Consultation on Police Powers to Promote and Maintain Public Order

Consultation Response

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Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. On 13 October 2011, the Home Office published its consultation on Police Powers to promote and maintain public order ("the Consultation Paper"). The consultation paper seeks views on three specific proposals for reform:

    a. Reform of Section 5 of the Public Order Act 1986, to narrow the offence of using threatening, abusive or insulting behaviour causing harassment, alarm or distress;
    b. Extension of existing powers in Section 60 AA of the Criminal Justice and Public Order Act 1996 which allow the police to request the removal of face and head coverings in specific circumstances; and
    c. The creation of general police powers to order a curfew be imposed on a specific geographic area

3. JUSTICE has worked extensively on the policing of protest over the past decade, including calling for reform of Section 5 Public Order Act 1986.

a) Reform of Section 5, Public Order Act 1986

Introduction

4. The Consultation paper recognises JUSTICE's previous work recommending reform of Section 5, Public Order Act 1986 ("POA"). In our response to the previous consultation on this issue in 2009, we called for broad reform of Section 5 and indicated that the removal of the "insulting" element of the offence should be at a minimum accompanied by guidance to the police designed to prevent the offence being charged in circumstances where prosecution was not in the public interest and to prevent the offence being used to trigger arrest in connection with instances of low level anti-social behaviour. Since this consultation in 2009, we have continued to recommend Section 5 POA be subject to

repeal or reform. In our briefings on the Protection of Freedoms Bill we have proposed amendments for this purpose.[1]

5. Freedom of expression is arguably 'the primary right in a democracy', without which 'an effective rule of law is not possible'.[2] In England and Wales its importance has been long recognised by the common law:[3] In particular, it is a fundamental aspect of the right of freedom of expression that it includes not merely the expression of ideas or sentiments that we agree with or approve of. If the right to freedom of expression is to mean anything, it must also extend to forms of expression that others find offensive or insulting, including ideas that 'offend, shock or disturb'.[4] This aspect of freedom of expression is especially important in the context of protests and demonstrations and other circumstances where the expression is political – for expression of political ideas enjoy particularly strong protection under article 10 of the European Convention on Human Rights.[5]

6. Also highly relevant, in the context of protests and demonstrations and other circumstances where the expression is political, is that freedom of political expression is accorded particularly high importance in the jurisprudence of the ECtHR. Political expression includes discussion of matters of public concern.[6]

7. In addition to freedom of expression, arrests for section 5 offences will also frequently interfere with the right to freedom of assembly, protected under Article 11 ECHR. For observations on Article 11 (in which we emphasised its importance to a democratic society) we direct the authors of the consultation to our evidence to the JCHR in its inquiry into policing and protest, which is annexed to the Committee's report.[7]

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[1] The relevant briefings for Committee Stage in the House of Lords and the House of Commons are available online: www.justice.org.uk

[2] Lord Steyn in *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277 at p297. Case-law quotations and references in the 'General remarks' section of this document are taken from R Clayton and H Tomlinson, The Law of Human Rights (2nd ed), OUP, 2009.

[3] *Bonnard v Perryman* [1891] 2 Ch 269 at p284.

[4] See e.g. the decisions of the European Court of Human Rights in *Lehideux and Isornia v France* (2000) 30 EHRR 665, para 55; *De Haes and Gijsels v Belgium* (1997) 25 EHRR 1.

[5] See e.g. *Thorgeison v Iceland* (1992) 14 EHRR 843, para 62.

[6] *Thorgeison v Iceland* (1992) 14 EHRR 843, para 62.

[7] Human Rights Joint Committee – Seventh Report Session 2008-2009, *Demonstrating respect for rights? A human rights approach to policing protest*, Written Evidence – Volume II (HL 47-II/HC 320-II), Appendix, Memorandum submitted by JUSTICE.

8. For these reasons, JUSTICE has long been concerned about the scope and use of section 5 of the Public Order Act 1986, in particular its use by police as a basis for arresting people otherwise engaged in lawful and peaceful protests. In particular, there is no requirement on the prosecution under section 5 to prove either that:

   - the alleged offender *intended* to cause 'harassment, alarm or distress'; or

   - any person was actually caused 'harassment, alarm or distress' by hearing the words.

9. In our view, it is especially problematic when the alleged victim of the offence is the arresting officer.[8]

This consultation: "insulting" words or behaviour

10. Our starting point is that there is no right, either in English law or in the law of the ECHR, not to be offended. While there is clearly a public interest in the criminal law protecting members of the public from being threatened or harassed by others, merely causing offence (or being likely to do so) through words or conduct in a public place should not, without more, constitute a criminal offence. Public words and conduct which some members of society would have been offended by in previous centuries (and indeed, which a minority of people with less progressive social views are probably still offended by) has been responsible for important social and political reforms: the assertion of racial and gender equality; gay Pride marches; etc. It is essential for the progress of our society that we do not now attempt to ossify public views by censoring debate on matters of current public controversy.

11. Strongly held social, political and religious views mean that offence is easily taken often on both sides of a debate: for example, on topics as heterogeneous as abortion and conflict in the Middle East. Such subjects, however, remain of extreme importance and ordinary citizens, as well as the media and political classes, must be able to discuss them, debate and demonstrate without fear of arrest and prosecution. For members of the public, expression in public places remains one of the most important methods of publicising a view or attracting attention to a cause. While the internet has to some

[8] See also e.g. *Southard v DPP* [2006] EWHC 3449 (Admin). See also Home Office, *Consultation on Police Powers to Promote and Maintain Public Order,* October 2011, page 8.

extent democratised the media, the visual impact and news coverage attracted by prominent demonstrations such as the 2003 march against war in Iraq and the recent protests by supporters of the Tamil community in Sri Lanka in Parliament Square cannot be rivalled by a blog or online post.

12. The removal of the word 'insulting' from s5 POA would go some way to prevent the overuse of this power in the context of protests and demonstrations. It is uncontroversial, in our view, that 'threatening' words and conduct should be restrained by the law. The word 'abusive' in s5 POA remains problematic since it can be defined as 'insulting or rude' (Chambers 21st Century Dictionary definition); further, it is by no means clear that even if the meaning of 'abusive words' for the purposes of this offence is restricted to the use of swear words and other similarly coarse language, that the use of such language should be criminalised in the broad range of contexts embraced by s5.

13. Consideration of the 'abusive' element of s5 is outside the scope of this consultation but we would recommend that at the least, clear guidance be issued to police officers and developed by the CPS to distinguish between proportionate and disproportionate uses of the offence in the case of abusive words and behaviour (similarly for the extremely broad category of 'disorderly behaviour', which we believe should be the subject of similar consideration as that for 'insulting' words and behaviour in this consultation). In particular, we do not consider that prosecution should result for, without more, the use of a single swear word against a police officer (for example, the case of *Southard* – see para 9 above), since this is frankly a waste of public funds. Section 5 can appear at the end of a charge sheet where abusive language has been used during arrest for another offence, for example, and in this context it adds little if anything to the prosecution of the main offence. In other contexts it can result in unnecessary arrests, for example, in the context of stop and search, and in this context it is likely to harm community relations with the police – for example, in the context of the disproportionate use of stop and search against certain ethnic groups, or in relations between police and young people. In these cases it is likely that a verbal warning would suffice.[9]

14. We therefore support the removal of the word 'insulting' from s5 POA, although we believe that in addition consideration should be given to reform of the offence as a whole,

[9] We note that since the consultation on this issue in 2009, a number of controversial cases about the scope of Section 5 POA have arisen. See for example, *Reda v DPP* [2011], EWHC 1550 (Admin) QBD, where an individual was charged after

and at the least that clearer guidance should be issued on the use of even a narrower incarnation of the offence. If it is decided that the category of 'insulting' words and behaviour in s5 POA should be retained after responses to this consultation are considered we would recommend that new guidance also be issued to police and developed by prosecutors to prevent the inappropriate use of this offence.

15. Below we respond to selected consultation questions on which we have expressed a view or have particular experience which may inform the consultation process. Where we do not provide a response, this should not be taken as approval or assent.

1) Is there a clear difference between insulting words and behaviour and abusive words and behaviour?

16. As set out above, we are concerned that, on a dictionary definition, the court could be encouraged to consider that the term "abusive" incorporated "insulting" words or behaviour. However, conversely, we consider the term insulting incorporates a far broader range of possible expression, including criticism of a personal nature which offends against religious or other characteristics. We consider that the criminalisation of insulting words and behaviour, together with the low level *mens rea* element of the Section 5 offence creates the potential for this offence to be used in a way which unduly restricts freedom of expression.

17. Unfortunately, the courts do not tend to routinely distinguish between abusive and insulting behaviour, often referring to behaviour as "abusive and insulting" or "abusive or insulting" interchangeably. Thus, in order to address the inappropriate use of the offence to criminalise speech or other forms of expression unjustifiably, the removal of the "insulting" strand must be accompanied by clear guidance on the limitations of the remainder of the offence.

2) Are 'insulting' words and behaviours less serious than 'abusive' words and behaviours?

18. In our view, this question starts from the wrong premise. In order to justify the criminalisation of expression, the Government must show that the interference that the

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shouting "fuck the police" on the street. This was heard by a police officer emerging from a nearby building who arrested the defendant. See also *Harvey v DPP* QBC, 17 November 2011.

criminal offence poses to the right to freedom of expression is necessary and proportionate to protect the rights of others. The criminalisation of the use of "insulting" words and behaviours is more likely to lead to violations of the right to free expression than the criminalisation of words and behaviours which are truly abusive, in the sense that they are likely to cause harm to those may witness them.

3) Does having 'insulting' words and behaviour as a criminal offence restrict people from expressing themselves freely?

19. Yes (see paras 10-12, above). In our view, the scope of this offence does have a chilling effect on the freedom of individual expression. In addition it sends a message which devalues and disrespects the speech and expression we as a society attach inherent value to as something to be protected and cherished. As we explain above, the overuse of this offence in connection with low-level anti-social behaviour is disproportionate and risks violation of Article 10 ECHR, since it criminalises behaviour which enjoys its protection without an adequate degree of justification.

4) Would the removal of the word 'insulting' from section 5 have any particular impact on specific groups?

20. We discuss the criminalisation of young people and ethnic minorities and the overuse of section 5, in paragraph 13, above.

21. The consultation paper asks whether reform might impact adversely on targeting hate crime. In our view, significant instances of racial harassment or abuse, could and should be considered abusive. The criminalisation of behaviour intended to cause harassment alarm and distress will clearly continue to be covered by Section 4A POA. We consider that there is no serious possibility of the removal of the "insulting" limb damaging the ability to police racial hatred.[10]

22. We note further that there are a number of other offences protecting the public against language attacking members of the public on the grounds of their religion or race, including those relating to racial and religious hatred. We would like to see examples of words and behaviour that would not be covered by these offences or by a revised racially/religiously aggravated s5 ((with the word 'insulting' removed)) but which would

[10] See JUSTICE, Consultation Response, Section 5 Public Order Act, 2009, paras 16 -17.

still be worthy of criminalisation. We emphasise that while we deplore attitudes of prejudice on the grounds of race or religion, that criminalisation of the expression of deplorable attitudes is not always the appropriate or proportionate response.

5) Are our problems with Section 5 a result of interpretation or statutory language?

23. Both. We think that the interpretation of Section 5 as a whole has been problematic and it is subject to overuse. The most objectionable part is the inclusion of the "insulting" strand, which we consider creates a disproportionately low level trigger for the offence and criminalises "offensive" behaviour and criminalises language and conduct which is protected by the right to freedom of expression protected by Article 10 ECHR and the common law.

6) Is the reasonableness defence for 'insulting' an adequate safeguard?

24. No. As explained above, the criminalisation of speech which is protected by Article 10 ECHR and the common law creates a chilling effect on the vitality of individual dialogue. Aside from the disproportionate impact of prosecutions for offensiveness on individuals, the inclusion of "insulting" behaviour "likely" to cause distress in our prosecutorial tool-kit undermines our commitment to freedom of expression enshrined in the common law and our international obligations. In practice, the operation of the reasonableness defence has not been effective and rarely succeeds. If a magistrates' court has been persuaded that the offence has been made out, a convincing defence that the use of insulting words or behaviour was reasonable would need to be exceptional.

25. In any event, the existence of the offence itself, in its current form, has a chilling effect on the right to free expression in the UK. As we explained above, in our view, the message that criminalisation of behaviour which is insulting or offensive sends is damaging to the inherent value of speech and expression in the UK. The inclusion of a defence which is rarely made out, cannot counteract that effect.

7) Is guidance to police officers clear on when insulting behaviour constitutes an offence?

26. We do not consider that this problem can be resolved with changes to guidance alone. The guidance to officers was changed in December 2010 with little impact, in our view. The real objection is to the creation of an offence which disproportionately criminalises speech and conduct which is protected by the right to freedom of expression. Removal

of the "insulting" limb and the amendment of guidance to correspond to the amended offence are necessary in order to limit the scope of the offence.

8) Do you think that the threshold for arrest under section 5 is set at the right level?

27. No. See paragraph 13, above. If reform is not forthcoming, we consider that there is a need for much clearer guidance to officers on the circumstances when it would be in the public interest to act.

b) Removal of face and head coverings

28. The consultation explains that the Government is seeking views on when it would be appropriate to extend the power of individual police officers to require individuals to remove face or head coverings. The Consultation Paper argues that the existing limitation on this power to circumstances when authorisation is given by a senior officer in writing, for a geographic area, over a limited period of time, is bureaucratic and can hinder the police response to mass disorder.

29. This arises as a result of the Prime Minister's commitment in the aftermath of the August riots to allow the police the discretion to remove face coverings in "any circumstances" where there was suspicion of criminal activity. We are concerned that the lack of detail in the final parts of the Consultation Paper reflects their character as knee-jerk responses to the August riots. The Consultation seeks views on whether officers on the street should be allowed to use their discretion to require the removal of face coverings without seeking permission and what respondents think that the appropriate safeguards should be. The justification for this is that "it would prevent the build-up of disorder; provide an effective deterrent to criminal activity; and accelerate the response to crime". The Consultation Paper provides no evidence to support the relationship between the removal of face coverings and the prevention of disorder and crime.

30. The Home Secretary has committed to act if there is evidence that the police need new powers. We are not persuaded that there is justification for a change to current practice. It is difficult to see how a blanket discretion to allow the police to remove face and head coverings can be justified in order to prevent disorder and deter crime. As the evidence of the riots showed, mass disorder of this kind is extremely difficult to police as a result of sheer numbers, and shifting groups of people engaged in acts of suspected criminality. It is difficult to see that the power to require individuals to remove face-coverings will

improve policing of widespread disorder, as opposed to improving the ability to identify and prosecute individuals suspected of participating in criminal behaviour. Where this type of disorder has occurred, it is likely that the police will seek to exercise powers of arrest, and unclear what the power to ask someone to remove face coverings would add. It may be that in circumstances when intelligence is available that disorder is planned, the police wish to ask individuals to remove face coverings in order to prevent individuals committing offences from disguising themselves. If this is the case, we are unclear why existing powers are inadequate. The rare occurrence of disorder of the scale witnessed in summer 2011 cannot be used to justify a broad, general distinction which allows the police to significantly interfere with the individual right to privacy.

31. We are concerned that the breadth of the discretion being considered by the Government would risk operating in an unduly draconian way, would pose a disproportionate to the right to respect for private life with few resulting benefits to the prevention and detection of crime and could operate in a way impacts significantly on children and young people and people from ethnic minorities. The widening of police discretion in this way without clear justification and appropriate safeguards could significantly damage the relationship between the police and the communities where these powers are most likely to be exercised.

32. The discussion in the Consultation Paper of Section 60/60AA of the Criminal Justice and Public Order Act 1994, includes a note that this power does not include a power to "stop and search for disguises", that removal can only be requested when the police believe that the item is being worn to conceal identity, that special provision must be made to accommodate religious beliefs and for same sex officers to witness removal of the clothing requested and that the assessment of when this power should be appropriately exercised must be made on an objective basis. These are safeguards, as opposed to limitations, in the existing system. We are concerned that the tone of the Consultation Paper suggests that these are unnecessary. We consider that they provide a core of workable safeguards designed to ensure an effective balance between the interests of the police in removing disguises where necessary, and the right of individuals to be free from invasions of their privacy (particularly in circumstances where religious beliefs underlie the decision to wear head or face coverings).

33. **We are not persuaded that there is significant evidence to justify a change to existing practice.**

c) Curfews

34. The Prime Minister also announced in August that the Government would look again at "the use of existing dispersal powers and whether any wider power of curfew is necessary". The police have a number of existing powers of dispersal which the consultation paper suggests may be inadequate.

35. The power to impose a curfew imposes a significant interference with the right of individuals to respect for private life, and in particular their right to free movement. Any interference must be justified, and blanket interference such as the imposition curfew, requires significant evidence that it serves a legitimate aim and that other measures would be inadequate to meet the danger to the rights of others, to public order or the prevention and detection of crime.

36. The Government is already consulting on the conversion of existing dispersal powers into a single power of direction and the Consultation Paper indicates that this work will be enshrined in detailed policy in the Autumn. The Consultation explains that a more general curfew power may more "useful" to police than a dispersal power designed to be used after evidence that trouble has begun to develop. We are concerned that the police might seek the power to use a pre-emptive curfew without clear evidence to justify the necessity for such a draconian action. The reason the Consultation Paper only identifies an exceptional curfew power is in the Civil Contingencies Act and that power is granted subject to emergencies, is the broad based potential for curfew to have an arbitrary impact on a mass population, the right of individuals to respect for private and family life and the right to free movement. These powers are generally recognised as draconian measures of last resort.

37. We welcome the Consultation's recognition that the key principles underlying any reform would need to include proportionality and oversight. As any discretionary power which interferes with individual rights, the Consultation Paper recognises that the safeguards which accompany the power and the guidance on its operation will be key. We consider that any general discretion of the type envisaged by the Prime Minister would be wholly inappropriate. We welcome the recognition in the Consultation Paper that any enhanced power could only be introduced for a set period of time limited (in our view to a very short period, and definitely less than 24 hours) and to a limited, clearly defined geographical area, that their exercise should remain exceptional should remain beyond doubt and we would endorse the need for any revised discretion to be subject to prior judicial approval.

Clearly the imposition of any such restriction could only be shown to be proportionate and necessary in light of extremely strong evidence-based justification.

38. While the Consultation Paper recognises that the police would be required to give notice to people within the curfew zone that it was in place, there is no detail on how this notice will be given effectively, how notice will be given to people outside the zone who may need to enter it, how the discretion to allow exceptions to the curfew will operate (for example, to allow people to travel to work or to travel to seek medical attention) and what safeguards will be in place to prevent arbitrary and disproportionate enforcement of curfew conditions in individual cases. What arrangements will be made to compensate businesses operating within a curfew zone, if any? These and many other questions remain unanswered by the Consultation Paper and each highlights the draconian nature of the proposal.

39. **We consider that, safeguards aside, the introduction of a general police power to impose a curfew is not currently justified and that this policy is being introduced in the aftermath of the August riots without significant consideration of the potential for its use to lead to a disproportionate impact on young people and people from ethnic minorities. We are not persuaded that there is evidence to justify a shift from existing practice.**

40. In addition to the general proposal on curfew, the Consultation asks for views on the attachment of curfew conditions to conditional cautions. We are concerned that the extension of the conditions available to the police under the scheme of conditional caution could be subject to abuse. While an individual must accept that they have committed an offence before a conditional caution is imposed, we are concerned that the discretion afforded to police and prosecutors in these circumstances does not afford adequate transparency to expand the conditions available to include specific powers to limit the movement of individuals in the way proposed in the Consultation Paper. We have expressed our concern in the past that existing powers are increasingly being used to remove children and young people from public places. The Consultation Power implies that the Government specifically intends this power to be used to divert young people away from criminality. While this is an admirable aim, we are not persuaded that the extension of the power to impose personal curfews on individuals without judicial oversight will be capable of achieving this goal.

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