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Policy paper

Police, Crime, Sentencing and Courts Bill 2021: protest powers factsheet

Updated 13 May 2021

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Protests are an important part of our vibrant and tolerant democracy. Under human rights law, we all have the right to gather and express our views. But these rights are not absolute rights. That fact raises important questions for the police and wider society to consider about how much disruption is tolerable, and how to deal with protesters who break the law. A fair balance should be struck between individual rights and the general interests of the community.

Having reviewed the evidence, our conclusion is that the police do not strike the right balance on every occasion. The balance may tip too readily in favour of protesters when – as is often the case – the police do not accurately assess the level of disruption caused, or likely to be caused, by a protest.

These and other observations led us to conclude that a modest reset of the scales is needed.

Her Majesty's Inspector of Constabulary, Matt Parr CB, 2021

1. Why are these measures needed?

Over recent years, certain tactics used by some protesters have caused a disproportionate impact on the hardworking majority seeking to go about their everyday lives. This has included halting public transport networks, blocking the printing press, blocking ambulances from reaching hospitals and preventing hundreds of hard-working people from getting to their jobs.

These protests have not only been highly disruptive and sometimes incredibly dangerous, they have also been a drain on public funds. For example, during Extinction Rebellion's protests of April and October 2019, some of London's busiest areas were brought to a standstill for several days. This had a disproportionate impact on commuters and small businesses, for example, with the policing operation for the two extended protests costing £37m - more than twice the annual budget of London's violent crime taskforce.

Over the summer of 2020, 172 Metropolitan Police Service officers were assaulted by a violent minority during the BLM protests.

As a result, the National Police Chief's Council have expressed concerns that existing public order legislation is outdated and no longer appropriate for responding to the highly disruptive protest tactics used by some groups today.

The measures in the Police, Crime, Sentencing and Courts Bill will improve the police's ability to manage such protests, enabling them to balance the rights of protesters against the rights of others to go about their daily business, and to dedicate their resources to keeping the public safe.

2. What are we going to do?

The measures in the Bill will allow the police to take a more proactive approach in managing highly disruptive protests causing serious disruption to the public.

We have asked Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) to consider five legislative proposals. These were to:

- widen the range of conditions that the police can impose on assemblies (static protests), to match existing police powers to impose conditions on processions;
- lower the fault element for offences relating to the breaching of conditions placed on a protest of either kind;
- widen the range of circumstances in which the police can impose conditions on protests (again, of either kind);
- replace the existing common law offence of public nuisance with a new statutory offence as recommended by the Law Commission in 2015; and
- create new stop, search and seizure powers to prevent serious disruption caused by protests.

HMICFRS “concluded that, with some qualifications, all five proposals would improve police effectiveness without eroding the right to protest”. They go on to recommend that the Home Office consider introducing legislation to obligate organisers of public assemblies to give the police written notice in advance of such assemblies and make provision for the prohibition of public assemblies. Such measures already exist for public processions, introducing them would align legislation so that the police have the same powers to deal with processions and assemblies.

Following careful consideration of the impact these measures will have on the police’s ability to manage protests as well as civil liberties, we are proceeding with the legislative proposals set out below.

3. How are we going to do it?

Provisions in the Bill will:

- Widen the range of conditions that the police can impose on static protests to match existing police powers to impose conditions on marches.

This measure will enable the police to impose conditions such as start and finish times and maximum noise levels on static protests. The police already have the power to impose such conditions on marches.

HMICFRS’ inspection found that “protests are fluid, and it is not always possible to make this distinction [between static protests and marches]. Some begin as assemblies and become processions, and vice versa. The practical challenges of safely policing a protest are not necessarily greater in the case of processions than in the case of assemblies, so this would not justify making a wider range of conditions available for processions than for assemblies”.

- Broaden the range of circumstances in which police may impose conditions on a protest.

This measure will broaden the range of circumstances in which the police can impose conditions on protests, including a single person protest, to include where noise may cause a significant impact on those in the vicinity or serious disruption to the running of an organisation. The Home Secretary will have the power, through secondary legislation, to define and give examples of “serious disruption to the life of the community” and “serious disruption to the activities of an organisation which are carried out in the vicinity of the procession/assembly/one-person protest”. These regulation-making powers will clarify ambiguous cases where, if they arise, it may not be clear whether the threshold for the use

of such powers have been reached. This will enable the police to make use of their powers with the confidence that they are doing so legally.

- Amend the offence relating to the breaching of conditions

This measure will close a loophole which some protesters exploit. Some will cover their ears and tear up written conditions handed to them by the police so that they are likely to evade conviction for breaching conditions on a protest as the prosecution have to prove that the person “knowingly fails to comply with a condition imposed”. The Bill will change the threshold for the offence so that it is committed where a person “knows or ought to have known” that the condition has been imposed.

- Restate the common law offence of public nuisance in statute

The Bill will implement a recommendation by the Law Commission to introduce a statutory offence of public nuisance and abolish the existing common law offence. This will provide clarity to the police and potential offenders, giving clear notice of what conduct is forbidden.

- Ensure vehicular entrances to the Parliament Estate remain unobstructed

This measure will enable the police to direct an individual to cease, or not start, obstructing the passage of a vehicle into or out of Parliament and make it an offence not to comply with such a direction. This will protect the right of access to the Parliamentary Estate for MPs, Peers and others with business there, as recommended in the Joint Committee on Human Rights in their 2020 report on Democracy, freedom of expression and freedom of association: Threats to MPs.

4. Common Misconceptions

4.1 Will these measures ban protests?

No, these measures will not grant the police, local authorities, or any other body powers to ban protests.

However, the Public Order Act 1986 already contains exceptional powers for a local authority, on an application by the Chief Constable and with the consent of the Home Secretary, to prohibit a public procession or trespassory assembly. In London, these powers are given to the Commissioner of the Metropolitan Police and the Commissioner of the City of London Police, with the consent of the Home Secretary. These powers are unchanged by this Bill.

4.2 Will these measures ban protests for being too noisy?

No, the police will only be able to impose conditions on unjustifiably noisy protests that cause harm to others or prevent an organisation from operating.

The threshold for being able to impose conditions on noisy protests will be appropriately high. Police will only use it in cases where it is deemed necessary and proportionate.

For an upcoming protest, the Chief Constable of the relevant force will be responsible for making the decision of whether the threshold is likely to be met. For a protest already taking place, the most senior officer at the scene will decide if the threshold is likely to be met. Depending on the circumstances, the senior officer would typically be an Inspector, Chief Inspector, or Superintendent.

In recent years we have seen some protesters use egregious noise not as a method of legitimately expressing themselves, but to antagonise and disrupt others from the enjoyment of their own liberties and rights.

This power can only be used when the police reasonably believe that the noise from the protest may cause serious disruption to the activities of an organisation or cause a significant impact on people in the vicinity of the protest. “Impact” is defined as intimidation, harassment, serious unease, serious alarm, or serious distress with the police then having to consider whether the impact is significant.

When making use of these powers, the police will need to take into account a range of factors, including:

- Who is impacted – police can consider factors such as whether a protest will impact children or vulnerable groups. They may also consider the number of people likely to be impacted by a protest.
- The duration of the impact – an extended protest stretching over many days may, for example, be more likely to meet the thresholds for use of these powers than a short but noisy protest, which will be unlikely to meet the threshold.
- The intensity of the impact – an extremely noisy protest taking place outside a large, double-glazed office building is unlikely to have the same impactor cause the same disruption as a similarly noisy protest outside a care home for the elderly, a small GP surgery, or small street-level businesses.
- The human rights of protesters and of those impacted – in all scenarios, police will need to consider the human rights both of protesters – including freedom of expression and freedom of assembly – and of those impacted by protests.

This means that:

- A noisy protest in a town centre may not meet the threshold, but a protest creating the same amount of noise outside a school might, given the age of those likely to be impacted by the protests.
- A noisy protest outside an office with double glazing may not meet the threshold, but a protest creating the same amount of noise outside a care home for elderly people, a small GP surgery, or small street-level businesses might, given the level of disruption likely to be caused by the protest.
- A noisy protest that only lasts a short amount of time may not meet the threshold, but a protest creating the same amount of noise over several days might, given the extended duration of the protest.

The majority of protests in England and Wales do not cause serious disruption to the activities of an organisation or a significant impact on the people in the vicinity of the protest so will be unaffected by this legislation. This power will only limit the most extreme cases where the noise from protests is unjustifiable.

4.3 Will these measures ban protests outside Parliament?

No, the ability to protest outside the heart of our democracy is a fundamental right that this Government will not erode.

The measure relating to Parliament enables a police officer to direct an individual to cease, or not begin, obstructing the passage of a vehicle into or out of Parliament. This is to ensure that those who have business there can access Parliament without facing the security risk of being attacked as a result of being held stationary outside of Parliament's gates.

Protesters will be able to continue to protest outside Parliament, providing they follow a police officer's direction to not obstruct vehicular entrances as a vehicle is approaching.

This measure responds to a recommendation made by the cross-party Joint Committee on Human Rights to prioritise the protection of democratic institutions and the importance of access to Parliament for everyone with business there in their October 2019 report "Democracy, freedom of expression and freedom of association: Threats to MPs". The Committee is Chaired by Harriet Harman, a Labour MP.

4.4 Will these measures ban protest that are annoying?

No. The Police, Crime, Sentencing and Courts Bill does not introduce a new power to ban protests.

Whilst the public nuisance offence can capture behaviour that causes the public or a section of the public to suffer serious annoyance, this is consistent with the existing common law offence of public nuisance and does not connote merely feeling annoyed.

The term "annoyance" has been applied to:

- allowing a field to be used for holding an all-night rave;
- conspiring to switch off the floodlights at a football match so as to cause it to be abandoned; and
- noise, dirt, fumes, noxious smells and vibrations.

4.5 Will protesters face 10-year sentences for being a nuisance?

The public nuisance offence is not a new offence, but an existing, centuries old, common law offence which currently has a maximum sentence of life imprisonment.

We are introducing the offence in statute, and abolishing the common law offence, in line with the recommendations of the independent Law Commission. In doing so, we are narrowing the scope of the offence and lowering the maximum penalty from unlimited crown court penalties, to 10 years' imprisonment.

The offence of public nuisance covers behaviours beyond those related to public order. The Law Commission identified the need for this offence as "Human inventiveness being so great, it is desirable to have a general offence for culpable acts that injure the public but do not fall within any of the specialised [existing] offences."

Any protesters found guilty of public nuisance are likely to face penalties in line with existing sentences for public order offences.

Stricter sentences under this offence are likely to only occur in exceptional circumstances, the Law

Commission recommended “as the offence is intended to address serious cases for which other offences are not adequate, if a maximum sentence is set it should be high enough to cover these cases.” Sentencing in individual cases is a matter for the independent judiciary.

4.6 Will the Home Secretary be able to decide what constitutes “serious disruption”?

No. Deciding whether to place conditions on an assembly or procession to prevent serious disruption is an operational matter for the police. In the event of a challenge, ultimately it would be for the courts to decide whether the threshold of serious disruption had been met.

The regulation-making power provided for in the Bill simply allows the Home Secretary to provide clarity as to the term “serious disruption” where confusion arises. Any definition created through this power will need to fall within what can reasonably be understood as “serious disruption”. For example, clarifying that hindering news reporting and disrupting the free press can be considered to be serious disruption.

The regulations will need to have been debated and approved by both Houses of Parliament before they can be made by the Home Secretary.

4.7 Will these measures undermine freedom of expression?

No, freedom of expression is a cornerstone of British democracy. The majority of protests in the England and Wales will be unaffected by these changes.

These measures will balance the rights of protesters with the rights of others to go about their business unhindered. They will achieve this by enabling the police to better manage highly disruptive protests.

4.8 Why are these measures needed?

Existing public order legislation was passed in 1986 and is no longer fit for managing many of the types of protests we experience today.

The highly disruptive tactics used by some protesters cause a disproportionate impact on the surrounding communities and are a drain on public funds. For example, during Extinction Rebellion’s protests of April and October 2019, some of London’s busiest areas were brought to a standstill for several days with the policing operation for the two extended protests costing £37m - more than twice the annual budget of London’s violent crime taskforce.

These measures will improve the police’s ability to manage such protests, enabling them to dedicate their resources to keeping the public safe.

4.9 How will protesters’ rights be protected?

When using these, or existing public order powers, the police must act within the law and be able to demonstrate that their use of powers are necessary and proportionate. They must act compatibly with human rights, principally in relation to protests, Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of association) of the European Convention on Human Rights (ECHR).

The ECHR is explicit in stating that public authorities may temporarily restrict these rights in extreme circumstances if they can show that their action is lawful, necessary and proportionate in preventing disorder or crime [among other reasons].

For example, an authority may be allowed to restrict the freedom of expression, given by article 10, if the protest in question expresses views that encourage racial or religious hatred. This in turn protects the rights of the public at large, including the protestors.

4.10 What conduct will the new public nuisance offence capture?

The new statutory offence of public nuisance will cover the same conduct as the existing common law offence of public nuisance. The offence captures conduct which causes serious harm to, endangers the life, health, property or comfort of the public, or obstructs the public in the exercise or enjoyment of rights common to the public. An act or omission is considered to cause serious harm if as a result, a person suffers serious distress, serious annoyance, serious inconvenience or serious loss of amenity. Conduct captured here will include nuisances such as producing excessive noise or smells, or offensive or dangerous behaviour in public, such as hanging from bridges. For instance, previous convictions have been for throwing oneself into a river, or for threatening to jump from motorway bridges. Each of these caused unnecessary burden on, and distraction for, emergency services, in particular the use of police resources that could not be used elsewhere in the community. This denied an amenity to a cross section of the public.

A reasonableness defence is provided; allowing for a person to prove that they had a reasonable excuse for the act or omission. The burden of proof is placed on the defendant as the facts as to whether they have a reasonable excuse will be within their knowledge.

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