Supreme Court of New South Wales
District Registry: New South Wales
Division: General

No: 2026/7005

Elizabeth Ann Jarrett and Ors
Plaintiffs

State of New South Wales
Defendant

SUBMISSIONS ON BEHALF OF THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM

I. Introduction

1. The United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Professor Ben Saul (**the Special Rapporteur**), seeks leave to appear in these proceedings as amicus curiae to assist the Court with submissions on international human rights law. These submissions are filed pursuant to orders made by Bell CJ on 29 January 2026. The Special Rapporteur reiterates his statement on privileges and immunities as a United Nations expert on mission as set out in paragraphs 2 and 3 of his request for leave to intervene dated 27 January 2026.

2. These submissions address the content and scope of the international law right to peaceful assembly, and its application to the laws that are impugned in the present proceedings. They are intended to assist the Court and the parties with relevant principles of international law relating to this right. The analysis contained in these submissions is relevant both to construing the impugned laws, and to considering their validity using the "reasonably appropriate and adapted" test for the implied freedom of political communication.

3. These submissions are therefore of a confined scope and will not occasion disproportionate delay or costs in the proceedings. As a United Nations mandate holder and expert in international law with particular comparative experience in the application of laws that balance restrictions upon peaceful assembly with security related issues, the Special Rapporteur is uniquely placed to provide information on the right to peaceful assembly. As such, and for the reasons set out in the Special Rapporteur's submissions dated 27 January 2026, leave should be granted to appear as amicus.

II. Relevance of international human rights law to the present proceedings

4. The plaintiffs have alleged that the following laws impermissibly burden the implied constitutional freedom of political communication and are therefore invalid (collectively, **the impugned laws**):

    a. Part 2, Div 3A, or alternatively ss 23B(2), 23C and 23D of the *Terrorism (Police Powers) Act 2002* (NSW);

    b. Section 200(5) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (**LEPRA**);

    c. Sections 27A and 27B of the *Summary Offences Act 1988* (NSW).

5. Seen as a whole, the impugned laws allow the Commissioner of Police or Deputy Commissioner of Police to make a "Public Assembly Restriction Declaration" (**PARD**) in specified geographical areas, and restrict public assemblies in those areas for the duration of the PARD. A PARD ends after 14 days but may be further extended for 14 day periods to a collective maximum of 90 days. The impugned laws thus expressly restrict public assemblies. The plaintiffs in these proceedings allege they do so in a way that is unconstitutional.

6. Consistent with his role as amicus curiae, the Special Rapporteur does not advance a position as to the ultimate question of whether the impugned laws impermissibly infringe the implied freedom of political communications. Rather, these submissions provide information about the international framework around the right to peaceful assembly and the application of this right to the impugned laws. They consider the status of the PARD presently in force under the laws. That analysis is relevant to the questions before the Court in the following ways.

7. First, it is well established that Australia's obligations under treaties, international conventions and customary international law are relevant to statutory construction. In *Kingdom of Spain v Infrastructure Services Luxembourg sárl*[1] the High Court said:

> "A "long standing" principle of interpretation is that statutory provisions should be interpreted, so far as possible, to be consistent with international law. This is particularly so where a provision…seeks to give effect to matters of international law."[2]

8. Additionally, where there is any ambiguity in a statute, it should be construed in such a way that is consistent with Australia's human rights treaty obligations (which includes the right to peaceful assembly). In *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287, Mason CJ and Deane J stated:

> Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, the relevant international instrument.

9. Thus, the international legal framework surrounding the right to peaceful assembly is relevant to the construction of the impugned laws. This anterior question of construction, by which

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[1] (2023) 275 CLR 292.
[2] Citing *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589, *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 and *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015).258 CLR 31.

the effect of the impugned laws upon the implied freedom is determined, is a necessary precondition to understanding their constitutional validity: see e.g. ***Monis*** *v The Queen* (2013) 249 CLR 92, 145-146 ([118]-[121]) per Hayne J.

10. Two hypothetical propositions flow from this. If the laws can be "read down" in accordance with international law, then the laws may be constitutionally valid, but may operate in a way which is consistent with the right to peaceful assembly: *Interpretation Act 1987* (NSW) s 31. Alternatively, if the laws cannot be read down in such a way, then this may support a contention that they impermissibly infringe the implied freedom of political communication due to their disproportionately restrictive effect.

11. Second, the content and application of the right to peaceful assembly may be relevant to the application of the "reasonably appropriate and adapted" test arising as a component of the implied freedom of political communication. It is acknowledged that the implied freedom of political communication does not confer rights, but rather operates as an implied limit on legislative power: ***Brown*** *v Tasmania* (2017) 261 CLR 389 at [313] (Gordon J). Nothing in these submissions is to the contrary.

12. Dealing first with the content, there is a clear conceptual overlap between the implied freedom and the right to peaceful assembly. Both are engaged where governments purport to restrict public protests for political purposes. The freedom to associate for the purpose of communicating on political matters was described by Gageler J (as the Chief Justice then was) as "part and parcel of the protected freedom": *Tajjour v New South Wales* (2014) 254 CLR 508 at 578 ([143]). In *Kruger v The Commonwealth* (1997) 190 CLR 1 at 115, Gaudron J noted (footnotes omitted):

> [J]ust as communication would be impossible if 'each person was an island', so too it is substantially impeded if citizens are held in enclaves, no matter how large the enclave or congenial its composition. Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others.

13. Additionally, each of the questions of whether an impugned law impermissibly infringes the implied freedom *or* the right to peaceful assembly involves matters of proportionality and balancing.

14. In determining whether an impugned law impermissibly infringes the implied freedom of political communication, the Court is required to undertake a three-stage analysis (see e.g. *Brown* at [102]-[104]):

    a. Does the impugned law **effectively burden** the freedom in its terms, operation or effect?

    b. If so, **is the purpose of the law legitimate** in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

    c. If so, **is the law reasonably appropriate and adapted** to achieve that legitimate object in a manner that is compatible with the constitutionally prescribed system of representative and responsible government?

15. This third question – whether a law is "reasonably appropriate and adapted" – has long been understood to involve an assessment of whether those laws are proportionate. For example, in *Monis,* Crennan, Kiefel and Bell JJ observed (at 214, [347], footnotes omitted):

> Where there are other, less drastic, means of achieving a legitimate object, the relationship with the legislative purpose may not be said to be proportionate, at least where those means are equally practicable and available. Given the proper role of the courts in assessing legislation for validity, such a conclusion would only be reached where the alternative means were obvious and compelling…In such circumstances the means could not be said to be reasonably necessary to achieve the end and are therefore not proportionate.

16. Since ***McCloy*** *v State of New South Wales* (2015) 257 CLR 178 2015, the High Court has generally approached this question by reference to a "structured proportionality" test. Structured proportionality involves the following analysis to determine whether a law is reasonably appropriate and adapted (see e.g. *McCloy* at [2] (French CJ, Kiefel, Bell and Keane JJ):

    a. Is the law suitable, in the sense of having a rational connection to its purpose?

    b. Is the law necessary, in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect?

c. Is the law "adequate in its balance", which requires a value judgment balancing "the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom": *McCloy* at [2].

17. The structured proportionality approach to the implied freedom of political communication has also been adopted in several decisions of this Court, including recently in the decision of Mitchelmore J in *Lees v State of New South Wales* [2025] NSWSC 1209, where her Honour found that s 200(5) of LEPRA (as then in force), which allowed police to direct protestors "in or near a place of worship" to move on, was constitutionally invalid.

18. Recent decisions of the High Court have thrown doubt on the doctrinal status of structured proportionality as the means of determining whether a law is reasonably appropriate and adapted: ***Babet*** *v The Commonwealth* [2025] HCA 21; *Ravbar v The Commonwealth* [2025] HCA 25. However, it retains its status as a "tool of analysis, express or ritual invocation of which is by no means necessary in every case": *Babet* at [49] (Gageler CJ and Jagot J).

19. Whether or not it is expressed in terms of "structured proportionality", the inquiry into whether a law is reasonably appropriate and adapted to its object for the purposes of the implied freedom of political communication is nonetheless a form of proportionality analysis.

20. In this sense, the three-stage approach to the implied freedom of political communication has a common methodology to the international law analysis as to whether a law impermissibly infringes the right to peaceful assembly. As is developed in Part III of these submissions, the international law analysis as to whether a restriction on the right to peaceful assembly is lawful involves an assessment of its legality, its legitimate aim, and its necessity and proportionality. These steps mirror the three-stage approach to the implied freedom of political communication.

21. This Court may therefore have regard to how international law has adopted a similar balancing exercise in respect of an international law right that is at least cognate with the implied freedom of political communication.

22. The submissions that follow address the content and scope of the right to peaceful assembly in international human rights law from the perspective of the Special Rapporteur, and consider the impugned laws within that context.

III. The right to peaceful assembly in International Law

The content of the right to peaceful assembly

23. As a State party to the *International Covenant on Civil and Political Rights* (**ICCPR**), all Australian public authorities, including the state of New South Wales and its component parts such as the police, Police Minister, and the judiciary, are required by international law to respect and protect the rights under the ICCPR.

24. Most relevant to these proceedings, article 21 of the ICCPR provides for the right of peaceful assembly:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

25. The scope of the right has been authoritatively interpreted by the United Nations Human Rights **Committee**, which is established by treaty under the ICCPR and is comprised of distinguished independent experts periodically elected, on merit, by the member States of the United Nations Human Rights Council. The Committee's *General Comment No. 37 on the right of peaceful assembly (article 21) (2020)* (**GC37**) consolidates the Committee's interpretive practices, including based on its "views" (final decisions) in "communications" (individual cases)[3] and its "concluding observations" on the periodic reports of State parties that must be submitted to the Committee under the ICCPR. The Committee's General Comments are regarded as the most authoritative, comprehensive, quasi-jurisprudential interpretations of the ICCPR by the dedicated expert body mandated by the State parties to interpret and apply it.

26. According to GC37, the right of peaceful assembly "enables individuals to express themselves collectively and to participate in shaping their societies", "protects the ability of people to exercise individual autonomy in solidarity with others", and "with other related rights, it also constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism": GC37 at [1]. By airing grievances, "peaceful assemblies may create opportunities for the inclusive, participatory and peaceful resolution of

[3] Communications are cases submitted to the Committee for decision under its individual complaints procedure; the procedure is binding on the States parties who have accepted the Committee's jurisdiction, and the Committee's views are authoritative, but non-binding, interpretations of the ICCPR.

differences": GC37 at [1]. It is "of particular importance to marginalized individuals and groups": GC37 at [2].

27. The right protects the non-violent gathering by persons for "principally expressive" purposes: GC37 at [4]. It is an individual right that is exercised collectively, thus having an associative element: GC37 at [4]. Its full protection is thus only possible when other overlapping rights are protected, notably freedom of expression (ICCPR, article 19), freedom of association (ICCPR, article 22) and the right to take part in public affairs (ICCPR, article 25): GC37 at [9]. According to the Committee, "[g]iven that peaceful assemblies often have expressive functions, and that political speech enjoys particular protection as a form of expression, it follows that assemblies with a political message should enjoy a heightened level of accommodation and protection": GC37 at [32].

28. The right of peaceful assembly requires States parties to respect and ensure its exercise without discrimination, including by allowing assemblies to take place without unwarranted interference and to facilitate the exercise of the right and to protect the participants: GC37 at [8].

29. Article 21 of the ICCPR protects only "peaceful" assembly, meaning an absence of "widespread and serious violence" involving "physical force against others that is likely to result in injury or death, or serious damage to property": GC37 at [15]. Mere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to "violence": GC37 at [15]. Non-violent civil disobedience and direct-action campaigns are also peaceful assemblies: GC37 at [16].

30. In the present proceedings, the Special Rapporteur is not aware of any evidence that the potential protests to which the PARD in force since 24 December 2025 appears to be directed would not be considered "peaceful" assemblies under the high threshold outlined above. Rather, the key question is whether restrictions on presumptively peaceful protests could nonetheless be justified under the second sentence of article 21 of the ICCPR.

Restrictions on the right of peaceful assembly

31. Restrictions on the right of peaceful assembly may only be imposed in accordance with the grounds specified in the second sentence of article 21, and these must be "narrowly drawn": GC37 at [8].

32. The impugned laws, and their application in practice since 24 December 2025, undoubtedly constitute a restriction on the right of peaceful assembly. Individuals and groups are deprived of the ordinary protections available for authorised protests, including protections against certain criminal liabilities and police move on directions. These protections under NSW law in turn reflect the protected scope of the right of peaceful assembly under article 21 of the ICCPR, which recognises that a considerable level of obstruction of persons and traffic and disruption of ordinary life are both commonplace and tolerable in the legitimate exercise of democratic protest, subject to certain recognised limits: see e.g. GC47 at [7], [44] and [47].

33. The next issue is whether restrictions are justified by the requirements of the second sentence of article 21 of the ICCPR, namely legality, legitimate aim and necessity and proportionality. The requirement of non-discrimination under article 2 of the ICCPR complements these requirements.

Legitimate aim

34. Article 21 specifies six permissible grounds for restricting the right of peaceful assembly where it is necessary in a democratic society. Two of these – "the protection of public health or morals" – are irrelevant to any justification of the grounds for a Public Assembly Restriction Declaration under s 23B of the *Terrorism (Police Powers) Act* or the making of such Declaration since 24 December 2025.

35. The "interests of national security" would not support s 23B, despite its location in a counter-terrorism law and its enactment coming in response to the Bondi attack. The threshold for national security under article 21 of the ICCPR concerns exceptional restrictions that are "necessary to preserve the State's capacity to protect the existence of the nation, its territorial integrity or political independence against a credible threat or use of force": GC37 at [42]. A risk to community safety, including at the place of an assembly – at issue in these proceedings – or fears of harassment, intimidation or violence, or of personal safety under s 23B, come nowhere near this high threshold.

36. The grounds in s 23B could potentially come within the legitimate aims of "public safety", "public order", and/or the protection of the rights and freedoms of others. To fall within the ground of "public safety", it "must be established that the assembly creates a real and significant risk to the safety of persons (to life or security of person) or a similar risk of serious damage to property": GC37 at [43]. Speculative, hypothetical, minor or remote risks are not sufficient. The focus must foremost be on the specific assembly or assemblies concerned.

Evidence as to the conduct of recent comparable protests, such as the pro-Palestine protests on the Harbour Bridge and protests in relation to Australia Day, may be relevant in assessing the likelihood and severity of the risks of future like protests, but generalised extrapolations from past protests cannot be determinative, given that each protest is contextually distinct.

37. The threshold of a mere "risk to community safety" under s 23B falls short of the more demanding standard under article 21 of the ICCPR, which requires a "real and significant risk" to the safety of persons (to life or security of person) or a similar risk of serious damage to property". Section 23B could accordingly authorise restrictions that are not in pursuit of a legitimate aim and thus unjustifiably restrict the right of peaceful assembly. The Commissioner of Police has indicated that the PARD has been applied not only "to ensure community safety, but also to ensure the community *feels* safe"[4] (emphasis added), which appears to not only exceed statutory authority under s 23B but also goes well beyond the lawful grounds of restriction under article 21 of the ICCPR.

38. The ground of "public order" concerns "the sum of the rules that ensure the proper functioning of society, or the set of fundamental principles on which society is founded, which also entails respect for human rights, including the right of peaceful assembly": GC37 at [44]. The Human Rights Committee has indicated that State parties "should not rely on a vague definition of "public order" to justify overbroad restrictions", emphasised that "[p]eaceful assemblies can in some cases be inherently or deliberately disruptive and require a significant degree of toleration, and noted "public order" is a higher threshold than mere "law and order": GC37 at [44]. Since the focus of the PARD at issue in these proceedings is based on a risk of community "safety", rather than public order, it appears to align more closely with the "public safety" ground in article 21, and should be assessed accordingly, although there is overlap between the categories.

39. Restrictions to protect "the rights and freedoms of others", including of victims of terrorism, concern rights recognised under the ICCPR, including of those not participating in the assembly: GC37 at [47]. This includes the hate speech prohibition on "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" under article 20(2) of the ICCPR. Again, the Committee has emphasised that "assemblies are a legitimate use of public and other spaces, and since they may entail by their very nature a certain level of disruption to ordinary life, such disruptions must be accommodated, unless

[4] "Public Assembly Restriction Declaration extended for parts of Sydney", NSW Police News, 3 February 2026.

they impose a disproportionate burden, in which case the authorities must be able to provide detailed justification for any restrictions": GC37 at [47].

Hate speech and incitement to violence

40. To the extent that any risk to community safety justifying the PARD is considered based on risks of hate speech, the applicable international legal standards must define the scope of such risks and thus identify the permissibility of restrictions. The hate speech prohibition in article 20(2) of the ICCPR ("advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence") is additionally subject to the general requirements for restrictions on freedom of expression under article 19(3), including legitimate aim and legality, necessity and proportionality – all similar to the test in the second sentence of article 21 concerning freedom of peaceful assembly. Article 20(2) requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception: ***Rabat Plan of Action*** *on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence* (2021), UN Doc. A/HRC/22/17/Add.4, annex, para. 18.

41. The most authoritative international guidance on the interpretation of article 20(2) is the Rabat Plan of Action. Since overbroad definitions of terms such as hatred, hostility, advocacy and incitement can lead to arbitrary application, States should narrowly define them (ibid. para. 21).[5] The Rabat Plan of Action then recommends a six-part test for assessing whether expression constitutes criminal incitement to ethnic, racial or religious hatred. These would require careful assessment to support any determination by the NSW authorities that assemblies as a whole pose such a serious risk of hate speech that they could be justifiably restricted by the PARD for threatening the rights of others. The six-part test is as follows:

    a. Context: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;

[5] Specifically: '**hatred'** and '**hostility'** refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; '**advocacy'** is to be understood as requiring an intention to promote hatred publicly towards the target group; and '**incitement'** refers to statements about national, racial or religious groups, which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups: *Camden Principles on Freedom of Expression and Equality 2009*, principle 12.

b. Speaker: The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed;

c. Intent: Article 20 of the ICCPR anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.

d. Content and form: The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;

e. Extent of the speech: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;

f. Likelihood, including imminence: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.

Incitement to terrorism

42. Any restrictions on expression to prevent incitement to terrorism must likewise satisfy the requirements of article 19(3) of the ICCPR. Best practice international guidance has been provided by the former Special Rapporteur, Professor Martin Scheinin, and consistently followed by his successors and other UN experts. Thus, any offence of incitement to terrorism:

a. must be limited to the incitement to conduct that is truly terrorist in nature, as properly defined according to best practice international standards;

b. must restrict the freedom of expression no more than is necessary for the protection of national security, public order and safety or public health or morals;

c. must be prescribed by law in precise language, including by avoiding reference to vague terms such as "glorifying" or "promoting" terrorism;

d. must include an actual (objective) risk that the act incited will be committed;

e. should expressly refer to two elements of intent, namely intent to communicate a message and intent that this message incite the commission of a terrorist act; and

f. should preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to "unlawful" incitement to terrorism.[6]

Grounds of restriction are exhaustive

43. The grounds of restriction under article 21 of the ICCPR are exhaustive. Protests cannot be lawfully restricted on other bases, such as the mere fact that a terrorist attack has occurred; that protests could offend or hurt the feelings of parts of the community, be "divisive", create "tensions", or undermine "cultural safety or sensitivity"; or that protests would simply inconvenience the authorities or the public or be a burden on the resources of law enforcement.

44. In this regard, international human rights law accepts that the right of peaceful assembly may involve the legitimate and protected expression of contentious ideas or goals, including those that shock, offend and disturb or that are disagreeable to the authorities or even to majority opinion: GC37 at [7]. Restrictions should be content neutral and not relate to the message conveyed by the assembly, including "explicitly or implicitly, to stifle expression of political opposition to a government, challenges to authority, including calls for democratic changes of government, the constitution or the political system, or the pursuit of self-determination": GC37 at [48]-[49]. All forms of expression at an assembly are protected, including speech, flags, uniforms, signs and banners: GC37 at [51].

45. Whereas the grounds under s 23B must be consistent with article 21 of the ICCPR, any PARD issued under the Act must also satisfy the legitimate aim criteria in the factual circumstances, which is a question of evidence.

The legality of restrictions

[6] UN Doc. A/HRC/16/51, para. 31. See also UN Doc. A/HRC/40/52, para. 37.

46. The legality requirement under article 21 of the ICCPR, that restrictions must be "in conformity with the law", is not a purely formal requirement of statutory authority and administrative decisions based on it, but further requires that the laws "must be sufficiently precise to allow members of society to decide how to regulate their conduct and may not confer unfettered or sweeping discretion on those charged with their enforcement": GC37 at [39].

47. In this respect, the reference in s 23B of the *Terrorism (Police Powers) Act* to a "risk to community safety", insofar as it extends beyond the concrete case of "the safety of participants" in the assembly, is vague and overbroad and does not satisfy the requirement of legality. The terms "risk" and "community safety" are nebulous and not defined by reference to any specific offences or other concrete harms identified under other legislation.

48. This deficiency is further evident in the practical operation of s 23B. The Commissioner is not required to provide evidence or reasons substantiating his belief that a ground under s 23B is satisfied. Public statements by the Commissioner justifying the PARD have been limited to sweeping assertions about highly general and indeterminate risks to "community safety", the need to reduce "community tension" and "division", "the potential for a counterprotest" of an unspecified nature, and the danger that "a number of people will be absolutely upset" if protests are held;[7] or that the visit of a foreign head of State might attract "much animosity".[8]

The necessity and proportionality of restrictions

49. Authorities must further show that any restrictions are both necessary for and proportionate to at least one permissible ground for restrictions: GC37 at [36]. An assembly may only be prohibited "as a measure of last resort", after first seeking "to apply the least intrusive measures": GC37 at [37], [40]. States should ordinarily allow an assembly to take place and decide afterwards whether measures should be taken regarding possible transgressions during the event, rather than imposing prior restraints in an attempt to eliminate all risks: GC37 at [37].

50. Any restrictions on participation in peaceful assemblies should be based on a differentiated or individualized assessment of the conduct of the participants and the assembly concerned; and blanket restrictions on peaceful assemblies are presumptively disproportionate: GC37 at [38].

[7] Press Conference of the NSW Police Commissioner, 6 January 2026.
[8] Press Conference of the NSW Police Commissioner, 3 February 2026.

51. Since restrictions must be "necessary in a democratic society", the assessment must consider what is necessary and proportionate in response to "a pressing social need" and "in the context of a society based on democracy, the rule of law, political pluralism and human rights, as opposed to being merely reasonable or expedient": GC37 at [40]. Proportionality "requires a value assessment, weighing the nature and detrimental impact of the interference on the exercise of the right against the resultant benefit to one of the grounds for interfering. If the detriment outweighs the benefit, the restriction is disproportionate and thus not permissible": GC37 at [40]. As mentioned, assemblies with a political message enjoy heightened protection (GC37 at [32]), and this necessarily affects the assessment of proportionality.

IV. Application of the right to peaceful assembly to the impugned laws

52. The PARD issued on 24 December, as extended and amended since, does not satisfy the requirements of necessity and proportionality under article 21 of the ICCPR.

53. First, the PARD involves a blanket restriction on all protests, not limited to any rational connection to the Bondi terrorist attack invoked to justify it and any risks to community safety that could be plausibly associated with the aftermath, causes or context of that attack. It accordingly restricts protests on entirely unrelated issues, such as Indigenous rights and deaths in custody, climate change, killings of protesters in Iran, the United States' invasion of Venezuela and threats against Greenland, or Russia's war in Ukraine, where there is likely little or no out-of-the-ordinary risk to individuals or sections of the community. It would even restrict protests that advocate enhancing community safety against terrorism – for instance, calls for a Royal Commission into the Bondi attack, criticisms of law enforcement and intelligence failures by the NSW or Commonwealth authorities in preventing the Bondi attack, or the need to strengthen measures against antisemitism or to provide greater support to victims of the attack. This manifest overbreadth alone is sufficient to establish that the PARD is an unnecessary and disproportionate restriction on the right of peaceful assembly.

54. Second, as a blanket restriction on all protests, the PARD cannot possibly be based on an individual, evidence-based assessment of the characteristics of particular protests, planned protests, or likely protests as required by article 21 of the ICCPR, but makes acontextual assumptions about the inherent dangerousness of any and all protests in Australia's largest city over protracted periods. The size, place and route, timing, organisers, objective, methods, risk mitigation measures and other critical factors pertaining to a protest vary from protest to protest, whereas the PARD indiscriminately restricts all protests regardless of their specific

risk profiles. Only in exceptional cases, such as widespread civil unrest, could such blanket restrictions conceivably be proportionate.

55. Third, to the extent that there is sufficient evidence of risks to community safety, proportionality requires the application of the least intrusive restrictions to address the risk, particularly by focusing on the risks of individual behaviour and dealing with transgressions during an assembly rather than imposing prior restraints in an attempt to eliminate all risks. Yet, the Terrorism (Police Powers) Act does not require any such assessment of alternative means for addressing and mitigating the risks, but permits a PARD to be issued merely where the authorities are satisfied that a bare risk exists. In practice, in issuing the PARD, the Commissioner of Police has given no indication or explanation that less invasive means would be insufficient, or even that alternative measures were considered. The Commissioner has admitted that "[o]verwhelmingly, we are pleased with the actions and behaviours of protesters, however, [only a] few continue to incite violence and cause fear and harm".[9]

56. In this regard, the PARD's preclusion of authorisation of protests itself impedes the likelihood of a proportionate response. The Human Rights Committee has indicated that notification regimes "are permissible to the extent necessary to assist the authorities in facilitating the smooth conduct of peaceful assemblies and protecting the rights of others": GC37 at [70]. Precluding notification through a Form 1 notice thus prevents the authorities working as cooperatively as possible with protest organisers to address any safety concerns in a proportionate manner. In addition, notification regimes "must not in practice function as authorization systems" and must not be used as a basis for dispersal of an assembly, including through unjustified "move on" directions for merely impeding pedestrians or traffic, including where such obstructions are ordinarily incidental to many protests: GC37 at [73].

57. Fourth, the operative assumption underlying the PARD appears to be that the continuation of protests in favour of Palestinian rights, or critical of alleged Israeli violations of international law in Palestine, would entail risks to "community safety". As mentioned, a mere risk to community safety is not a legitimate ground for restrictions under article 21 of the ICCPR; there must be a "real and significant risk" to the safety of life or personal security or of serious property damage. Further, where restrictions otherwise aim to protect the rights of others, they must be grounded, for example, in the stringent test for hate speech under article 20(2) of the

[9] "Public Assembly Restriction Declaration extended for parts of Sydney", NSW Police News, 3 February 2026.

ICCPR, which concern incitement to violence or racial or religious hatred and do not capture, for instance, legitimate expression critical of Israel or other governments.

58. The Special Rapporteur is not aware of any evidence which substantiates the existence of any systematic, repeated threat to life or bodily integrity, or incitement to violence or hatred against Jewish people by assemblies as a whole that would warrant blanket restrictions in the nature of the PARD. To the extent that individuals within protests that have taken place relating to Israel and Palestine since 7 October 2023 have posed such threats, a proportionate response under article 21 of the ICCPR would involve taking appropriate law enforcement action against those individuals, utilizing the range of ample powers available, rather than indiscriminately restricting whole assemblies, and every assembly, when the PARD is in force. Blanket restrictions unjustifiably stigmatise all protesters as risks to community safety, thereby also potentially infringing the right to reputation under article 17 of the ICCPR – particularly where the power is situated in a counter-terrorism law, the immediate context is the asserted connection with the Bondi terrorist attack, and the wider context is Israel's response to Hamas' terrorist attack on Israel on 7 October 2023.

59. In respect of the risk of counter-protest, the Human Rights Committee has emphasised that "[t]he fact that an assembly provokes or may provoke a hostile reaction from members of the public against participants, as a general rule, does not justify restriction", and it is incumbent upon the authorities to take the necessary measures to protect the protest: GC37 at [52]. Only "in the exceptional case where the State is manifestly unable to protect the participants from a severe threat to their safety, restrictions on participation in the assembly may be imposed": GC37 at [52]. Further, "[a]n unspecified risk of violence, or the mere possibility that the authorities will not have the capacity to prevent or neutralize the violence emanating from those opposed to the assembly, is not enough; the State must be able to show, based on a concrete risk assessment, that it would not be able to contain the situation, even if significant law enforcement capability were to be deployed": GC37 at [52]. From the evidence available to the Special Rapporteur, the PARD is not a justifiable restriction in light of the extent and degree of community safety concerns arising from the pattern of protests and the very limited and peaceful counter-protests in Sydney since 7 October 2023.

60. Fifth, the geographical scope of application of the PARD has been impermissibly excessive and has rendered it a disproportionate restriction. From 24 December 2025 to 20 January 2026 – a period of about one month – the PARD applied to the Central, Northwest and Southwest Metropolitan Police Regions, covering the majority of the population of 5.5 million people in

Australia's largest city. The area to which the PARD applied was narrowed to central Sydney and part of the eastern suburbs from 20 January 2026.

61. According to the Human Rights Committee, under article 21 of the ICCPR, any restrictions on the place of assemblies must "as far as possible, allow participants to assemble within sight and sound of their target audience, or at whatever site is otherwise important to their purpose" and any restrictions must be justified on a case-by-case basis: GC37 at [53]. Further, "[p]eaceful assemblies should not be relegated to remote areas where they cannot effectively capture the attention of those who are being addressed, or the general public. As a general rule, there can be no blanket ban on all assemblies in the capital city in all public places except one specific location within a city or outside the city centre, or on all the streets in a city": GC37 at [55]. Restrictions should be limited to specific locations, such as particular parks or buildings.

62. Sixth, the PARD has a substantial "chilling effect" on all protest causes in Sydney and beyond, beyond those already engaging or intending to engage in protest. Restrictions must not be "aimed at discouraging participation in assemblies or causing a chilling effect": GC37 at [36]. In considering the proportionality of a restriction on freedom of assembly, account must be taken of its chilling effect (*Christian Democratic People's Party v. Moldova*, Application No. 28793/02, European Court of Human Rights (2006), at [77]). The chilling effect is particularly pronounced where restrictions on protest emanate from counter-terrorism legislation, given the highly stigmatising and deterrence effects of counter-terrorism powers and narratives.

Non-discrimination

63. The right of peaceful assembly must be protected with full respect for non-discrimination and equality: GC37 at [8], [11], [24], [25] and [36]. Restrictions must be "content neutral" and not related to the message conveyed by the assembly: GC37 at [22], [48] and [53].

64. Thus, to the extent that the PARD is implicitly aimed largely at the perceived or assumed risks to community safety of protests critical of Israel or in favour of Palestinian rights, these restrictions may involve indirect discrimination on the basis of political opinion contrary to article 2 of the ICCPR. The targeting of such protests to prevent "division", "tension", "upset", or "hurt" does nothing to change that result. Such grounds are not legitimate aims the pursuit of which can justify discriminatory targeting of assembly and expression that is critical of Israel, where it does not present a genuine risk to public safety or of hate speech under international law. The unjustified suppression of peaceful assembly and expression, including the right to freely criticise foreign governments and visiting foreign leaders, itself

stimulates social division, hurt and exclusion and unjustifiably privileges the feelings of one group in society over another.

65. Further, "particular efforts must be made to ensure the equal and effective facilitation and protection of the right of peaceful assembly of individuals who are members of groups that are or have been subjected to discrimination": GC37 at [11]. In this regard, protesters in relation to Palestine include Palestinians and others legitimately protesting violations of the collective and individual human rights of Palestinians, including in respect of:

    a. the findings of the International Court of Justice that Israeli laws and practices in the occupied Palestinian territory involve violations of the right of self-determination of the Palestinian people, the prohibition on the forcible annexation of foreign territory, fundamental rules of international humanitarian law and international human rights law, and the prohibition on racial segregation and apartheid;[10]

    b. the findings of the International Court of Justice that there exist plausible allegations of genocide and incitement to genocide in relation to Israel's conduct towards Gaza,[11] including in relation to statements by Israel's President, whose scheduled visit to Australia has been given as a reason by the Commissioner of Police for extending the PARD on 3 February 2026; and

    c. the issuing of arrest warrants by the International Criminal Court in relation to senior Israeli political and military leaders for war crimes and crimes against humanity; Australia is a State party to the 1998 Rome Statute of the Court; and

    d. numerous findings of fact by United Nations human rights mechanisms, including multiple expert human rights treaty bodies, the Human Rights Council's independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, and numerous United Nations Special Procedures mandate holders, including the Special Rapporteur.

66. The United Nations Security Council, General Assembly, Human Rights Council, and the Global Counter-Terrorism Strategy (adopted by consensus of the General Assembly in 2006

[10] International Court of Justice, *Advisory opinion on the Legal Consequences of a Wall in the Occupied Palestinian Territory* (9 July 2004); International Court of Justice, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (19 July 2024).
[11] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) – Provisional Measures* (26 January 2024).

and continuously reaffirmed since then), they emphasize that all State counter-terrorism measures must respect human rights; they emphasize that violations of human rights while countering terrorism may be conducive to the spread of more terrorism; and that ensuring security and respecting human rights must be complementary, reinforcing, and not be in competition. The PARD regime does not meet the requirements of international human rights law and, as a result, may counterproductively fuel the social divisions and tensions it aims to prevent. Such negative effect is further reason why the regime is likely to be disproportionate, since an ineffective or counter-productive restriction cannot be considered necessary or rationally connected in pursuit of a legitimate public safety aim.



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5 February 2026

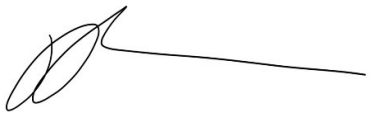


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