

LIBERTY

STRIKING AT THE HEART OF DEMOCRACY: LIBERTY'S BRIEFING ON THE PROPOSED THREATS TO PROTEST

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ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at libertyhumanrights.org.uk/policy.

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INTRODUCTION

1. The right to protest is the lifeblood of any democracy. Protest allows us to hold the powerful to account and to actively assert our membership of a society. This decade, the world has witnessed an unprecedented number of ordinary people standing up to power and making their voices heard: from those upset by the Government's handling of the pandemic, to school children demanding action to tackle the climate crisis; from pro and anti-Brexit campaigners, to people protesting against police violence and racial inequality. History shows us that protest often underpins social, political and economic change. Some of our most fundamental freedoms have been won in spite of Governments of the day seeking to quell these demands – from some women gaining the right to vote, to the abolition of the slave trade. As a fundamental right that underpins our democracy, protest – especially during a public emergency – is even more crucial than ever to protect.
2. Over the last 35 years, the State has been vested with significant powers to regulate protest. Police now have wide powers to impose conditions and prohibit protests, as well as broad discretion in how those powers are applied. This has been brought into focus by the response to protests over the past year. Anti-lockdown protesters were arrested under the claims that protest was outright banned under coronavirus regulations,¹ and research into the policing of Black Lives Matter protests showed that the Metropolitan Police used excessive force, including through practices such as kettling, the tactic of enclosing protestors in confined spaces for hours on end.²
3. While Policing Minister Kit Malthouse MP recently affirmed that “the right to peaceful protest is a fundamental tool of civic expression”, and promised that protest “will never be curtailed by this government”,³ reports in the Telegraph, confirmed in correspondence between the Home Secretary and Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), show that the Government seeks to create more obstacles to protest.⁴ In a sweeping series of Bills due to be published this year, the Government is proposing to drastically limit the right to protest. These Bills, including the ‘Protection of the Police and Public Bill’ would raise barriers to organising protests, limit the areas in which they may take place, increase criminal penalties for people who fall foul of police-imposed conditions and establish new criminal penalties altogether. The cumulative effect of these measures – which target the tools that make

¹ Damien Gayle and Mattha Busby, ‘Police arrest 155 anti-lockdown protesters in London’ *The Guardian* (28 November 2020) <https://www.theguardian.com/world/2020/nov/28/met-police-anti-lockdown-protest-london>

² The Network for Police Monitoring (NETPOL), *Britain is Not Innocent*, November 2020, page 4 <https://secureservercdn.net/50.62.198.70/561.6fe.myftpupload.com/wp-content/uploads/2020/11/Britain-is-not-innocent-web-version.pdf>

³ Home Office, *Policing Minister Kit Malthouse's statement on Birmingham incident and Extinction Rebellion protests* (7 September 2020) <https://homeofficemedia.blog.gov.uk/2020/09/07/policing-minister-kit-malthouses-statement-on-birmingham-incident-and-extinction-rebellion-protests/>

⁴ Charles Hymas and Harry Yorke, ‘Priti Patel to clean up law on protests that damage democracy’ *The Telegraph* (8 December 2020) <https://www.telegraph.co.uk/news/2020/12/08/priti-patel-readies-new-law-protect-tenets-democracy/>

protest rights meaningful – would constitute an attack on a fundamental building block of our democracy.

EXPANDING ALREADY INTRUSIVE POWERS

4. The UK’s legal landscape for the conduct of protest is heavily weighted in favour of the authorities. Police already have extremely wide-ranging powers to control or ban protests, and to arrest those who stray from the conditions imposed by the police or fall foul of legislation which criminalises the traditionally civil wrong of trespass. This following table details the existing powers available to the police to manage protests and the changes these proposals would make.

Existing Powers	The Proposals
Imposing conditions on public processions (i.e. marches)	
<p>Section 12(1) of the Public Order Act allows a senior police officer to impose conditions on public processions if they reasonably believe that:</p> <ul style="list-style-type: none"> a. it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or b. the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do. 	<p>The proposals would amend Section 12(1) to lower the threshold that needs to be met before a senior police officer can impose conditions on public processions from “serious public disorder” to “significant public disorder.”</p>
<p>Section 12(4) of the Public Order Act establishes an offence for “a person who organises a public procession and knowingly fails to comply with a condition imposed.”</p>	<p>The proposals would amend Section 12(4) to establish an offence where someone breaches a police-imposed condition on a march where they “ought to have known” the condition existed.</p> <p>This would have the effect of criminalising people who unwittingly breach conditions the police impose and criminalise behaviour that would not in itself be unlawful, but for the imposition of these conditions. This places an</p>

	<p>additional undue burden on the organisers of protests (to inform protestors of conditions), and on protestors themselves, and potentially may disproportionately criminalise smaller, under-resourced or spontaneous protest groups, as well as digitally excluded protestors (who don't have access to announcements the police put on their website, for example).</p>
<p>Imposing conditions on public assemblies (i.e. static gatherings)</p>	
<p>Section 14(1) of the Public Order Act 1986 details three conditions that a senior police officer may impose on persons organising or taking part in a public assembly as appear to him necessary to prevent such disorder, damage, disruption or intimidation. These conditions are:</p> <ol style="list-style-type: none"> 1. the place at which the assembly may be (or continue to be) held, 2. its maximum duration, or 3. the maximum number of persons who may constitute it. 	<p>The proposals would amend Section 14 of the Public Order Act 1986 to expand police powers to impose conditions on static assemblies. This would mean bringing Section 14(1) into parity with Section 12(1) which enables a senior police officer to impose any conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including</p> <ol style="list-style-type: none"> 1. conditions as to the route of the procession, or 2. prohibiting it from entering any public place. <p>In the context of a public assembly, these unlimited conditions would mean that a senior police officer could now ban an assembly altogether.</p>
<p>Section 14(1) of the Public Order Act allows a senior police officer to impose conditions on public assemblies if they reasonably believe that:</p> <ol style="list-style-type: none"> a. it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or b. the purpose of the persons organising it is the intimidation of others with a 	<p>The proposals would amend Section 14 to lower the threshold that needs to be met before police can impose conditions on static assemblies from “serious public disorder” to “significant public disorder.”</p>

<p>view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.</p>	
<p>Section 14(4) of the Public Order Act establishes an offence for “a person who organises a public assembly and knowingly fails to comply with a condition imposed.”</p>	<p>The proposals would amend Section 14(4) to establish an offence where someone breaches a police-imposed condition on an assembly where they “ought to have known” the condition existed.</p>
<p>Prohibiting protest at specific locations</p>	
<p>While police may impose conditions which limit, to some degree, where protests take place, the High Court handed down a decision last year which held that a London-wide ban on assemblies imposed by the Metropolitan Police was unlawful.</p> <p>The Serious Organised Crime and Police Act 2005 criminalised all protests taking place outside Parliament or other designated areas without prior authorisation by police. Whilst the 2005 restrictions on protests around Parliament have since been repealed, new limitations were added in 2011, including the prohibition of the operation of noise amplification equipment and tents or other structures designed for sleeping overnight.⁵</p>	<p>The proposals would establish a new power to make it illegal for protestors to obstruct</p> <ol style="list-style-type: none"> a. Parliament – by setting up buffer zones outside the Palace of Westminster, b. the Courts, c. the distribution of newspapers or broadcast media, or d. “Critical national infrastructure”. <p>This restriction could render actions such as picketing by strikers at their workplace or protests outside nuclear power plants illegal.</p>
<p>Advance notice of protests</p>	
<p>The Public Order Act 1986 establishes that the organiser(s) of a public procession must give advance written notice of their protest at minimum 6 days before it is due to take place, unless it is not reasonably practicable to give advance notice (e.g. if it is spontaneous).</p>	<p>The proposals would increase the advance notice period requirements. This could also involve introducing a notice period requirement for public assemblies.</p>

⁵ Police Reform and Social Responsibility Act 2011

Organisers of public assemblies do not need to provide advance notice to the police.	
Obstruction of a highway	
Section 137 of the Highways Act 1980 establishes a civil offence for a person who “without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway.” A person guilty of this offence is liable for a fine.	The proposals would create a criminal offence for the obstruction of a highway where it causes “serious disorder.” In other words, protesters could face imprisonment and a criminal record.
Stop and search	
<p>Police have the power under Section 1 of the Police and Criminal Evidence Act 1984 and Section 23 of the Misuse of Drugs Act 1971 to stop and search someone if they have ‘reasonable grounds’ to suspect a person is carrying</p> <ul style="list-style-type: none"> • Illegal drugs • A weapon • Stolen property • Something which could be used to commit a crime, such as a crowbar <p>Under Section 60 of the Criminal Justice and Public Order Act 1994, police have the power to stop and search someone without reasonable grounds if it has been approved by a senior police officer and if it is suspected that:</p> <ul style="list-style-type: none"> • Incidents involving serious violence may take place • An incident involving serious violence has taken place and that a weapon used in the incident is being carried in the area 	<p>The proposals would establish a new protestor-specific stop and search power to prevent “serious disorder” if an officer suspects a person of carrying an item that may be used in a protest.</p> <p>This would allow a police officer to stop and search someone simply because they suspect they are carrying certain items that are not themselves a criminal offence to possess or use (such as a lock). This could effectively amount to a suspicionless stop and search power that could be applied to anyone linked to a protest.</p>

<ul style="list-style-type: none"> Someone is carrying a weapon in the area <p>Sections 44-47 of the Terrorism Act 2001 introduced new powers to stop and search individuals and has been widely used in respect of protests. This was successfully challenged at the European Court of Human Rights⁶ and the stop and search powers have since been limited.⁷</p>	
Trespass⁸	
<p>Trespass is currently a civil law offence and police have no powers to arrest offenders.</p> <p>Aggravated trespass is a criminal offence, and someone is at risk of an offence if they are trespassing and intentionally obstructing, disrupting, or intimidating others from carrying out 'lawful activities.' A senior police officer has the power to order any person believed to be involved in aggravated trespass to leave the land and there is an additional offence if someone returns to the land in question within three months' time.</p>	<p>The proposals would establish a criminal offence for trespass and introduce new police powers to arrest offenders in situ and seize any vehicles or other property immediately.</p>

5. Liberty is yet to hear a compelling case in favour of creating far-reaching new powers or expanding those already on the statute books. As Sajid Javid MP, in his role as Secretary of State for the Home Department, noted: "*it is a long-standing tradition that people are free to gather together and to demonstrate their views. This is something to be rightly proud of... where a crime is committed the police have the powers to act so that people feel protected*", citing the vast legislation that "*already exists to restrict protest activities that cause harm to others*" including the Public Order Act 1986 and the Protection from Harassment Act 1997, as well as other civil legislation.⁹ Similarly, Andrew Gwynne MP has amplified comments made by former Attorney General, Dominic Grieve QC that "no new laws were required if the police used the substantial

⁶ *Gillan and Quinton v United Kingdom* [2009] ECHR 28 (12 January 2010)

⁷ Section 47A Terrorism Act 2000

⁸ Our understanding is that trespass will be dealt with in a separate Bill (The Police Powers Bill). However, newspapers have reported that it may also be covered in the Protection of the Police and Public Bill which is why we include it here.

⁹ <https://hansard.parliament.uk/Commons/2018-09-13/debates/1809132900018/AbortionClinicProtestReview?contribution-974CF934-8681-4514-88EC-1A2397C66011>

powers they already have”.¹⁰ Indeed, it is not clear that police forces even support all the proposals. Responding to the Home Office’s consultation on the proposal to introduce criminal sanctions with respect to trespass, only 21% of police forces and Police and Crime Commissioners that submitted responses agreed with the move towards criminalisation.¹¹

6. The Government’s response to the coronavirus pandemic has laid bare the risks in affording the State broad powers to limit the right to freedom of association and assembly. While necessary and proportionate restrictions on protest are permissible under human rights law, no explicit protection has been made for protest in the Coronavirus Act 2020 or in many of the regulations, made under the Public Health Act 1984, which impose restrictions on movement and gatherings. The Home Secretary has made the very concerning claim that protests of more than two people are unlawful, and reportedly briefed police chiefs that they are expected to impose this effective blanket ban on protest.¹² This has led to people being criminalised *en masse* for voicing opposition to state practices.¹³ Scores of people have been arrested for taking to the streets to protest against lockdown restrictions,¹⁴ and protest organisers who have done their best to comply with pandemic restrictions, such as carrying out a risk assessment, have been cowed into not going ahead.¹⁵

ATTACKING THE PRINCIPLES OF PROTEST

7. Under human rights law, States have an obligation not to place unnecessary obstacles in the way of people wishing to protest, as well as a positive obligation to facilitate protest.¹⁶ Any restrictions on the rights to freedom of assembly and freedom of expression must be defined in law, pursue a legitimate aim and be necessary and proportionate. Moreover, the right to freedom of assembly includes the right to choose the time, place and modalities of any protest.¹⁷ As the Court of Appeal has held, protest “becomes effectively worthless if the protestor’s choice of ‘when and where’ to protest is not respected as far as possible.”¹⁸

¹⁰ <https://hansard.parliament.uk/Commons/2020-09-07/debates/05C94BEF-35F9-496D-B43F-3F9E95C33CE3/BirminghamAttacksAndExtinctionRebellionProtests#contribution-B6771FD4-5D43-49A1-9EA3-09C2F1134560>

¹¹ Friends, Families, and Travellers, *Police oppose criminalising unauthorised encampments and call for more sites* (November 2019) <https://www.gypsy-traveller.org/wp-content/uploads/2019/11/FINAL-Police-oppose-criminalising-unauthorised-encampments-and-call-for-more-sites-to-be-published-9am-13.11.19.pdf>

¹² Fiona Hamilton, ‘Coronavirus lockdown: Priti Patel wants police to stop protests of more than two’, *The Times*, (3 November 2020) <https://www.thetimes.co.uk/article/coronavirus-lockdown-priti-patel-wants-police-to-stop-protests-of-more-than-two-zdpv3xczx>

¹³ Liberty, ‘Liberty calls for protest protections’, (22 January 2021), <https://www.libertyhumanrights.org.uk/issue/liberty-calls-for-protest-protections>

¹⁴ BBC News, ‘Covid: More than 150 arrests at London anti-lockdown protest’, (28 November 2020) <https://www.bbc.co.uk/news/uk-england-london-55116470>

¹⁵ Liberty, Liberty challenges police on cancelled trans rights protest, (11 November 2020) <https://www.libertyhumanrights.org.uk/issue/liberty-challenges-police-on-cancelled-trans-rights-protest>

¹⁶ *Ollinger v Austria*, Application no. 76900/01.

¹⁷ *Sáska v. Hungary*, Application no. 58050/08.

¹⁸ *Singh and ors, R (on the Application of) v Chief Constable of West Midlands Police* [2006] EWCA Civ 1118, at para 87

8. Liberty is deeply concerned by proposals to impose onerous conditions on protesters, and restrict protest at “critical national infrastructure” or locations which “serve a democratic function”. When people are protesting against the practices of those with power – whether in Government, Parliament, the courts or the media – it is critical they are facilitated to meaningfully make their voices heard. These proposals seek to shield those in power from public criticism, and could see protests curtailed outside a broad range of powerful institutions on the basis of minor inconvenience of disruption, striking the wrong balance between the rights of protestors and others.¹⁹ Further, banning protest in particular places of power would constitute a retrograde step – one which the public have already expressed their disquiet towards when the same measures were proposed in the Serious Organised Crime & Police Act in 2011.²⁰
9. Plans to introduce legislation requiring protestors to give significant notice of demonstrations outside Parliament also strike at the heart of protest by preventing spontaneous and rapid response action.²¹ The Right to Protest Principles – a set of best practice standards developed by international non-governmental organisation ARTICLE 19 – recommend that notification regimes for protests only ever be voluntary, and that notice periods should be limited to a maximum of 48 hours before a protest is due to take place.²² The current requirements for advance notice of protests in the Public Order Act 1986, outlined above, already overstep this guidance.

IMPACT ON COMMUNITIES

10. In addition to impacting the fundamental right of protest, these proposals will have an impact on a broad range of communities and interest groups. Women, people of colour, LGBTI+ people, religious minorities and other groups who are disproportionately denied access to other means of participation in public life especially rely on protest as a means to express their inclusion into a fair and equal society. As a matter of law, the State must respect and promote the rights of all people under their jurisdiction; particular effort should be made to ensure “*equal and effective protection of the rights of groups or individuals who have historically experienced discrimination.*”²³
11. Communities who are already subject to systemic over-policing are likely to bear the brunt of any new police powers to manage protest. Research into the policing of the Black Lives Matter

¹⁹ Article 19, *Right to Protest Principles*, page 8

²⁰ The Government’s proposals in effect seek to re-introduce sections of the Serious Organised Crime & Police Act (that were repealed by the Police Reform and Social Responsibility Act 2011). Sections 132-138 of SOCPA caused national anger and disquiet when they placed onerous restrictions on the rights of assembly within the vicinity of Parliament

²¹ Further, there are numerous alternative solutions to any potential logistical issues that protest might cause that do not entail hollowing out a fundamental right. For example, MPs have access to alternative private entrances to the Palace of Westminster.

²² Article 19, *Right to Protest Principles*, page 18

²³ United Nations, *Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the proper management of assemblies* (4 February 2016) <https://digitallibrary.un.org/record/831673?ln=en>

protests last year found that force was disproportionately used against black and other minoritised protesters, reflecting wider patterns of institutional racism in policing.²⁴ Liberty is particularly concerned about the proposal to establish a stop and search power specifically targeted at protesters. Existing stop and search powers are used against communities of colour, and Black men in particular, at staggeringly disproportionate rates.²⁵ Used in the context of protest, new grounds for stop and search will only mirror these disparities, and may deter people of colour from exercising their right to protest. There is no justification for creating a protest-specific stop and search power, especially while these disparities endure.

12. The proposals to criminalise ‘unauthorised encampments’ also pose significant risks for minority communities. Establishing trespass as a criminal offence risks effectively criminalising Gypsy, Roma and Traveller (GRT) communities’ traditional way of life. In Liberty’s view, these proposals are potential unlawful, in light of the recent Court of Appeal decision which held that “*the Gypsy and Traveller community have an enshrined freedom not to stay in one place but to move from one place to another.*”²⁶ As one of the most marginalised groups in British society, GRT people must not be further impacted by Bills that are expansive and unclear in scope.
13. Criminalising trespass will also impact access to the countryside and affect the enjoyment of British land for recreational activities. This runs contrary to the Government’s commitment to “[open] up the natural world,” as stated in its 25 year Environmental Plan.²⁷ As a coalition of groups including the Ramblers, the Open Spaces Society, and CPRE, the countryside charity, outlined in an open letter to the Home Secretary last month, these proposals “*would send a signal that the countryside is not an open resource accessible to all, but a place of complex rules and regulations, where stepping off a public path could lead to a criminal sentence...the exercise of recreational activities, such as walking, cycling, climbing or canoeing in the countryside, should not put you at risk of committing a crime*”²⁸

CONCLUSION

14. When the Government of the day seeks to create new powers to attack the protest rights of any group, it harms us all. The Government has expressed its concern when countries such as China and the United States have reacted with heavy-handed actions to the right of freedom of assembly. Normalising the criminalisation of protesters runs contrary to the principles of democratic governance and risks the UK’s ability to take a firm stance against international

²⁴ The Network for Police Monitoring (NETPOL), *Britain is Not Innocent*, November 2020, page 4 <https://secureservercdn.net/50.62.198.70/561.6fe.myftpupload.com/wp-content/uploads/2020/11/Britain-is-not-innocent-web-version.pdf>

²⁵ Liberty, ‘New figures show racism stop and search persists’ <https://www.libertyhumanrights.org.uk/issue/new-figures-show-racism-in-stop-and-search-persists/>

²⁶ *London Borough of Bromley v Persons Unknown and Ors* [2020] EWCA Civ 12, at para 109

²⁷ Government Policy Paper, ‘25 Year Environment Plan’ <https://www.gov.uk/government/publications/25-year-environment-plan>

²⁸ <https://mk0ossociety9jn92eye.kinstacdn.com/wp-content/uploads/2021/01/Dont-criminalise-trespass-joint-letter-to-Home-Office-18th-Jan-2021-1.pdf>

abuses of power. In addition, targeting the various methods of effective protest through onerous conditions and restrictions hollows out the right to protest, and risks deterring, preventing or otherwise obstructing people from exercising their rights. There are numerous reasons to warrant the expression of dissent, and it is crucial that the Government stops any plans to further disrupt the public's civic participation.²⁹ Liberty anticipates the impact of these Bills to be felt particularly acutely by marginalised communities, as well as preventing people from walking, canoeing or cycling through the countryside.

15. Rather than protecting the public, as the title of one of the proposed Bills stipulates, these plans demonstrate that the Government intends to target those already less able to make their voices heard and protect those with power. By restricting protest you do not protect democracy, you threaten it – a threat that becomes even more egregious when one considers the wholesale context of attacks on democratic accountability that this Government is waging more broadly through efforts to expand executive power and limit the scrutiny of Government decisions through Parliament and the courts.³⁰

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²⁹ Caroline Lowbridge, 'Covid: Women on exercise trip 'surrounded by police'' *BBC News* (8 January 2021) <https://www.bbc.co.uk/news/uk-england-derbyshire-55560814>

³⁰ Gracie Mae Bradley, 'How the British Government is trying to crush our right to protest' *The Guardian* (14 December 2020) <https://www.theguardian.com/commentisfree/2020/dec/14/british-government-right-to-protest-limitations-freedoms-pandemic-legislation>