

Consultation on Police Powers to Promote and Maintain Public Order The Police Foundation's response

Introduction

The Police Foundation is the only independent charity focused entirely on developing people's knowledge and understanding of policing and challenging the police service and the government to improve policing for the benefit of the public. The Police Foundation acts as a bridge between the public, the police and the government, while being owned by none of them. Founded in 1979 by the late Lord Harris of Greenwich, The Police Foundation has been highly successful in influencing policing policy and practice, through research, policy analysis, training and consultancy.

We welcome the opportunity to respond to this consultation and we will direct our answers towards those issues concerning policing.

Chapter 1: Section 5 Public Order Act 1986

Section 5 makes it an offence to use

“threatening, abusive or insulting words or behaviour... within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.”

The Police Foundation is concerned about the breadth of behaviour caught under this, particularly through the element of 'insulting'. The courts have not defined the word 'insulting' other than stating it should carry its ordinary, everyday meaning.¹ Nor does the current guidance adequately assist the police in terms of definition or proportionality (see further below). This effectively means an officer on the ground has wide discretion to decide whether the voicing of unpopular opinion amounts to a criminal offence chargeable under the Act.

We have specific concerns that Section 5 (along with other legislation) can be used by the police as a tool to undermine legitimate protest. The police have a duty to uphold and protect the right to protest peacefully but have on occasion inappropriately employed the threat of Section 5 in an attempt to prevent protestors from displaying banners or vocalising opinions or concerns.² The policing of protest involves the complex balancing of rights and freedoms in a highly charged environment and the subjective nature of the word 'insulting', without sufficient guidance, only adds to the difficulties officers face.

We therefore support the removal of the word 'insulting' from the Act and believe the words 'abusive' and 'threatening' are sufficient in themselves to enable criminal conduct to be appropriately policed.

¹ Chambers v DPP [1995] Crim. L.R. 896, 896; Brutus v Cozens [1973] A.C. 854, 862

² An example of this is the issuing of a summons to a demonstrator for displaying a placard that read "Scientology is not a religion it is a dangerous cult" The Human Rights Joint Committee, 'Demonstrating Respect for Rights? A Human Rights Approach to Policing Protests' (Session 2008-2009, Seventh Report) para 80

Question 7 In your opinion, is guidance to police officers clear on when insulting behaviour constitutes an offence and an arrest should be made and is it sufficiently clear to ensure consistency of decisions?

Section 5 affords the police broad discretion³ in assessing whether to restrict freedom of expression. As the courts have noted, *'free speech includes...the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative.'*⁴ By their very nature a number of these behaviours could be construed as insulting and it is not an easy task for officers on the ground to make a speedy judgment call. In the case of Hammond⁵ a man was arrested after displaying a sign stating that homosexuality was immoral. In detailing the facts of the case the judge noted that:

*'Police Constable Elliott was of the opinion that it was not necessary for the police to become involved in the incident or to take any action...Police Constable Gandy was of the view that the appellant was provoking violence and that it was not safe for her to leave the scene without intervening, and she therefore arrested [Mr Hammond]'*⁶

This highlights the difficult judgements that officers face when implementing section 5, in particular when it concerns 'insulting' words or behaviour.

It is fundamental to the principle of policing by consent that police discretion and powers are exercised in a legitimate, consistent and fair manner that adheres to the rule of law. Ensuring policing is consistent and fair requires clear guidance. However, we have concerns over the inadequacy of guidance for officers concerning the practical implementation of Section 5.

In 2009 the previous Government acknowledged that clear guidance must be given on the use of Section 5⁷ and the ACPO Manual of Guidance on Keeping the Peace⁸ was revised accordingly. However, the manual does not provide examples of what may be considered 'insulting' behaviour; it merely covers 'threatening' behaviour. Further, the examples of behaviour set out are those in which there has been a clear breach of Section 5, rather than those that might be considered more borderline. The Crown Prosecution Service (CPS) has also provided guidance on the use of section 5⁹ and similarly provides examples of 'disorderly behaviour' but not 'insulting' behaviour.

The Police Foundation recommends that more thorough guidance be given to police in dealing with Section 5 offences, with practical examples and case studies of behaviour that does and does not fall within each individual element of Section 5 (threatening, abusive and insulting). The guidance must also underline that the police should be aware of their duty to protect the right of freedom of expression as well as to maintain public order. It should set out the importance of legitimate protest and should caution against 'over-policing'.

³ Gross LJ Abdul v DPP [2011] HRLR 16. Para 41

⁴ Redmond-Bate v DPP [2000] HRLR 249

⁵ Hammond v DPP [2004] EWHC 69 (Admin)

⁶ Hammond v DPP [2004] EWHC 69 (Admin) para 5

⁷ The Government Reply to the Seventh Report from the Joint Committee on Human Rights Session 2008-09 HI Paper 47, HC 320 CM 7633, May 2009

⁸ ACPO, 'Manual of Guidance on Keeping the Peace', 2010 30-31

⁹ CPS, Public Order Offences Incorporating the Charging Standard, updated 1 November 2010

Chapter 2: Powers to require removal of face coverings

There are currently two sets of powers in place to require the removal of face coverings: Section 60AA and PACE stop and search.

Under Section 60AA, where an officer above the rank of inspector reasonably believes that people are likely to commit offences in an area s/he can authorise police officers on the ground to demand the removal of face coverings. To exercise this power the officer must reasonably believe that someone is wearing an item wholly or mainly for the purpose of concealing identity.

Under PACE Code A, where on reasonable grounds it is considered necessary to conduct a more thorough search, an officer may require the removal of an item. The power only applies to a search for an item; it cannot be used for identification purposes.

The Government has considered extending the range of powers to remove face coverings in relation to two policy areas: the policing of riots and the policing of protest.

The Police Foundation contends that a Section 60AA authorisation is perfectly sufficient to address large-scale disorder. The fact that many crimes were committed under disguise during the August riots is not a reflection of insufficient powers. Instead it demonstrates the impracticality of requesting the removal of face coverings during mass disorder. We are of the view that the proposed powers would not assist with this, and their use could prove to be counter-productive (see below).

In terms of the policing of protest, when the police anticipate violence or disorder prior to a demonstration or event, they are already able to issue a Section 60/60AA as seen by the authorisations on November 9th 2011 (London Student Protests) and October 16th 2011 (Occupy London Protests). The consultation states that Section 60AA has caused a problem of *'bureaucratic delays and can hinder police response to mass disorder.'* Neither evidence nor examples have been presented in the consultation to support these assertions, nor has this been publicly mentioned by any police officer during the Home Affairs Inquiry into Policing Large-Scale Disorder. Indeed the Home Affairs Committee concluded: *'There was no sense among any of our witnesses that the law needed to be changed to give the police more power to tackle public disorder.'*¹⁰ (see further under Curfew, below). Similarly the HMIC report, *The Rules of Engagement*¹¹ does not call for additional police powers with regard to face-coverings. The Police Foundation is not aware of any evidence to support the notion of an operational gap which would require the extension of current powers. If such a gap exists, we would like to see the supporting evidence on this.

We are concerned about the potential effect of creating legislation as a knee-jerk reaction to an extraordinary event. As we saw with Section 44 of the Terrorism Act, broad powers with few safeguards can become extensively used, unpopular in disproportionately affected communities and consequently counter-productive. Like any police powers, they can also be used for purposes for which they were not intended. The legitimacy of policing relies on public trust and the belief that the police are exercising their powers fairly and with justification.¹² If additional powers are to be put in place, extreme caution must be taken to

¹⁰ TSO (December 2011) Policing Large Scale Disorder: Lessons from the disturbances of August 2011 HC 1456-I

¹¹ HMIC(2011) *The Rules of Engagement: A Review of the August 2011 Disorders*

¹² Tom Tyler (2004) *Enhancing Police Legitimacy*, Hough et al (2010) *Procedural Justice, Trust and Institutional Legitimacy*

ensure they are set out in narrow terms and are accompanied by clear guidance on their use so as not to jeopardise community relations and public confidence.

Question 1. In what circumstances would it be appropriate to require removal of face coverings without prior authorisation by a senior officer?

Question 2. What should be the trigger under the new power if authorisation by a senior officer is not being sought?

If there are to be additional powers to remove face coverings then the legislation must be very tightly circumscribed. We are of the view that such powers could allow for an officer on the ground to require removal without prior authorisation from a senior officer, but only under a very narrow set of circumstances such as: **Where an officer has a reasonable suspicion of criminality AND s/he needs to visually identify the suspect AND cannot do so without the removal of the face covering.**

The power should not be used to identify an individual on the potential of future criminality (even in the near-future), should be used sparingly and be accompanied by clear guidance (see further below).

Question 3. Do you think that wider powers to demand removal of face coverings may interfere with individual freedoms?

This power could have an unintended but disproportionate effect on certain minority communities. Requiring the removal of face coverings worn for religious observance is extremely sensitive. The embarrassment and impact this could have on an individual should not be underestimated. In France, the recent introduction of legislation outlawing the wearing of the niqab and the burka has led to a spate of attacks against Muslim women and in effect legitimises intolerance of ethnic minorities and racial discrimination. But even there the police do not have the power to remove face coverings – only to refer the matter to a court. The French courts, in turn, are seemingly reluctant to impose sentences on the grounds that when they do it will trigger a referral to the European Court of Human Rights.

The risk of inadvertently creating a range of potentially divisive and counter-productive effects is, in our view, greater than the potential gains that may accrue from introducing such powers. There may be lessons to be learnt in this respect from the disproportionate or heavy-handed use of stop and search with minority ethnic groups, which can contribute towards poor police: community relations and have even triggered anti-police rioting. The difference, we would contend, is that the benefits of stop and search powers are greater than the potential benefits that the removal of face coverings might provide.

Question 4. Do you think that guidance, training and monitoring could help to ensure consistency of officers' decisions? Please give examples.

If a new power is created, training and guidance will certainly be necessary. Officers must understand the intention behind the power and must not extend its use beyond very narrow circumstances nor threaten to do so. Training around religious and cultural sensitivity would also be necessary, preferably involving local leaders from relevant communities. Given the risks of discrimination referred to above, monitoring would need, in our view, to go beyond establishing consistency and comply with the provisions of Section 95 of the Criminal Justice

Act 1991, which would create a bureaucratic burden on the police at a time when they are being asked by government to do more with less and to cut unnecessary bureaucracy.

Question 6. In your view, should officers be required to explain the reason for the demand to remove face coverings?

We are strongly of the view that if such powers were introduced, it should be made clear that officers are required to explain the reason for the demand to remove face coverings, as is the case in relation to stop and search under PACE Code A. Research shows that citizens are more likely to trust, comply with and co-operate with the police if they believe the police are acting fairly.¹³ An important element of acting fairly is giving reasons for the exercise of powers. This is particularly so where the power interferes with someone's rights and freedoms, or could potentially embarrass or humiliate.

Question 7. Do you think that officers should be required to conduct the identification in reasonable privacy, if requested, even though it might cause a delay in the response?

As occurs with a thorough search under PACE, we are of the view that the removal of face coverings should be done out of public view by a member of the same sex. As PACE Code A sets out:

'All stops and searches must be carried out with courtesy, consideration and respect for the person concerned. This has a significant impact on public confidence in the police. Every reasonable effort must be made to minimise the embarrassment that a person being searched may experience. The co-operation of the person to be searched must be sought in every case, even if the person initially objects to the search. A forcible search may be made only if it has been established that the person is unwilling to co-operate or resists'

If it is deemed necessary to adopt a similar approach, including the requirement for cooperation and consent, then consideration would need to be given as to whether, on balance, this would render the measure both impractical and ineffective. For example, in a public order situation, to search a suspect out of public view, an officer might need to withdraw from the situation they are there to control. Currently, officers take photographs of demonstrators with a view to later identification, which may prove more practical while being equally effective than the proposed new powers.

Chapter 3: Power to impose Curfews

Question 1. What are your views on the proposal to give the police a limited, general power to impose curfews?

In our view such a power, which interferes with rights and freedoms, and affects both those suspected of criminality and those innocent of any wrongdoing, would not be justifiable save in an emergency situation. If an emergency situation were to occur, the Civil Contingencies Act 2004 already allows senior Ministers to introduce regulations to prevent, control or mitigate the emergency.¹⁴ These powers therefore enable ministers to enact any measure (including curfews) so long as it is 'appropriate...and...proportion[ate]'¹⁵ and complies with the Human Rights Act.

¹³ Tyler, T (2008) Psychology and Institutional Design. *Review of Law and Economics*

¹⁴ Civil Contingencies Act 2004 s 21 (3)

¹⁵ Civil Contingencies Act 2004 s 23s

We are not aware of any Western democracy that provides a limited general power to impose curfews, save than in relation to children on the streets at night or to cover crisis situations such as medical or security emergencies. Moreover, as noted by the Joint Committee on Human Rights in respect of child curfews, a general power of curfew may be in breach of the European Convention on Human Rights, specifically Article 5 (liberty), Article 8 (private and family life) and Article 11 (right of peaceful assembly).¹⁶

We also have some reservations about the operational value of the proposed power. In evidence to the Home Affairs Committee inquiry into Policing Large-Scale Disorder, which considered the imposition of curfews and other police powers in response to the summer riots, senior police officers expressed their reservations in relation to the introduction of new public order powers in general and curfews in particular. The view was expressed that the latter would be very difficult to enforce – a large police presence would be required - and in its report the Committee concluded that there was no need to change the law or give the police greater public order powers.¹⁷ A report by HMIC on the riots reached the same conclusion.¹⁸

It is relatively unusual for the police to forgo (rather than request) additional powers and it is generally accepted wisdom that policy made on the back of a single but high profile event (such as the summer riots) and the media fanfare that inevitably accompanies such events is rarely the most sensible. For these reasons alone, we urge caution.

The consultation document states that the government hopes that curfew powers will help reduce the criminalisation of, in particular, young people. There is however a real risk that precisely the opposite will occur as those who refuse to observe curfews may be criminalised for so doing. Research on the use of child curfews in the United States shows the power generally has limited deterrent effect on those already involved in illegal activity¹⁹ yet at the same time, those who are law-abiding are likely to conform to the measure even if they need to forego socially productive activity to do so;²⁰ and this latter group may come to equate the police with oppression.²¹

Finally, the folly of introducing curfews to prevent public disorder has been graphically illustrated by the argument put forward by Lord Toby Harris to the Metropolitan Police Federation:

*'Curfews are only meaningful if they are enforced. And they can only be enforced effectively if there are large numbers of police on the streets. And, as we have seen in the last week, if there are large numbers of police on the streets, you are unlikely to have disorder and you won't need a curfew.'*²²

The consultation notes that there will be exceptions permitted during times of the curfew and the example given concerns the emergency services. The Police Foundation believes that the number of instances where exceptions may be required might in practice be rather extensive. Parents who need to collect their children, family members caring for an elderly relative, or those working late within the curfew zone may all constitute reasonable exceptions. We also have concerns that the proposed power would most likely be

¹⁶ Joint Committee on Human Rights (2001) First Report. London, Parliament.

¹⁸ HMIC(2011) The Rules of Engagement: A Review of the August 2011 Disorders

¹⁹ Walsh, C (2002) Curfews: No More Hanging Around Youth Justice 2002 2: 70

²⁰ Budd, J (1999) Juvenile Curfews: The Rights of Minors vs. the Rhetoric of Public Safety. Human Rights 26:22

²¹ Walsh, C (2002) Curfews: No More Hanging Around Youth Justice 2002 2: 70

²² Metropolitan Police Federation, 'Police Numbers Snag to Curfew Plan'
<http://www.metfed.org.uk/news?id=1430>

implemented in areas where police: community relations are already fragile and could therefore increase the risk of public disorder rather than reduce it.²³

Curfews and Conditional Cautions

Question 4. What are your views of the proposal to make a curfew one of the recognised rehabilitative options for a conditional caution?

Conditional cautions were implemented as part of the Criminal Justice Act 2003.²⁴ They enable the police to deal with low-level offences and any conditions attached must be rehabilitative, reparative or restrictive as²⁵ well as proportionate, achievable and relevant to the offence.²⁶

We do not believe such a sanction would be rehabilitative, indeed it may in effect prevent an offender from accessing rehabilitative interventions, such as work, training or obtaining treatment. One of the main purposes of pre-court disposals is to avoid prosecution and divert an offender from an expensive and potentially damaging court appearance. By imposing a curfew as a condition of a caution, the risk of breach is increased, which defeats the purpose of the diversionary measure. Further, we are of the view that even a short curfew would breach the principle of proportionality, which underpins international norms and standards in this field.

Question 6. Are there other powers you think would help the police take a more preventative approach to local crime, particularly youth crime? If so, what are they?

The Police Foundation recommends that the Government examine the report by the Independent Commission on Youth Crime and Antisocial Behaviour,²⁷ in particular pages 29-36 which deal with prevention.²⁸ The report states that prevention should include tackling the underlying causes of local crime by understanding welfare needs, including health, education, and emotional development. It also recommends concentrating on the reintegration of offenders to counter recidivism and ensuring responses and sanctions are proportionate. These points will become more relevant if police powers are increased to allow them to impose a wider range of sanctions such as conditional cautions.

Abie Longstaff

²³ http://eprints.lse.ac.uk/37947/1/blogs_lse_ac_uk-What_further_options_might_work_in_boosting_the_police_capacity_to_handle_urban_disorders_and_riot_em.pdf

²⁴ Crime Justice Act 2003 s 22

²⁵ CPS, 'CPS Conditional Cautioning Data by Quarter'
http://www.cps.gov.uk/publications/performance/conditional_cautioning/

²⁶ CPS, 'Conditional Cautioning: Code of Practice & Associated Annexes'
<http://www.cps.gov.uk/publications/others/conditionalcautioning04.html#intro>

²⁷ Independent Commission on Youth Crime and Antisocial Behaviour, 'Time for a Fresh Start: The Report of the Independent Commission on Youth Crime and Antisocial Behaviour' (2010: The Police Foundation) http://www.youthcrimecommission.org.uk/attachments/076_FreshStart.pdf

²⁸ Independent Commission on Youth Crime and Antisocial Behaviour, 'Time for a Fresh Start: The Report of the Independent Commission on Youth Crime and Antisocial Behaviour' (2010: The Police Foundation) http://www.youthcrimecommission.org.uk/attachments/076_FreshStart.pdf 29-36