



A Legal Handbook

for the coal and gas movement

Acknowledgement

This booklet was created on the land of the Wurundjeri people of the Kulin nation, and we pay our respects to them, elders past and present, and to traditional custodians of all Aboriginal nations across Victoria.

Thanks to all photographers, writers, editors who contributed, our interns Orietta and Jen, Quit Coal Victoria, Melbourne Activist Legal Support, the Victoria Law Foundation for printing costs, Lock the Gate, Environmental Defenders Office NSW, and the frontline communities who continue to inspire us, standing up for country, and bravely defending farms, food, water and climate.

Seek legal advice regarding specific cases

While all care has been taken in preparing this publication, it is not a substitute for legal advice in individual cases. It has been prepared for people in Victoria. Whilst there may be some similarities with other states, the law differs state to state. For any specific questions, seek legal advice.

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About CounterAct

CounterAct supports communities in taking effective, creative, strategic action on issues of environmental and social justice through providing training and resource development.

Across the country we are seeing a growing network of concerned citizens taking on large multinationals and government to defend their right to clean air, water, a safe climate and for social justice.

CounterAct provides training in direct action skills, campaigning and community organising across Australia. We aim to increase capacity and skills amongst grassroots activists whilst encouraging a culture of skill sharing, on-training and making activism accessible for everyone. We believe strongly in providing people with campaign and legal information that allows them to make informed choices.

We have worked with the Lock the Gate, Quit Coal, Australian Youth Climate Coalition, 350.org, Wilderness Society and a range of social justice related organisations, and supported climate campaigns across the country, including the struggle against unconventional gas, the Leard forest blockade at a coal expansion project in NSW which numbered over 300 civil disobedience arrests at the end of 2014, and the Pacific Climate warriors tour.

CounterAct is affiliated with Friends of the Earth Australia and relies on donations and grants to support other community organisations.

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About Environmental Justice Australia

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect the environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. We also pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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Introduction

This country has a long and proud history of protest and nonviolent direct action. We have seen significant environmental outcomes secured from campaigns that have used direct action. The iconic campaigns to stop the damming of the Franklin River, the battle to stop uranium being mined at Jabiluka, the fight against an industrial gas hub in the Kimberley, and the ongoing old growth forest campaigns are just some of the victories that have come about in part due to direct action being used.

There is also a significant history of nonviolent direct action over the last ten years in Australia on issues relating to climate change. In Victoria in recent years there have been large convergences at the Hazelwood power station, the ongoing civil disobedience actions of Quit Coal, and communities preparing across Gippsland and Western Victoria to challenge unconventional gas projects.

The growing campaign to ‘Lock the Gate’ to unconventional gas across the country is one of the most significant social movements in Australia’s recent history, bringing together farmers, environmentalists, traditional owners and conservatives.

As government inaction fails to secure our climate, land and water from the impacts of coal and unconventional gas, people across the country are speaking out and defending their local communities.

This resource allows people to take informed risks and be educated on their legal rights in the event they wish to take action themselves.

Mining, the law and the community

The legal framework that regulates mining is designed to allow mining and unconventional gas developments to go ahead. While laws regulate their operations, the laws alone will not stop coal seam gas (CSG) and other forms of unconventional gas going ahead in communities that don’t want gas development.

The objectives of the relevant Acts make it clear that their purpose is to facilitate mining and exploration. CSG is regulated by the Mineral Resources (Sustainable Development) Act 1997 (MRSD Act). The purpose of the MRSD Act is to ‘encourage mineral exploration and economically viable mining and extractive industries which make the best use of, and extract the value from, resources in a way that is compatible with the economic, social and environmental objectives of the State.’¹ Other forms of unconventional gas (shale and tight gas) are regulated by the Petroleum Act 1998. Its objective is to ‘encourage the exploration for petroleum in Victoria and to promote petroleum production for the benefit of all Victorians.’²

In this context, peaceful community action can have an important role to play for communities who do not want to see coal or unconventional gas in their local area.

Purpose of this handbook

The purpose of this handbook is to help you understand your rights and what risks you might be taking, including when you could be arrested and what you could be charged with, if you choose to participate in protests and other actions.

While some of the information in this handbook may be useful in actions relating to unconventional gas, and coal mining across Australia, the laws discussed only apply in Victoria.

Why protest?

There can be many reasons people will use peaceful direct actions as part of their campaigns—this can be to generate public awareness and media attention, to remove the ‘social licence’ of the company to operate or to place pressure on companies or government to stop physically destructive projects, or change laws. Some communities consider it a demonstration of their commitment to physically intervene in destructive projects when all other options are exhausted.



¹ Mineral Resources (Sustainable Development) Act 1997, section 2

² Petroleum Act 1998, section 3

1 Risks of protesting:

What happens if you are charged with a crime?



People such as teachers, doctors, lawyers and other professionals have participated in peaceful civil disobedience actions with relatively minor consequences.

While protesting in itself is not illegal, protests sometimes involve a conscious decision to break the law. Laws around protests are discussed in detail in section 2. Protests often involve police, protective services officers and other authorised officers. In some instances, people can be arrested and charged with criminal offences. Offences you might be charged with, the meanings of 'arrest' and what being charged means are discussed in section 4. This section contains a brief outline of the risks of being convicted of an offence, with more detail and FAQ available in section 8.3.

1.1 Common concerns about having a criminal conviction

Many people new to campaigning and activism have serious concerns about having a criminal record and the impacts that may have on employment, including working with children, or travel. People such as teachers, doctors, lawyers and other professionals have participated in peaceful civil disobedience actions with relatively minor consequences – see the examples in the box, below. However, you should always assess the risks for your own situation. The following information helps you to understand some of the risks before taking any action that may break the law.

Can anyone see my criminal record?

Police can only release your criminal record to another person or organisation with your consent.³

Some organisations that ask for a criminal record check include employers, embassies and some organisations that issue licences.⁴

Being convicted of a crime may not automatically result in you getting a criminal record. See section 6 for more information.

³ www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/possible-outcomes-for-criminal-offences/criminal-records (accessed 9 September 2014)

⁴ For more detail see www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/possible-outcomes-for-criminal-offences/criminal-records (accessed 9 September 2014)

Case studies



Roger* was convicted of multiple civil disobedience offences (for example, trespass) and has successfully applied for and been granted a visa through the normal visa waiver process to the United States, having disclosed his criminal record. He also travelled without incident through Indonesia and Europe.



Jane has participated in multiple peaceful civil disobedience actions in Victoria and Queensland and received convictions for trespass and resisting arrest. She disclosed this when applying for a visa to the United States. As a result she had to take some extra steps in her application process, was asked for a national police clearance certificate and was interviewed. She then received her visa.



Rachel participated in civil disobedience actions and received a Section 10 (NSW equivalent of no conviction recorded) and good behaviour bond. She was admitted to practice law after disclosing her record, while still on a good behaviour bond.

*these are actual examples, but pseudonyms have been used

Just because you have a criminal record does not necessarily mean your ability to work, travel and get licences will be impacted.

How far back will a criminal record check go?

In Victoria, in general, a criminal record check is for a period of ten years from the time of sentencing if you were 18 years old or older, or five years if you were under 18 years old.⁵ However, there are some organisations that will request a criminal record check for a longer period of time.⁶

Important note

Just because you have a criminal record does not necessarily mean your ability to work, travel and get licences will be impacted. The nature of what you have been charged with is relevant. For example, if you are convicted of a nonviolent offence like trespass, you will still be able to get a 'Working with Children clearance' for jobs working with children.

Case study

Barry was given a 'diversion' from a trespass charge, and Lisa has been convicted of trespass and obstruction. They both received working with children clearance and were able to have foster children in their care.



⁵ www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/possible-outcomes-for-criminal-offences/criminal-records (accessed 9 September 2014)

⁶ For details of when organisations and licencing bodies can ask for a criminal record check that is more than 10 years old, see www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/possible-outcomes-for-criminal-offences/criminal-records (accessed 9 September 2014)

2 Protesting and criminal charges

Generally speaking, if you behave in a peaceful and respectful manner, you are unlikely to be charged with a serious offence.

It is not illegal to protest and much protest activity does not involve breaking the law. However, some protest actions can result in breaking the law. This chapter explains common offences that protestors are charged with, so that you can make an informed decision about whether your actions involve breaking the law.

The first part of this chapter discusses offences that may apply if you participate in a peaceful protest. The second part discusses offences that have more serious consequences but are likely to be avoided if you participate in a peaceful and well-organised action. Generally speaking, if you behave in a peaceful and respectful manner, are not abusive, threatening or violent, you are unlikely to be charged with a serious offence.

For the penalties involved with each charge please see the table in the appendices.

2.1 Trespass

Trespass can be a criminal offence, which means you can be arrested and charged if you trespass.


The offence of trespass can involve one or more of the following types of behaviour:

- being on someone else's land (whether public or private land) without a good reason and without the permission or authorisation of the owner, occupier or their authorised representative;⁷
- remaining on someone else's land (whether public land or private land) after being asked to leave;⁸
- being on someone else's land (whether public land or private land) after being told not to enter, by the owner, occupier or their authorised representative;⁹

⁷ Summary Offences Act 1966 (Vic)s 9(1)(e) and 9(1C)

⁸ Summary Offences Act 1966 (Vic)s 9(1)(d)

⁹ Summary Offences Act 1966 (Vic)s 9(1C)

- 
- A woman with short blonde hair, wearing a bright yellow long-sleeved shirt and a dark blue knitted hat with a yellow band, is speaking at a protest. She has a yellow circular badge on her hat that reads "On-National Party Supporters Against CSG". In the background, other people are visible, including a man in a grey shirt and a hat.
- being on someone else's land (whether public land or private land) if there is a sign telling you not to enter the land,¹⁰ or being on someone else's land and carrying out an activity if there is a sign telling you not to carry out that activity;¹¹
 - being on someone else's land (whether public land or private land) without a lawful excuse and causing a breach of the peace;¹²
 - damaging, polluting or obstructing water bodies such as ponds or dams;¹³ or
 - damaging any public or private property, if the damage is less than \$5000.¹⁴

Examples of reasons or excuses to be on land without express permission include going to a park to go for a walk, or going through a place so that you can go to work.

There may also be local laws, put in place by your local Council, that restrict how you can use public land. For example, camping may be prohibited in some areas. You can check the local laws on your local Council's website.

10 Summary Offences Act 1966 (Vic)s 9(1C)(c)

13 Summary Offences Act 1966 (Vic)s 9(1)(a)

11 *ibid*

14 Summary Offences Act 1966 (Vic)s 9(1)(c)

12 Summary Offences Act 1966 (Vic)s 9(1)(g) and 9(1E)

2.2 Change to 'move on' powers

In 2014 a range of "move on" powers were given to police under the Summary Offences Act, including the ability to apply exclusion orders to individuals who breached these newly instigated move on laws.

In March 2015, after a strong community campaign, these laws were repealed in their entirety by the newly formed ALP government. All provisions were repealed and no longer apply.

There are specific laws that may apply to protesters in state forests where forestry operations occur. The above advice on trespass does not apply to protest in an area where forestry takes place. If you propose to take any protest action in a state forest, we recommend you first read the 'Legal Guide for Forest Activists in Victoria', prepared by Lawyers for Forests and available at this website: www.lawyersforforests.asn.au/images/stories/pdfs/Guide.pdf

2.3 Obstructing a footpath or road

If you obstruct a footpath or road, such as with a vehicle or objects, you may be charged with a public order offence.¹⁵

2.4 Besetting

If you stop or try to stop someone who has a right to enter, use or leave a premises from entering, using or leaving a premises,¹⁶ you could be charged with 'besetting'. To be charged with 'besetting' you must be surrounding the premises so as to obstruct the entry and exits to the premises in such a way that it is not possible for a person to enter or exit the premises.¹⁷

The offence of besetting might apply if you decide to surround a premises and prevent people from undertaking the work they are employed to do or prevent the public from lawfully accessing the premises— that is, you decide you want to 'shut the place down'.¹⁸

15 Summary Offences Act 1966 (Vic)s 4(e)

16 Summary Offences Act 1966 (Vic)s 52(1A)

17 *Victoria Police v Anderson* [2012] VMC 22 (Max Brenner Case); www.lawhandbook.org.au/handbook/ch11s02s04.php (accessed 9 September 2014)

18 *ibid*

2.5 Posting bills and defacing property

You cannot write, paint or deface any structure, tree, road or footpath unless you have the permission of the owner or occupier.¹⁹ If you do, you may be charged with defacing property.²⁰

You should keep this in mind if you decide to affix a poster to an object or tree, or paint or graffiti an object, or do anything else which could be said to damage or spoil an object.

2.6 Resisting, hindering and obstructing arrest

Generally speaking, if you make it difficult for police or protective services officers or a local authority to carry out their duties, or to arrest you, you are committing an offence.²¹

You may be charged if you make it difficult for police or protective services officers or a local authority to arrest you, such as by being violent or running away, or if you encourage someone else to do the same.²²

In general 'going limp' to make the arrest difficult for police officers is not considered an active form of resistance.²³

You should also be aware that if you are 'locked on' to a piece of machinery that you could receive a charge of resisting arrest, in addition to other charges.

In mass protest situations activists have occasionally used power of numbers to peacefully intervene in an unlawful arrest (this is termed de-arresting). This could result in charges of hinder and obstruction.

2.7 More serious offences

Charges such as assault, threatening injury or weapons charges could not only have serious consequences for you, but they can also negatively impact the campaign or issue you are trying to highlight. These offences to avoid are detailed below.

19 Summary Offences Act 1966 (Vic)s 10(1) and the Environment Protection Act s45O

20 Summary Offences Act 1966 (Vic)s 10(1)

21 Summary Offences Act 1966 (Vic)s 52(1)

22 Summary Offences Act 1966 (Vic)s 52(1)

23 www.activistrights.org.au/handbook/ch02s08s06.php (accessed 9 September 2014)

2.8 Offensive or threatening language

If you speak or behave in an offensive, threatening or abusive manner within earshot of others in a public place, you may be charged with an offence.²⁴

2.9 Using violence or threatening violence to prevent police from carrying out their duties

2.9.1 Threatening injury

If you try to prevent or hinder the arrest or detention of yourself or another person by threatening to injure a person or property, you may be charged with preventing an arrest.²⁵ If you prevent a member of the police force or protective services officer from investigating any act or situation, you may be also charged.²⁶

2.9.2 Assault

It is a serious offence if you assault or threaten to assault a police officer, protective services officer or any other person in order to prevent you or someone else being arrested.²⁷ It is also an offence to assault or threaten to assault a police officer, protective services officer or a person assisting police, in order to prevent the police from doing their duty. Assault can be any form of touching a person or their clothing where the person has not given you permission to do so. This can also be indirect force for example, applying liquid to someone.

You should be aware that it is easy to accidentally touch someone at protests or pickets and activists have been charged for unintentional actions so be mindful of your surroundings.



24 Summary Offences Act 1966 (Vic)s 17

25 Crimes Act 1958 (Vic) s 30

26 Crimes Act 1958 (Vic) s 30

27 Crimes Act 1958 (Vic) s 31(1)

2.10 Offences relating to weapons

If you carry a weapon with you, such as a knife, you should ensure that they are carried in a safe and secure manner and only for a purpose such as employment, sport, recreation or entertainment, for example cooking or camping.²⁸ Otherwise, possessing a weapon can be an offence.²⁹

It is important for you to keep this in mind if you usually carry a knife (such as a pocket knife) and are planning on being involved in a protest. Carrying a pocket knife might give police a basis for charging you.

2.11 Trespassing and other offences on critical infrastructure

After the successful large peaceful climate-focused convergences at Hazelwood coal-fired power station in 2009 and 2010, the government introduced legislation to deter further protest activity and marginalise peaceful protesters.

Penalties for trespassing and property damage on critical electricity infrastructure are much more severe than their ordinary equivalents (see the table at appendix 1).

Critical electricity infrastructure includes certain large electricity generation facilities,³⁰ a related coal mine or substation, a terminal station or distribution system or a transmission system switchyard.³¹

2.11.1 Trespass on critical infrastructure

It is an offence to be on land or premises or in an enclosure containing critical electricity infrastructure without authority.³²

²⁸ Control of Weapons Act 1990 (Vic)ss 6(1) and (2)

²⁹ Control of Weapons Act 1990 (Vic) s 6(1)

³⁰ Electricity Industry Act 2000 (Vic)s 3; electricity generation facilities that have an installed or name plate generation capacity of 1,000 kVA or greater, and include a water storage facility

³¹ Electricity Industry Act 2000 (Vic)s 3

³² Electricity Industry Act 2000 (Vic)s 79

2.11.1.1 Damage or interference with critical infrastructure equipment

It is an offence to damage or interfere with equipment that forms part of critical electricity infrastructure, if you are reckless about whether the act will disrupt the generation, transmission or distribution of electricity.³³

2.11.2 Damage or interference with critical infrastructure vehicle

It is an offence to interfere with or damage a relevant infrastructure vehicle without authority and be reckless about whether this will result in a disruption to the generation, transmission or distribution of electricity.³⁴

A relevant infrastructure vehicle is a vehicle used as part of the production process for generating electricity or for the purpose of maintaining critical electricity infrastructure.³⁵

³³ Electricity Industry Act 2000 (Vic)s 80(1)

³⁴ Electricity Industry Act 2000 (Vic)s 80(2)

³⁵ Electricity Industry Act 2000 (Vic)s 80(2)

Case study

Two activists scaled Yallourn Power Station in 2012 and occupied the side of the cooling tower for over 24 hours. They were charged with trespass on critical infrastructure. The Police Prosecutor initially offered them 'diversion' as a sentence (see section 6.2), including an order for compensation (see section 6.3) to the power company (for use cherry picker, and other alleged expenses) of \$16,000. They refused and argued they had no means to pay.

The police prosecutor then returned with a revised compensation order of \$5,000. They refused that, and as a result, the offer of diversion was withdrawn. They were found guilty and given a dismissal (section 6.1) and a compensation order of \$5,000 (\$2,500 each). The compensation order is currently being appealed.

3 Interactions with police

If you do not wish to answer a police officer's questions, do not say anything – this cannot be used against you.

It is vital to understand and assert your rights in any interactions with police. Having a respectful relationship with police can contribute towards a safer action outcome in some instances. However it is very important to not be naive in these situations—police have differing objectives to community campaigners, and will act accordingly. There can be a difference between what is lawfully required of police, and how they choose to respond to protest in reality.

For detailed explanations and for further rights and obligations, see the following.

3.1 Providing personal details

Do I have to give my name and address to a police officer?

Yes, in some circumstances.

If the police believe you have committed or are about to commit an offence you must give the police your name and address.³⁶ If the police ask for your name and address they must tell you why they believe you have committed an offence.³⁷ The police officer must give you enough detail so you understand the offence.³⁸

If police give you an order to 'move on' (see section 2.2) and ask for your name and address you must give the police your name and address.³⁹

If you do not give your name and address or you give a false name and address you could be charged.⁴⁰

If you have not been accused of committing an offence you do not have to give your name and address. It has, however, been the experience of activists that police commonly believe they have a right to ask for and receive this information. It is suggested that you politely assert your rights and question what offence they believe you have committed or are about to commit.

³⁶ Crimes Act 1958 (Vic)s 456AA(1)

³⁷ Crimes Act 1958 (Vic)s 456AA(2)

³⁸ Crimes Act 1958 (Vic)s 456AA(2)

³⁹ Summary Offences Act 1966 (Vic) s 6B

⁴⁰ Crimes Act 1958 (Vic)s 456AA(3) and Summary Offences Act 1966 (Vic) s 6B(3)

You must provide your name, address and driver's licence when driving a motor vehicle if asked by a police officer, or an authorised officer.⁴¹

Are police officers required to provide me with their details?

Yes.

If a police officer asks you for your name and address you have a right to ask that the police officer for:

- their name;
- their rank; and
- the police station where they work.⁴²

The police officer cannot refuse to give you this information or give you false information.⁴³

While it is unlawful for the police to refuse to give you this information, many activists have experienced police refusing to comply with this, particularly at large-scale convergences such as Occupy Melbourne⁴⁴ and S11 (anti-globalisation protests).⁴⁵ It is a good idea to record these instances.

3.2 Directions to move on

When can a police officer ask me to move on?

See section 2.2. above.

3.3 Police questions and interviews

Do I have to answer questions from the police?

No.

Other than providing your name and address, as above, you do not have to answer any other police questions—you can remain silent, or say 'no comment'.⁴⁶ Police officers can use anything you say to arrest or charge you, or as evidence in court.

There is no such thing as an 'off the record' conversation. In other words, police can record and use everything you say, even if you ask them not to.

Do not lie to police. For example, do not say you cannot 'lock off' (if you are attached to equipment) if you can 'lock off'. Lying to police could be used against you. Simply refuse to say anything, or say no comment—this cannot be used against you.

Do I have to answer any questions from the police if I am arrested and in custody?

No.

If you are arrested and put in custody (that is, imprisoned by police, either in a cell or otherwise) the police may try to question you formally. Before any questioning begins the police must allow you to phone a lawyer.⁴⁷ You must also be allowed to try to contact a friend or relative.⁴⁸

If you wish to speak with a legal practitioner, the police must allow you to do so in circumstances in which, as practicably as possible, you will not be overheard.⁴⁹

In an interview, you still have a right to remain silent, and this silence cannot be used against you in court.

The police officer must inform you of these rights before they begin questioning you.⁵⁰



⁴¹ Road Safety Act 1986 (Vic) s 59

⁴² Crimes Act 1958 (Vic) s 456AA(4)

⁴³ Crimes Act 1958 (Vic) s 456AA(5)

⁴⁴ Alejandra Seguel González, Rhys Aconley-Jones and David Adam, *Occupy Policing*, October 2012, p 60

⁴⁵ Wikipedia, S11 (protest), www.en.wikipedia.org/wiki/S11_%28protest%29, downloaded 9 September 2014

⁴⁶ Crimes Act 1958 (Vic) s 464J

⁴⁷ Crimes Act 1958 (Vic) s 464C(1)

⁴⁸ Crimes Act 1958 (Vic) s 464C(1)

⁴⁹ Crimes Act 1958 (Vic) s 464C(2)

⁵⁰ Crimes Act 1958 (Vic) s 464C(1)

Unless you have spoken to a lawyer before an interview and they have advised you otherwise, we recommend you give a 'no comment' interview - meaning that you say 'no comment' in response to questions by police, other than those relating to your name and address.

Again, remember there can be serious consequences if you lie to police. Lying to police could be used against you. If you do not wish to answer a police officer's questions, do not say anything—this cannot be used against you.

Can the police interview me if I am under 18 years old?

If you are under 18 the police cannot question you or carry out an investigation unless you have your parent or guardian present.⁵¹ If your parent or guardian is not available, an independent person must be present.⁵²

Do I have the right to an interpreter?

Yes. If you are arrested and you do not have sufficient knowledge of the English language, then before any formal questioning commences you have a right to ask for an interpreter.⁵³ You have the right for the questioning to be delayed until a competent interpreter is present.⁵⁴

What if I am an Indigenous Australian?

If you are an Indigenous Australian you should tell police. The police must then notify Victorian Aboriginal Legal Aid and any local Aboriginal Justice Panel.⁵⁵

What if I am not an Australian citizen?

If you are not an Australian citizen, you have a right to contact your consulate.⁵⁶

51 Crimes Act 1958 (Vic)s 464E(1) 54 ibid

52 ibid

53 Crimes Act 1958 (Vic)s 464D

55 www.activistrights.org.au/handbook/ch02s11s04.php (access 15 Oct 2013)

56 ibid

3.4 Photographs, fingerprints and forensic material

3.4.1 Photographs

Do police have the right to take my photograph?

A police officer (or anyone else) may film or take photographs in public.

If you are in custody, you have the right to refuse to have your photo taken by police.⁵⁷ If you do not want to be photographed, you should make your objection clear. A police officer cannot use force to take your photo.⁵⁸ If a police officer takes your photo against your wishes you can lodge a complaint.

3.4.2 Fingerprints

When can the police take my fingerprints?

The police can take your fingerprints if:

- you are aged 15 years or over and
- the police believe on reasonable grounds that you have committed, or you have been charged with, an offence.⁵⁹

Police can use reasonable force to obtain your fingerprints. If you are not charged with the offence for which your fingerprints were taken or if you are found not guilty of that offence, then your fingerprints will be destroyed after six months.⁶⁰

You must also be told the offence police believe you have committed, or you have been charged with.⁶¹

57 R v McPhail and Tivey (1988) 36 A Crim Reports 390

58 Charter of Human Rights and responsibilities Act 2006 (Vic)s 13

59 Crimes Act 1958 (Vic) s 464K(1)

60 Crimes Act 1958 (Vic)s 464K(2)

61 Crimes Act 1958 (Vic)s 464K(2)

3.4.3 Body samples

When can the police take body samples from me?

Police can only take a body sample from you if you are over 18 years old and:⁶²

- you are suspected of having committed a serious offence; or
- you have been charged with a serious offence

and the police reasonably believe that taking a sample would either prove or disprove your involvement in that offence.

You can refuse to give a body sample.⁶³ If you refuse you should make your intention clear to remove any doubt. Body samples can include hair, material under your fingernail, blood or a swab from your mouth. If you refuse, the police must seek a court order or approval from a senior police officer to take body samples.⁶⁴ Court orders are required to take 'intimate' body samples, which include taking your blood, a sample from inside your mouth or a sample from your genital area.⁶⁵

3.5 Searching people and property

3.5.1 People

When can the police search me?

Police can only search you if:⁶⁶

- they have a warrant
- you give them consent to search you; or
- you are under arrest (see below).

If you are under arrest the police can only search you if they believe they must search you to preserve evidence or find a weapon which may be used to harm yourself or others or to escape custody.⁶⁷ The police must tell you why they are searching you.⁶⁸

⁶² Crimes Act 1958 (Vic) ss 464R

⁶³ Crimes Act 1958 (Vic) ss 464R, 464S; www.legalaid.vic.gov.au/find-legal-answers/police-powers-and-your-rights/fingerprints-and-body-samples (accessed 9 September 2014)

⁶⁴ *ibid*

⁶⁵ *ibid*

How about my right to privacy?

Police must be mindful of your right to privacy and dignity.⁶⁹

If possible, the search should be conducted by a police officer of the same gender as that with which you identify.⁷⁰ It is suggested that you request this if it will make you more comfortable.

Can a police officer search me in a public space?

A police officer may search you in a public space if they reasonably suspect you are carrying a weapon (for example a knife) or something that could be used to graffiti property (for example a permanent marker).⁷¹

3.5.2 Property

Do the police have a right to take my property?

The police only have a right to take your property if:

- you are under arrest;
- the police have a search warrant; or
- the police have reasonable grounds to believe you possess something illegal, for example, a weapon (this could include a pocket knife).

The way you speak or dress are not reasonable grounds for searching you and taking your property.

Can the police search my vehicle?

The police can only search your vehicle if:

- your vehicle is in a public place and the police believe on reasonable grounds that the vehicle may contain evidence of a crime or offence;⁷²

⁶⁶ Victoria Legal Aid, *Being Arrested*; www.legalaid.vic.gov.au/find-legal-answers/police-powers-and-your-rights/getting-searched (accessed 28 April 2014)

⁶⁷ Victorian Government Printer, *Review of Victoria Police 'Stop and Search' Powers 2012*

⁶⁸ *ibid*

⁶⁹ *ibid*

⁷⁰ *ibid*

⁷¹ Victoria Legal Aid, *Being Arrested*; www.legalaid.vic.gov.au/find-legal-answers/police-powers-and-your-rights/being-arrested (accessed 9 September 2014)

⁷² Police Regulations Act 1958 (Vic) s 100

- the police have a search warrant;⁷³ or
- you give police permission.

If a police officer asks to search your vehicle, you have a right to refuse. Some activists' experiences have been that some police will act as though they have the right to search your vehicle. It is suggested that you politely assert your rights and question on what basis they believe your vehicle may contain evidence.

A reasonable ground is more than just the way you or your car looks. If you choose to allow a police officer to search your vehicle, anything the police find which may be of assistance to them can be seized and used as evidence.⁷⁴ Experience from past protests suggests that if you chose to take your vehicle to a protest your vehicle should be in roadworthy condition to ensure you do not receive a defect notice.

3.6 Police behaviour

Police have a responsibility to be fair in their dealings with the community.⁷⁵ Their decisions and actions must also comply with the Victorian Charter of Human Rights and Responsibilities.⁷⁶ The Charter contains a series of rights, some of which are relevant to interactions with police. For example, the Charter requires that 'All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person'.⁷⁷

In short, police are supposed to treat you fairly and with respect at all times.

Police cannot discriminate against you in anyway. This includes discrimination based on the way you look, your age, gender or any other matter.

What about if I am 'locked on'?

Police are supposed to behave fairly and ethically towards the community at all times regardless of whether you are 'locked on' or not.

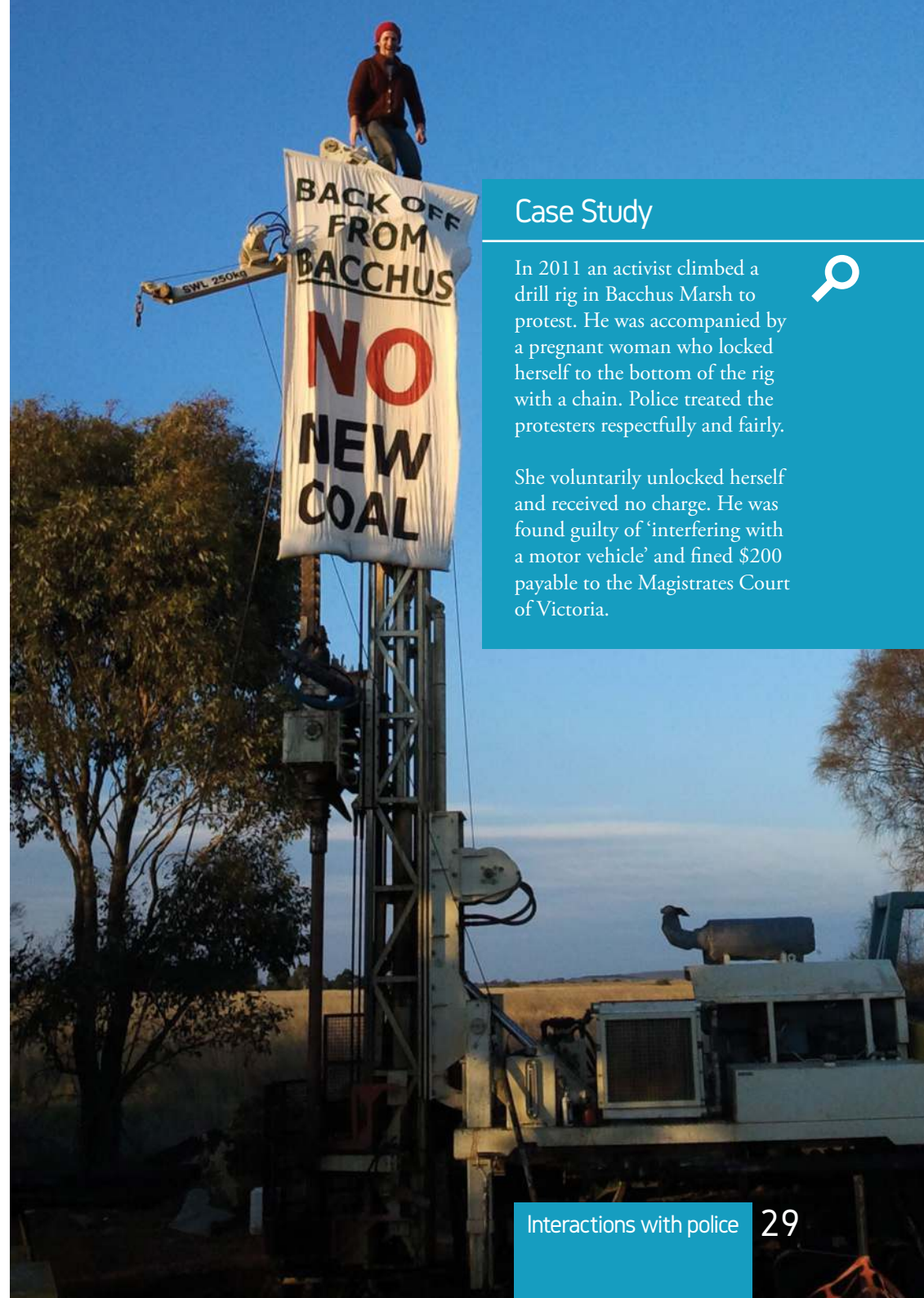
⁷³ Police Regulations Act 1958 (Vic) s 100A

⁷⁴ Police Regulations Act 1958 (Vic) s 100(3)

⁷⁵ Police Manual – Code of Conduct

⁷⁶ Charter of Human Rights and Responsibilities Act 2006 (Vic); Police Manual - Code of Conduct

⁷⁷ Charter of Human Rights and Responsibilities Act 2006 (Vic) s22



Case Study

In 2011 an activist climbed a drill rig in Bacchus Marsh to protest. He was accompanied by a pregnant woman who locked herself to the bottom of the rig with a chain. Police treated the protesters respectfully and fairly.

She voluntarily unlocked herself and received no charge. He was found guilty of 'interfering with a motor vehicle' and fined \$200 payable to the Magistrates Court of Victoria.

Experiences of protesters suggest that in some instances protesters are not treated with fairness and respect. If you feel the police are not behaving fairly and ethically while you or someone else is protesting, including someone who is locked on, you should politely ask that they do what you believe would reasonably be considered ethical. You should also note the details of the police officer involved. This will be helpful if you need to make a complaint either by calling the Officer in Charge at the police station on the day or if you wish to make a complaint after the protest (see section 3.6.2 below).

In some protests where there have been 'lock ons' and police have refused to allow supporters to assist with toilet needs, or have refused access to water, it has been useful to contact both the Officer in Charge as well as any relevant police media units to place pressure on them, and use social media to increase public awareness.

3.6.1 Police tactics

While it is useful to be polite and civil in all interactions with police, sometimes the experience has been that they are not always polite and civil with protesters and may say things to protesters that are misleading.

For example, when police are trying to remove an obstruction caused by a protest, activists are often threatened with heavy fines, and more charges than it is reasonable to expect in the circumstances. This is why it is useful to know your rights, and the likely charges you may receive in any given circumstances. Sometimes activists have also been told if they 'unlock' or leave voluntarily, that they will not receive any charges. This has not always proved to be the case.

3.6.2 Mistreatment and complaints

As mentioned above, there have been many reports of some Victorian Police not treating protesters with fairness and respect⁷⁸, or complying with the Police Manual Code of Conduct.

What if I have been mistreated by police?

If you feel you have been mistreated by police, you should lodge a complaint. If you have been charged and were treated roughly or unfairly either during your arrest or while in custody, it is important to tell your lawyer about this treatment.

How do I lodge a complaint about police?

For the police officer to be charged, you will need to make a complaint about the police officer's conduct.

You can make complaints about police conduct to:

- the police officer's police station;
- the Victoria Police Conduct Unit; and/or⁷⁹
- Independent Broad-based Anti-Corruption Commission (IBAC).⁸⁰

You should be mindful that as some of the above procedures involve review by the police, you may not receive the result you want. It is advised that if you want to make a complaint, you should ask a lawyer for help.

Further information on police complaints can be found at:
www.activistrights.org.au/handbook/ch02s12s01.php

⁷⁸ For example, Occupy Melbourne Policing: www.occupypolicing.wordpress.com/occupy-policing-report/

⁷⁹ www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=33328 accessed on 9 September 2014

⁸⁰ www.ibac.vic.gov.au/report-corruption-or-misconduct/how-to-report-corruption-and-police-misconduct accessed on 9 September 2014

4 Being arrested

Being arrested means you are required to go with the police. Once arrested, you are not free to go until they release you. Usually, after you're arrested police will take you to the police station.

Being charged means police think you have committed a crime and that they intend to start court proceedings against you, to argue that you should be convicted of a crime. They will either give you a charge sheet or send you a summons, telling you when you need to appear in court.

You can be arrested without being charged (if the police believe at the time of the arrest that you have broken the law), and be charged without being arrested.

If you are considering participating in a deliberate civil disobedience arrest it is useful to consider wearing comfortable clothes, carrying a supply of personal medication if needed, and your ID if you want to be processed quickly. Many activists write the name and/or number of a legal support person on their arm so this person can be contacted if they are arrested.

4.1 Being arrested by police

When can the police arrest me?

A police officer can arrest you if:

- they have a reasonable belief that you have broken a law;⁸¹ or
- they have a warrant.⁸²

An arrest can involve the police officer touching you, or simply saying 'you are under arrest'. If a police officer arrests you, you should ask for the reason. You can only be arrested for a reason.

It is a good idea to remember the reason for your arrest, as the police can only arrest you for a reason and this could be useful if a later dispute arises concerning your arrest. Also, sometimes the reason given for your arrest is not the same as the offence you end up being charged with. This information could be useful if you are disputing your charge.

⁸¹ Crimes Act 1958 (Vic)ss 458, 459

⁸² Crimes Act 1958 (Vic)ss 457, 464X

If a police officer arrests you, you should ask for the reason. You can only be arrested for a reason.

If you are arrested but refuse to go with the police, the police officer can charge you with resisting arrest.⁸³ See section 2.6.

Police officers can use reasonable force to arrest you.⁸⁴ That is, the police can only use the minimum amount of force necessary to arrest you. If you are arrested, police cannot use force if you are complying with their orders.

4.2 Being arrested by others

Can someone other than a police officer arrest me?

4.2.1 Protective services officer

Protective services officers (PSOs) are uniformed officers, employed by the police. They do not have all the powers police have, but can issue fines and arrest people.⁸⁵ PSOs' powers can only be exercised in designated areas, which are areas in and around public transport facilities.⁸⁶

After making the arrest the PSO must hand you to a police officer as soon as possible.⁸⁷

4.2.2 Security guards and members of staff of premises

Security guards do not have any more powers than an ordinary citizen. Anyone, including a security guard, or a member of staff of employed at the property you are on, may arrest you if they believe it is necessary to prevent you from committing an offence.⁸⁸ A security guard or member of staff can also ask you to leave private property, on behalf of a property owner (see section 2.1 on trespass).

⁸³ Summary Offences Act 1966 (Vic) s 52(1)

⁸⁴ Crimes Act 1958 (Vic) s 462A

⁸⁵ Crimes Act 1958 (Vic) s 459(1)

⁸⁶ Police Regulations 2013, cl. 54

⁸⁷ Crimes Act 1958 (Vic) s 459(2)

⁸⁸ Crimes Act 1958 (Vic) s 462A

⁸⁹ Crimes Act 1958 (Vic) s 464I

⁹⁰ Criminal Procedure Act 2009, s 7

4.3 Being detained by police

Can the police detain me?

If you are not under arrest the police cannot hold you against your will (detain you) for any reason.⁸⁹ This includes taking you to the police station.

If you are not under arrest and you do not want to accompany police, make it very clear that you do not consent to questioning or going with police.

If you are arrested, the police can take your details and release you. They may later send you a 'summons', which is a notice that you have to attend court. For summary offences (minor offences) police need to charge you within 12 months of arresting you.⁹⁰

Case Study

In 2012 nine activists from Quit Coal chained themselves to the base of Victorian parliament house, while two climbers unfurled a large banner down the side of Parliament. Police took their details and stated they may receive a summons to appear in court. This never happened. No charges were laid. The event gained widespread media attention.

If police don't take your details and release you, the other option is to take you into custody; that is, the police will take you to a police station, custody centre or a cell at a court. The police may handcuff you and take you in a police vehicle.

4.4 When in custody

What happens once I am in custody?

Once arrested, you will be taken to the police station for processing. During processing you could expect the police to tell you what you are being charged with, and to remove and give you a receipt for your property. Police may search you, ask for fingerprints and your photograph, try and interview you and you may be placed in a cell which may be shared. See section 3 for information on these processes, including on answering police questions when you are in custody.

Once in custody, the police must do one of the following:

- release you without charge;
- decide to charge you, but release you unconditionally and charge you at a later date;
- release you on bail (see section 4.7, below); or
- bring you before a bail justice or the Magistrates' Court.⁹¹

The police must do one of these things within a reasonable amount of time.⁹² To determine what is meant by a reasonable amount of time, factors including the amount of time needed to undertake various tasks and the seriousness of the offence are taken into consideration.⁹³

If you believe the police have kept you in custody for too long:

- ask when they will charge you or release you; and
- ask to phone a lawyer.⁹⁴

What happens to my personal property when I am in custody?

If the police place you in a holding cell they will take your personal property.⁹⁵ The police must list all of the property they take from you on a property sheet and ask you to sign the sheet so that you can verify the property that they have taken from you.⁹⁶

Once you are released from custody the police must return your personal property to you.⁹⁷ However, the police do not have to return your personal property if they are keeping your property as evidence.⁹⁸ Ensure you get a record of any property police are keeping.

91 Crimes Act 1958 (Vic) s 464A(1); Activists Rights Handbook, www.activistrights.org.au/handbook/ch02s11s11.php (accessed on 9 Sept 2014)

92 Crimes Act 1958 (Vic) s 464A(1)

93 Crimes Act 1958 (Vic) s 464A(4)

94 Victoria Legal Aid, Being Arrested; www.legalaids.vic.gov.au/find-legal-answers/police-powers-and-your-rights/being-arrested (accessed 9 September 2014)

95 *ibid*

96 *ibid*

97 *ibid*

98 *ibid*

What happens when I leave custody?

When releasing you from custody, the police may ask you whether you were reasonably treated.⁹⁹ You may also be asked to sign the Attendance Register Book.¹⁰⁰ If you sign the Attendance Register Book you acknowledge:

- the police have not taken anything from you;
- you have been treated reasonably; and
- you have received your police charge sheets (if you have been charged).¹⁰¹

You are not obliged to sign the Attendance Register Book.¹⁰²

4.5 Bail

Police can release you from the police station on bail, which means that there are a series of conditions attached to your release. If you break these conditions you could be arrested and fined and the breach will be recorded on your criminal record. Conditions can include requiring you to give an undertaking (promise) to attend court on a certain date and requiring you to report into the police station on regular intervals. Bail conditions can also include a condition that you don't return to a protest site.¹⁰³

If police don't grant you bail, you can ask for bail, and they must take you before a court as soon as possible, so you can apply to the Magistrate for bail. You should ask to see a lawyer before you appear before the court for bail. You can also apply to the court to vary your bail conditions.

99 Fitzroy Legal Service Inc. Activists Legal Rights

100 Fitzroy Legal Services Inc. Activists Rights; www.activistrights.org.au/handbook/ch02s11s11.php (accessed 07 October 2013)

101 *ibid*

102 *ibid*

103 www.activistrights.org.au/handbook/ch02s11s12.php#Ch1172Se236813

5 Going to court

Knowing the process helps empower you to feel more confident about being in court.

Sometimes being involved in a protest action means that you will have to go to court, either to support someone you know or on your own charges. Knowing the process helps empower you to feel more confident about being in court. If you have to go to court on your charges there are a number of steps you should take before you are due to appear in court. It is important you prepare for your time in court emotionally, financially and practically.

5.1 Legal Assistance

You are entitled to represent yourself at court or engage a lawyer who will represent you. If you decide to represent yourself it is still recommended that you seek some legal advice as soon as possible after your arrest. This should help you feel more comfortable with the court process and clarify any questions. Some options are as follows.

5.1.1 Private lawyers

Many general practice and criminal lawyers will be able to assist you. They will charge fees which may vary considerably. Make sure you discuss fees at the outset—either on the phone or at the first interview—so that you know what fees to expect. If you decide to engage a lawyer for the entirety of your case make sure you clarify how much you will need to pay and when. They must do this as part of their duties to the profession and to you.

In some circumstances, solicitors or barristers may be prepared to act for you or your group on a 'pro bono' or reduced fee basis. You can check the Law Institute of Victoria's referral website www.liv.asn.au/Referral or call 03 9607 9550 to find a qualified lawyer in your area.

5.1.2 Community legal centres

Community legal centres are non-government, not-for-profit organisations that exist to provide legal assistance to disadvantaged people and make law more accessible to everyone. Many provide free, one-off legal advice. Some will take on your case depending on your circumstance and their intake criteria. For a list of community legal centres near you visit www.nalc.org.au.

5.1.3 Victoria Legal Aid

Victoria Legal Aid is a government organisation that assists people in some criminal matters. It is important to note that eligibility for Victoria Legal Aid is very strict and your income must be below a certain level to receive assistance.¹⁰⁴

5.2 Interpreters

You should be aware there are interpreters available if you are not confident about your English. Local courts have a booking service and in criminal matters this service is usually free. Ask the court registry about finding an interpreter.

5.3 Preparing your case

It is important that you prepare before you go to court. EDO NSW has prepared a useful guide to steps that you should undertake in order to be prepared for court. The guide can be found at this link: http://pandora.nla.gov.au/pan/124833/20130228-0007/www.edo.org.au/edonsw/site/campaigning/campaigning_17.html

5.4 Deciding how to plead

A plea is simply an answer to your charge. After you have received legal advice, you can decide whether you will plead guilty to the charges or plead not guilty and go to trial.

5.4.1 Guilty plea

Pleading guilty means that you accept that you committed the crime.

Even if you want to plead guilty, you should still check the prosecution documents to see if they accord with your recollection of what occurred. Prior to you appearing in Court, you should be sent the preliminary brief, by police.

This will contain details of the prosecution's case against you. If you intend to plead guilty, make sure that you agree with the details in the preliminary brief. If you don't, you can contact police officer who charged you before the hearing to discuss the matter and ask them to change certain facts or withdraw charges.¹⁰⁵

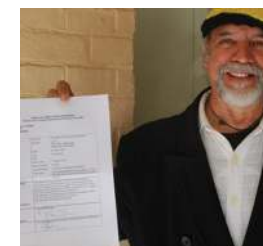
At the hearing, the prosecutor will rely on the 'brief of evidence', which will have the details of the prosecution case, and evidence supporting their case. It will include your criminal history, if you have one, and a 'statement of alleged facts'. If you have a criminal history (including charges where you were convicted but no conviction was recorded), obtain a copy from the police before the hearing to check its accuracy.¹⁰⁶

At the hearing, police will read the 'statement of alleged facts' and your criminal history to the Magistrate. If you do not agree with the statement of alleged facts or think the history is inaccurate, you should tell the Magistrate what you don't agree with, and give your version of events. You can ask the prosecution to see these documents before the hearing.

If you enter a plea of guilty, your matter will go straight to sentencing: the Magistrate will decide what penalty you should get. At a sentencing hearing, you can argue why the sentence should be reduced. Reasons for reducing the sentence can include that you were protesting for a legitimate reason and that you have a good character. You can bring references from people to support your argument that you are of good character.

5.4.2 Not guilty plea

If you plead 'not guilty', your matter will go to a full hearing, where both sides will bring evidence about whether you committed the offence. Sentencing (see above) will only occur if the court finds you guilty. If the court finds you not guilty, you are free to go and you will not have the matter recorded on your criminal record.



¹⁰⁴ www.legalaid.vic.gov.au/get-legal-services-and-advice/who-is-eligible-for-help (accessed on 9 September 2014)

¹⁰⁵ www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/pleading-guilty (accessed on 9 January 2015)

¹⁰⁶ *ibid*

5.4.3 No plea

The entry of no plea by a defendant will be considered by the court as a 'not guilty' plea.

If you do not enter a plea you cannot enter evidence which means only the prosecutor's evidence will be heard.

5.4.4 Unsure of your plea

The best thing you can do if you are unsure of what your plea should be is to seek advice from a lawyer so that you clearly understand the implications and risks of each plea. You can seek the opinion of more than one lawyer but you need to consider costs.

5.4.5 Changing your plea

You can change your plea up to and including the day of your hearing. It is quite straightforward to change your plea from 'not guilty' to 'guilty'. However, it is very difficult to change your plea from 'guilty' to 'not guilty'. Therefore, we strongly recommend that you get legal advice before pleading guilty.¹⁰⁷

If you intend to change your plea, it is best to do so early so as not to inconvenience the court.

¹⁰⁷ Fitzroy Legal Services Inc. Activists Rights, www.activistrights.org.au/handbook/ch02s17s10.php (accessed on 9 September 2014)

5.5 Penalties

When deciding what to plead and how to run your case, always consider the penalties for the offence. For some offences the only way to avoid the penalty is to plead not guilty and win. On the other hand, if you plead guilty, the court will see that you are accepting responsibility for what happened. You might get a less severe penalty. Make sure you seek legal advice on this.

Section 6 discusses possible penalties. In appendix 1 there is also a table of the offences discussed in this handbook and the maximum penalties.

5.6 When in court

On your days in court, it is strongly recommended that you do the following.

- Dress respectfully—this shows to the court that you are taking the matter seriously.
- Speak in turn and do not speak over other parties or the Magistrate.
- Expect to wait. Lots of matters get heard by the court every day, it could be several hours before your matter is heard.
- Address the Magistrate as 'your honour'.

6 Possible outcomes and penalties

It is very rare for nonviolent protesters to go to gaol, even if they've been convicted previously.

If you are found guilty of an offence you will be sentenced. Outcomes can range from no conviction being recorded to going to gaol. It is very rare for nonviolent protesters to go to gaol, even if they've been convicted previously.

Note that the court only orders the maximum penalties in the most serious offences of that nature.

In addition to the penalties listed in the table, the options below are available to Magistrates when sentencing.

6.1 Dismissal

If you are convicted of a less serious offence, the court might decide not to record a conviction. This means that the court has found that you committed the offence, but due to the non-serious nature of the offence and your good record, they have decided that it would not be fair to record a criminal conviction against your name. In Victoria, this outcome is known as a 'dismissal'.

6.2 Diversion

A diversion is an alternate way of dealing with your charge and a way to avoid a criminal record.¹⁰⁸

If a diversion is granted you will be put on a diversion plan. Diversion plans generally go for one year and may include community work, making a donation or writing a letter of apology.¹⁰⁹

If you attend to all of the conditions on your diversion plan then the charges against you will be dropped and you will not get a criminal record.¹¹⁰

Diversions must be agreed to by the prosecutor. You can ask the prosecution to consider offering you a diversion. You can also ask the Magistrate for a diversion, but they cannot give you a diversion unless the prosecutor agrees.

¹⁰⁸ www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/possible-outcomes-for-criminal-offences/diversion-programs (accessed 9 September 2014)

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

For more information on asking for a diversion, see the Victorian Legal Aid website: www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/possible-outcomes-for-criminal-offences/diversion-programs.

Generally, the prosecution will consider offering a diversion if it is your first offence and the charge is not for a serious offence, or, if it's not your first offence, if your previous offences have been relatively minor.

6.3 Compensation orders

The court can order compensation for a person who has 'suffer[ed] loss or destruction of, or damage to, property as a result of the offence.'¹¹¹ These types of orders are increasingly being sought by prosecutors against activists who cause commercial operations to cease operating or incur expenses through their actions. The orders have only been sought with limited success to date, so we recommend you think about challenging any order for compensation if it is for causing inconvenience to a commercial or industrial operation. For example, see the case study on page 19 and the one below.

Case Study



In 2007, four young activists entered Loy Yang power station, locked themselves to machinery and temporarily disrupted conveyor belts. They were charged with trespass. They had to pay \$300 fines and were given a one-year good behaviour bond with no conviction recorded. The police initially applied for \$10,000 compensation but withdrew this request after it was challenged by the activists' lawyers.

6.4 Other penalties

Fines

The court can require you pay money to the court. You can be ordered to pay a fine even if no conviction is recorded.

¹¹¹ Sentencing Act 1991 s 86

¹¹² www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/possible-outcomes-for-criminal-offences/criminal-records (accessed 9 September 2014)

Community Corrections Orders

These may be appropriate in more serious offences, when the Magistrate thinks that a fine is not a sufficient punishment. Community Corrections Orders offer an alternative to gaol, and require a person to not re-offend over a certain timeframe. They may also have conditions on them, such as a requirement to perform a certain number of hours of community service.

Suspended sentences

Magistrates can 'suspend' your sentence, meaning they can sentence you but make an order that you will not serve that sentence if you go for a certain period of time without committing another offence.

Case Study

In 2009, 22 activists were arrested at 'Switch off Hazelwood', a mass convergence drawing attention to Hazelwood, the most polluting power station in Victoria. This was the largest civil disobedience action in Victoria relating to climate change. Most of those arrested were charged with 'Entering Enclosed Lands'. Many people received a diversion or a good behaviour bond and a fine, between \$100 and \$250 payable to various charities or the court.



Among their number were a university lecturer, a doctor, two teachers and other professionals.

6.5 What does the court consider when sentencing?

Courts consider several matters including:

- the timing of your plea – if you decide to plead guilty early, the court may reduce your sentence because you are saving the court's resources;
- previous convictions – if you have existing convictions you are less likely to get an order for dismissal or a diversion. Police have access to all of your past convictions within Australia. So, it does not matter if you were convicted in another state. All of these convictions will be available for the court to see;¹¹²
- if you were engaged in a legitimate and peaceful protest. It may mean you get a less serious sentence; and the maximum penalties for the offence with which you have been charged.

7 Contacts and resources

7.1 Useful websites with additional information

www.activistrights.org.au

www.melbourneactivistlegalsupport.org

www.legalaid.vic.gov.au/find-legal-answers

www.lawhandbook.org.au

www.communitylaw.org.au/flemingtonkensington/cb_pages/policeaccountability1.php

7.2 Useful contacts

Fitzroy Legal Service
Telephone 03 9419 3744

Environmental Justice Australia
Telephone 03 8341 3100 or 1300 336 842

Victoria Legal Aid
Telephone 1300 792 387

Victorian Aboriginal Legal Service
Telephone 1800 064 865

8 Appendices

Appendix 1 8.1 Glossary

Arrest

Literally, stopping. This is when the police take you into their custody or control. You are required to go with police. It does not necessarily mean you will be charged.

Assault

Any form of touching to a person or their clothing where the person has not given you permission to do so. This can also be indirect force for example, applying liquid to someone.

Bail

The system that allows people to be released from custody, subject to conditions.

Besetting

Surrounding a premises so as to obstruct the entry and exits to the premises in such a way that it is not possible for a person to enter or exit the premises.

Charge

A formal allegation of an offence. After arrest, the police have several hours during which they can hold you while they collect evidence to charge you, or not. Being “charged” means the police have accused you of a crime and you are required to face court to determine whether you’re guilty or not.

Controlled weapon

A controlled weapon is a:

- knife, other than a knife that is a prohibited weapon;
- spear gun;
- baton or cudgel, including a police nightstick;
- bayonet; or
- cattle prod.

For a full list of Controlled weapons please consult Schedule 2 of the Control of Weapons Regulations 2011 (Vic).120

Criminal record

A formal record of your interaction with the criminal justice system. It includes information such as, offences, convictions, and penalties. It does not include charges and court appearances (though these appear on your criminal history which is only accessible to the judiciary and police).

Critical electricity infrastructure

Critical electricity infrastructure is a: critical electricity generation facility; related coal mine; or substation, terminal station or distribution system or transmission system switchyard.

Diversion

An alternate way of dealing with your charge and a way to avoid a criminal record.

Diversion plan

A plan of activities you agree to undertake as part of getting a diversion. It may include community work, making a donation or writing a letter of apology, and will generally run for one year.

Intimate body sample

Intimate body samples are:

- a blood sample;
- pubic hair and root if required;
- a swab, washing or sample taken from the external genital or anal region of a male or female or from the breast of a female;
- saliva;
- a scraping taken from the mouth; or
- a dental impression.

Lawful reason

A legitimate reason; for example, a lawful reason to be in a place might be going to the park to go for a walk or going to premises to be able to go to work.

Local authority

Local authority means the council or staff of any municipal district or the closest Magistrate's Court to the area.

Non-intimate body sample

A non-intimate body sample is:

- hair, other than pubic hair;
- matter taken from under a fingernail or toenail; or
- a swab, washing or sample taken from any external body part of the body other than the genital or anal region of a male or female or the breast of a female.

Penalty unit

One penalty unit is equivalent to \$147.61 for the 2014-2015 financial year.

Prohibited weapon

Prohibited weapons include imitation firearms. For a full list of prohibited weapons please consult Schedule 3 of the Control of Weapons Regulations 2011 (Vic).

Protective Services Officer (PSO)

A person appointed to be a protective services officer by the Government and Governor of Victoria, under the Police Regulation Act 1958 (Vic). PSOs' powers can only be exercised in designated areas, which are areas in and around public transport facilities.

Protesting

Protesting includes:

- picketing a place of employment;
- demonstrating or protesting about a particular issue;
- speaking in a way that is intended to publicise your views about an issue; and
- holding a banner or sign that is intended to publicise your views about an issue.

Public space

A public space can include the following:

- gardens;
- parks;
- highways;
- roads;
- streets;
- bridges;
- thoroughfares on public property;
- public halls; and
- schools.

A public space is any other place which the public can enter, with or without payment.

Relevant infrastructure vehicle

A vehicle used as part of the production process for the generation of electricity or for the purpose of maintaining critical electricity.

Warrant

A court document detailing what police can do for example, conduct a search.

Criminal offence, summary offence and indictable offence

Criminal offences in Victoria may be categorised as either summary or indictable;

Summary offences are almost always heard in the Magistrates Court.

Indictable offences are serious crimes that are usually triable only by judge and jury, and will therefore be heard in either the County or Supreme Court.

Appendix 2

8.2 Laws that apply to Locking the Gate

8.2.1 Property rights

Owning your property does not mean you own the minerals or gas below it. All mineral resources belong to the people of Victoria and are therefore the property of the Crown (i.e. the State Government). The Government can issue licences to give people the right to explore for and extract minerals and gas over the area which the licence covers. Licences give the miners the right to explore or mine for minerals, subject to:

obtaining landholders' consent to entering that property, including consent that is pursuant to a negotiated compensation agreement with that landholder;

or

having a compensation agreement imposed by the Victorian Civil and Administrative Tribunal.

Environmental Justice Australia has a detailed fact sheet on 'Your Rights against mines' freely available. Email us at admin@envirojustice.org.au if you would like a copy. In addition, Meat and Livestock Australia have produced a useful guidance note that contains practical advice for landholder's who get approached by CSG companies available at www.tinyurl.com/csg-on-property.

8.2.2 Locking the Gate

A common action being employed by landholders who do not wish unconventional gas companies to mine and explore on their land is known as 'Locking the Gate'. Locking the Gate involves placing a sign on your property saying that mining companies and their representatives are not authorised to come onto your property.

Locking the Gate is completely legal; you are within your rights to lock the gate. In fact, if a mining company enters your property when you have a sign on the gate, and then refuses to leave after being asked, they are trespassing (see section 2.1), and you can call the police.

However, if you Lock the Gate and the mining company wants access to your property, even if you do not consent, they can commence proceedings in the Victorian Civil and Administrative Tribunal ('VCAT'). VCAT will then determine what level of compensation should be paid to that landholder. VCAT can make such an order even if you do not consent to anyone accessing your land to explore or mine for minerals or gas. Once VCAT has made an order about compensation, if you continue to deny access to your land to a mining company with a licence, you may be breaching the Mineral Resources (Sustainable Development) Act, or the Petroleum Act, and committing an offence.

As of September 2014 no landholders have been taken to VCAT for access to their lands for unconventional gas mine access.

In summary, you can legally Lock your Gate until a mining or gas company gets an order from VCAT that says otherwise.

Locking the Gate has proved to be an effective campaign against unconventional gas in Australia so far. There is social and moral power to the strong community opposition represented by the majority locking their gates. For more information see: www.lockthegate.org.au

Appendix 3

8.3 Legal overview Frequently asked questions

Many people new to campaigning and activism have serious concerns about having a criminal record and the impacts that may have on employment, including working with children, or travel. People such as teachers, doctors, lawyers and other professionals have participated in peaceful civil disobedience actions with relatively minor consequences, which we will give some examples of. However, you should always assess the risks for your own situation. The following information helps you to understand some of the risks of before taking any action that may break the law.

8.3.1 What are the impacts of a criminal record?

It depends on your circumstances, but often the impacts of a criminal record are overstated. Whilst some employment applications may require you to disclose your interactions with the justice system, many employers tend to be more concerned about issues relating to dishonesty or violence. That said, it is important you make a decision for yourself, and some government departments or employers may not look kindly upon civil disobedience activities. Employment could be refused in some instances on the basis of having a criminal record. Your career as an international spy could be ruined. Or enhanced, who knows.

We are aware of a number of activists who have participated in civil disobedience actions related to climate change in the last five years who have had negligible impacts on their careers. At 'Switch off Hazelwood' in 2009, large convergence at Hazelwood power station in Victoria where 22 activists were charged with trespass, a doctor, two teachers and a university lecturer were among the number of people arrested. They had no issues with their employment.

8.3.2 Will I always get a criminal record if I have been arrested and charged?

In some states you can sometimes be offered an opportunity to have a first offence not listed on your record. This will typically be at the discretion of the magistrate. In Victoria this is known as a diversion.

Diversions must be agreed to by the prosecutor. You can ask the prosecution to consider offering you a diversion. You can also ask the Magistrate for a diversion, but they cannot give you a diversion unless the prosecutor agrees. You must plead guilty to get a diversion.

If you want to avoid a criminal record, you should write to the prosecution asking them to consider granting a diversion. You may wish to explain the nature of the protest action and that it was a matter of conscience or personal conviction by which you were involved, the relatively minor consequences, and your lack of a prior criminal record (if relevant). In addition, when you go to Court to be sentenced, you should always provide the court with references as to your good character. An effective reference will communicate to the court that you have discussed the charges with the person drafting the reference and that they understand the nature of the offence and the circumstances of the offending behaviour.

8.3.3 Can anyone see my criminal record?

Police can only release your criminal record to another person or organisation with your consent.

Some organisations that ask for a criminal record check include employers, embassies and some organisations that issue licences. Courts do not need your consent to see your criminal record.

Courts can also rely on criminal records (and criminal history) to determine appropriate punishment. In some circumstances, consent is not required to share criminal record information e.g. between law enforcement agencies.

8.3.4 How far back will a criminal record check go?

The law generally draws a distinction between your criminal record (convictions only) and your criminal history (charges, court appearances and convictions).

Your criminal record will lapse after a 10 year crime-free period (or 5 years for juvenile offenders). This is known as the conviction becoming “spent”. Once a conviction is spent, the person concerned is usually not obliged to disclose it (for example, when applying for most jobs, insurance, credit or when completing an application for a statutory licence). However, there are some limited exceptions where a person may not have the right to withhold information about a spent conviction.¹

¹ For Commonwealth convictions, the exceptions include: working with children check, law enforcement agencies for the purposes of prosecution and sentencing, courts and tribunals when making decisions, decision-makers under the Australian Citizenship Act or Migration Act (Division 6, Part VIIC, Crimes Act 1914 (Cth)). For Victorian convictions, a criminal record that is more than ten years old may be released if the purpose of the criminal record check is for: registration with a child-screening unit and/or the Victorian Institute of Teaching, assisted reproductive treatment, registration and accreditation of health professionals, employment in prisons or state or territory police forces, a casino or gambling licence, a sex work licence, a bus driver licence, a security guard licence, a Victorian taxi driver licence, or a firearms licence. See: www.legallaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/possible-outcomes-for-criminal-offences/criminal-records

Spent convictions will not appear on the National Police Certificate that you may be required to obtain when applying for certain roles. It is unlawful for a person or authority to disclose an individual's spent conviction or take it into account when the person has a right of non-disclosure.

Some convictions may never become spent, for example, for offences under Victorian and Commonwealth law, where a prison sentence of more than 30 months has been imposed.² However, prison sentences for this length of time are unlikely to arise from the context of peaceful protests.

In contrast with your criminal record, your criminal history generally lasts forever, as it is used by police to gain a profile of your involvement within the criminal justice system for investigative purposes. In other words, even when a conviction is spent, information about your criminal history is not destroyed and can be viewed by Police and the Courts.

8.3.5 Will I still be able to travel overseas?

Most likely, yes, if you have been charged with minor (summary) offences. We have gathered several examples of people who have been charged at civil disobedience actions who have been able to travel freely despite a criminal record. A couple of these examples are described below.

The examples of people who have been able to travel even though they have a criminal record includes peace activists who have been charged with trespass under Commonwealth laws and other offences at joint US-Australian military exercises, and were granted entry to the United States. These activists chose to disclose their criminal record. Other activists have travelled without incident throughout Asia, Europe and the United States, some disclosing their records, others were not required to.

Some countries, including Australia, require you to disclose any past arrests or convictions on visa applications. Laws vary from country to country and are changing rapidly in the current international climate. You should call the relevant consulate or embassy to find out the approach taken to charges and convictions by the country you wish to visit. Websites may also contain such information.³

² Victoria Police, 'Information Release Policy', www.police.vic.gov.au/content.asp?Document_ID=692; Part VIIC of the Crimes Act 1914 (Cth)

³ See, for example, www.travel.state.gov (USA) and www.delaus.ec.europa.eu/VisitingEurope/faqsvisas.htm (European Union)

Case studies

Roger was charged with multiple civil disobedience offences (for example, trespass) and has successfully applied for and been granted a visa through the normal visa waiver process to the United States, having disclosed his criminal record. He also travelled without incident through Indonesia and Europe.

Jane has participated in multiple peaceful civil disobedience actions in Victoria and Queensland with charges such as trespass and resisting arrest. She disclosed this when applying for a visa to the United States. As a result she had to take some extra steps in her application process, was asked for a national police clearance certificate and was interviewed. She then received her visa.

8.3.6 Will I still be able to get a working with children check?

Working with children checks are a pre-requisite for a range of professions, such as childcare teachers.⁴ Your criminal history is one factor that is taken into account when you are undergoing a working with children check. Your criminal history includes convictions (spent or unspent), charges (whether heard, unheard or dismissed) and juvenile records. You are usually required to provide this information with your working with children check application.

Some offences will automatically disqualify you from obtaining a working with children check, such as sexual assault and sexual offences against children.⁵ The kinds of offences that may arise in the context of a protest (such as property damage, trespass) will not automatically disqualify you. However, they are likely to be taken into account as part of a broader risk assessment about whether you are a suitable person to hold a working with children check.

If you are refused a working with children check, you usually will have the right to appeal the decision to the Victorian Civil and Administrative Tribunal (VCAT).⁶

Case study

Barry was given a 'diversion' from a trespass charge, and Lisa has been charged with trespass and obstruction. They both received working with children clearance and were able to have foster children in their care.

⁴ These are also known as a 'blue card' in QLD, 'registered to work with vulnerable people' in the ACT, and a 'clearance' in NSW

⁵ Working with Children Act 2005 (Vic), s13

⁶ See for instance, the appeal rights under s 13 of the Working with Children Act 2005 (Vic)

8.3.7 What information do I have to give police?

If the police believe you have committed or are about to commit an offence you must give the police your name and address.

If the police ask for your name and address they must tell you why they believe you have committed an offence. The police officer must give you enough detail so you understand the offence. If you do not give your name and address or you give a false name and address you could be charged.

If you are driving, you must give your drivers license to any police officer who asks for it.

It is advised that you do not give any further information and answer 'no comment' to further questions, for your own and others' safety.

You have a right to

- Remain silent
- Refuse to answer police questions
- Know why you are being arrested
- Know the identity of police officers
- Refuse to give personal (DNA) samples in particular circumstances
- Refuse to be searched unless police believe you are carrying evidence or a weapon (unless you are under arrest)
- Privacy

Seek legal advice regarding specific cases



Appendix 4

8.4 Activist rights—a short guide



Our rights

Our rights to protest, demonstrate and take part in political activities are recognised by the *International Declaration of Human Rights (1948)* as well as the *International Covenant on Civil and Political Rights (1966)* and other covenants.

In Australia, these international human rights are seldom enforceable in the face of the state.

Victoria's *Charter of Human Rights and Responsibilities 2006* codifies in legislation various rights. Part 2 of the *Charter* guarantees certain rights to all Victorians (section 8- 27) including peaceful assembly and freedom of association.

We do have these rights and we can assert them as citizens and activists, but we shouldn't expect them to be respected without question.

Being arrested

Police are not required to give you a warning prior to arresting you, but sometimes they will.

Police must formally tell you they are arresting you. Usually, the police will also touch you on the arm or shoulder to arrest you. However, should you (the arrestee) submit to the authority of the arrester (the police), words alone can be sufficient for an arrest.

You should always ask the police officer; "Am I under arrest?" and "What for? Remember what they say. In most cases, it is necessary for police to inform you of the reason for the arrest.

You should not participate in any further conversations with police (except to provide your name and address) until you have spoken to a lawyer.

Hindering or resisting arrest

It is an offence to actively resist or hinder a legal arrest (yours or another's).

It is not *necessarily* an offence to not co-operate, for instance by lying down, going limp or refusing to move, but police may then use "reasonable force" to pick you up, carry you and take you into custody. It is often in these circumstances that police could use threats, force, dragging, pressure-point holds, or other tactics to move you.

If an arrest proves to be unlawful, or if "unreasonable" or "excessive" force was used, civil actions against the police for assault or false imprisonment may be possible.

There is no power for police, or anyone else, to "detain a person for questioning". Unless you are under arrest as above, you are not obliged to go anywhere with the police.

Name and address

Police have the right to ask for your name and address if they reasonably believe that you have committed, or are about to commit any offence, or you may be able to assist in the investigation of an indictable (serious) offence.

Refusing to give a name and address once under arrest is an offence and you can be charged. Police can arrest and detain you to verify your name and address, if they suspect that you are not telling the truth.

If you are arrested you can ask the police officer for their name, rank and station for use in court later. They are legally obliged to tell you.

Answering police questions

You have the right to remain silent. Anything you do say to the police can be used as evidence against you in court, or in the police decision whether or not to charge you.

You should refuse to answer any questions, apart from your name and address, until you have had an opportunity to speak to a lawyer.

If the police question you before you have received legal advice, you should answer "no comment" to all questions. Do **NOT** answer some questions and not others - this may be used in court as evidence that you had something to hide regarding the questions that you did not answer.

There are no "off the record" conversations with police and many people are convicted on statements that they made to the police.

If you are under 18 years of age: The police **MUST NOT** formally question you unless your parents, a guardian or an independent person is present during questioning.

Contacting legal advice and support

You have the right to make a private telephone call to a friend and a lawyer or legal support before the police question you. Ask for this if police do not offer.

Aboriginal people should also contact the Victorian Aboriginal Legal Service (Free call 1800 064 865).

Photographs and ID line-ups

The police cannot force you to have your photo taken. It is your right to refuse any request from the police for a photo. You should refuse to participate in any police identification line-ups.

Fingerprints

If you are 15 or older the police can demand your fingerprints and can use "reasonable force" to take them.

If you are between 15 and 17 years of age your parents, guardian or an independent person must be with you when the police ask to take, and take, your fingerprints. If you are between 10 and 14 years of age, the police must get your consent and the consent of your parents and guardian before your fingerprints are taken. You do NOT have to consent.

Searches

Generally, the police can only search you if you agree or if they have a warrant.

The police can search you, your possessions and your car without consent or a warrant if you are in a public place and they believe you are carrying illegal drugs, volatile substances, weapons, graffiti implements, or firearms. If you are within a "designated area" the police do not need to have a reasonable suspicion that you are actually in possession of or intend to use a weapon in order to search you.

Police may conduct a "pat-down search" of the outside of your clothes and ask you to empty your pockets.

If you are in custody or under arrest you can be searched for things that could be used as evidence for the offence you have been arrested for. Police may conduct either a "pat-down search" or a "strip search" in a private place.

Police must not undertake an internal search without first obtaining a court order.

Searches are required to be conducted, so far as is reasonably practicable, by police officers of the same sex as the person to be searched.

Where possible, refuse to be searched, but if police insist then closely monitor them. Try to have as many witnesses as possible to follow and observe each police officer (there will usually be several). Use cameras and tape recorders, if you have them.

Body Samples

For police to obtain a forensic sample (blood, hair, mouth swabs etc) they require your consent or a court order. You should refuse to consent to providing a forensic sample, and ask to speak with a lawyer.

Getting out of custody

Just because you have been arrested does not mean that you will necessarily be charged. You may be:

- Released without charge
- Released and charged at a later date
- Charged and released on bail
- Charged and brought before a bail justice

If you are being released, you will be asked to confirm that:

- The police have not taken anything from you
- You have been treated reasonably
- You have received your police charge sheets

You can raise any issues with your treatment at this point. You do not have to sign or confirm anything if you do not want to.

Bail

Bail is simply an undertaking (promise) that you will appear in court on the day your charge is listed. The undertaking is recorded in a form that you will have to sign before you are released. The form has standard conditions on it that you will go to court, tell the police officer who charged you if you change residential address etc. The police can add special conditions such as an undertaking not to return to the place of arrest or the entire area where the action took place. You do not have to agree to these special conditions. The police often use these special conditions as a way of preventing further protest and restricting your movements after you are released.

If the bail undertaking does not have any special conditions you can sign it and leave.

If the bail does include special conditions and you do not agree with them, you can:

- Ask the police to contact your lawyer or legal support and put you on the phone to speak to them.
- Refuse to sign the bail form. This means that you may be kept in custody until the police change the conditions or take you before a magistrate. You or your legal representative can ask for the conditions to be removed. You can sign the bail form at any time - despite what police may tell you.
- Sign the bail form with the special conditions and leave. If you then breach the conditions, such as returning to the protest site, it may be grounds for the police to re-arrest you. A court order can alter these special conditions at a later date.

Keeping records

If you are arrested, or you have been a witness to arrests or police violence involving other activists, keep a record of every detail: what, when, where etc. Write everything down as soon as possible. This information can be of critical importance in subsequent legal proceedings, either against you (for example, when you are charged with an offence), or against the police (for example, when you are complaining against them or suing them for injuring you or unlawfully arresting you).

There is no law that prevents you from video-taping or taking photographs while protesting if these events are taking place outdoors.

Complaints against the police

If you have been injured:

- see a doctor immediately, and ensure that they provide you with a written medical report describing your injuries,
- get someone to photograph any injuries,
- write down as much information as you can about the person or people who injured you including name, rank, police station, etc.
- write down the name of the last person to see you before you were injured and the first person to see you afterwards,
- contact the *Legal Support Team* or lawyer who will help you make a formal complaint.

Police are under instructions to wear their identity badges at all times, but commonly do not do so during confrontations at demonstrations. You can make complaints about this, seeking the introduction of immovable numbers on police uniforms.

Where excessive force has been used, civil legal proceedings can help make police accountable for their actions. Civil legal proceedings may be expensive and can take a long time to complete. Seek specialist legal advice before taking such action.