



## FRIENDS OF THE EARTH

### POLICE ACT WEBINAR FOR LOCAL GROUPS

Thank you for attending our recent webinar. In this document, we set out our answers to the questions that we were not able to address in the webinar itself owing to time constraints. Where there is crossover between questions, we have grouped them together and provided a composite answer.

We are grateful to Shahida Begum, barrister at Garden Court Chambers, for reviewing and contributing to these answers.

*NB: This note is intended as guidance, and does not equate to legal advice. Given the Police, Crime, Sentencing and Courts Act ("Police Act") is a new piece of legislation, it is especially hard to predict with certainty what impacts it will have, or how it will be interpreted, as cases concerning its provisions have not yet come before the courts. As well as the provisions themselves, the courts will need to consider the body of caselaw which has been built up over the years in the light of protest rights under the common law <sup>1</sup> and the European Convention of Human Rights.*

#### General

##### 1. What will this Act mean for peaceful demonstrators?

The Police Act does not outlaw protest. There is no doubt, however, that it includes provisions which attack our rights to express dissent. The police can now restrict these rights to a degree and for reasons that wouldn't previously have been possible. And there are now new offences and harsher punishments that, in our view, are designed to try to deter the public from exercising their rights and holding the powerful to account. As set out in Shahida's presentation:

- it gives the police considerable new powers to restrict protests (e.g. on the basis of noise), in ways that they could not previously;
- it increases the severity of penalties for offences;
- the police can now impose conditions on one-person protests;
- the buffer zone around Parliament is significantly increased (in which protest activities such as use of noise amplification devices are prohibited); and
- as someone can now be found guilty of an offence if they *ought to have known* (as opposed to actually knew) about the existence of a condition which was breached but it is a defence if the failure was due to circumstances beyond their control.

You can read more about our view on the impact of the Police Act [here](#). We are still understanding the full implications ourselves and beyond the actual measures in the new Act it's clear the Government is seeking to delegitimise protest more generally, paint protesters as being separate from and at odds with 'ordinary people going about their business'. And

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<sup>1</sup> Which is made by the courts, rather than by Parliament



they aren't stopping with the Police Act. The new Public Order Bill takes things even further and the attack on the Human Rights Act could erode one of the last lines of defence we have against abuse of our rights.

But it's important we don't do the Government's job for them. These restrictions are intended to confuse and deter people from protesting as they have a right to and as the planet needs us to. By arming ourselves with knowledge of the measures, we help to ensure they have as little impact as possible.

2. *If conditions are set in advance how would an individual know/find out what they were?*

If conditions are imposed prior to the protest taking place, then these should be put in writing by the relevant force's Commissioner or Chief Constable. The Act does not specify to who/how the conditions should be communicated. But if they aren't communicated, then it would not be possible to establish that anyone was in breach of the conditions. In practice, the police will probably communicate the conditions to the organisers of the protest.

It is important to note that the Police Act amends the requirement for the mens rea (i.e. intent) from 'knowledge' to 'ought to have known'. This makes it easier for prosecutions to succeed, as 'ought to have known' is easier to prove. However, as above, the police need to make the conditions known. Of course, any individual can contact the relevant police force for information in advance should they wish to do so.

If the police decide they want to impose any restrictions whilst the protest is taking place, then these should be communicated to those taking part. If they don't do this, then again, it is hard to see how any prosecution could be brought and/or succeed. The decision to impose any restrictions should be taken by the most senior police officer present.

3. *Do these harsher sentences shift the Overton window (i.e. what is considered reasonable by the mainstream) for the courts and encourage stronger penalties generally, even if not the max sentence? I understand we probably can't answer this yet.*

Historically, courts have been very reluctant to send non-violent protesters acting out of moral conviction to prison. There have been a number of famous cases reinforcing this. For example, Friends of the Earth and Liberty intervened in the sentencing appeal of three peaceful anti-fracking protestors in 2018, who had been convicted of public nuisance. The appeal succeeded, and the protestors' prison sentences were quashed on the basis that they were manifestly excessive<sup>2</sup>. However, it's clear that the intention of the recent legislation and statements by ministers is to break this tradition and see peaceful protestors imprisoned. Both the political atmosphere, and the increase in the maximum penalties do mean that the courts may impose more severe penalties. However, the previous sentencing authorities against doing this are still applicable.

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<sup>2</sup> <https://www.theguardian.com/environment/2018/oct/17/court-quashes-excessive-sentences-of-fracking-protesters>



A court cannot impose a penalty which is more severe than the maximum proscribed by legislation e.g. the maximum prison sentence for those attending protests who breach conditions has increased from a fine of up to £1,000 (level 3 on the standard scale), to a fine of up to £2,500 (level 4 on the standard scale).

That said, judges will still need to consider various factors e.g. mitigating and aggravating factors, such as whether the person has any previous convictions, the duration of the unlawful conduct, whether the defendant's actions were peaceful etc to decide on what sentence to hand down.

4. *Could you expand on your point about the bill being encouraged by certain industries? Or perhaps you have some links to further reading/resources/evidence?*

The report by [HMICFRS](#) sets out some of the industries involved in discussions about public order legislation.

#### Organisers of Protests

5. *If you are acting as a "steward" would your risk of prosecution be higher, might you be deemed an "organiser"?*

In general, prosecutions prior to the Police Act have related to participants rather than organisers. Furthermore, the majority of the changes are focused on providing more powers to the police rather than amendments relating to organisers of protests.

However, the same reduction of the fault element from 'knowledge' to 'ought to have known' has been introduced for offences committed by organisers. It is not yet known whether it will be suggested by the prosecution, or interpreted by the courts, to require a higher standard for organisers.

The maximum sentence for organisers who breach conditions has increased from 3 months to 51 weeks (and/or a level 4 fine, which is £2,500, as before).

Again, it is unclear whether the Police Act has increased the risk of prosecution for organisers. The Crown Prosecution Service<sup>3</sup> are under a duty to make decisions independent of external influence in accordance with their Code of Conduct: applying the evidential test (whether there is sufficient evidence to prosecute) and the public interest (whether it is in the public interest to prosecute). There is a particular policy [document](#) (this is fairly detailed, but is included for reference) relating to protests as participants are often engaged in their article 10 and 11 rights

There has been no further legislation regarding those who are to be deemed to be organisers. It is likely to be a factual issue depending on the role played in organising a particular protest.

6. *What are the implications or how can an NGO who organises small banner protests keep as safe as possible and minimise the risk of our staff and people who attend from getting in to any trouble?*

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<sup>3</sup> The body which takes decisions on whether or not to bring criminal prosecutions



As above, it's important to note that the Police Act does not outlaw protest.

Organisers of any protest need to understand and be aware of any conditions that the police impose. They can contact the relevant police force to discuss any queries. As above, ultimately it is for the police to communicate what restrictions there are, as if this isn't done, then it would not be possible for a prosecution to succeed.

Whilst police attitudes to protest can vary (including by reference to who is in attendance at protests – we know that the police do not approach different communities in the same way e.g. stop and search powers are disproportionately used against young black men), in general terms, a small, peaceful protest attended by people holding banners by the side of a road will be less likely to result in arrests, than a much larger protest, involving (for example) people scaling buildings.

If anyone is arrested, it's important to ensure that the person obtains advice from a solicitor with experience of protest law offences, before being interviewed under caution by the police. We'd recommend that you do not use the duty solicitor at the police station as they may not have this experience, but contact a specialist firm such as Bindmans, or another firm recommended by the grassroots protest support group [Green & Black Cross](#). See this list [here](#).

### Incitement

7. *Could advertising a protest event be classed within the "incite" category?*
8. *Could "Incite" include organisations sending out emails about the protest, eg climate action groups ?*

As Shahida mentioned in the webinar, her practical experience is that prosecutions where an individual is charged for the higher offence of inciting another to breach police conditions are rare. Often, participants are charged in their own individual capacity of breaching a condition. It's important to note that the offence of incitement existed before the Police Act came into force, so the Act has not changed that (it has however increased the severity of the penalty on conviction).

In addition, if a prosecution for incitement was pursued, then the prosecution would have to establish the various elements of the offence. For example, that the person alleged to have done the inciting did this intending or believing that the person incited would do the action (i.e. breaching a condition for a protest) with the necessary mens rea (i.e. intention) for that offence. So if, for example, a Climate Action Group sent an email out advertising a march which had conditions on it such as a duration of 4 hours from 10am in the morning, and the protest in fact went on till 8pm that evening (and therefore breached this condition) and someone was arrested at 6pm for attending an unlawful protest – then it is very hard to see how a prosecution could be attempted of the person in the climate action group who had sent the email (unless e.g. they had specified that those attending should continue at the protest after the time period had expired).



There is an absence of case law in this context as prosecutions have been rare. If charges are brought, it may give rise to complex court cases. Specialist legal advice should be sought to assess the facts of the particular case.

### Immigration Issues

- 9. What are the implications of this for people with settled or pre-settled status? Could status/right to remain be lost?*

An arrest allows an officer to require details from the detained person. As a result, those with no or irregular status are at risk of their immigration status being investigated.

Specialist immigration law advice, in addition to criminal law advice, should be sought at an early stage if these issues arise.

It must be emphasised that immigration law is a complex area. If anyone has concerns over how being arrested, charged or convicted of a protest-related offence could impact on their immigration status, then they should obtain specialist immigration law advice.