made to the proposal exists, the objection can be quashed, and approval granted.[51] If approval is provided under the *Public Assemblies Act*, and the organisers and participants in the approved assembly adhere to the details that were contained in the approval, they will 'not incur any civil or criminal liability by reason of the obstruction of a public place'.[52] Section 6(2) of the *Public Assemblies Act* makes it clear that

45 See, e.g., Head (n 22).

46 'SA Firsts: Timeline for South Australian Firsts', *Parliament of South Australia* (Web Page) <https://www.parliament.sa.gov.au/About-Parliament/Timelines-for-SA-Firsts>.

47 Ibid.

48 Paul Sendziuk and Robert Foster, *A History of South Australia* (Cambridge University Press, 2018) 187–8.

49 *Public Assemblies Act 1972* (SA) s 4 ('*Public Assemblies Act*').

50 Ibid.

51 Ibid s 5.

52 Ibid s 6(1)(b).

> [a]n act permitted by this section is lawful notwithstanding the provisions of any other Act or law regulating the movement of traffic or pedestrians, or relating to the use or obstruction of a public place.

In 1973, the High Court considered how an earlier iteration of this provision of the *Public Assemblies Act* interacted with provisions criminalising loitering under s 18 of the then *Police Offences Act 1953* (SA). The Court confirmed that s 6 of the *Public Assemblies Act* operates as a 'positive defence' to a relevant criminal charge, that must be raised by the defendant in relevant proceedings.[53] It does not constitute an element of any related criminal offence that needs to be positively disproved by the prosecution.[54] There appears to be no further judicial interpretation of the *Public Assemblies Act*, and no record of any decisions by a local or district court with respect to an unsuccessful application for approval under the Act.

The City of Adelaide Council has a 'March, Parade or Rally Registration' online form[55] for those seeking to apply for approval under the *Public Assemblies Act*, and a 'Public Assemblies Info Sheet' available on its website.[56] This information encourages applicants to '[c]ontact SAPOL [SA Police] and/or the City of Adelaide a minimum of 1 month prior to the date of [their] activity' and '[h]ave a meeting to discuss public assembly proposal/requirements with SAPOL & a Council representative'.[57] As discussed further below, it is difficult to locate similar information or online application forms for other local government areas in SA.

A *Relevant South Australian Laws*

South Australia has a range of criminal offence provisions in place to respond to people who wilfully obstructed a public place, caused a public disruption or engaged in certain types of anti-social behaviour. For example, there is the 'obstruction of public places' offence contained in s 58 of the *Summary Offences Act 1958* (SA) ('*Summary Offences Act*') which has existed in different forms and is discussed further below. The *Summary Offences Act* also makes it an offence to engage in 'disorderly or offensive conduct or language',[58] with a maximum penalty of $1,250 or imprisonment for three months. Offences also exist for hindering police,[59] property damage[60] and the making of unlawful threats.[61]

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53 *Samuels v Stokes* (1973) 130 CLR 490, 501 (Menzies J).

54 Ibid 500.

55 'March, Parade or Rally Registration', *City of Adelaide* (Web Page) <https://customer.cityofadelaide.com.au/forms/register-march-parade-or-rally/>.

56 Ibid.

57 Ibid.

58 *Summary Offences Act* (n 14) s 7.

59 Ibid s 6.

60 Ibid pt 9.

61 *Criminal Law Consolidation Act 1935* (SA) s 19.

Under the *Police Act 1998* (SA), police security officers have express powers to detain persons where necessary for the protection of a designated person,[62] the protection of a designated place[63] or the protection of a designated vehicle.[64] It is an offence to be on premises for an unlawful purpose, carrying maximum penalties ranging from $2,500 or imprisonment for six months, to $10,000 or imprisonment for 12 months. [65] Loitering is also an offence, carrying a maximum penalty of $1,250 or $5,000, or imprisonment for three months depending on the circumstances.[66]

Under pt 14B of the *Summary Offences Act*, police also have increased powers in certain public places termed 'declared public precincts'. Section 66N of the *Summary Offences Act* empowers the Attorney-General to declare a defined area comprised of one or more public places[67] to be a 'declared public precinct'. There must be a reasonable likelihood of conduct in the area posing a risk to public order and safety, and the inclusion of each public place in the area must be reasonable having regard to that identified risk.[68] The declaration should be limited to 12 hours, unless the Attorney-General is satisfied that special circumstances exist in the particular case.[69] As the SA Police website explains,[70] if a person is in an area that has been declared a public precinct, the police are then authorised to conduct a metal detector search of a person to determine the presence of weapons,[71] search a person for drugs,[72] order a person posing a risk to public safety to leave the declared public precinct[73] and/or ban a person who behaves in an offensive or disorderly manner within the precinct for up to 24 hours.[74]

62 *Police Act 1998* (SA) s 63P(2)(e).

63 Ibid s 63Q(6)(f).

64 Ibid s 63S(2)(e).

65 *Summary Offences Act* (n 14) s 17.

66 Ibid s 18.

67 'Public place' is defined as including: (a) a place to which free access is permitted to the public, with the express or tacit consent of the owner or occupier of that place; and (b) a place to which the public are admitted on payment of money, the test of admittance being the payment of money only; and (c) a road, street, footway, court, alley or thoroughfare which the public are allowed to use, notwithstanding that that road, street, footway, court, alley or thoroughfare is on private property: ibid s 4. See also s 7.

68 *Summary Offences Act* (n 14) s 66N(2).

69 Ibid s 66N(4).

70 'Declared Public Precincts', *South Australia Police* (Web Page) <https://www.police.sa.gov.au/your-safety/declared-public-precincts>.

71 *Summary Offences Act* (n 14) s 66R.

72 Ibid s 66S.

73 Ibid s 66O(1).

74 Ibid s 66T(1).

These powers give police the ability to issue expiation notices for offences within the geographic area or to issue barring orders covering the precinct.[75] A person who is barred, but enters or remains in the declared precinct is guilty of an offence which carries a maximum penalty of $2,500.[76] Offences also apply for remaining in or re-entering a declared precinct after being ordered to leave, or behaving in an offensive or disorderly manner within the precinct.[77] A person who carries an offensive weapon or dangerous article within the declared precinct can face penalties of up to $10,000 or imprisonment for two years.[78]

It should be noted that the above 'declared public precinct' regime was described by its proponents as being necessary to address the 'perceived increase in crime and antisocial behaviours in the Adelaide CBD' rather than civil resistance to climate change or protest activity.[79] Nevertheless, the powers this regime bestows on the executive are extensive, and have the potential to restrict access to public spaces in a wide range of contexts. It was within this legislative landscape that amendments were quickly made to the 'obstruction of public places' offence.

B *Summary Offences (Obstruction of Public Places) Amendment Bill 2023 (SA)*

Early on the morning of 17 May 2023, a group of people from the climate action movement Extinction Rebellion engaged in a protest near the Adelaide Convention Centre, where the Australian Petroleum Production and Exploration Association Conference was being held. The protest involved one member of the group abseiling down from the Morphett Street bridge, which crosses over North Terrace — a major thoroughfare in the Adelaide CBD.[80] In response to the protest, police blocked access to the Morphett Street bridge and restricted tram and car traffic flow on North Terrace. Although road closures and diversions were lifted by 9am, some morning commuters experienced significant delays, including those seeking to leave or enter the nearby Royal Adelaide Hospital.[81] The Extinction Rebellion member involved in the abseiling was charged with several offences, including obstructing a public place, as it was then prescribed under s 58 of the *Summary Offences Act*.

As the protest activities were unfolding, a local radio station began taking calls from commuters impacted by the traffic diversions and road restrictions.[82] The Leader of

75 Ibid s 66T.

76 Ibid s 66T(3).

77 Ibid s 66O(2).

78 Ibid s 66Q.

79 'Expansion of Declared Public Precincts: Society Seeks Evidence for Increased Police Powers', *Law Society of South Australia* (Advocacy Notes, July 2023).

80 'Extinction Rebellion Protestors' (n 3).

81 Ibid.

82 See, e.g., FIVEAA, 'WATCH LIVE: Breakfast with David and Will' (YouTube, 17 May 2023) 2:12:36–2:14:44 <https://www.youtube.com/watch?v=EZ7A0GBKDXI&t=8086s>.

the Opposition at the time, the Hon David Speirs MP, joined the on-air discussion the following day, calling for tougher penalties for protesters who cause traffic chaos.[83]

As at 17 May 2023, s 58 of the *Summary Offences Act* made it an offence for a person to 'wilfully obstruct the free passage of a public place', with a maximum penalty of $750.[84] On 18 May 2023, the day after the protest, the South Australian Premier, the Hon Peter Malinauskas MP, suspended standing orders and introduced the Summary Offences (Obstruction of Public Places) Amendment Bill 2023 (SA) into the House of Assembly,[85] where it passed in under an hour. The Bill dramatically increased the maximum penalty for the s 58 offence from a fine of $750, to a fine of $50,000 or three months imprisonment. No explanatory memorandum or other statistical information was provided to support this increase. In his Second Reading Speech, the Premier described the amendments as 'simply an adjustment to the penalty regime and its application to ensure that some of the conduct that we have seen over the course of recent months is not able to occur with impunity'.[86] The Premier also noted that the amended provisions did not alter the approval process contained in the *Public Assemblies Act* and described above.[87]

However, the amendments made significant changes to the nature and scope of the existing obstruction of public places offence that extend far beyond the dramatic increases in penalties and have the potential to fundamentally alter the way many South Australians think about their freedom to peacefully assemble or protest. For example, the Bill replaced the term 'wilfully' with 'intentionally or recklessly'.[88] This broadens the scope of liability to capture circumstances including those in which a person only has to turn their mind to the possibility that an obstruction will occur, even though the consequence is entirely unintended, to be found guilty of the offence. This concerning feature of the amendments passed by the House of Assembly caught the attention of crossbench upper house members and was successfully removed when the Bill proceeded through the Legislative Council on 30 May 2023. In addition, although the public discourse about the need for the newly broadened offence regularly referred to the obstructing conduct causing a real and significant risk to the safety of persons or similar risk of serious damage to property,[89] no such requirement was included in the offence itself. In fact, the new s 58(1a) makes it clear that a person can be found guilty of an offence against this

83 FIVEAA, 'WATCH LIVE: Breakfast with David and Will' (YouTube, 18 May 2023) 2:09:10–2:14:53 <https://www.youtube.com/watch?v=qIwmnkakec>.

84 *Summary Offences Act 1953* (SA) s 58, as at 31 May 2023.

85 *Parliamentary Debates* (n 15) 3979 (Peter Malinauskas, Premier).

86 Ibid 3980.

87 David Eccles, 'Controversial Protest Law Passes Upper House after Marathon Debate', *InDaily* (online, 31 May 2023) <https://www.indailysa.com.au/news/archive/2023/05/31/controversial-protest-law-passes-upper-house-after-marathon-debate>.

88 Summary Offences (Obstruction of Public Places) Amendment Bill 2023 (SA) cl 2(1).

89 See, e.g., Government of South Australia, 'Tougher Penalties for Obstructing Public Places' (Media Release, 31 May 2023).

section if the person's conduct directly or indirectly obstructed the free passage of a place. As a result, the scope of the offence is not limited to protest activity and could apply in many contexts, such as: (1) journalists trying to take a photograph or obtain an interview with someone on a street; (2) a homeless person sleeping on the street; or (3) a community event that takes place across a park or footpath.[90]

The amended offence also includes provisions permitting the court to make an order requiring the defendant to pay reasonable costs associated with the response employed by a 'relevant entity' (such as the police or an emergency services organisation).[91] According to s 58(1c), a certificate provided by the relevant entity setting out remedial action will be accepted as proof of the costs and expenses incurred. This provision effectively transfers the onus of proof to the defendant, who would be unlikely to be in a position to test the figure put forward in a certificate, let alone present an alternate compelling view to the court as to these costs and expenses.

This cost-recovery feature of the amendments, coupled with the dramatic increase in penalties and expanded scope of the offence, led a range of community organisations and legal experts to express strong concerns about the new laws.[92] These groups explained that the provisions were unnecessary, likely to give rise to unintended consequences, and disproportionate in terms of their impact on the right to protest about matters of significance to the community, including climate change.[93] Those groups were supported in their efforts by hundreds of South Australians who 'protested against the protest laws' on the steps of Parliament on 26 May 2023.[94] At the time of writing, the new provisions have not been subject to judicial consideration, and it appears that no prosecutions have been issued, however it appears that at least one charge may have been laid.[95]

Under the current South Australian provisions, it remains challenging for ordinary people, who are contemplating participating in or organising a small, peaceful rally outside their local council chambers or member of Parliament's office to draw attention to an issue they care about, to work out how to do this *lawfully*. If they know about the amended 'obstruction of public places' offence, and are keen to avoid doing anything disruptive that would offend other pre-existing laws,

90 See, e.g., Australian Lawyers for Human Rights, 'Human Rights Lawyers Slam Attempts to Ram Through Anti-Protest Laws in SA' (Media Release, 19 May 2023).

91 *Summary Offences Act* (n 14) s 58(1c).

92 South Australian Council of Social Services, 'Joint Media Release on Proposed New Anti-Protest Laws: Undo 22 Minutes of Bad Lawmaking' (Media Release, 29 May 2023).

93 Ibid.

94 Belinda Willis, 'Protest Against the Protest Laws', *InDaily* (online, 23 May 2023) <https://indaily.com.au/news/2023/05/23/protest-against-anti-protest-laws/>.

95 See David Simmons, 'Pro-Palestine Activist Defiant after Adelaide Arrest and 17-Hour Jail Stint', *InDaily* (online, 10 October 2025) <https://www.indailysa.com.au/news/just-in/2025/10/10/pro-palestine-activist-defiant-after-adelaide-arrest-and-17-hour-jail-stint>.

what should they do? At the time the reform to the offence was rushed through Parliament, the South Australian Premier noted that the provisions of the *Public Assemblies Act* remained unchanged, and that the new offences were not intended to impact 'lawful' protests undertaken in accordance with the provisions of that Act.[96] However, accessing approval for protest activity under the *Public Assemblies Act* is not always easy to do in practice. To whom should the person apply? What form needs to be filled out? What information is required and how much time is needed? What if the application is refused? If it is granted — are there still risks in proceeding?

As noted above, s 4(4) of the *Public Assemblies Act* provides that notice of a public assembly must be

> (4) served personally or by post, at least four days before the date of the assembly on
>
> (a) the Chief Secretary; or
>
> (b) the Commissioner of Police; or
>
> (c) the clerk of the council for the area in which the assembly is to be held, and the recipient of the notice must then inform the other persons described above about the contents of the notice.[97]

Section 4(1) of the Act also requires the person providing notice to specify

> (a) the date of the assembly; and
>
> (b) the time at which the assembly will convene and the time at which it will disband; and
>
> (c) the place in which the assembly will be held, and the boundaries of the area to be occupied by the assembly, or if it is to move in procession, the route that it will follow, the extent to which it will occupy the public places through which it will pass, the places (if any) at which it will halt and the time for which it will remain stationary in each such place.[98]

However, there is no clear, publicly available information about how someone would go about preparing this notice, other than the online form that applies for proposed public assemblies taking place within the City of Adelaide. There are no key steps or online application processes available on most local council websites. As a result, it remains unclear — even to those with access to information about the relevant laws — how citizens should go about conducting a lawful and peaceful public assembly in SA. This means that without proactive support and information sharing from the legal profession, communities who assume they have a right to peacefully protest

96 'Protesters Condemn Public Obstruction Penalties in SA as "Attack on Fundamental Rights"', *ABC News* (online, 30 May 2023) <https://www.abc.net.au/news/2023-05-30/sa-protest-law-opposed-outside-parliament-house/102409004>.

97 *Public Assemblies Act* (n 49) s 4(4).

98 Ibid s 4(1).

may not have the practical means to understand and exercise their legal rights and, therefore, may be at risk of criminal prosecution under the amended South Australian laws.

There are examples of the legal complexities associated with seeking to access legal protections for public assemblies in other jurisdictions where 'protest permit' systems are in place, including in the recent case of *Commissioner of Police v Coglin*.[99] In this case, the New South Wales ('NSW') Commissioner of Police sought orders under s 25 of the *Summary Offences Act 1988* (NSW) prohibiting the holding of two public assemblies proposed by climate activist group Rising Tide in and around the Port of Newcastle. The Rising Tide group had previously served on the Commissioner of Police a 'Form 1' notice advising of their intention to hold a public assembly of approximately 10,000 people at Horseshoe Beach, Newcastle and in adjoining parkland, with the objective of protesting against the NSW Government's continuing approval of new coal projects.[100] The activities proposed by Rising Tide, including kayaking activities and a land-based 'protestival', were planned to take place over a number of days.[101] On 7 November 2024, Fagan J of the Supreme Court of NSW made the prohibition orders sought by the police.[102] The NSW Government took further action to prevent Rising Tide's activities by using its powers under the *Marine Safety Act 1998* (NSW) to issue an exclusion zone around Newcastle Harbour for the relevant period in which the proposed 'protestival' was to be held.[103] The exclusion zone order imposed a maximum $1,100 fine for breaching the zone and $3,300 fine for anyone in the vicinity who failed to comply with directions. However, the exclusion zone order was successfully challenged in the Supreme Court by a member of Rising Tide, with McNaughton J finding that a plain reading of the law was that NSW Maritime had exceeded its powers in declaring the zone.[104] Rising Tide's protest went ahead on the weekend of 22–24 November 2024, and resulted in 170 protesters being charged with offences described in the media as 'disruption of a major facility', and 'not complying with direction by authorised officer relating to safety'.[105] This example illustrates the range of intersecting laws that can come into play when individuals or groups are seeking to engage in protest

99 [2024] NSWSC 1412 ('*Coglin*').

100 Ibid [2]–[6].

101 Ibid.

102 *Coglin* (n 99).

103 *Marine Safety Act 1998* (NSW) s 12, as at 7 November 2024.

104 *Stuart v Minister for Transport* [2025] NSWSC 39, [40]–[44], [66]. See also Caitlin Fitzsimmons, 'Anti-Coal Protesters Clear Court Hurdle for Kayak Flotilla Near Port', *Sydney Morning Herald* (online, 21 November 2024) <https://www.smh.com.au/environment/climate-change/anti-coal-protesters-clear-court-hurdle-for-kayak-flotilla-near-port-20241121-p5ksdv.html>.

105 Blair Jackson and Aisling Brennan, 'More Than 100 Anti-Coal Protesters Arrested, Shipping Suspended at Newcastle', *NewsWire* (online, 24 November 2024) <https://www.news.com.au/breaking-news/more-than-100-anticoal-protesters-arrested-after-forcing-ship-back-to-port/news-story/d57dec178d3355168e2e3d535d7a0e61>.

activity, and the legal complexities associated with seeking 'permission to protest' under Australian laws.[106]

IV The Broader Legal Landscape

The rapid passing of the 'obstruction of public places' law in SA is indicative of a trend across several Australian jurisdictions, where new offences are being rushed through parliament to deter and punish those who use disruptive protest activities — particularly in connection with climate activism. For example, in Queensland, the *Summary Offences and Other Legislation Amendment Act 2019* (Qld) has significantly increased penalties for protesters who clamp themselves to buildings or other things such as plants, equipment and infrastructure. In NSW the *Roads and Crimes Legislation Amendment Act 2022* (NSW) imposes harsher penalties on protesters whose actions disrupt businesses and other economic activity. These laws mean that people can be fined up to $22,000 or jailed for up to two years for protesting illegally on public roads, rail lines, tunnels, bridges and major ports such as Newcastle and Port Botany.[107] Police in NSW and in other Australian states have 'move-on' powers, which Luke McNamara and Julia Quilter have described as being originally designed as an 'instrumental tool for addressing anti-social behaviour orientation', but are increasingly seen as 'a flexible and potent mechanism for interrupting and closing down peaceful protests that take place in "public fora"'.[108] In Tasmania, anti-protest laws have been introduced to specifically target activists looking to disrupt logging activities by increasing penalties for anyone who obstructs employees from carrying out their work or causing a risk to worker safety.[109] The Victorian *Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022* (Vic) contains similar provisions. These laws are designed to send a 'zero tolerance' message to climate activists who hinder, obstruct or interfere with timber-harvesting operations.

When such laws are rushed through parliament, they are often poorly designed and typically fail to consider the key questions set out above with respect to the implied freedom of political communication in the *Constitution*. For example, previous versions of anti-protest laws in Tasmania have been struck down by the High Court for going too far when it comes to imposing penalties on activists seeking to disrupt workplaces, with some judges taking a strong interest in the powers given to police

106 For further examples in other jurisdictions see Maria O'Sullivan, 'Should You Need a Permit to Protest? Here's Why That's a Bad Idea (and Might Be Unlawful)', *The Conversation* (online, 8 October 2024).

107 This offence was considered by the New South Wales District Court in the case of *Glover v R* [2023] NSWDC 322. For commentary about this case see Royce Kurmvelos, 'Climate Activist Violet CoCo and Protest Laws', *The Saturday Paper* (online, 18 March 2023). See also *Coglin* (n 99).

108 McNamara and Quilter (n 13) 23.

109 *Police Offences Amendment (Workplace Protection) Act 2022* (Tas).

and other authorities under these laws.[110] In *Brown v Tasmania*,[111] Kiefel CJ, Bell and Keane JJ explained that anti-protesting laws that are drafted in vague terms, and are highly dependent on police interpretation on the ground, risk the capture or deterrence of lawful protesters.[112] When this happens, the laws may no longer be considered proportionate and may be incompatible with our constitutionally protected system of representative democracy.[113]

In the 2023 case of *Kvelde v New South Wales*[114] Ms Helen Kvelde and Ms Dominique Jacobs (two members of the Knitting Nannas, whose 'Nannafesto' states that members of the group engage in protests to raise awareness of environmental issues)[115] challenged amendments to New South Welsh laws related to protest that were enacted through the *Roads and Crimes Legislation Amendment Act 2022* (NSW). The Supreme Court of NSW declared parts of s 214A of the *Crimes Act 1900* (NSW), which sought to criminalise 'damage or disruption to major facilities', invalid for impermissibly burdening the implied freedom of political communication.[116] The Court applied the modified three-part *Lange-McCloy* test as described above to examine the validity of s 214A of the *Crimes Act 1900* (NSW). The Court reaffirmed the general proposition that protests over environmental issues constitute political communication, and that there was a real prospect that s 214A could burden various methods of political communication.[117] However, the Court also considered the fact that pre-existing criminal laws already prohibited unlawful access to, or damage of, major facilities covered by s 241A, and so sought to determine whether or not s 214A creates a 'real additional burden' on the implied freedom, having regard to the High Court's consideration of similar laws in *Brown v Tasmania*.

The Court also held that the purpose of s 214A of the *Crimes Act 1900* (NSW) was legitimate, and one that was compatible with the system of representative government provided for by the *Constitution*, as required by the *Lange-McCloy* test. The Court described the purpose of s 214A as being 'to increase deterrents to such conduct causing damage or serious disruption or obstruction to facilities and hence, to community generally'.[118] However, Walton J held that the legitimacy of this purpose did not extend to the criminalisation of conduct merely causing inconvenience to particular individuals who, for example, were redirected by protesters situated near a major facility.[119] As a result, it was held that ss 214A(1)(c)–(d) of

110 *Brown* (n 41).

111 Ibid.

112 Ibid 355–6 [73].

113 Ingmar Duldig and Jasmyn Tran, 'Proportionality and Protest: *Brown v Tasmania* (2017) 261 CLR 328' (2018) 39(2) *Adelaide Law Review* 493, 497–500.

114 [2023] NSWSC 1560.

115 Ibid [68].

116 Ibid [259], [363].

117 Ibid.

118 Ibid [434], [436].

119 Ibid.

the *Crimes Act 1900* (NSW) were not reasonably necessary, and failed to satisfy the proportionality limb of the *Lange-McCloy* test.[120] The Court declared that ss 214A(1)(c), insofar as the provision criminalised conduct that causes the closure of part of a major facility, and 214A(1)(d) impermissibly burdened the implied freedom of political communication contrary to the *Constitution*, and were therefore invalid.[121]

V Embedding a 'Democratic Listening' Approach To Avoid Reactionary Legislative Responses to Civil Resistance to Climate Change and Protest Activity

Although people become frustrated when their drive to work or school takes hours longer than usual because of the actions of climate activists, and rightly so, many individuals and communities also care deeply about climate change and the impact it has on our lives. At the time the *Summary Offences Act* was amended, Parliament failed to facilitate a public consultation process about the adequacy of existing offences relating to obstructing public places through protest, or the government's climate change policies. Nor was there an opportunity to collectively reflect on the value and precarity of our democratic freedoms, including our right to participate in peaceful protest activity. Instead, South Australian parliamentarians appeared to 'lean in' to what McNamara and Quilter have previously described as a (re)conceptualisation of 'protestors' as 'perpetrators' and the act of protest as 'anti-social behaviour' posing risks to 'ordinary' people.[122]

As soon as this type of conceptualisation takes hold, the voices of some groups in the community become immediately elevated (such as the 'ordinary person' delayed by traffic on the way to work) and others become silenced. Identities become entrenched around binary notions of 'ordinary people' and 'disruptive protesters' and we lose our collective ability to conceptualise peaceful protest as evidence of a mature and healthy democratic society.[123] For McNamara and Quilter, who explored these conceptualisations in the context of 'move on' police powers in NSW, this 'recalibration' has two dimensions:

> invocation of the rights of the 'general public' (set in conflict with the right to protest) via the ambiguous idea of 'reasonable enjoyment' of public spaces; and a repurposing of the capacious concept of 'public safety' as a vehicle for an ascendant imperative that business activities should suffer no interruption. Embedding these malleable imperatives in public order legislation further extends the capacity of the police to exercise discretion in coercive and restrictive ways that impede rather than tolerate or facilitate peaceful protest.[124]

120 Ibid [576]–[578].

121 Ibid.

122 Ibid.

123 McNamara and Quilter (n 13) 23.

124 Ibid.

The potential implications of these different public conceptualisations of 'legitimate protest' for the future of legislative responses to climate activism is something that must be carefully considered. A range of recent surveys suggest that Australians from all walks of life would like to see governments do more to address the causes and impacts of climate change,[125] and many would also like to see stronger legal protections for human rights, including the right to peaceful assembly.[126] At the same time, many groups in the community feel troubled or threatened by acts of civil disobedience or disruptive protest and are looking for reassurance from lawmakers about where the lines of legal legitimacy will or should be drawn.[127] It is imperative, therefore, that Australian lawmakers resist the temptation to participate in reactionary lawmaking or binary conceptualisations of protesters as perpetrators. They should instead seek the perspectives of a more diverse range of community members when evaluating the merits of different policy or legislative responses to acts of civil resistance to climate change, or other forms of protest.[128]

Ideally, this would involve the use of public or parliamentary forums, such as parliamentary committee inquiries or government consultations.[129] These forums allow elected representatives and community members to work together to build a shared social mandate and to avoid 'self-reinforcing cycles of intergroup enmity and policy gridlock'.[130] As Matthew J Hornsey et al have explained, this in turn demands that policymakers, legislators and other public communicators take active steps to avoid positioning 'in-groups' (such as 'ordinary commuters') as being 'in symbolic or material conflict with relevant "outgroups"' (such as environmental scientists or climate activists). When elected representatives are able to approach contested

125 Elizabeth Morison et al, *Climate of the Nation 2024* (Research Report, The Australia Institute, 2024); Australian Institute of Company Directors and Pollination, *Climate Governance Study 2024: Moving from Vision to Action* (Report, March 2024); Timothy Neal, 'The 2025 Federal Budget Fails the Millions of Voters Who Want Action on Climate Change', *University of New South Wales Newsroom* (online, 27 March 2025) <https://www.unsw.edu.au/newsroom/news/2025/03/2025-budget-fails-millions-of-voters-who-want-action-on-struggling-environment>.

126 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework and Laws* (Final Report, May 2024) 22; 'World Report 2024: Australia', *Human Rights Watch* (Web Page, 2024) <https://www.hrw.org/world-report/2024/country-chapters/australia>.

127 For further discussion of community concerns relating to protest and other forms of democratic expression see Scanlon Foundation Research Institute, *Mapping Social Cohesion: 2024 Report* (Report, December 2024).

128 Gulliver, Fielding and Louis (n 8) 3–4. See also: Zick (n 9); Brian Martin (n 9).

129 Sarah Moulds, 'From Disruption to Deliberation: Improving the Quality and Impact of Community Engagement with Parliamentary Law Making' (2020) 31(3) *Public Law Review* 264.

130 Hornsey et al (n 6) 1. See also: A M Bliuc et al, 'Public Division About Climate Change Rooted in Conflicting Socio-Political Identities' (2015) 5(3) *Nature Climate Change* 226; Laura G E Smith et al, 'Polarization Is the Psychological Foundation of Collective Engagement' (2024) 2(1) *Communications Psychology* 41.

policy issues from this standpoint of 'democratic listening',[131] they can increase the potential for all groups to accept the legitimacy of the policy or legislative settings that are ultimately adopted.[132] As Hornsey et al observe, this is because 'people often care about procedural justice as much as — and sometimes more than — distributive justice'.[133] The authors go on to explain:

> legal frameworks that place order, structure and a core of justice to negotiations around transitions have the potential to mitigate conflict and develop systems of compensation (e.g. for the unequal burdens of decarbonisation caused by historical emissions). Ultimately, the goal is to create a 'civic immune system' whereby issues of justice are fortressed by an ecology of transparency, integrity and accountability.[134]

If, on the other hand, rapid and reactionary lawmaking occurs in response to civil resistance to public threats like climate change, the potential for meaningful debate and the identification of sustainable policy and legislative responses is stymied; 'people heuristically accept ingroup messages as valid, moral and trustworthy, whereas outgroup messages are heuristically received with scepticism.'[135] This can then lead communities, groups or individuals to either increase the scale or disruption of their resistance activities,[136] or look to adversarial-dominated dispute resolution techniques such as litigation. In Australia, this has historically taken the form of legal actions against public and private entities using administrative law, constitutional law and tort law, but is increasingly likely to take the form of class actions.[137] As Corey Byrne observes:

> in an age where large corporations and public bodies are capable of committing harms on a mass scale the class action plays an important role in providing access to justice. Crucially, the aggregation of claims and economies of scale provided by the

131 Andrew Dobson, *Listening for Democracy* (Oxford University Press, 2014); M F Scudder, 'Measuring Democratic Listening: A Listening Quality Index' (2022) 75(1) *Political Research Quarterly* 175.

132 See, e.g., Moulds, '*Connected Parliaments*' (n 20).

133 Hornsey et al (n 6) 3. See also Christian Schnaudt, Caroline Hahn and Elias Heppner 'Distributive and Procedural Justice and Political Trust in Europe' (2021) 3 *Frontiers in Political Science* 642232:1–18 .

134 Hornsey et al (n 6) 4. See also Archon Fung, 'Infotopia: Unleashing the Democratic Power of Transparency' (2013) 41(2) *Politics and Society* 183.

135 Hornsey et al (n 6) 2. See also Matthew J Hornsey, 'Social Identity Theory and Self-Categorization Theory: A Historical Review' (2008) 2(1) *Social and Personality Psychology Compass* 204.

136 Gulliver, Fielding and Louis (n 8) 8.

137 Corey Byrne, 'Environmental Class Actions in Australia: A Coming Storm?' (2020) 37(2) *Environmental and Planning Law Journal* 186. See also Mark Hamilton, 'Climate Change Litigation in Australia: The Potential of Restorative Justice' (2024) 40(1) *Environmental and Planning Law Journal* 30, 37–8.

> class action allows claimants to obtain redress in cases where their individual losses may be too small by themselves for litigation to be economically viable.[138]

However, adversarial-based techniques for resolving complex policy issues are 'by no means a panacea for dealing with the incredibly complex and challenging issue of environmental protection'.[139] They are also rarely capable of generating the type of large-scale, sustainable socio-economic shifts necessary to build the strong 'civic immune system' which Hornsey et al and Archon Fung have identified as critical to developing and maintaining effective policy responses to climate change.[140] For this reason, structural and process-orientated measures are needed to: (1) slow down and deter reactionary legislative responses to protest activity in response to climate change; and (2) prompt and incentivise deliberative lawmaking techniques, such as meaningful and diverse community consultation.[141]

One structural reform that can incentivise this type of deliberative or participatory approach to lawmaking in areas involving competing public interests or rights is the adoption of human rights legislation with two characteristics. Such legislation must impose: (1) 'preventative' duties on parliaments to consider rights, such as the right to peaceful assembly or the right to a clean and healthy environment, when introducing or scrutinising proposed laws in response to civil resistance or protest relating to climate change;[142] and (2) 'positive' duties on lawmakers and public servants to seek the views of different communities before introducing new laws or policies, and to actively consider human rights when implementing laws or policies.[143] Such legislative frameworks operate in varying forms in Victoria, Queensland and the ACT,[144] with models having also been considered for implementation at the federal level[145] and in SA.[146]

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138 Byrne (n 137) 188.

139 Ibid.

140 Hornsey et al (n 6) 4. See also Fung (n 134).

141 For further discussion see Helen Fenwick, 'The Right to Protest, the Human Rights Act and the Margin of Appreciation' (1999) 62(4) *Modern Law Review* 491. For consideration of these types of structural and process orientated measures in a different context see Timon Forster and Mirko Heinzel, 'Reacting, Fast and Slow: How World Leaders Shaped Government Responses to the COVID-19 Pandemic' (2021) 28(8) *Journal of European Public Policy* 1299.

142 Social Development Committee (n 36) 125. See also Parliamentary Joint Committee on Human Rights (n 126) 231–49.

143 Social Development Committee (n 36) 126–7. See also Parliamentary Joint Committee on Human Rights (n 126) 169–81.

144 *Charter Act* (n 37); *Qld Human Rights Act* (n 38); *ACT Human Rights Act* (n 39). See also: Social Development Committee (n 36) 58; Parliamentary Joint Committee on Human Rights (n 126) 9.

145 Parliamentary Joint Committee on Human Rights (n 126) xxi.

146 Social Development Committee (n 36) 11.

It is important to note that these types of preventative and positive duties do not *prohibit* governments from enacting laws criminalising protest activity or curtailing the right to peaceful assembly. Experiences from within existing human rights jurisdictions like Queensland indicate that governments can and do pass rights-abrogating laws despite having human rights acts in place.[147] However, human rights regimes that include both preventative, scrutiny elements and enforceable positive duties do slow down the legislative process and demand that public servants and members of parliament publicly justify their legislative and policy choices having regard to human rights standards. This in turn contributes to a 'culture of justification'[148] across government that works to reward lawmakers and policymakers that *do* engage in more deliberative or participatory legislative design by protecting them from the risk of future liability for non-rights compliant actions or decisions.

The absence of either 'preventative' duties to consider human rights at the pre-enactment stage, or 'positive' studies to consider human rights when implementing laws and polices gives rise to a heightened risk of reactionary, rights-abrogating lawmaking.[149] This has been recognised by the South Australian Parliament's Social Development Committee following its 16-month Inquiry into the Potential for a Human Rights Act for South Australia. The Committee recommended that the South Australian Government consolidate the various rights and protections afforded to citizens across a wide range of existing laws into one comprehensive human rights act,[150] and 'conduct a comprehensive consultation with the South Australian community on the model of human rights act to be adopted'.[151]

Had such a human rights act been in place when South Australian legislators were contemplating the proposed amendments to s 58 of the *Summary Offences Act* in May 2023, a richer debate may have ensued. Freedom of peaceful assembly and association could have been considered alongside other important public interests such as freedom of movement, and a structured approach to developing proportionate and effective legislative amendments could have been adopted. It might have resulted, for example, in a law that specifically targeted disruptive protest activity on major roads or thoroughfares whilst also increasing the practical accessibility and scope of the provisions designed to enable community members to conduct lawful and peaceful, public assemblies. Even if it did not have any impact on the legislative design of the amendments to the *Summary Offences Act*, a human rights act would

147 See, e.g., Savannah Meacham and Laine Clark, 'Cruel, Inhuman: Queensland Government Admits Justice Laws Will Violate Human Rights', *National Indigenous Times* (online, 29 November 2024) <https://nit.com.au/29-11-2024/15149/cruel-inhuman-queensland-government-admits-justice-laws-will-violate-human-rights>.

148 Janet L Hiebert, 'Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?' (2006) 4(1) *International Journal of Constitutional Law* 1.

149 Julie Debeljak, Submission to Social Development Committee, Parliament of South Australia, *Inquiry into the Potential for a Human Rights Act in South Australia* (1 February 2024).

150 Social Development Committee (n 36) 11.

151 Ibid.

have given legislators — and community members — a common language and a new set of tools for navigating competing claims of rights in a consistent, systematic and transparent way.

VI Conclusion

The legislative response to climate protests in SA, exemplified by the rapid amendments to the *Summary Offences Act,* highlights the trends explored in depth by Robyn Gulliver, Kelly S Fielding and Winnifred R Louis in their study of civil resistance against climate change, and the different interests that are weighed and prioritised by governments when seeking to respond to such acts of resistance.[152] While the urgency to address disruptive protest activities is understandable, the approach taken raises significant concerns about the proportionality and fairness of the legal measures imposed. The dramatic increase in penalties and the broadening of the offence's scope risk undermining the fundamental freedoms of assembly and expression, which are cornerstones of a healthy democracy.

The concept of democratic listening offers a promising framework for navigating these complex issues. By actively engaging with diverse community perspectives and fostering inclusive dialogue, lawmakers can develop more balanced and sustainable legislative responses. This approach not only enhances the legitimacy of the laws enacted but also strengthens public trust in democratic institutions.

The introduction of a human rights act in SA could provide a structured mechanism for ensuring that legislative measures are compatible with fundamental human rights. Such a framework would facilitate a more considered and transparent lawmaking process where the rights of protesters are weighed alongside other public interests in a systematic way. Such legislative reform should also be accompanied by changes to parliamentary procedure to provide real incentives for elected members to engage with their constituents before voting to enact punitive responses to protest and to mitigate the political realities of executive dominance that can facilitate rushed law making.

As we face the challenge of developing practicable, effective responses to the complex and dynamic climate crisis it is imperative that we continue to allow members of the community to peacefully and publicly test power and register their discontent with the status quo.[153] As the UN Human Rights Committee has observed:

> peaceful assemblies can play a critical role in allowing participants to advance ideas and aspirational goals in the public domain and to establish the extent of support of or opposition to those ideas and goals. Where they are used to air grievances, peaceful assemblies may create opportunities for the inclusive, participatory and peaceful resolution of differences.[154]

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152 Gulliver, Fielding and Louis (n 8) 75–83.

153 Zick (n 9) 27.

154 *Human Rights Committee* (n 28) 1 [1].