

## **JOINT COMMITTEE ON HUMAN RIGHTS – POLICING AND PROTEST**

This paper responds to the Joint Committee's request for evidence to its inquiry into the human rights issues arising from policing and protest. It seeks to respond to the themes outlined by the Committee, namely:

- the proportionality of legislative measures to restrict protest or peaceful assembly, and;
- reconciling competing interests of public order and protest.

It does not seek to respond to wider human rights issues surrounding other legislative measures.

### **Introduction**

2. Peaceful protest is a fundamental part of a democratic society and has a very long and respected tradition in the United Kingdom. Many of the rights and freedoms we enjoy today were gained because people were prepared to protest. The Government is clear that there should be no unnecessary restrictions on people's right to peaceful protest

3. This tradition was cemented into the *rights* to freedom of assembly and expression through the incorporation of the European Convention on Human Rights into domestic law in the Human Rights Act 1998. So while we were previously free to do anything which was not otherwise proscribed by law, we now have a *positive right* to assemble, to march together, to campaign and to express our views and opinions, albeit subject to qualifications.

4. The rights to freedom of expression and peaceful assembly are not absolute and Articles 10 and 11 of the Convention outline the possibility of legitimate restrictions. Interference with these rights is permissible only if what is done:

- has its basis in law;
- secures a permissible aim set out in the Articles; and
- is necessary in a democratic society, in the interests of national security or public safety, for the prevention of disorder and crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

5. The Government is confident that the legislative framework in England and Wales upholds the right to protest while providing appropriate latitude to impose legitimate restrictions. As part of the Government's commitment to keep legislation under review, the Government is currently addressing one area where it has concerns (see paragraphs 19 to 28). The powers available to the police through this legislative framework reflect the need to consider and weigh different rights against each other and gauge competing interests. For example, the right to peaceful protest which the police have a duty to facilitate, needs to be balanced against the other responsibilities of the police to promote public safety, maintain public order, prevent crime and protect the rights of others. The challenge for the police is how to use their powers in a

way that is sensitive to these sometimes competing needs and the expectations of people and communities in which they live.

## **QUESTIONS RAISED BY THE COMMITTEE**

**Are current legislative measures which restrict protest or peaceful assembly (such as SOCPA 2005 and the Public Order Act 1986) necessary and proportionate to the rights to freedom of expression and peaceful assembly?**

\* ***To what extent should peaceful protest be facilitated by the State?***

6. The State is under a positive duty to refrain from interference with the individual's right to peaceful assembly and to prevent others from doing so. It can only interfere with that right if the interference is prescribed by law, is intended to achieve a legitimate objective, such as prevention of disorder or crime and is proportionate to the end that is to be achieved.

7. In addition to not unjustifiably restricting the freedom to peaceful assembly, the State is under a positive duty to take reasonable and appropriate measures to enable lawful demonstrations to take place without the participants being subjected to physical violence or other threats from those who object to a demonstration.

8. The Government is clear that this is not just a question of duties. The Government is committed to upholding and reinforcing these rights as part of a wider programme of Constitutional renewal and reinvigorating our democracy, as set out in the Governance of Britain Green Paper published in July 2007, and the current draft Constitutional Renewal Bill.

\* ***What limits, if any, should be placed on the right to protest and why?***

9. The rights to freedom of expression and peaceful assembly, although fundamental, are not absolute, and Articles 10 and 11 of the Convention outline the possibility of legitimate restrictions, necessary in a democratic society, for the prevention of disorder and crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

10. The purpose of public order law is to ensure that individual rights to freedom of speech and freedom of assembly are balanced against the rights of others to go about their daily lives unhindered. Criminal offences in relation to public order are designed to prevent violence and disorder.

11. The Government believes that in order for the police to be able to maintain the difficult balance of competing rights, there is a need for proportionate limits on the right to protest in certain circumstances, and that

the framework set out in the Public Order Act 1986 allows the police to strike that balance.

12. For example, sections 12 and 14 of the Public Order Act, allow senior officer to impose conditions on organisers of processions and assemblies to prevent serious public disorder, serious damage, serious disruption to the life of the community and intimidation. In the case of assemblies, the conditions are more exhaustively defined in that they can only be imposed in relation to the location of an assembly, its maximum size and maximum duration.

13. Additionally, section 11 of the Public Order Act requires the organisers of processions to give written notice to the police 6 days in advance, unless not reasonably practicable, notifying them of the date, time and route of the march and the name and address of the organiser. The interference here can be justified on the grounds that in order to facilitate a peaceful march and minimise disorder, the police need to be able to plan ahead with the organisers. The caveat of 'not reasonably practicable' allows for more spontaneous protest.

14. Another area where it may be appropriate to impose limits is in relation to what people say or display in public – in so far as what is said, or displayed could cause harassment, alarm or distress. This is reflected in section 5 of the Public Order Act which covers the use of threatening, abusive, insulting words or behaviour, or the display of any writing or sign which is threatening, abusive or insulting. Clearly this provision has to be read and given effect in a way which is compatible with the right to freedom of expression. Article 10 (1) of ECHR applies “not only to ideas that are favourably received, or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.” (Handyside v UK (1976) 1EHRR 737.)

\* ***Should specific limitations be placed on the ability of certain groups to protest? If so, who and why?***

15. The legislative framework covering policing and protest does not impose limits on the ability of certain groups to protest simply because of their membership of a group.

16. However, the Home Secretary has the power to lay before Parliament a draft Order placing an organisation on the proscribed list if she believes that the organisation is concerned in terrorism. The effect of this, once confirmed by Parliament, is that membership of the organisation becomes unlawful, as does fundraising for it and arranging meetings or speaking at meetings where the purpose is to encourage support for it or further its activities. Clearly this means that such groups will not be able to protest, although it is often the case that a proscribed terrorist organisation will be closely associated with a separate political body which is of course free to protest the wider issues as long as it does not encourage support for the proscribed group itself.

17. A proscribed organisation, or anyone affected by a proscription, may apply to the Home Secretary for the organisation to be deproscribed. If this application is refused, they may appeal this refusal to the Proscribed Organisations Appeals Commission.

18. Lord Carlile, in his independent annual reviews of the operation of the Terrorism Act 2000, has consistently said that he believes proscription to be a necessary and proportionate response to threat that terrorist organisations pose.

**\* *Should the right to protest be more strictly curtailed in relation to certain geographical areas? If yes, where, why and what limits would be acceptable?***

**\* *The Government proposes to repeal sections 132-8 SOCPA dealing with protest around Parliament and invites Parliament to consider whether additional provision is needed to ensure that Parliament's work is not disrupted by protests in Parliament Square. What, if any, additional provision is required?***

19. Whether the right to protest should be more strictly curtailed in relation to certain geographical areas has been a key consideration in the context of protests in the vicinity of Parliament. We posed this question in our consultation paper *Managing Protests around Parliament* which was published last October.

20. In passing sections 132 to 138 of the Serious Organised Crime and Police Act 2005, Parliament took the view that a more stringent regime was appropriate for demonstrations in a designated area around Parliament, compared with elsewhere. The provisions in SOCPA sought to establish a framework around Parliament that:

- balanced the competing rights of demonstrators and the wider community;
- provided the police with appropriate powers to manage this balance, and;
- protected the rights and interests of demonstrators and those undertaking other lawful activities.

21. We are however well aware of the concerns which organisations, including the Joint Committee and individuals have raised around the proportionality of these provisions, and following on from our consultation have included provision in the draft Constitutional Renewal Bill to repeal the SOCAP provisions.

22. The Government has proposed repeal of SOCAP as part of a wider programme of constitutional renewal – not because of concerns over ECHR compliance.

23. The compliance of the provisions has been supported by the courts. The JCHR refers to the case of Maya Evans who was convicted under section

132 of the Serious Organised Crime and Police Act. Ms Evans was not convicted for reading out the names of the war dead at the Cenotaph, but for failing to comply with the prior notification requirements of SOCPA (the provisions of which actually ensure that such protests would be authorised if notice given). The High Court upheld the conviction on appeal, ruling that the procedure under section 134 of the Serious Organised Crime and Police Act 2005 for authorising demonstrations in a designated area was compliant with Article 11 of the ECHR, and there was no need for the state, in its various public authority guises, to justify the necessity to act on the individual facts of the case where a person had been charged with organising or taking part in an unauthorised demonstration in a designated area.

24. Once an authorisation procedure was Article 11 compliant, Parliament had to be entitled to impose sanctions where authorisation had not been obtained; otherwise, the finding that the sections were compatible was illusory.

25. In another ECHR case, (*Rassemblement Jurrasien Unite v Switzerland*, EctHR 1979) the court has ruled that subjecting peaceful demonstrations to a prior authorisation procedure does not encroach upon the essence of the Article 11 right which can be regulated in its exercise.

26. In moving to repeal sections 132-138 of the Serious Organised Crime and Police Act, the Government takes seriously the need to ensure that the operation of Parliament is safeguarded and security is not compromised. In response to concerns raised by the Metropolitan Police and others, we are seeking the views of Parliament on whether additional provision is needed to ensure access to the House is not hindered and the workings of the House are not disrupted. These concerns need to be balanced against Parliament's status as the natural focus for the electorate to express its views which was very strongly articulated in response to our consultation

27. In terms of whether additional provision is needed in the wake of the repeal of sections 132 to 138, we are keen to hear the views of the JCHR. The JCHR will be aware that the Joint Committee on the draft Constitutional Renewal Bill which has been examining protests around Parliament, including the repeal of SOCPA, has now published its recommendations. We are carefully considering the Committee's recommendations and will respond in due course before introduction of the Bill during the fourth Parliamentary session.

28. The Government has made it very clear that the overarching aim of the review of the provisions covering protest around Parliament is to ensure there are no unnecessary restrictions on people's right to protest.

29. Another area where limitations on protest may be legitimate is in relation to demonstrations which take place outside a person's home. The Government introduced provisions which give a police officer at the scene the power to issue reasonable directions to prevent harassment of a person in their home and created an offence of knowingly causing harassment of a

person in their home. These provisions balance the rights of freedom of expression and peaceful assembly with the right to respect for private and family life.

\* ***In what circumstances would it be permissible for the State to take pre-emptive action which curtailed protests?***

30. The framework for managing protest in England and Wales set out in the Public Order Act 1986 only allows the State to take pre-emptive action to prevent a march. It does not allow the state to take action to prevent an assembly. This reflects the different risks posed by moving and static demonstrations to public order.

31. Under section 13 of the Public Order Act it is permissible for the State to authorise the ban of a march on the basis that a chief officer of police reasonably believes that because of particular circumstances existing in any area, the powers to impose conditions under section 12 would not be sufficient to prevent a march resulting in serious public disorder. In such a case, the chief officer can apply to the local authority to ban a march and would also need the consent of the Home Secretary. In London it is the appropriate Commissioner who makes the order with the consent of the Home Secretary.

32. The sorts of considerations which will need to be taken into account include the public safety of the protestors and the local community, the risk of violence, regard to community tensions and whether counter demonstrations are likely to take place. One of the key questions for the police will be whether the right of the marchers to assemble supersedes the public order threat. Police have to balance their rights against the interests of wider community.

33. The Committee will be aware that the powers in section 13 are used rarely and then only in extreme cases. The Committee will also be aware that the courts have ruled that it is not permissible for the police, relying on their duty to prevent a breach of the peace, to take pre-emptive action to curtail protest where there is no risk of imminent violence.

34. In *R(Laporte)* the House of Lords ruled that police officers acted unlawfully when, relying on their duty to prevent a breach of the peace, they intercepted coach passengers travelling from London to a protest demonstration in Fairford (Gloucestershire) and prevented them from continuing to the demonstration, since no such breach was about to occur. The action was an interference with the protestors' rights under articles 10 and 11 ECHR and was disproportionate.

**3. Can the competing interests of public order and the right to protest be reconciled?**

\* ***In what circumstances may actions during protests be justifiably criminalised?***

35. Actions during protests may be justifiably criminalised if they involve the use of violence or intimidation or amount to an unreasonable obstruction of the highway or harassment, alarm or distress. The provisions in the Public Order Act give the police powers to impose conditions on marches and assemblies in anticipation of serious public disorder etc. as well as at the scene, and knowingly failing to comply with a direction given by a police officer is an offence.

***Does existing criminal law and practice pay sufficient regard to human rights?***

36. The Government believes that existing criminal law pays sufficient regard to human rights. English law took account of ECHR long before we incorporated it in the Human Rights Act 1998.

37. In terms of practice, in exercising any of the powers potentially available to them, the police will be mindful of their role as a public authority under section 6 of the Human Rights Act 1998 and of the need to balance the rights of the protestors under articles 10 and 11 with the need to preserve order. Police decisions will fall to be justified as necessary and proportionate under articles 10.2 and 11.2 in the interests of public safety, or in order to prevent disorder or crime, or to protect the rights of others.

38. Police are operationally independent and must be afforded a level of discretion to, for example, vary conditions in a rapidly changing situation to maintain public order and to do so proportionately. The legislative framework on policing and protest gives them this discretion. The check to ensure that discretionary powers invested in the police are exercised in an accountable and non-discriminatory way is that the Human Rights Act 1998 forbids any public body, such as the police and local government, from acting in ways that conflict with the principles set out in the Convention. It enables demonstrators to use the courts, in principle, to challenge decisions that would restrict protest.

39. There are examples of where protestors and others have used the courts to challenge police decisions, particularly in relation to their exercise of the common law power to prevent a breach of the peace. Common law powers of the police allow them, where appropriate to prevent people from travelling to certain locations. Such an anticipatory power is, however, exceptional and will only arise if there is an imminent threat to public order or risk of violence (see Laporte above).

40. That said, in *Austin* the Court of Appeal found that where (and only where) there was a reasonable belief that there were no other means whatsoever whereby a breach or imminent breach of the peace could be

obviated, the lawful exercise by third parties of their rights might also be curtailed by the police.

41. The case of *Austin & another* concerned the containment of persons within a police cordon at Oxford Circus for over 7 hours, in order to prevent an imminent breach of the peace by others. In that case people innocently caught up in the demonstration were also legitimately penned in as the police sought to control crowds. The judge concluded that “there was not simply a static crowd of protestors in Oxford circus surrounded by police and held in place for 7 hours; it was a dynamic, chaotic and confusing situation in which there were also a large number of other protestors in the immediate vicinity outside the cordon who were threatening serious disorder and posing a threat to the officers both on the cordon and within it.”

\* ***How should the balance be struck between the rights of protesters and other competing interests (such as the rights of others or the prevention of disorder or crime)? Would legislative changes be desirable to strike a better balance between competing rights, or is the current legislative framework about right?***

42. Public order law and the policing of it “*involves balancing opposing rights of individuals with one another against wider entitlements and requirements of society – a task that, in practical terms, can seem like trying to satisfy the insatiable.*” Blackstones General Policing Duties 2008 This sums up how difficult that balance is.

43. In so far as large marches or demonstrations are concerned, irrespective of whether there is a requirement to notify the police in advance, it is in the interests of those organising such events to notify the police voluntarily to ensure competing interests are satisfied.

44. The Government believes that the validity of police powers to impose conditions on marches and assemblies under the Public Order Act, together with other provisions to prevent harassment, intimidation and obstruction strikes the right balance. However, we keep the law under review and in particular we are reviewing the law in relation to protest around Parliament.