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Joint Committee on
Human Rights

The Government response to covid-19: freedom of assembly and the right to protest

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Joint Committee on Human Rights

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Summary

A number of high-profile protests have taken place during the covid-19 pandemic. Recent events surrounding the cancellation of the Reclaim These Streets gathering on Clapham Common, together with the Government introducing a Bill containing further police powers to control processions and assemblies, have brought the policing of protests to the fore once again.

The right to peaceful protest is protected by the Human Rights Act 1998 (HRA), and the rights of peaceful assembly and free expression guaranteed under Articles 10 and 11 of the European Convention on Human Rights (ECHR). Inevitably, the freedom to gather, including for the purposes of protest, has come into conflict with measures taken to combat the spread of covid-19. Such measures are themselves necessary to protect public health and ultimately to preserve the right to life, as guaranteed under Article 2 ECHR, and thus may justify interferences with the qualified rights under Articles 10 and 11. However, any such interferences will only be justified where they are prescribed by law that is both accessible and foreseeable, and where they are necessary and proportionate.

Throughout the pandemic the law has used regulations to impose restrictions, to a lesser or greater extent, on gatherings. Frequent changes in the law have made it hard for the public to be sure of the legality of protest, as has the fact that the regulations have generally been silent on protest.

During lockdown periods, restrictions on gathering have been severe and have been coupled with restrictions on leaving the home. While leaving the home has always been permitted where there is 'reasonable excuse', the same does not obviously apply to the prohibition on gatherings. This has understandably resulted in some believing protest to be completely prohibited. However, a defence of 'reasonable excuse' has been available in respect of the offence of breaching lockdown requirements. Under the HRA this defence must be read compatibly with Articles 10 and 11 and the right to peaceful protest, which means that the regulations have never completely prohibited protests. This position is legally complex and hard for both the police and the public to follow, something that has not been helped by unclear communications from Government.

Further uncertainty arises from the absence of guidance on when protest will constitute a 'reasonable excuse' for gathering during lockdown. This leaves too much subjective interpretation and discretion to the police.

The law must be amended to make clear that peaceful protest is not prohibited during lockdown. Under the national three tier system, the regulations covering Tiers 1 to 3 have expressly stated that protest is an exception to the prohibition on gatherings, but only where a risk assessment has been conducted and all reasonable steps taken to minimise the risk of covid-19 being transferred. This model could equally apply to Tier 4.

1 Introduction

1. This report focuses on how the right to protest and freedom of assembly have been impacted by the restrictions introduced by the Government since March 2020 to curb the spread of covid-19.

2. On 30 November 2020 we launched an inquiry into the implications of long lockdown—that is, the impact of continued restrictions introduced to curb the spread of covid-19. Our call for evidence covered a range of human rights issues raised by the restrictions, including the impact on the right to protest. We asked:

How have lockdown restrictions affected the right to protest? Has the correct balance been struck?¹

3. A number of protests had taken place since covid-19 restrictions were first introduced. Protests relating to the Black Lives Matter movement had taken place across the country in late Spring and Summer; protests by those who wished to defend memorials followed, after a statue of Edward Colston was pulled down in Bristol; and protests against the lockdown restrictions themselves had also taken place.

4. Then, on 13 March 2021 events unfolded on Clapham Common. The day before, a woman's remains found in Kent had been identified as Sarah Everard's; she had last been seen on the Common. A gathering was planned to take place on 13 March but the organisers, Reclaim These Streets, called off the event when the police said that it would be unlawful. Others still gathered, and the police intervened. Images of the confrontation that followed that evening brought issues regarding the policing of protests to the fore once again.

5. In February 2021, we had taken evidence on matters relating to the policing of the pandemic, the use of Fixed-Penalty Notices and the right to protest. We heard oral evidence from Gracie Bradley, Interim Director, Liberty, Kirsty Brimelow QC, Doughty Street Chambers and Lochlinn Parker, Head of Civil Liberties, ITN Solicitors. We also heard from representatives of the police: John Apter, National Chair, Police Federation of England and Wales, Ben-Julian Harrington, Chief Constable at Essex Police, and Public Order & Public Safety at National Police Chiefs Council, and Owen Weatherill, Assistant Chief Constable, National Police Coordination Centre. We are grateful to all our witnesses, and those who have sent the committee written submissions.

6. This report covers the law in England, although similar restrictions have been in place in Wales, Scotland and Northern Ireland. Whilst fixed penalty notices are referred to, their use and the human rights issues they raise are not covered in detail in this report.

2 Protest during the pandemic

7. The covid-19 pandemic has inevitably posed challenges for the right to protest, as protected by the right to free assembly and association (Article 11 ECHR) and the right to freedom of expression (Article 10 ECHR). Restrictions on large groups of people gathering during a pandemic seem entirely reasonable and proportionate. However, faced with some of the most extensive legal constraints on daily life ever seen in this country, mostly contained in legislation rushed through Parliament with limited debate, protecting the right for people to express their views effectively is particularly important at this time.

8. The need to consider how successfully the Government has balanced the right to protest against the need to limit the spread of covid-19 and protect the right to life has been highlighted by a number of high profile public demonstrations over the course of the pandemic. At times these have caused many to question why they have been permitted to go ahead, while at other times the dominant concern has been the way in which protests have been curtailed.

Black Lives Matter

9. On 25 May 2020 George Floyd was tragically killed in Minneapolis, USA by a police officer who was subsequently charged with his murder. A wave of protests, organised largely by the Black Lives Matter movement ('BLM'), spread across the USA and the rest of the world. In the UK dozens of demonstrations took place in towns and cities including London, Birmingham, Liverpool, Manchester, Cardiff, Edinburgh, and Glasgow. The Home Secretary estimated on 8 June in the House of Commons that BLM protests in the UK had been attended by 137,500 people.² Probably the most high-profile event of these protests occurred on 7 June, when the statue of Edward Colston was pulled down and thrown in Bristol harbour by protestors. On the same day, the statue of Winston Churchill in Parliament Square was graffitied with the words "was a racist".³ Smaller protests took place around the country over the following weeks.

'Defending memorials'

10. In response to the events on 7 June 2020, the following weekend there were protests in Parliament Square by people who claimed to be gathering to protect statues from BLM protesters. BLM protests also continued on the same day. Video footage was circulated showing significant violent confrontations between demonstrators who claimed to be protecting statues and the police at the Parliament Square demonstration.⁴

Anti-lockdown

11. There have also been numerous protests held against the lockdown laws, by those who believe the restrictions on freedoms imposed by the State have gone too far as well as those who do not believe that covid-19 poses a substantial risk. On 24 October 2020 an anti-lockdown protest in London was broken up by the police because the protesters had failed to comply with the risk assessment the organisers had been required to conduct and

2 HC Deb, 8 June 2020, [col 41](#)

3 "[Winston Churchill statue daubed with 'was a racist' graffiti during Black Lives Matter protests](#)", The Independent, 8 June 2020

4 "[London protests: Demonstrators clash with police](#)", BBC News, 13 June 2020

because they had failed to comply with social distancing. On 28 November, during the second national lockdown, the Metropolitan Police arrested more than 150 demonstrators marching against the lockdown.

Reclaim These Streets

12. On the evening of 3 March 2021 Sarah Everard went missing after leaving a friend's home in Clapham, south London. On 10 March her remains were discovered in woodland in Kent. Her disappearance and death triggered a wider public discussion about violence and harassment towards women going about their daily lives.

13. A gathering intended "to channel the collective grief, outrage and sadness in our community" was planned to take place on Clapham Common on Saturday 13 March.⁵ The organisers contacted the Metropolitan Police in advance to ensure that the event could safely and legally take place. When the police did not approve the event, the organisers went to the High Court to establish that the lockdown law did not ban all gatherings for protest. While the judgment from the High Court has not been published at the time of writing, it is understood that this legal position was ultimately accepted by the Metropolitan Police, so no declaration from the court was necessary. Nevertheless, the police refused to confirm to the organisers that the event could go ahead lawfully, meaning that each of the organisers risked a fine of £10,000 for breaching the restrictions on gatherings. As a result, the event was cancelled.⁶

14. Despite the event being cancelled, many people still gathered on Clapham Common (and elsewhere) on the evening of 13 March to make their feelings known. On Clapham Common, confrontations broke out between the police and members of the public. Police officers were filmed using force to restrain women and remove them from the event.⁷

5 ["Reclaim the streets"](#), CrowdJustice, Jessica Leigh

6 ["Reclaim These Streets vigil for Sarah Everard cancelled after talks with police break down"](#), The Telegraph, 13 March 2021

7 ["Sarah Everard: Met Chief under pressure over Clapham vigil policing"](#), BBC News, 14 March 2021

3 The right to protest—Articles 10 and 11 ECHR

15. The right of the public to assemble or march together in peaceful protest has long been acknowledged by the common law of England and Wales. Lord Denning M.R. noted in *Hubbard v Pitt* [1976] QB 142:

“Here we have to consider the right to demonstrate and the right to protest on matters of public concern. These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done. It is often the only means by which grievances can be brought to the knowledge of those in authority—at any rate with such impact as to gain a remedy. Our history is full of warnings against suppression of these rights.”

16. However, the protection of this right under the common law was uncertain and piecemeal. The Human Rights Act 1998 brought the rights guaranteed by the ECHR into domestic law and established express rights to free speech (Article 10 ECHR) and free assembly and association (Article 11 ECHR). The Article 11 right to freedom of peaceful assembly extends to gathering together for a common purpose in private or in public, and being able to choose the time, place and form of the gathering, within the limits established by Article 11(2). However, Article 11 protects only the right to *peaceful* assembly. Violent protests and those organised with violent intentions will not receive the protection of Article 11.⁸ But an individual who remains peaceful will not lose the protection of the Convention merely because other participants in a demonstration engage in sporadic violence.⁹

17. Article 10 ECHR protects the expression of opinions in the form of protest, covering “not only the substance of the ideas and information expressed, but also the form in which they are conveyed”.¹⁰ The right to free expression extends not only to information or ideas that are favourably received or regarded as inoffensive, but also to those that “offend, shock or disturb the State or any sector of the population”.¹¹ The European Court of Human Rights has placed particular emphasis on the importance of political free expression: “in a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression.”¹²

8 [Navalnyy v. Russia](#) [GC] 2018, § 98

9 [Primov and Others v. Russia](#), 2014, § 155

10 [GC], nos. [28955/06](#), [28957/06](#), [28959/06](#), and [28964/06](#), at [53]

11 [Handyside v United Kingdom](#) [1976] ECHR 5

12 [Egitim ve Bilim Emekçileri Sendikası v Turkey](#) Application no. 20641/05 (25 September 2012) at paragraph 70.

Articles 10 & 11, European Convention on Human Rights**ARTICLE 10—FREEDOM OF EXPRESSION**

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11—FREEDOM OF ASSEMBLY AND ASSOCIATION

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Source: European Convention on Human Rights—page 8

18. The rights to free expression and assembly under Articles 10 and 11 ECHR impose both negative and positive obligations on the State. This means that States must refrain from applying unjustified restrictions on the right to protest, the negative obligation, and they must also safeguard the right to protest, the positive obligation. This includes taking reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, with participants kept safe.¹³ It is often referred to as the duty to ‘facilitate peaceful protest’.¹⁴

19. The HRA prohibits all public authorities in the UK from acting incompatibly with Convention rights, but the key authorities concerned with protest are the police and the Government, particularly the Home Office. The police are operationally independent of Government. Chief Constables are entitled to make decisions about the deployment of their officers without political interference.¹⁵

13 [The United Macedonian Organisation Ilinden and Ivanov v Bulgaria](#) [2011] ECHR 1250, paragraph 115

14 See, for example, Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services, [Getting the balance right? An inspection of how effectively the police deal with protests](#), 11 March 2021, pages 71–72

15 While operational independence is fundamental to the British model of policing (see [Schedule 1](#), The Policing Protocol Order 2011, para 30) it is not defined in law and opinions on its precise meaning and scope vary.

20. Prior to the outbreak of covid-19, the key piece of legislation governing the right to gather to engage in public protest was the Public Order Act 1986. This Act, which is unaffected by the coronavirus laws and remains in force, gives the police the power to impose such conditions on public assemblies and processions, including restrictions on their size, duration and location,¹⁶ as are necessary, but only where a senior officer reasonably believes that the procession or assembly may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or that the purpose of the organisers is to intimidate. In exceptional circumstances public processions may be banned with the permission of the Secretary of State, but there is no power to ban a public assembly.¹⁷

Lawful interferences with the right to protest

21. Together, Articles 10 and 11 provide a clear, positive right for any individual to organise and engage in public protest with others.¹⁸ However, as the rights guaranteed by both Articles are qualified, the right to protest is not absolute. Article 10(2) and Article 11(2) establish that authorities may interfere with the right to protest for legitimate reasons including public safety, protecting public health and protecting the rights and freedoms of others. Plainly, taking steps to prevent the spread of a potentially deadly and highly virulent virus falls within these legitimate reasons. Indeed, there is a positive obligation on the State under the ECHR to safeguard the right to life (Article 2 ECHR).

22. However, any interference with Article 10 or 11, even by a measure intended to serve a legitimate purpose like preventing the spread of covid-19, will only be justified where it is properly prescribed by law, where there is a pressing social need for the interference and where the interference is proportionate to the aim of the measure. For an interference to be prescribed by law for the purposes of Articles 10 and 11, the law governing it must be adequately accessible to those affected by it and the law's consequences for them must be foreseeable. The law must also contain adequate safeguards against arbitrary or discriminatory use.¹⁹ This requirement is not affected by a public health emergency such as the covid-19 pandemic.

23. The proportionality of any measure interfering with Article 10 or 11 rights during the pandemic must be assessed against a number of factors such as its intention, its impact on different groups, whether it will cause the least interference possible to achieve its end, and, most obviously, its likely public health impact. Throughout the pandemic the Government response to covid-19 has been characterised by efforts to limit people gathering, in recognition of the ease with which the virus can be spread from person to person and the crucial need to keep the infection rate down. The proportionality of different measures will change over the course of the pandemic, as the prevalence of the virus and the rate of infection fluctuates, and it is therefore understandable that the

16 In respect of assemblies, these are the only types of condition that can be imposed.

17 Public Order Act 1986, [Sections 12 to 14](#)

18 The European Court of Human Rights has described "the protection of personal opinions, secured by Article 10, [as] one of the objectives of freedom of peaceful assembly as enshrined in Article 11" ([Ezelin v France](#) [1991] ECHR 29 at paragraph 37) and noted that in cases of restrictions on protest it can be impossible for "the issue of freedom of expression [to be] entirely separated from that of freedom of assembly" ([Schwabe and MG v Germany](#) [2011] ECHR 1986 at paragraph 101).

19 See, in the context of mass protest, [Lashmankin and Others v. Russia](#), [2017] ECHR 130 at paragraphs 410–471

position on protest in the law has changed as well. Tighter restrictions at times of national lockdown may be reasonable, compared to more deference being shown to the right to protest when the public health situation is less severe.

24. In order to assess whether restrictions on protest over the course of the pandemic have met the requirements of lawfulness and proportionality, we need to understand what restrictions have in fact been in place.

4 The law governing protest during the pandemic

25. This Chapter focuses on the legal regime applicable to England as the devolved parliaments and assembly are responsible for their own public health responses to covid-19.

The First Lockdown

26. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 imposed the first national lockdown, beginning on 26 March 2020. These Regulations prohibited any person leaving their home “without reasonable excuse” and provided a non-exhaustive list of reasonable excuses. This list stated that a “reasonable excuse includes” various reasons such as obtaining basic necessities, taking exercise and seeking medical assistance. The Regulations did not specify engaging in protest as a reasonable excuse for leaving the home. However, given that the list of exceptions was not exhaustive any person who left their home in order to protest would be entitled to argue that it amounted to a “reasonable excuse” and was therefore not a contravention of the Regulations. A police officer had the power to direct a person to go home, to remove them to their home (using reasonable force, if necessary) and to issue an FPN—but only if they were contravening the Regulations by being out without a “reasonable excuse”.²⁰ It would be for the individual police officer and/or the courts to determine whether it was a reasonable excuse or not.

27. At the same time, the first lockdown regulations also imposed restrictions on gatherings: no person was permitted to participate in a gathering in a public place of more than two people. This restriction took a slightly different approach. It did not specify that gatherings were only prohibited where there was no “reasonable excuse”. Instead, it provided a general prohibition on gatherings coupled with an exhaustive list of lawful exceptions. These exceptions did not include protest.

28. However, the regulation dealing with ‘offences and penalties’ provided that contravening the prohibition on gatherings would only amount to a criminal offence if it was done “without reasonable excuse”. Thus it appeared that a person participating in a gathering for the purposes of protest would always be contravening the prohibition in the regulations, but they would not be committing a criminal offence if the police and/or the courts accepted that the protest amounted to a ‘reasonable excuse’ to breach the rules.²¹

29. This appeared to have some significance in respect of enforcement. Where the police considered that a gathering of three or more was taking place “in contravention of” the regulations they had the power to direct that gathering to disperse and to direct the participants home or remove them there by force.²² Because these powers were triggered by a gathering in contravention of the regulations rather than by a criminal offence, on the face of the regulations the police did not have to consider whether there was any “reasonable excuse” before exercising them. The police action would seemingly be permitted under

20 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ([SI 2020 / 350](#)), Regulation 8(3)

21 This appears to create a confusing situation in which a person would be acting ‘unlawfully’ (because their participation in the gathering would be prohibited by the Regulations) but would not be committing an offence.

22 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ([SI 2020 / 350](#)), Regulation 8(9)

the regulations even if the person being removed did have a reasonable excuse to gather. Failing to comply with a police direction to go home, or obstructing an attempt to remove you home, would, however, only be an offence if done “without reasonable excuse”.²³

30. From 1 June 2020 the restrictions were eased, with the prohibition on leaving the home replaced with a prohibition on staying overnight at any place other than home and the prohibition on outdoor gatherings limited to those involving more than 6 people.²⁴ For the first time, “gathering” was defined—as “when two or more people are present together in the same place in order to engage in any form of social interaction with each other, or to undertake any other activity with each other.”²⁵ There remained no exemption for engaging in public protest. It was under these restrictions that the BLM protests and the protests to protect statues and memorials took place.

Permitting some protest

31. From 4 July 2020 a further easing of restrictions took place, with people permitted to leave their homes and stay overnight elsewhere. Restrictions on outdoor gatherings remained, although up to 30 people were now able to attend gatherings outside as opposed to six. Significantly, for the purposes of protest, there was an exception in relation to outdoor gatherings of more than 30 people taking place in public spaces as long as (a) the gathering had been organised by “a business, a charitable, benevolent or philanthropic institution, a public body, or a political body”; (b) the person organising had carried out a health and safety risk assessment; and (c) the person organising had taken all reasonable measures to limit the risk of transmission of the coronavirus (taking into account both the risk assessment and government guidance).²⁶

32. The key detail for those wishing to protest in numbers over 30 was the definition of “political body” within the regulations, which included “a political campaigning organisation within the meaning of regulation 2 of the Health and Social Care (Financial Assistance) Regulations 2009”.²⁷ Regulation 2 of the Health and Social Care (Financial Assistance) Regulations 2009 defines a “political campaigning organisation” as including:

“any person carrying on, or proposing to carry on activities—

(a) to promote, or oppose, changes in any law applicable in the United Kingdom or elsewhere, or any policy of a governmental or public authority (unless such activities are incidental to other activities carried on by that person) [...]”

33. This definition covers a significant number of campaigning organisations and protest movements, although notably not any person campaigning against the activities of private companies or organisations.

23 This confusing situation is discussed further below

24 Amendments made by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020 ([SI 2020/558](#)), Regulation 2, paragraph 7(3)

25 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, ([SI 2020/350](#)), Regulation 7(3) (a)

26 The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 ([SI 2020/684](#))

27 See The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 ([SI 2020/684](#)), Regulation 5(7)(c)(ii)

34. While there were local variations in the restrictions imposed, on the national level this limited recognition of protest as an exception to the restrictions on public gatherings continued into the Autumn, despite the number of people permitted to gather together socially being reduced from 30 to 6 on 14 September.

Explicit recognition of protest

35. From 14 October 2020 a localised 3-tier system came into effect, which continued the prohibition on gatherings of more than 6 people in all three tiers. However, for the first time, the regulations expressly introduced an exception to this prohibition for a gathering “for the purposes of protest”—applicable in all three tiers. The exception mirrored that which had appeared in earlier regulations, permitting protests “organised by a business, a charitable, benevolent or philanthropic institution, a public body or a political body” in respect of which the organiser “takes the required precautions”.²⁸ The required precautions were: carrying out a risk assessment and taking all reasonable measures to limit the risk of transmission of the coronavirus (taking into account both the risk assessment and government guidance).²⁹

36. The 24 October anti-lockdown protest in London was broken up by police. This was despite the explicit exemption allowing protest in the regulations described above. The police reported it was broken up because the protesters had not complied with the risk assessment the organisers had been required to conduct by failing to comply with social distancing and other measures.³⁰ This demonstrates that the exemption for protest did not prevent the police breaking up a protest that risked public health.

The November national lockdown

37. On 5 November 2020 the second national lockdown began, under the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020. As in the first lockdown, these regulations imposed a prohibition on leaving home without ‘reasonable excuse’ and provided a list of exceptions, which did not include protest. Once again, however, this list was not exhaustive, leaving open the possibility that participation in a public protest could amount to a reasonable excuse to leave home without contravening the regulations.

38. The regulations also prohibited participating in any gathering of more than two people in a public outdoor place, without reference to ‘reasonable excuse’ and with no exception for public protest. Again, the police were empowered to direct a gathering to disperse or to direct or remove participants home if they were considered to be breaching this prohibition (not if they were committing an offence). Surprisingly, however, the prohibition on ‘holding or being involved in the holding of’ (i.e. organising) a gathering of more than 30 people *did* provide for an exception in relation to gatherings “organised by a business, a charitable, benevolent or philanthropic institution, a public body or a

28 The term “political body” continued to be defined in the way set out in para 33 above in these and all further coronavirus Regulations to date.

29 The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020, (SI 2020/1105), Schedule 1, para 10; The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020 (SI 2020/1104), Schedule 1, para 9; The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 (SI 2020/1103), Schedule 1, para 6

30 “[Covid-19: Arrests at London anti-lockdown protest](#)”, BBC News, 24 October 2020

political body” in respect of which the organiser “takes the required precautions”.³¹ Thus, the regulations appeared to permit a gathering, including for the purposes of protest, involving more than 30 people to be held, but not to permit anyone to participate in it (or arguably to leave home to attend it). This was presumably an error in the drafting of the legislation, but it contributed to wider problems of obscurity in the law.

39. As with the first national lockdown, an offence would only be committed if a person participated in a gathering, or did not comply with police directions/removal, “without reasonable excuse”.³²

40. Under this legal regime, on 28 November 2020, the Metropolitan Police arrested more than 150 demonstrators marching against the lockdown, although not all of these arrests were for breaching coronavirus regulations. At the time, a statement by the Metropolitan Police said: “Protest is not currently a permitted exemption to the prohibition on gatherings under the current coronavirus regulations.”³³ What was not made clear was that, while protest was not a specific permitted exemption, it could still have amounted to a “reasonable excuse” for gathering.

Return to permitting protest

41. At the end of the second lockdown the Government introduced the national 3-tier system under the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, coming into force on 2 December 2020. This system again imposed restrictions on outdoor gatherings in each tier, essentially prohibiting gatherings of more than 6 people in public spaces, subject to a list of exceptions. As with the system in place prior to the second lockdown, these regulations expressly recognised an exception for a gathering “for the purposes of protest”—applicable in all three tiers.³⁴ As had been the case immediately prior to the second lockdown, protests “organised by a business, a charitable, benevolent or philanthropic institution, a public body or a political body” were permitted as long as the organiser had taken the same “required precautions”.³⁵

Tier 4 and the third national lockdown

42. From 20 December 2020 the fourth tier of restrictions was introduced, which again prohibited those in the Tier 4 area leaving the home without reasonable excuse and gathering together in a public place in groups of more than 2.³⁶ The exception for protest that applied in Tiers 1 to 3 was removed from the list of exceptions applicable in Tier 4.

31 The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 ([SI 2020/1200](#)), Regulation 10(6)

32 The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 ([SI 2020/1200](#)), Regulation 20

33 “[Police arrest 155 anti-lockdown protesters in London](#)”, The Guardian, 28 November 2020

34 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 ([SI 2020/1374](#)), Schedule 1 para 3 (Tier 1); Schedule 2 para 4 (Tier 2); Schedule 3 para 4 (Tier 3)

35 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 ([SI 2020/1374](#)), Regulation 7

36 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 ([SI 2020/1374](#)), Schedule 3A

However, from 26 December 2020 a new exception was introduced both for leaving the home and for gathering, covering “gathering for the purposes of picketing” as long as the organiser takes the same “required precautions”.³⁷

43. On 5 January 2021 all of England was placed under Tier 4—the third national lockdown. While some restrictions were slightly tightened, in respect of protest under Tier 4 the position remained the same—no exception to the prohibition on leaving the home other than the general ‘reasonable excuse’ and no exemption from the prohibition on gathering for protest (apart from picketing). Again, the police were empowered to direct a gathering to disperse or to direct or remove, with force if necessary, participants to their home if they were considered to be breaching the prohibition on gathering. Once again, however, no offence is committed by contravening the restriction on gatherings or by failing to comply with a police direction unless the individual concerned had “no reasonable excuse”.³⁸ Thus there remains the possibility of a protest providing a reasonable excuse for a gathering and therefore not being an offence. There also remains the possibility of the police being permitted to using force against someone despite their participation in a gathering having a reasonable excuse and therefore not being an offence. This is the situation that continues to apply at the time of writing.

44. The gathering at Clapham Common on 13 March 2021 took place under the third national lockdown. Also under the third national lockdown, protests were organised following the Government’s recommendation of a 1% pay rise for NHS workers. A 65 year-old NHS worker was issued with an FPN and fined £10,000 for organising a gathering attended by 40 people in central Manchester. The police have since committed to review this fine.³⁹

Has protest ever been illegal?

45. In her oral evidence to the Committee, Kirsty Brimelow QC described the laws governing protest during the pandemic as “completely inaccessible and opaque”.⁴⁰ The frequently changing regulations have created substantial confusion over what should be a clear answer to a simple question: is going on a protest illegal?

46. On a few occasions the answer to that question has been a relatively straightforward ‘no’. Between 14 October and 5 November 2020 and between 2 December 2020 and 5 January 2021, the law expressly permitted gathering for the purposes of protest. The requirement to carry out the required risk assessment and take all reasonable steps to prevent the spread of covid-19 was clear and understandable. Prospective organisers and participants, particularly those from smaller organisations and grassroots movements, might have struggled to be clear on whether they were a “business, a charitable, benevolent or philanthropic institution, a public body” or, in particular, “a political body”. They might also have wondered, as we have done, why a demonstration organised against a private

37 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) (Amendment) (No. 3) Regulations 2020 (SI 2020/1646). The picketing must be lawful, i.e. carried out in accordance with the [Trade Union and Labour Relations \(Consolidation\) Act 1992](#).

38 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (SI 2020/1374), Regulation 10(1)

39 “Covid: Police to review £10k fine for NHS protest organiser”, BBC News, 10 March 2021

40 Oral evidence taken on 24 February, HC (2019–21) 1004, [Q29](#)

company was not permitted while a protest against a public body was—this distinction having no obvious relationship with the risk of spreading covid-19. Nevertheless, the law did provide a clearly defined basis for lawful protest.

47. At other times during the pandemic, however, the legal status of protest has been far less clear. In particular, during all three periods of national lockdown in England, the law expressly prohibited gathering together without providing any exception that would cover protest (other than picketing, under the third lockdown). Furthermore, during lockdown the law prohibited leaving the home without reasonable excuse, without including protest in the list of examples of reasons that would amount to such an excuse. Indeed, once the express exemption “for the purpose of protest”, was included in the law on 14 October, its later removal during periods of national lockdown would seem a clear signal that protest was no longer permitted. This has understandably had the effect of convincing many people, including a number of those who provided written evidence to us and elements of the national press, that during lockdown it has been against the law and therefore a criminal offence to gather together in a public place to protest.⁴¹

48. Yet through each period of national lockdown the law has not prohibited leaving the home if there is a “reasonable excuse” for doing so. Given that the regulations imposing lockdown have not (and could not) remove the underlying right to protest under Articles 10 and 11 ECHR, guaranteed by the HRA, it seems that going on a protest, if conducted in a manner that minimises the risk of spreading covid-19, could have been and could remain a lawful reason to leave the home during lockdown.

49. Furthermore, while throughout the national lockdowns the regulations have been clear that protest does not fall within the lawful exceptions to the prohibition on gatherings, they have been equally clear that breaching that prohibition will only be an offence if it is done without a ‘reasonable excuse’. If protest could potentially be a reasonable excuse in respect of the prohibition on leaving home, then protest could also potentially be a reasonable excuse for gathering together—meaning that participating in that gathering would not be an offence.

50. However, this also means, confusingly, that attending a protest could be in breach of the regulations despite it not being a criminal offence. The precise status of this ‘unlawful but not criminal’ behaviour is not clear, but its consequences for anyone considering gathering for a protest during lockdown could be significant. The lockdown regulations have granted the police the power to disperse gatherings, direct participants to go home and even to remove them forcibly (if necessary) where they consider the prohibition on gatherings has been contravened, not where they consider a criminal offence has been committed. On their face therefore, the regulations allow these powers to be used whether or not a ‘reasonable excuse’ is available, and therefore against individuals who are not breaking the (criminal) law. It is hard to see how this could be consistent with Article 10 and 11 ECHR.

51. The cause of this ambiguity in the regulations is unclear. However, if the intention was for police enforcement powers in respect of gatherings to be unavailable where the participant had a ‘reasonable excuse’, the clauses governing gatherings could simply have been drafted in the same way as the clauses governing leaving the home. It is also notable

41 See for example, “*Coronavirus: Priti Patel bans demonstrations during England’s lockdown*”, The Independent, 3 November 2020

that the ambiguity has been maintained in all three lockdowns over the past year. ***The regulations must be corrected to ensure that persons who have a reasonable excuse to gather, and who are therefore not committing an offence, cannot be directed to disperse or leave, or removed from the gathering.***

Confirmation that protest is not banned

R (Dolan) v Secretary of State for Health and Social Care

52. The potential for protest to remain lawful despite it not being listed as an exception to prohibitions on gathering was recognised by the Court of Appeal in the case of *R (Dolan) v Secretary of State for Health and Social Care*.⁴² This case saw the lawfulness of the regulations covering the first lockdown challenged on various grounds, including their compatibility with Convention rights. The court did not grant permission for judicial review in respect of the claim that the regulations were incompatible with the right to free assembly under Article 11, but it did consider the claim’s merits and found that it was “unarguable”:

103 [...] In our view, the regulations cannot be regarded as incompatible with article 11 given the express possibility of an exception where there was a reasonable excuse.

53. Significantly, the Government supported this interpretation of the legislation and reminded the court “that the HRA is primary legislation, whereas the regulations are subordinate legislation.” The court thus found that “[i]f there were any conflict between them, it is the HRA and not the regulations that would have to take priority. It would be possible to resolve any potential conflict by the process of interpretation required by section 3 of the HRA were there an incompatibility with a Convention right.”⁴³

54. This is an important point. Under section 3 HRA, all of the lockdown regulations must be interpreted in a way that is compatible with the Convention, including Articles 10 and 11 ECHR. This is an obligation that applies to all public authorities and not just the courts. Given that the regulations did not expressly prohibit all protest, they must be read in such a way as to permit protest where it would be unnecessary or disproportionate not to. If the regulations *had* expressly banned all protest without any possibility of ‘reasonable excuse’ the regulations would have run the very clear risk of being found to be incompatible with the Convention and struck down.

55. It is notable that while concluding that the presence of the ‘reasonable excuse’ defence undermined any claim that the regulations breached Article 11, the court did not address in its judgment the implications of the police being given the power to disperse gatherings and to direct or remove people home for violating the prohibition on gatherings—a power which, on the face of the regulations, does not depend on an absence of ‘reasonable excuse’.

42 [2020] EWCA Civ 1605

43 Section 3 HRA requires all legislation to be read and given effect compatibly with Convention rights, so far as it is possible to do so.

Police understanding

56. Significantly, the senior police officers who gave oral evidence to our Committee also appeared to agree that protest was not prohibited under lockdown. In answer to the question: “can we assume that your understanding of the law is that there is no absolute prohibition on the right to protest, and that it still exists, notwithstanding the terms the regulations made under the Public Health Act?”, Chief Constable Harrington said: “Absolutely.”⁴⁴

Reclaim These Streets

57. It is somewhat concerning then, that around two weeks after that oral evidence session Reclaim These Streets still considered it necessary to bring an emergency application against the Metropolitan Police in the High Court to establish that the law did not impose an absolute ban on protest. We understand that when considering the application brought by Reclaim These Streets prior to the cancelled event on Clapham Common on 13 March 2021, the High Court accepted that the conclusion in *Dolan* regarding the first national lockdown applied equally to the 2021 lockdown. The regulations prohibiting gatherings must be read subject to the rights guaranteed by Article 10 and 11 ECHR, and therefore a protest may only be prohibited where it is necessary and proportionate to do so. A policy effecting a blanket ban on protest would be unlawful.⁴⁵

Reasonable excuse

58. Yet even once it is established that protest has never been subject to a blanket prohibition, even under the three national lockdowns, the precise lines between legal and illegal protest remain obscure. The burden of protecting the right to protest and Articles 10 and 11 ECHR falls on the phrase ‘reasonable excuse’ and the way in which it is interpreted. The defence of ‘reasonable excuse’ undoubtedly provides flexibility in the application of the lockdown regulations—a vital safety net for human rights, ensuring that not all infringements of sweeping restrictions are criminalised—but ‘reasonable excuse’ alone is insufficient to adequately protect the right to protest during the pandemic. While it is important to know that protest may be lawful as it may amount to a reasonable excuse for breaching the prohibition on gathering, this does not and cannot provide the accessibility and foreseeability of the law that the ECHR requires. The impact of this uncertainty are considered further below.

Legality of protest—other factors contributing to confusion

Government communications

59. The most obvious reason for the lack of clarity over the legality of protest is outlined above: that the law governing gatherings (i) has frequently changed and (ii) during lockdown has left protest to fall within the general defence of ‘reasonable excuse’. Yet confusion around the right to protest has not been helped by communications coming from Government. For example:

44 Oral evidence taken on 24 February, HC (2019–21) 1004, [Q37](#)

45 See the [open advice](#) provided to Reclaim These Streets by their lawyers, following the judgment in the High Court

- a) On 6 June 2020, when gatherings of more than six were prohibited under the regulations, the Home Secretary tweeted: “Protests must be peaceful and in accordance with social distancing rules.”⁴⁶ On 7 June 2020 the Prime Minister tweeted similarly: “People have a right to protest peacefully & while observing social distancing but they have no right to attack the police.”⁴⁷ Shortly afterwards, on 8 June 2020, the Home Secretary wrote in the national media on the subject of the ongoing protests following the death of George Floyd in the USA and stated, in a seeming contradiction of the earlier tweets:

“This government understands the importance of the right to protest. In normal circumstances, a large (and largely peaceful) protest of this kind would not be of concern to the authorities. But these are not normal times. To protect us all, and to stop the spread of coronavirus, any large gatherings of people are unlawful.”⁴⁸

- b) The Home Secretary followed this with a tweet on 13 June 2020, which stated that “[g]athering in large numbers at this exceptional time is illegal.”⁴⁹ The law had not changed.
- c) Before the second national lockdown began in November 2020, numerous news sources reported that protest was to be banned.⁵⁰ These headlines were inaccurate but perhaps understandable as the exemption permitting protest had been removed from the regulations. The statement from the Home Office quoted in these articles did nothing to clarify whether removing the exception that allowed for protest meant that there was a ban or not:

“People must follow the rules on meeting with others, which apply to all gatherings and therefore protests too. As they have done throughout the pandemic, the police and local authorities will engage, explain and encourage people to follow the rules before moving on to enforce the law.”

60. Inaccurate communications were not limited to central Government. On 27 November, during the second national lockdown, in anticipation of planned protests in London the following day, the Mayor of London tweeted that “[u]nder the current lockdown restrictions, gatherings of more than 2 people who do not share a household or bubble are illegal.”⁵¹ No mention was made of Article 11 rights or any exceptions to the prohibition.

61. While the law surrounding protest during the pandemic has been and remains far from clear, this does not justify inaccurate and misleading communications from Government. Indeed, it demands the opposite. Public communications from Government about the law must be accurate.

46 @pritipatel, (2020, June 6), [Protests must be peaceful and in accordance with social distancing rules](#)

47 @BorisJohnson, (2020, June 7), [People have a right to protest peacefully & while observing social distancing but they have no right to attack the police](#)

48 Home Office News Team, [Home Secretary: op-ed on protests](#), 8 June 2020

49 @pritipatel, (2020, June 13), [We are in the grip of an unprecedented national health emergency](#)

50 [“Coronavirus: Priti Patel bans demonstrations during England’s lockdown”](#), The Independent, 3 November 2020; [“Protests of more than two ‘to be banned during second lockdown”](#), Metro, 3 November 2020; [“Coronavirus lockdown; Priti Patel wants police to stop protests of more than two”](#), The Times, 3 November 2020 [paywall]

51 @MayorofLondon, (2020, November 27), [Under the current lockdown restrictions, gatherings of more than 2 people who do not share a household or bubble are illegal](#)

*Further ambiguities in the law**“Gathering”*

62. The uncertainty over the right to protest has also been exacerbated by further ambiguity in the terms used in the regulations. For example, until June 2020, the regulations provided no definition of “gathering” despite it being a key term that determined whether behaviour was lawful or unlawful. Since then a definition has been provided:

“[A] gathering takes place when two or more persons are present together in the same place in order—(i) to engage in any form of social interaction with each other, or (ii) to undertake any other activity with each other”⁵²

63. While this definition is a substantial improvement on no definition, it is still not clear at what distance two people becomes a gathering. Especially given the regulations are all ‘Health Protection’ regulations designed to halt the spread of covid-19, it could be interpreted that once people are far enough apart to pose no risk of spreading coronavirus to each other then they cannot be considered as a gathering. This would mean any socially distanced protest would not be caught by the prohibition on gatherings. This does not appear to be the interpretation that has been adopted by the police, given reports that socially distanced protests have been ‘refused permission’ or resulted in police enforcement action.⁵³

64. The phrase “in the same place” does not provide much additional clarity. Two people protesting on opposite sides of a park might be said to be “in the same place”, despite there being hundreds of metres between them. Would this be considered a gathering? The same question could be asked in respect of neighbours on a street all standing outside their front doors to ‘clap for carers’; are they “present together in the same place” to undertake “an activity with each other”? It seems unlikely, but the language of the regulations might leave doubts in the minds of some.

52 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, ([SI 2020/1374](#)) Regulation 2, clause 6e.

53 For example, the Reclaim These Streets event on Clapham Common and see also: [“Organiser of socially-distant nurses’ pay protest fined £10,000 by police”](#), The Mirror, 7 March 2021

5 Impact on the police and public

Impact on the police

65. The lack of clarity outlined above with regards the right to protest clearly leaves the police in a difficult situation. In evidence to us John Apter, National Chair of the Police Federation, quoted statistics saying that “nine out of ten officers felt the regulations were not clear”, and we are sympathetic to this given the complexities in the law.⁵⁴ Lochlinn Parker described to us his experiences of dealing with police forces who did not appear to understand the law: “some forces have treated protests as being banned, except when protest was specifically exempt. Forces have also just got it wrong in general”.⁵⁵ Following the clashes between police and members of the public on Clapham Common on 13 March, after the Reclaim These Streets event was cancelled, the Metropolitan Police Commissioner welcomed a review and said that “this is fiendishly difficult policing.”⁵⁶

66. Ambiguous or confusing law poses a challenge to those tasked with enforcing the law as well as those seeking to abide by it. The police should not be required to enforce laws that are unclear, as this could lead to interferences with human rights that do not have a proper basis in law.

67. Nevertheless, the police have an obligation not to misstate the law. Professor David Mead of the University of East Anglia’s written evidence provides examples of the police’s confusion over the law causing troubling errors in their communication with the public. He refers to a 31 October 2020 tweet from the Metropolitan Police warning those planning a protest outside the French Embassy that they “must submit a risk assessment where applicable” when the regulations only require that a risk assessment is carried out.⁵⁷ More concerningly, he also drew our attention to an 18 December 2020 video appeal from West Midlands police ahead of a planned demonstration which stated that the police had not been able to identify an organiser “and therefore such protests are unlawful.”⁵⁸ As Professor Mead noted, this was not what the Public Order Act 1986 or any coronavirus regulations said.

68. The senior police officers who gave oral evidence to us recognised that the coronavirus regulations, even during lockdown, did not remove the right to engage in protest. It is to be hoped that this message has been properly communicated to the officers policing protests on the street. Yet even with the law properly understood, too much of the policing of protest, and the difficult question of respecting Articles 10 and 11 ECHR during a pandemic, has been left to police discretion and particularly police interpretation of what constitutes a “reasonable excuse”.

69. This has led the Metropolitan Police, on at least one occasion, to seemingly leave it to the public to decide for themselves whether they are committing an offence. In an “open letter to persons organising and/or participating in public gatherings” tweeted during the November lockdown, the Met informed readers that “if you attend a gathering

54 Oral evidence taken on 24 February, HC (2019–21) 1004, [Q35](#)

55 Oral evidence taken on 24 February, HC (2019–21) 1004, [Q35](#)

56 Metropolitan Police, [Commissioner’s statement following vigil on Clapham Common](#), 14 March 2021

57 @MetPoliceEvents, (2020, October 31), [We’re aware of plans for a protest outside @FranceintheUK today](#)

58 [“Our appeal to the community ahead of planned demonstration”](#), West Midlands Police, 18 December 2020 (youtube clip)

that breaches the regulations, you may be committing an offence”, directed them to the Government’s legislation website and stated that “it is your responsibility to check the current position and ensure you are not committing an offence by being involved in a gathering”.⁵⁹ It is not clear what they expected a reader to do when they checked the regulations and, if they could identify the relevant provisions, found that they prohibited protest but did not render it criminal if there was a ‘reasonable excuse’. This leads us to consider the impact of these regulations on the public.

Impact on the public

Sanctions that may be incorrect

70. Police officers not being clear on the content of the law they are tasked with enforcing presents a challenge to the rule of law. It creates a substantial risk of the police wrongly interpreting the law and misapplying it, thereby sanctioning individuals who have not behaved illegally, in breach of their Convention rights. This applies to protest as much as anything else, and indeed, there have been serious sanctions given out to people for engaging in protest when the illegality of their behaviour is far from certain.

71. For example, as noted above, the organiser of a demonstration in Manchester against the recommendation of a 1% pay rise for nurses was issued with a £10,000 FPN after around 40 others attended the protest.⁶⁰ This is a very significant amount of money, and the fine was imposed in a context where the police were left to resolve whether the protest was a criminal offence or a “reasonable excuse” to leave home and to gather.

Deterrent

72. Despite ambiguities in the law and inconsistencies in its application, it is clear that many people did still gather to engage in public protest over the course of the pandemic—even during lockdown. But the fact that some protests did go ahead does not mean that many others were not dissuaded from organising or attending demonstrations and exercising their Article 10 and 11 rights because they were uncertain whether protesting would be legal.

73. It is positive that the lockdown regulations provide a reasonable excuse defence for those accused of gathering unlawfully. It is important that this has been identified by the courts as protecting the right to free assembly under Article 11. This defence means that protests may be lawful despite the law failing to provide for them.

74. However, this protection is of relatively limited use in practice. Firstly, the police power to disperse gatherings and to direct or remove people home, which has applied throughout the national lockdowns, appears to be available without the need for the police to assess whether there is a “reasonable excuse”. While a participant in an assembly might have a defence to a charge of failing to comply with a direction to disperse, that would not help them when a police officer exercises his or her power to use reasonable force against them.

59 @MetPoliceEvents, (2020, 28 November), [Open letter to event organisers and those looking to participate in public gatherings](#)

60 [“NHS pay-rise demo organiser fined £10,000 in Manchester”](#), BBC News, 8 March 2021

75. Secondly, and crucially, it is not obvious how to determine whether any individual protest amounts to a “reasonable excuse”. This is a problem not only for a prospective protester unsure whether a local demonstration will lead to an FPN, but also for the police officer faced with that demonstration. The authorities cannot decide whether a protest falls within a ‘reasonable excuse’ on the basis of the particular cause being promoted or the policy challenged. Indeed, it is not clear what they can base such a judgement on other than an assessment of the implications of the protest for the spread of covid-19.

76. In the absence of specific guidance for the police and public, the question of whether a protest amounts to a “reasonable excuse” can only be answered definitively through legal proceedings—whether that is a criminal trial following an FPN being issued or a judicial review. As Professor David Mead noted in his written submission to the Committee:

“We should not have to rely on going to court to have our rights upheld. The protection of rights should be equal for all, not simply (using the focus of this paper) to those political campaigners who are legally trained, or who have access to such advice (and/or have significant wealth to afford it).”⁶¹

77. We agree. The uncertainty in the application of the regulations has made and continues to make it difficult for individuals to confidently exercise their rights within the law. Lochlinn Parker told us about “the deterrent effect and the fact that inconsistency and lack of clarity in rules might deter people from getting involved in protesting.” Furthermore, as Kirsty Brimelow QC reminded us, “in order for a law to be lawful it has to be clear and accessible so that people will understand that they have committed an offence.”⁶² **If people have to go to court to establish whether their actions are lawful or criminal, it is questionable whether the law is meeting the standards of accessibility and foreseeability required by the Convention.**

78. Beyond the individuals deterred from attending or organising protests, there are stories of gatherings being cancelled after interventions from the local council or police force. The most high-profile example of this was the vigil planned to take place on Clapham Common after the tragic murder of Sarah Everard in March. Reports said that after initially seeking to find a way to facilitate the event, the Metropolitan Police then told the group it would be “unlawful” and that the organisers “could” face £10,000 fines. Yet, as the events on Clapham Common on 13 March 2021 showed, cancelling formally organised events can result in less well organised gatherings taking place in their stead, potentially posing a greater risk to public health.

61 Professor David Mead ([CIL 1514](#))

62 Oral evidence taken on 24 February, HC (2019–21) 1004, [Q29](#)

6 Conclusions and the way forward

79. While there has been confusion in the law governing protest during the pandemic, this has not always been the case. In October and December 2020 there was relatively clear and accessible legislation confirming that protest could go ahead subject to the organisers completing reasonable safeguards. The existence of an explicit exemption allowing protest brought into regulations in October 2020, and covering Tiers 1–3 prior to the third national lockdown, was a significant improvement on the previous regime. However, it is not perfect. *The limited definition of a “political campaigning organisation” seems to prevent an individual from being able to protest against a private company or its activities. We assume this is not the intention and recommend that the regulations are changed to allow individuals to protest against private companies*

80. Nevertheless, these regulations demonstrate that protest can be safely accommodated within laws designed to protect against the spread of covid-19. The existing law on public order, which permits the police to place conditions on assemblies and processions to ensure they do not seriously disrupt the life of the community, provides a back-up should protests threaten to get out of hand.

81. In respect of periods of lockdown, the legal position has been and remains far more concerning. Protest has not been a permitted exception to prohibitions on leaving the home or gatherings. It is unclear why the highly restrictive approach to protest during lockdown has been necessary.⁶³ Other activities that seem to pose similar public health risks have been treated differently—without this damaging efforts to combat covid-19.

82. For example, in the third national lockdown, an exception has been made for picketing. Plainly workers’ rights are important, and Articles 10 and 11 engaged, but if picketing can be allowed safely why not gatherings for other forms of protest?

83. Furthermore, the exceptions to the prohibition on gathering under lockdown extend to “communal worship”, as long as the required precautions are taken.⁶⁴ This includes indoor gatherings where the risk of covid-19 transmission is said to be higher.⁶⁵ The Committee welcomes the respect this exception shows for the human right to freedom of religion under Article 9 ECHR. Article 9 expressly includes the right to manifest one’s religion or belief in community with others in the form of worship. However, the justification for treating gathering for religious purposes differently from gathering together for the purposes of protest is not clear. Kirsty Brimelow QC stated of this: “The regulations now allow unlimited numbers in church services, for example, certainly under tier 4. There is also a lot of illogicality around where the red lines are drawn and elasticity over what people can do.”⁶⁶

63 The JCHR has not been provided with evidence on the precise risk posed by outdoor protests in respect of the spread of covid-19. However, in [evidence to the Science and Technology Committee on 9 March 2021](#), Sir Patrick Vallance, the Government’s Chief Scientific Adviser, made the following comments: “I reiterate that our view has always been—it is clear in the SAGE papers—that outdoors is much lower risk than indoors, but it is not completely risk free. It is the case that it is difficult to see how things like large beach gatherings and so on can cause a spike. The same was the case in a protest march in New York; they did not really see any spikes after that...” Professor Chris Whitty, Chief Medical Officer for England, confirmed that he agreed.

64 The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 ([SI 2020/1374](#)), Para 6(24) of Schedule 3A

65 See for example, Cabinet Office, [Policy paper - SAGE advice on reducing the risk of coronavirus \(COVID-19\) transmission in the home](#), 7 December 2020

66 Oral evidence taken on 24 February, HC (2019–21) 1004, [Q29](#)

84. Gathering to protest is not and has never been completely illegal. Regulations have never expressly constrained the right to protest and must always be read in a way that is compatible with the rights guaranteed by Article 10 and 11 ECHR. But even if the law does not prohibit all protest, that is no good if the public are unaware of that fact.

85. The regulations in force during the 2021 lockdown, under which protest is not an offence if it constitutes a “reasonable excuse” to gather contrary to the regulations, but police officers apparently still have powers to break up such gatherings, leave too much to the interpretation of individual police officers to adequately protect the right to protest. A degree of police discretion is vital, but leaving too much to their interpretation or discretion runs the risk of police officers being asked to establish the law on protest as well as enforce it. This is unfair on the officers, but more significantly it affects the rights of protesters who are unsure whether their behaviour will be sanctioned or not.

86. The regulations that applied in October and December 2020 confirmed that protest could go ahead subject to the organisers completing reasonable safeguards. However, during periods of national lockdown, the law became confusing and unclear. Numerous communications from public authorities implied or stated that protest was illegal, while in court Government lawyers argued the opposite. Even when properly understood, the lockdown laws leave the right to protest dependent on interpretation of the highly subjective “reasonable excuse”. This is unacceptable and leaves the public unsure of their rights, and at risk of arbitrary or discriminatory decision-making. *The Government must make clearer that protest is not, and never has been, completely illegal during the pandemic—even under lockdown. The Government should amend the law to make clear that protest is permitted if conducted in a manner that reduces public health risks to an acceptable level. The model used in Tiers 1 to 3 under The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, whereby protest is permitted where a risk assessment has been conducted and all reasonable measures to limit the risk of transmission have been taken, could also be applied to outdoor protests in Tier 4.*

Conclusions and recommendations

The law governing protest during the pandemic

1. *The regulations must be corrected to ensure that persons who have a reasonable excuse to gather, and who are therefore not committing an offence, cannot be directed to disperse or leave, or removed from the gathering. (Paragraph 51)*
2. While the law surrounding protest during the pandemic has been and remains far from clear, this does not justify inaccurate and misleading communications from Government. Indeed, it demands the opposite. Public communications from Government about the law must be accurate. (Paragraph 61)

Impact on the police and public

3. Ambiguous or confusing law poses a challenge to those tasked with enforcing the law as well as those seeking to abide by it. The police should not be required to enforce laws that are unclear, as this could lead to interferences with human rights that do not have a proper basis in law. (Paragraph 66)
4. If people have to go to court to establish whether their actions are lawful or criminal, it is questionable whether the law is meeting the standards of accessibility and foreseeability required by the Convention. (Paragraph 77)

Conclusions and the way forward

5. *The limited definition of a “political campaigning organisation” seems to prevent an individual from being able to protest against a private company or its activities. We assume this is not the intention and recommend that the regulations are changed to allow individuals to protest against private companies (Paragraph 79)*
6. The regulations that applied in October and December 2020 confirmed that protest could go ahead subject to the organisers completing reasonable safeguards. However, during periods of national lockdown, the law became confusing and unclear. Numerous communications from public authorities implied or stated that protest was illegal, while in court Government lawyers argued the opposite. Even when properly understood, the lockdown laws leave the right to protest dependent on interpretation of the highly subjective “reasonable excuse”. This is unacceptable and leaves the public unsure of their rights, and at risk of arbitrary or discriminatory decision-making. *The Government must make clearer that protest is not, and never has been, completely illegal during the pandemic—even under lockdown. The Government should amend the law to make clear that protest is permitted if conducted in a manner that reduces public health risks to an acceptable level. The model used in Tiers 1 to 3 under The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, whereby protest is permitted where a risk assessment has been conducted and all reasonable measures to limit the risk of transmission have been taken, could also be applied to outdoor protests in Tier 4. (Paragraph 86)*

Annex: Proposed amendments to legislation

Schedule 3A of the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 sets out the restrictions in place in Tier 4. These constitute the national lockdown regulations.

Paragraph 6 of Schedule 3A contains the list of recognised exceptions to the prohibition on gatherings. It is proposed that this list be extended to include a new exception 21, which would mirror the exception for the purposes of protest that applies in Tiers 1 to 3. This exception would permit protest to take place outdoors if it is organised by a “a business, a charitable, benevolent or philanthropic institution, a public body or a political body” and if the organiser takes “the required precautions”. These required precautions are defined at regulation 7 and include carrying out a satisfactory risk assessment and taking all reasonable measures to limit the risk of transmission of coronavirus.

It is also proposed that Paragraph 2 of Schedule 3A, which contains exceptions to the prohibition on leaving the home, be amended to allow a person to leave home in order to attend a permitted protest.

Amendments

Add to Paragraph 2, Schedule 3A, Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020:

Exception 21: protest

(28) Exception 21 is that it is reasonably necessary for P to leave or be outside P’s home for the purposes of attending a gathering permitted under paragraph 6(29).

Add to Paragraph 6, Schedule 3A, Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020:

Exception 21: protest

(29) Exception 21 is that the gathering is for the purposes of protest and—

- (a) it takes place in a public outdoor place;
- (b) it has been organised by a business, a charitable, benevolent or philanthropic institution, a public body or a political body, and
- (c) the gathering organiser takes the required precautions in relation to the gathering.

Declaration of Interests

Lord Brabazon of Tara

- No Interests declared

Lord Dubs

- No relevant interests to declare

Lord Henley

- No Interests declared

Baroness Ludford

- No relevant interests to declare

Baroness Massey of Darwen

- No relevant interests to declare

Lord Singh of Wimbledon

- No Interests declared

Formal minutes

Wednesday 17 March 2021

Virtual Meeting

Members present:

Ms Harriet Harman MP, in the Chair

Lord Brabazon

Ms Karen Buck MP

Lord Dubs

Dean Russell MP

Lord Henley

Baroness Massey of Darwen

Lord Singh of Wimbledon

Draft Report (*The Government response to covid-19: freedom of assembly and the right to protest*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 86 read and agreed to.

Annex and Summary agreed to.

Resolved, That the Report be the Thirteenth Report of the Committee to both Houses.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till 24 March at 2.40pm.]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Wednesday 24 February 2021

Lochlinn Parker, Head of Civil Liberties, ITN Solicitors; **Kirsty Brimelow QC**, Doughty Street Chambers; **Gracie Bradley**, Interim Director, Liberty

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Owen Weatherill, Assistant Chief Constable, National Police Coordination Centre; **John Apter**, National Chair, Police Federation of England and Wales; **Ben-Julian Harrington**, Chief Constable, Essex Police, Public Order & Public Safety, National Police Chiefs Council

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List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website.

Session 2019–21

Number	Title	Reference
1st	Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 146 / HL 37
2nd	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 148 / HL 41
3rd	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343 / HL 59
4th	Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report	HC 256 / HL 62
5th	Human Rights and the Government's response to COVID-19: the detention of young people who are autistic and/or have learning disabilities	HC 395 / HL 72
5th (Easy read)	Human Rights and the Government's response to COVID-19: The detention of young people who are autistic and/or have learning disabilities	HC 395 / HL 72
6th	Human Rights and the Government's response to COVID-19: children whose mothers are in prison	HC 518 / HL 90
7th	The Government's response to COVID-19: human rights implications	HC 265 / HL 125
8th	Legislative Scrutiny: The United Kingdom Internal Market Bill	HC 901 / HL 154
9th	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill	HC 665 / HL 155
10th	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill	HC 847 / HL 164
11th	Black people, racism and human rights	HC 559 / HL 165
11th (Large print)	Black people, racism and human rights	HC 559 / HL 165
12th	Appointment of the Chair of the Equality and Human Rights Commission	HC 1022 / HL 180
1st Special	The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019	HC 313
2nd Special	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill: Government Response to the Committee's Tenth Report of Session 2019–21	HC 1127

Number	Title	Reference
3rd Special	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill: Government Response to the Committee's Ninth Report of Session 2019–21	HC 1120
4th Special	Black people, racism and human rights: Government Response to the Committee's Eleventh Report of Session 2019–21	HC 1210