

LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's Response to the Home Office's  
Consultation on Police Powers to  
Promote and Maintain Public Order**

**January 2012**

## About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## Liberty Policy

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

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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## **Introduction**

1. Liberty welcomes the opportunity to respond to proposals drawn up in the wake of last summer's devastating disorder. The present consultation is a document of two halves. On the one hand it proposes a modest but significant legislative amendment which would mitigate the most damaging and illiberal element of a public order offence which has been used all too often to stifle peaceful protest and legitimate debate. By contrast chapters 2 and 3 of the consultation paper follow a trend in the political response to the riots. Proposals to discard safeguards on existing powers to order the removal of face-coverings and introduce a general curfew power are unlikely to be of practical utility in tackling large scale disorder, but will have serious implications, both for civil liberties and for the relationship between the police and the communities they serve.

### **Section 5 of the Public Order Act 1986 (POA)**

2. Liberty has consistently expressed concern about overly broad public order offences and particularly the wide-ranging offence set out at section 5 of the POA. The POA creates three separate public order offences dealing with speech and behaviour short of actual violence. These range in seriousness and scope. Section 4 criminalises words or behaviour intended to cause another to fear immediate unlawful violence or to provoke another to immediately use unlawful violence. The offence created by section 4A prohibits "threatening, abusive or insulting words or behaviour" or the displaying of any "writing, sign or other visible representation which is threatening, abusive or insulting" wherever the impugned behaviour is undertaken with the intent to cause harassment, alarm or distress. Section 5 creates the even more broadly defined offence of using, with or without any intention, any "threatening, abusive or insulting" words or behaviour or displaying any writing, posters or signs to that effect which are likely to result in another person feeling "harassed, alarmed or distressed".

3. Liberty does not take issue with measures which curtail free expression to the extent that it is intentional and likely to incite violent criminality or cause others to fear immediate violence. The protection of freedom of expression provided for in the *Human Rights Act* is expressly qualified. Article 10 makes clear that the right to free expression must be balanced against the need to maintain public safety and prevent crime and

disorder.<sup>1</sup> Accordingly while section 4 provides for proportionate interference with free expression, sections 5 and 4A of the POA do not. Both of these offences potentially criminalise an expanse of activities such that legitimate forms of peaceful protest can be swept up with offences causing disorder or threatening the safety of an individual.

4. During the Parliamentary passage of the Protection of Freedoms Bill, Liberty suggested an amendment to the Bill which would remove section 5 in its entirety from the POA.<sup>2</sup> Section 5, which doesn't require a person to intend to cause harassment, alarm or distress, is far too expansive and unnecessary in light of the same offence in section 4A (which requires intention). Liberty's suggested amendments to the Protection of Freedoms Bill also include a proposal to remove the reference to insulting behaviour in section 4A - thereby restricting it to an offence of intentionally causing harassment, alarm or distress by using threatening or abusive (and not insulting) behaviour. The difficulty of charging and prosecuting offences, which rely on a subjective perception of the action or words spoken, is now well established, and there have been a number of high profile charges which have subsequently been dropped.<sup>3</sup>

5. Liberty welcomes this Government's decision to review the impact of section 5 and particularly the consideration being given to the need to remove the vague and highly subjective notion of 'insulting' behaviour from the offence. The term 'insulting' has been held to bear its ordinary meaning. Lord Reid in a House of Lords decision in 1972, (in respect of an equivalent provision in the *Public Order Act 1936*) stated:

*We were referred to a number of dictionary meanings of 'insult' such as treating with insolence or contempt or indignity or derision or dishonour or offensive disrespect. Many things otherwise unobjectionable may be said or*

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<sup>1</sup> European Convention on Human Rights, Article 10, as incorporated domestically by the *Human Rights Act 1998*.

<sup>2</sup> See Liberty's Supplementary Committee Stage Briefing on the Protection of Freedoms Bill, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy12/liberty-s-committee-stage-briefing-supplementary-prot-of-freedoms-bill-hol-j.pdf>.

<sup>3</sup> Some notable examples are given at pages 8 and 9 of the consultation, for example the case of a protestor carrying a plaque carrying the "*Scientology is not a religion, it is a dangerous cult*", and a student who spent a night in the cells for asking a police officer whether he "*realised that his horse was gay*".

*done in an insulting way. There can be no definition. But an ordinary sensible man knows an insult when he sees or hears it.*<sup>4</sup>

This effectively means that an insult is in the eyes or ears of the ‘reasonable’ beholder. While the courts may be reluctant to convict a person in relation to using ‘insulting’ words or signs, the mere fact that this is a criminal offence is enough to stifle freedom of expression. A recent example of this was the case of a young man (for whom Liberty provided legal advice) who was threatened with prosecution under section 5 for peacefully holding a placard that read “Scientology is not a religion it is a dangerous cult”.<sup>5</sup> While no prosecution ultimately went forward the fact that a peaceful protester who was merely expressing his opinion – which contained no threat or intimidation - could be threatened with prosecution demonstrates the clear need for this offence to be more tightly circumscribed. Even where police action is not accompanied by a threat of prosecution, Liberty’s experience of providing legal observation of the TUC’s ‘March for the Alternative’ fueled very real concerns about the way section 5 is being interpreted by officers on the ground. In one case observed by Liberty, a placard was confiscated, apparently on the basis (as reported to our observer by a police officer) that it was “full of swear words”. In another case the police took the details of protestors carrying a placard “which contained the word ‘fuck’” before letting them move on. Public order offences set out at sections 4A and 5 appear to have been the motivating force behind these interventions which had a clear and disproportionate impact on the right of the individuals involved to peacefully express dissent.

6. Liberty has long believed that there should be a wholesale review of overly broad public order offences. Removal of the reference to insulting words or behaviour from section 5 would mitigate the worst excesses of an offence which has been used in practice to undermine peaceful protest. Liberty urges the Government, however, to consider the wider impact of section 5 and the inclusion of insulting words or behaviour as elements of the offence set out at section 4A.

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<sup>4</sup> *Brutus v Cozens* [1972] 2 All ER 1297, per Lord Reid at 1300.

<sup>5</sup> See <http://www.liberty-human-rights.org.uk/media/press/2008/free-speech-victory-as-charges-against-teen-anti-scientology-protestor.php>;  
<http://www.guardian.co.uk/world/2008/may/23/religion>.

## **New Police Powers**

7. The remainder of the consultation deals with proposals for the introduction of new police powers which were amongst a series of measures mooted by senior members of the Government in the immediate aftermath of the riots.<sup>6</sup> Liberty understands that events such as those witnessed on the 8<sup>th</sup> and 9<sup>th</sup> of August placed significant pressure on political leaders to be seen to be responding appropriately. Liberty is concerned, however, that the particular policy proposals mooted in chapters 2 and 3 of this consultation paper are more examples of tough talk which will have no practical impact on public safety. Chapter 2 of the consultation considers removing the safeguard of prior authorisation from existing powers to order the removal of face coverings - chapter 3 proposes the introduction of a general curfew power and the incorporation of curfew requirements into the conditional caution regime. Not only will the new powers proposed do little to improve the quality of public order policing in this country, they will have grave implications for civil liberties and risk damaging the relationship between the police and the communities they serve.

8. Liberty urges the Government to pause and reflect before introducing further police powers. It is extremely disappointing see a Coalition which, at its inception, declared itself committed to restoring our liberties, proposing sweeping and ill-targeted police powers which will have such a grave and unwarranted impact on personal freedom. This is particularly so as senior police officers and the Home Secretary have separately acknowledged that it was the deployment of greater numbers of police officers and not the use of blanket, authoritarian powers which brought the disorder under control.

### *Additional powers to compel the removal of face coverings*

9. Chapter 2 of the consultation canvasses views about the merits of extending current powers to require individuals to remove face coverings by discarding the requirement that an authorisation be issued by an officer of above the rank of inspector

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<sup>6</sup> For more analysis of the response to the riots see Liberty's submission to the Home Affairs Select Committee's Inquiry into the Policing of Large Scale Disorder, available at: <https://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-submission-to-the-hasc-inquiry-into-policing-large-scale-disorder-.pdf>.

before police on the ground can direct individuals to remove face coverings. Liberty believes that this proposal does little to address the particular challenge that the police faced during the riots. Section 60 of the *Criminal Justice and Public Order Act 1994* (CJPOA) enables an officer of or above the rank of inspector to authorise searches for weapons or dangerous instruments without reasonable suspicion where he considers it 'expedient' to do so. The authorisation can be given for a specified area, for a specified period of time. Once a section 60 authorisation is in place, section 60AA CJPOA enables a similar authorisation to be given permitting a constable to require the removal of face coverings if he or she reasonably believes these are worn wholly or mainly for the purpose of concealing identity. A person refusing to remove his or her face covering when requested to do so risks imprisonment for up to a month or a fine. Further, it is well within the existing powers of officers to require a *suspect* to reveal their identity by removing a face covering. Liberty believes that police resources should be focused on those suspected of criminal activity.

10. Unless the Government is of the view that the riots did not meet the necessary criteria for a section 60 authorisation, it is difficult to see how further powers to require the removal of face coverings could be justified by the events of last August. In any event, the usefulness of such a power in riot circumstances is highly questionable. Where there is widespread crime and disorder and the police are outnumbered – as they were during the riots – requiring the removal of face coverings is hardly going to be a police priority. Further, someone who thinks it is fine to commit violence, theft and criminal damage is unlikely to take notice of a police request to reveal his or her identity by removing a face covering.

11. Existing powers to require the removal of face coverings in a designated area, without any prior suspicion of criminality, are already cause for concern representing one of a number of intrusive police powers which can be used without any accompanying suspicion of criminality. Liberty has consistently expressed concern about the impact of overly broad stop and search powers which operate in a comparable fashion. Before the power was suspended by the newly formed Coalition Government, section 44 of the *Terrorism Act 2000* allowed police to stop and search anyone in a specific area without suspicion. Whilst replacement powers included in the Protection of Freedoms Bill will more tightly circumscribe those powers, under section 60 of the CJPOA, police can stop

and search, without the need for suspicion, anyone who is in a designated area.<sup>7</sup> Both powers have been used disproportionately against ethnic minority groups and contributed to real tensions between the police and the public. In 2009/10 there were 118,446 section 60 stop and searches across England and Wales – a huge increase when compared with the 11,330 carried out in 2000/01. In the year 2009/10, the Met Police conducted 77% of all stops and searches in London (90,992 stops and searches); 41% of these were of Black people. Based on Ministry of Justice statistics for 2008/2009 across England and Wales, you are 26 more times likely to be stopped under section 60 if you are Black than if you are White. Once searched, White suspects were the most likely to be arrested across England and Wales, with 9% arrested following being searched; Asian and Black suspects were less likely to be arrested, with 6% and 7% respectively arrested after being searched.<sup>8</sup>

12. While nothing can excuse the violence displayed in our towns and cities over a number of days last summer, it would be short-sighted not to consider the relationship between the police and the communities that they serve. An independent panel convened by the Government to consider, amongst other issues, the motivating factors that drove thousands to participate in last summer's disorder noted that many of those involved identified stop and search as a motivating factor for their behaviour.<sup>9</sup> The panel warned that: *"where young law-abiding people are repeatedly targeted there is a very real danger that stop and search will have a corrosive effect on their relationship with the police"*.<sup>10</sup>

13. If the Government proceeds with proposals to remove safeguards regulating police powers to order the removal of face coverings, without any suspicion of criminality, it risks inflaming existing tensions. Whilst there is no reason to believe that the Government envisages that this power would be used to target a particular minority

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<sup>7</sup> Individuals can be searched to see if they are in possession of weapons or dangerous instruments (being anything that has a blade or sharp point).

<sup>8</sup> Home Office Statistical Bulletin Police Powers and Procedures England and Wales 2009/10 (2<sup>nd</sup> Ed) (14 April 2011), at page 37, 38, 43. Available at: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/police-research/hosb0711/hosb0711?view=Binary>.

<sup>9</sup> *5 Days in August: An Interim Report on the 2011 English Riots*, Riots Communities and Victims Panel, page 71. Available at: <http://www.5daysinaugust.co.uk/PDF/downloads/Interim-Report-UK-Riots.pdf>.

<sup>10</sup> *5 Days in August*, page 71.

over and above other members of the public, if we have learnt anything from over a decade of stop and search without suspicion, it is that broad and ill defined powers of this sort are susceptible to misuse and discriminatory impact. Further, powers to order the removal of face coverings - without even the safeguard of prior authorisation - carry the additional and specific risk of use without due respect for cultural or religious sensibilities.

#### *A general power of curfew*

14. Liberty has particular concerns about proposals to introduce a power of general curfew. It is frankly astonishing that this Government, a Coalition bound together by the language of liberties, is giving serious consideration to the implementation - in the oldest unbroken democracy in the world - of the kind of oppressive measure more usually associated with despotic regimes. The implementation of a power of general curfew in peacetime Britain would constitute an extraordinarily departure from our greatest traditions of liberty, aligning us more with the kind of military dictatorships which we have been rightly quick to condemn during the uprisings in the Middle East and North Africa.

15. The Government's proposal would involve the creation of a general curfew power for use in a '*clearly defined geographic area*' for a '*clearly defined length of time*'.<sup>11</sup> Decisions would be taken by a police officer of '*appropriate seniority*' and potentially of the rank of Superintendent or above.<sup>12</sup> Whilst the consultation envisages a general requirement of prior judicial authorisation before a curfew could be imposed, this safeguard is subject to an exception which would allow for '*subsequent validation*' where it is not possible to seek judicial permission before acting.<sup>13</sup> The Government envisages that Police and Crime Commissioners, the new political figures who are to lead our police forces, will need to be informed of the intention to impose a curfew and would have the opportunity to challenge the decision or ask questions. The consultation further envisages notice being given to people within the curfew zone before the power is exercised and arrangements made for exemptions for individuals such as emergency

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<sup>11</sup> *Consultation on Police Powers to Promote and Maintain Public Order*, paragraph 3.12.

<sup>12</sup> *Consultation on Police Powers to Promote and Maintain Public Order*, paragraph 3.12.

<sup>13</sup> *Consultation on Police Powers to Promote and Maintain Public Order*, paragraph 3.12.

workers to be out on the streets for *'justifiable reasons'*.<sup>14</sup> Being outdoors in a curfew zone would not, initially, be a criminal offence, but the Government are considering the imposition of criminal sanctions on those who breach an order to leave an area pursuant to a general curfew.

Liberty believes that police resources should be focused on apprehending offenders for their crime rather than for breaching a general curfew notice. Furthermore, those willing to engage in criminal activity such as theft, arson and criminal damage - individuals who have shown themselves willing to act with disregard for both the criminal law and the interests of their communities - are unlikely to comply with a requirement to remain indoors. Whilst a requirement of prior judicial authorisation would represent an important safeguard against arbitrary use, the Government clearly anticipates that restrictions could be imposed without prior authorisation in fast-moving situations. A further and obvious problem with proposals providing for a power of general curfew is the fact that, by its very nature, the power will operate in an indiscriminate manner. Ordinary people seeking to go about their everyday lives would have their liberty significantly curtailed. Those judged to have *'justifiable reasons'* for walking the streets, such as those who work for the emergency services, would be forced to explain their presence out of doors. There is no indication that there will be any degree of latitude for others who may wish to leave their homes whether for work, social or any other of a host of legitimate reasons. More worrying still is the plight of those who may feel compelled to venture outside during an outbreak of disorder - parents whose children have failed to return home, shop owners seeking to secure their premises or those concerned about the welfare of relatives and friends. Liberty urges the Government to think again before effectively criminalising these people.

16. Liberty believes that the police are at their most effective when targeting those individuals suspected of involvement in criminal activities. A surge in police numbers during last months riots was ultimately what brought the situation under control, and the considerable resources put into investigations after the event have meant that many suspects were identified and brought to justice in the interim period. Proposals to introduce a general curfew power will likely have little impact on those determined to

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<sup>14</sup> *Consultation on Police Powers to Promote and Maintain Public Order*, paragraph 3.12.

commit criminal acts, but will punish law-abiding citizens who will find their movements severely restricted.

17. Current dispersal powers are already broadly defined, allowing police to direct individuals to leave a designated area on the basis that they have reasonable grounds for believing that an individual's presence or behaviour has resulted in *or is likely to result in* a member of the public being harassed, intimidated alarmed or distressed.<sup>15</sup> Similarly police have the power to direct individuals aged 10 or over to leave an area for 48 hours as a preventative measure where an officer believes their presence is likely to contribute to alcohol-related crime and disorder.<sup>16</sup> Both powers enable punitive conditions to be placed on individuals based on speculation about future behaviour and without the protection of judicial due process. Proposals to introduce powers to impose a general curfew will not only punish people in anticipation of criminal behaviour: they will indiscriminately punish the public at large.

#### *Incorporating curfews into the conditional caution regime*

18. The consultation separately moots the possibility of providing for a curfew requirement to be attached to a conditional caution. The consultation envisages that the caution would be limited to specific times and specific geographical locations - as with conditional cautions generally, an individual would have to admit the offence and agree to the proposed conditions before a curfew requirement could be imposed.<sup>17</sup> The Government envisages that, if the curfew condition was breached, it would be *'very likely that the offender would be prosecuted in Court for the original offence'*.<sup>18</sup> The incorporation of curfew requirements into conditional cautions could be undertaken by changing the guidance used by the Crown Prosecution Service (CPS) – there would be no requirement for legislative change.

19. Moves to expand the conditional caution regime in this way are unsurprising in light of the Government's legislative proposals for sentencing reform. In its current form, the Legal Aid, Sentencing and Punishment of Offenders Bill proposes removal of the

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<sup>15</sup> Anti-social Behaviour Act 2003, sections 30-32.

<sup>16</sup> Violent Crime Reduction Act 2006, section 27.

<sup>17</sup> *Consultation on Police Powers to Promote and Maintain Public Order*, paragraph 3.15.

<sup>18</sup> *Consultation on Police Powers to Promote and Maintain Public Order*, paragraph 3.15.

requirement for prosecutorial authorisation before a conditional caution can be issued.<sup>19</sup> Restrictions on liberty as severe as a curfew should not be imposed without judicial involvement – yet if the Legal Aid, Sentencing and Punishment of Offenders Bill is passed in its current form and the present proposals implemented, we will see the imposition of punitive restrictions without even the protection of prosecutorial oversight. A lack of prosecutorial oversight is likely to undermine consistency and frustrate due process further in a system already roundly criticized for producing uncertain and erratic results.

20. Out-of-court disposals are presented as a softer alternative for low-level offending, but these measures are prone to use as a short-cut to punishment. On-the-spot police punishment without the involvement of the judiciary or even prosecutors undermines traditional due process standards. Bypassing normal judicial and fair trial safeguards can leave individuals open to bias and irrationality in sentencing decisions. An out-of-court disposal, whilst undoubtedly sparing an individual the disruption of court proceedings, can have a significant and long-lasting impact on life chances. An individual who receives a conditional caution, for example, in addition to having to comply with a specified condition, will have a criminal record which may well affect his or her employment prospects. Where conditions as restrictive and potentially punitive as curfews are to be incorporated, general concerns about the lack of due process safeguards are amplified.

21. The consultation paper makes clear that new curfew requirements are envisaged for use as a low-key preventative measure. Whilst it may seem that the Government has modest ambitions for curfew conditions, there is no guarantee that these new and restrictive provisions will be used accordingly. A recent report by Her Majesty's Inspectorate of Constabulary (HMIC) and the Crown Prosecution Service (CPS) concluded that there are "*wide variations in practice across police force areas in the proportion and types of offences handled out of court*".<sup>20</sup> Perhaps most worryingly, of the 190 cases of out-of-court disposals that the report considered "*one-third of the cases the*

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<sup>19</sup> Clause 122.

<sup>20</sup> HMIC, *Exercising Discretion: The Gateway to Justice*. A study by Her Majesty's Inspectorate of Constabulary and Her Majesty's Crown Prosecution Service Inspectorate on cautions, penalty notices for disorder and restorative justice. Page 7, available at: [http://www.hmcp.si.gov.uk/documents/services/reports/THM/CJI\\_20110609.pdf](http://www.hmcp.si.gov.uk/documents/services/reports/THM/CJI_20110609.pdf).

*disposal selected did not meet the standards set out in the existing national and force guidelines that were available*".<sup>21</sup> The addition of curfew requirements to the conditional caution regime will add a new and punitive sting to the measures. This is particularly concerning as the evidence shows that out-of-court disposals lead to inconsistency in approaches to suspected criminality, creating a very real prospect of unfairness for those involved.

22. Liberty does not take issue with the principle that the police should be able to use their professional discretion to determine that measures short of a prosecution against a suspected offender should be sought. Indeed, as Sir Hartley Shawcross (then Attorney-General) said in 1951: "*It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution*".<sup>22</sup> However conditional cautions in general, but particularly when combined with plans to remove prosecutorial oversight and include curfew requirements, are both too broad and too narrow. They both allow those guilty of serious or persistent offending to avoid the full force of the criminal law, whilst creating the real possibility that undue sanctions will be placed on others through the removal of safeguards inherent in judicial due process.

23. The inclusion of curfews as part of the conditional caution regime is likely to be of real practical significance. The fact that out-of court disposals can be formally recorded and retained, and harsh conditions imposed, only increases the temptation for this disposal mechanism to be used. While Liberty appreciates the desire to prevent reoffending and remove delays in the criminal justice system, powers designed to achieve this should not be at the expense of justice and fairness.

**Rachel Robinson**

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<sup>21</sup> HMIC, *Exercising Discretion: The Gateway to Justice*, page 5.

<sup>22</sup> House of Commons Debates, Volume 483, 29 January 1951.