

Protests During Lockdown (England): A Rule of Law Analysis

Katie Lines, 24 March 2021



Executive Summary

This report analyses the law governing protests during lockdown from a Rule of Law perspective. It ends by considering how far the right to protest will be protected by the new lockdown regulations, which are due to come into force on 29th March 2021 and will be debated by both Houses of Parliament on 25th March 2021 (The Public Health (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 (SI 2021/364) (the “New Regulations”). This report is intended to assist Members of Parliament and Peers who wish to understand how far the New Regulations facilitate the right to protest – a right long recognised as fundamental by the common law and protected by the Human Rights Act 1998, which gives domestic effect to the right to freedom of expression in Article 10 ECHR and the right to freedom of peaceful assembly in Article 11 ECHR.

The current law

The current lockdown restrictions in England are governed by The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (SI 2020/1374). These regulations do not make it sufficiently clear that there is no absolute ban on protests during the current lockdown regime, as they do not explicitly exempt protests from the prohibition on gatherings in Tier 4 areas. In addition, individual police forces have been given an extremely broad discretion to decide when it is necessary and proportionate to stop protests taking place, and there is no public guidance circumscribing that discretion or indicating how it will be exercised. As a consequence, the law currently governing protests during the pandemic is not sufficiently clear or foreseeable, and so fails to meet basic requirements of the Rule of Law. In addition, the breadth of the discretion given to individual police forces may mean that the police are not acting in accordance with Articles 10 and 11 of the ECHR when they enforce the lockdown regulations by restricting people’s right to protest. The ECHR requires restrictions on the right to protest to be “prescribed by law”, which means that restrictions must be based on laws that are clearly defined and subject to adequate safeguards so as to ensure that the law is not used in an arbitrary or discriminatory way.

The new law

The New Regulations come into force on 29th March 2021, and will introduce a 3-Step regime to replace the current 4-Tier lockdown system. The New Regulations contain a specific exception which allows protests to take place at all stages of the roadmap for easing lockdown. We welcome this exception and the additional clarity it will provide to the law governing protest. However, there is still a significant Rule of Law problem with the protest exception due to the lack of clear and detailed guidance in two respects, which should be resolved as soon as possible.

First, detailed and public guidance needs to be issued by the College of Policing and the National Police Chiefs’ Council, setting out how the police will ensure that the right to protest will be upheld in practice.

Second, people can only lawfully organise or attend a protest under the New Regulations if the protest organiser has carried out a risk assessment that would satisfy regulation 3 of the Management of Health and Safety at Work Regulations 1999. This regulation is aimed at making sure workplaces are safe, and does not sufficiently outline the type of risk assessment that should be carried out for a protest. The Government also does not appear to have produced any relevant guidance. Guidance for protest organisers on how to conduct a risk assessment that satisfies the requirements of the New Regulations should be produced as soon as possible. The Scottish Government has already produced guidance for protest organisers that can be used as a template.



About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society -too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

www.binghamcentre.biicl.org

Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. Previous Reports have been on the EU (Withdrawal Agreement) Bill and the Terrorist Offenders (Restriction of Early Release) Bill as well as on various coronavirus laws. Dr Ronan Cormacain is leading this Project.

The Report has been prepared by Katie Lines, Research Fellow in Rule of Law Monitoring of Coronavirus Legislation.

Table of Contents

Executive Summary.....	2
The Right to Protest and the Rule of Law	5
Overview of the Current Lockdown Regulations.....	6
A Lack of Clarity in the Current Law Governing Protests.....	7
The Steps Regulations.....	10

The Right to Protest and the Rule of Law

1. The right to protest has long been recognised as fundamental by the common law and is also protected by both Articles 10 and 11 of the European Convention on Human Rights (“ECHR”). Article 11(1) of the ECHR guarantees freedom of peaceful assembly, and states that:

“Everyone has the right to freedom of peaceful assembly and to freedom of association with others....”

2. Article 10(1) of the ECHR protects people’s ability to express their opinions by protesting, and provides that:

“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...”

3. Public authorities are required to act in a way which is compatible with the Convention rights, including the rights protected by Articles 10 and 11.¹ However, the right to protest is not absolute. Public authorities can place restrictions on the rights protected by Articles 10 and 11 in order to meet a limited number of legitimate aims, including where the restriction is in the interests of public safety, or is for the purpose of protecting health or the rights and freedoms of others. Preventing the spread of coronavirus could clearly fall under all of these legitimate aims. But the pursuit of a legitimate aim does not give authorities free reign to restrict the right to protest in any manner they wish; any restrictions must be a necessary and proportionate response to the legitimate aims pursued. A restriction will only be proportionate when it is no more than necessary to address the issue concerned. It is particularly hard for a public authority to justify restrictions on people’s ability to express political opinions, or their views on other matters of public interest, because these types of speech receive the highest degree of protection under the ECHR.²

4. Importantly, the ECHR also requires any restrictions on the right to protest to be “prescribed by law”. This requirement “does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law”.³ Therefore, any restrictions on the right to protest must be based on laws that are formulated with sufficient precision for their effects to be reasonably foreseeable.⁴ This reflects the principle within the Rule of Law that laws should be clear and predictable.⁵ Individuals cannot claim rights to which they are entitled, or perform their legal obligations, if they cannot reasonably discover what those rights and obligations are. It is of particular importance that legislation creating criminal offences is clear and predictable, so that people know what they must or must not do in order to avoid criminal penalty.⁶

¹ Section 6(1) of the Human Rights Act 1998

² *R v BBC, ex p ProLife Alliance* [2003] UKHL 23 at [32] and *Wingrove v United Kingdom* (1996) 24 EHRR 1 at [58]

³ *Malone v United Kingdom* (1984) 7 EHRR 14 at [67]. For a recent summary of the relevant principles see *R (Bridges) v the Chief Constable of South Wales Police* [2020] EWCA Civ 1058 at [55]-[56]. These cases discuss the need for an interference with the right to a private and family life under Article 8 ECHR to be “in accordance with the law”, but there is no difference in substance between the phrases “in accordance with the law” and “prescribed by law”: see *Silver v United Kingdom* (1983) 5 EHRR 347 at [85].

⁴ *Bridges* at [55]-[56].

⁵ Venice Commission “The Rule of Law Checklist” (Council of Europe 2016), Benchmark B3 available at <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf>

⁶ Tom Bingham, *The Rule of Law* (Penguin, 2011), p. 37

5. In addition, a restriction on the right to protest will only be “prescribed by law” if the law authorising the restriction clearly sets out the scope of any discretion given to a public authority. The law must not “confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice.”⁷ The Rule of Law requires there to be clear legal restrictions to the exercise of discretionary power in order to protect against arbitrariness and the abuse of power.⁸
6. There is therefore a substantial overlap between the Rule of Law and human rights law, as the protections of the ECHR require any restrictions on the right to protest to comply with basic principles of the Rule of Law.

Overview of the Current Lockdown Regulations

7. The current lockdown restrictions in England are governed by The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (SI 2020/1374) (“the Regulations”), which have been in force since 2 December 2020. The Regulations initially implemented a three-tier lockdown system, but were amended on 20 December 2020 to introduce a fourth tier. Every area of England has been in Tier 4 since 6 January 2021.
8. The detail of the Tier 4 restrictions is contained in Schedule 3A to the Regulations. Paragraph 4 of Schedule 3A prohibits gatherings of more than 2 people in a public outdoor place. A limited and exhaustive list of exceptions to the rule against gatherings is set out in paragraphs 6, 7 and 8 of Schedule 3A. There is an exception for funerals (where up to 30 people may gather), support groups (where up to 15 people may gather) and commemorative events following a person’s death (where up to 6 people may gather). Unlike the lockdown restrictions that apply in Wales, there is no catch-all exception which allows people to gather outdoors where they have “a purpose that is reasonably necessary and there is no reasonably practical alternative”.⁹
9. For parts of England under Tiers 1-3, there is an explicit exception allowing people to gather where “the gathering is for the purposes of protest and—
 - (a) it has been organised by a business, a charitable, benevolent or philanthropic institution, a public body or a political body, and
 - (b) the gathering organiser takes the required precautions in relation to the gathering.”¹⁰
10. Regulation 7 sets out the required precautions as follows:

“(2) The first requirement is that the gathering organiser or manager has carried out a risk assessment that would satisfy the requirements of regulation 3 of the Management of Health and Safety at Work Regulations 1999 (whether or not the organiser or manager is subject to those Regulations).

⁷ *R (P) v Secretary of State for the Home Department* [2019] UKSC 3 at [17]

⁸ Venice Commission, Benchmark C

⁹ The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020, paragraph 2 of Schedule 4 and paragraph 2(bb) of Schedule 5.

¹⁰ Paragraph 3(20) of Schedule 1, paragraph 4(20) of Schedule 2, and paragraph 4(18) of Schedule 3 of the Regulations

(3) The second requirement is that the gathering organiser or manager has taken all reasonable measures to limit the risk of transmission of coronavirus, taking into account—

(a) the risk assessment carried out under paragraph (2), and

(b) any guidance issued by the government which is relevant to the gathering.”

11. The protest exception was not included in the Tier 4 restrictions, meaning that protests are not explicitly excluded from the prohibition on gatherings in Tier 4 areas.
12. It is an offence for anyone to breach the prohibition on public outdoor gatherings in a Tier 4 area without a reasonable excuse.¹¹ This offence is punishable on summary conviction by a fine, although the police have a discretion to issue a fixed penalty notice (“FPN”) as an alternative to prosecution. People who participate in an unlawful gathering will receive a penalty of £200 for their first offence (reduced to £100 if paid within 14 days). Repeat offenders will be charged double the sum of the last FPN they received, capped at a maximum of £6,400.¹² The largest penalty is reserved for the organisers of a public outdoor gathering of more than 30 people, who will receive a £10,000 FPN.¹³ Regulation 9(3) also gives the police the power to direct the gathering to disperse, instruct people to return home, and to use reasonable force to remove people from the gathering.¹⁴ The police can use their powers under regulation 9(3) to disperse any gathering that is in breach of the Regulations, even if the attendees have a reasonable excuse for gathering and so are not committing a criminal offence.

A Lack of Clarity in the Current Law Governing Protests

13. There have been two important judgments which have found that the current Tier 4 restrictions do not contain a blanket ban on protests, even though the Regulations do not contain an explicit exception allowing protests to take place in a Tier 4 area.
14. The first judgment was given by the Court of Appeal in *Dolan v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605. *Dolan* concerned a challenge to the first set of lockdown regulations which were in force from 26 March 2020 - The Health Protection (Coronavirus, Restrictions) (England) Regulations (2020) (SI 2020/350). These regulations contained a prohibition on gatherings which was largely similar to that contained in the current Tier 4 restrictions. The claimant in *Dolan* challenged the prohibition on gatherings by arguing that it was incompatible with the rights protected by Article 11 ECHR. The Court of Appeal dismissed this argument, relying on the fact that, although the regulations did not explicitly permit protests to take place, they also did not criminalise anyone who had a “reasonable excuse” for gathering. Therefore, the Court of Appeal found that protests could in theory take place during the first lockdown, because taking part in a protest could be a reasonable excuse for participating in a gathering. The Court of Appeal ruled that:

“[T]he regulations themselves include the inbuilt exception of “reasonable excuse”. That would necessarily focus attention on the particular facts of a given case in the event of an alleged breach. 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.”¹⁵

¹¹ Regulation 10(1)(a)

¹² Regulations 12(1)

¹³ Regulation 12(4)(d)

¹⁴ Regulation 9(3)-(4)

¹⁵ At paragraph 103

15. The second key judgment was made by the High Court in *Leigh v The Commissioner of the Police of the Metropolis* [2021] EWHC 661 (Admin) on 12 March 2021. The claimants in this case were members of the grassroots organisation “Reclaim These Streets”, which was set up following the disappearance of Sarah Everard on 3rd March 2021. Sarah went missing while walking home from a friend’s house, and a Metropolitan Police constable has since been charged with her kidnapping and murder.¹⁶ Reclaim These Streets had planned to organise a vigil on Clapham Common to remember Sarah and also to pay tribute to all women who feel unsafe, face violence or go missing. After the Metropolitan Police indicated that the vigil would breach the prohibition on gatherings in the current Tier 4 lockdown Regulations, Reclaim These Streets sought urgent clarification of the law from the High Court, including seeking a declaration that the prohibition on outdoor gatherings in the current Regulations is subject to the right to protest protected by Articles 10 and 11 ECHR.¹⁷
16. The High Court applied the Court of Appeal’s reasoning in *Dolan*, and found that “it is inappropriate to treat the [Tier 4 lockdown] Regulations as if they give rise to a blanket prohibition on gatherings to protest, because that would fail to give effect to the law as laid down by the Court of Appeal in *Dolan* on the way in which the Regulations are to be read and applied compatibly with Articles 10 and 11.”¹⁸ The High Court found that the rights protected by Articles 10 and 11 not only affect whether an individual can be criminalised for breaching the prohibition on gatherings by taking part in a protest, but also whether the police can exercise their powers under regulation 9(3) to disperse gatherings that are organised in breach of the Regulations.¹⁹ While the Court found that “it is possible that the outcome of applying the relevant tests in relation to Articles 10 and 11 is that a particular protest or demonstration should not go ahead”, this is “a matter to be considered in the circumstances of each case”.²⁰ In other words, the police should only stop a protest from taking place where it is proportionate and necessary for them to do so. The High Court did not declare that the prohibition on outdoor gatherings was subject to the right to protest, but only because the Judge felt that there was no need to make this declaration since the relevant law had already been expressed in clear terms by the Court of Appeal in *Dolan*, and by the High Court in an earlier case concerning the right to protest and the offence of obstructing a public highway (*DPP v Ziegler* [2020] QB 253).²¹
17. Therefore, the current Regulations do not ban protests in Tier 4 areas, even though there is no explicit exception which allows protests to take place. Instead, individuals who engage in a protest may have a “reasonable excuse” for breaching the prohibition on gatherings, which means they will not be committing a criminal offence by taking part in a protest. Protests can only be restricted where the restriction is prescribed by law, and is a proportionate and necessary interference with the protestors’ rights under Articles 10 and 11 ECHR.
18. Unfortunately, existing legislation and guidance does not make clear when it is likely to be proportionate and necessary to stop a protest taking place. The current Regulations do not mention protests at all when setting out the Tier 4 restrictions, let alone provide a framework explaining the circumstances in which restrictions on protests can be made. Public guidance from the College of Policing and the National Police Chiefs’ Council on the current lockdown appears to get the law wrong. When discussing gatherings, the guidance merely states

¹⁶ BBC, “Sarah Everard ‘brought joy to our lives’, says her family” (11 March 2021)

<<https://www.bbc.co.uk/news/uk-england-london-56367223>>

¹⁷ The grounds to the challenge are available at

<https://www.bindmans.com/uploads/files/documents/2021.03.12_Leigh_Birley_Shah_and_Kligler_v_the_Commission_of_the_Police_of_the_Metropolis_-_Grounds.pdf>

¹⁸ *Leigh* at [17]

¹⁹ *Leigh* at [14]

²⁰ *Leigh* at [17]

²¹ *Leigh* at [21]

“Protests are not an exception in a Tier 4 area”, a position which is incomplete and misleading in light of the case law outlined above.²²

19. The outcome of this legal uncertainty is that a huge amount of discretion is left to individual police forces to decide whether it is proportionate and necessary to stop a protest taking place. An individual who wishes to know whether they can organise or attend a protest without committing an offence must engage in educated guess work as to what type of protests are lawful. Presumably a risk assessment must be conducted, since protests cannot take place in areas under Tiers 1-3 without a risk assessment, but what does that assessment need to look like? Must it be more comprehensive than if the protest was taking place in a Tier 3 area? What type of social distancing needs to take place? Must everyone wear masks and, if so, how far do protest organisers need to enforce this requirement? Will the type of protest allowed by one police force also be permitted elsewhere?
20. This level of legal uncertainty is likely to have a stifling effect on the right to protest. First, an ordinary person reading the Regulations who does not know about the judgments in *Dolan* and *Leigh* is likely to assume that protests cannot take place at all in a Tier 4 area. There is a specific exception allowing people to gather for the purpose of protesting in Tiers 1-3, but this exception is not included in the Tier 4 restrictions. A logical conclusion would be that protests are allowed to take place in areas under Tiers 1-3, but are banned in Tier 4 areas. Second, even if a person knows that protests can be a “reasonable excuse” for breaching the prohibition on gatherings in a Tier 4 area, it is not clear in what circumstances protests will be allowed to take place. People are likely to be dissuaded from attending a protest if they do not know whether they will be committing a criminal offence by doing so. People are even less likely to organise a protest when they do not know whether they be exposing themselves to a £10,000 FPN.
21. Moreover, creating a disincentive for people to organise protests does not necessarily mean that no protests will take place, especially when it is not immediately clear which types of protests will be unlawful. The Clapham Common vigil provides an example of this: Reclaim These Streets cancelled the official vigil after it became clear that the police firmly considered the vigil to be unlawful. But people still gathered at Clapham Common at the time the vigil was originally due to take place. This is concerning, as protests that occur without formal organisation are less likely to be well planned or to have Covid safety measures in place.
22. The lack of clarity and foreseeability in the law governing protests during the current Tier 4 lockdown fails to meet the basic requirements of the Rule of Law, and may mean that the police are not acting in a manner prescribed by law when they enforce the lockdown Regulations by restricting people’s right to protest. It is concerning that individual police forces have been given an extremely broad discretion to decide whether it is necessary and proportionate to restrict protests, and that there is no detailed, public guidance regulating how that discretion will be exercised in practice. In addition, it is confusing for the Regulations to contain a specific exception which allows protests take place in areas under Tiers 1-3, but for this exception to be completely absent from the Tier 4 restrictions, despite protests still being allowed to take place. An ordinary person should be able to ascertain their legal rights and duties without knowing the mysterious legal alchemy by which an exception which has been revoked still exists in another form.

²² The College of Policing and the National Police Chiefs’ Council, “Tier 4 National lockdown. The Health Protection (Coronavirus Restrictions) (All Tiers) (England) Regulations 2020, 8 March 2021 < <https://paas-s3-broker-prod-lon-6453d964-1d1a-432a-9260-5e0ba7d2fc51.s3.eu-west-2.amazonaws.com/s3fs-public/2021-03/covid-19-england-regs.pdf>>

23. On Friday 19th March 2021, sixty MPs and Peers wrote to the Home and Health Secretaries asking that the Regulations be amended to explicitly exempt protests from the prohibition on gatherings in Tier 4 areas.²³ The same day, the Joint Committee on Human Rights (“JCHR”) released a report on protesting during the pandemic, which ended by stating

“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.”²⁴

The Steps Regulations

24. The calls for the Tier 4 restrictions to be amended presumed that there would still be a Tier 4 in existence during the next stage of the roadmap for easing lockdown, which is due to commence on 29th March 2021. However, on Monday 22nd March, the Secretary of State made a new set of lockdown regulations which will introduce a new regime to replace the current 4-Tier system. These new regulations are entitled “The Public Health (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 (SI 2021/364) (“the New Regulations”), and are set to come into force on 29th March 2021. Both Houses of Parliament are scheduled to vote on whether to approve the New Regulations on Thursday 25th March 2021. The New Regulations create a 3-Step system. From 29th March 2021, every area of England will become a “Step 1 area”. As the roadmap for easing lockdown progresses, areas will be moved into Steps 2 and 3 and be subject to fewer restrictions as a result. The move to Step 2 is currently due to take place on 12th April 2021.²⁵
25. Steps 1, 2 and 3 all contain some type of restriction on people gathering.²⁶ However, the Government appears to have taken on board the calls for it to make it clearer that there is not a complete ban on protests during the pandemic. The prohibitions on gatherings in Steps 1, 2 and 3 all contain an express exemption allowing individuals to organise and attend a gathering where it is:
- “for the purpose of protest and –
- (a) it has been organised by a business, a charitable, benevolent or philanthropic institution, a public body or a political body, and
 - (b) the gathering organiser takes the required precautions in relation to the gathering.”²⁷
26. This exception is the same as exists for areas under Tiers 1-3 in the current lockdown Regulations. The “required precautions” are also copied across from the current lockdown Regulations, and are found in regulation 6 of the New Regulations:

²³ The letter can be accessed at < <https://www.libertyhumanrights.org.uk/wp-content/uploads/2021/03/Urgent-Letter-to-SSHD-SSCHSC-from-Parliamentarians-Right-to-Protest-002.pdf>>

²⁴ Joint Committee on Human Rights, *The Government’s response to COVID-19: freedom of assembly and the right to protest* (2019-2021, HL 252, HC 1328) p.26

²⁵ The Department for Health and Social Care, “Press release, Legal footing for national unlocking set out ahead of vote” (22 March 2021) at <<https://www.gov.uk/government/news/legal-footing-for-national-unlocking-set-out-ahead-of-vote>>

²⁶ Paragraphs 1-3 of Schedule 1 and Schedule 2, and paragraphs 1-2 of Schedule 3

²⁷ Paragraph 4(27) of Schedule 1 and Schedule 2, and paragraph 3(15) of Schedule 3

“(2) The first requirement is that the gathering organiser or manager has carried out a risk assessment that would satisfy the requirements of regulation 3 of the Management of Health and Safety at Work Regulations 1999 (whether or not the organiser or manager is subject to those Regulations).

(3) The second requirement is that the gathering organiser or manager has taken all reasonable measures to limit the risk of transmission of coronavirus, taking into account—

(a) the risk assessment carried out under paragraph (2), and

(b) any guidance issued by the government which is relevant to the gathering.”²⁸

27. It is an offence for a person to attend a protest which does not satisfy the above provisions, unless that person has reasonable excuse.²⁹ The penalties for committing this offence are the same as the penalties for breaching the prohibition on gatherings in the current lockdown Regulations. The maximum penalty upon conviction is a fine, although the police have a discretion to issue a fixed penalty notice as an alternative to prosecution. The penalty for participating in an unlawful outdoor protest will be set at £200 for the first offence (reduced to £100 if paid within 14 days), and will double for repeat breaches up to a maximum of £6,400.³⁰ As with the current lockdown Regulations, there is a separate offence for individuals who, without a reasonable excuse, organise a gathering of more than 30 people that does not comply with the requirements of the New Regulations. The police can offer the organisers of such a gathering the chance to avoid prosecution by paying a fixed penalty notice, but the penalty will be set at £10,000.³¹

28. We welcome the reintroduction in the New Regulations of a specific exception which acknowledges that protests should be allowed to take place at all stages of the roadmap for easing lockdown: this reflects the fundamental importance of the right to protest and the inappropriateness of blanket bans on such a fundamental right, even during a pandemic. However, there is still an important Rule of Law issue with the clarity and foreseeability of the protest exception in the New Regulations, due to the lack of clear and detailed guidance in two respects.

29. First, there is still no detailed, public guidance setting out how the police will ensure that the right to protest will be upheld in practice. The public guidance issued by the College of Policing and the National Police Chiefs’ Council, which currently states that “protests are not an exception in a Tier 4 Area”, needs to be replaced urgently with new guidance setting out how the police will discharge their responsibility to facilitate protests even while restrictions on gatherings remain. Without such detailed, public guidance, there will continue to be insufficient legal certainty for those who wish to organise or attend a public protest.

30. Second, people can only lawfully attend or organise a protest under the New Regulations if the protest organiser has carried out a risk assessment that would satisfy regulation 3 of the Management of Health and Safety at Work Regulations 1999. However, this regulation is aimed at making sure workplaces are safe, and does not provide much indication of the type of risk assessment that should be carried out for a protest. It requires employers to:

“make a suitable and sufficient assessment of—

²⁸ Regulation 6

²⁹ Regulation 11(1)(a)

³⁰ Regulation 17(1)

³¹ Regulations 17(1)(a) and 15

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997.”

31. The organiser of a protest is unlikely to be subject to the Fire Precautions (Workplace) Regulations 1997 or any other statutory duties that would apply to an employer. The Health and Safety Executive has produced some general guidance on what a risk assessment needs to contain in order to meet the requirements of the Management of Health and Safety at Work Regulations 1999. The Health and Safety Executive advise that the risk assessment should:

- a. Identify hazards in the workplace;
- b. Assess how likely it is that someone could be harmed and how serious it could be;
- c. Identify ways to eliminate or minimise the hazards;
- d. Record significant findings (where 5 or more people are employed);
- e. Provide for the review of controls that have been put into place.³²

32. While this is helpful general guidance, it is targeted at risks arising in the workplace. The Health and Safety Executive has also produced a guide on what to include in a Covid-19 risk assessment, but again this is very much focussed on workplace safety. For example, it discusses having a maximum occupancy for meeting rooms, grouping workers into cohorts, and avoiding shared work equipment.³³

33. As far as we are aware, the Government has not published more targeted guidance discussing how protest organisers should prepare a risk assessment in order to comply with the requirements of the New Regulations. A search for “protest” or “assembly” in the Government’s database of coronavirus guidance produces no relevant results. If a protest organiser is at risk of being prosecuted or fined £10,000 for failing to carry out an adequate risk assessment, then there should be clear and targeted guidance on what that risk assessment needs to contain. As discussed above, a lack of clarity is likely to have a stifling effect on the right to protest, as individuals will likely be dissuaded from organising a protest if they cannot be sure whether they will commit a criminal offence by doing so. Similarly, the police need to know exactly what is required of protest organisers in order properly to enforce the New Regulations. In addition, anyone attending a protest where a risk assessment was not properly carried out would be committing a criminal offence, although presumably they would be able to rely on the “reasonable excuse” defence if it was reasonable for them to assume that the protest was properly organised.

34. If the Government has already produced guidance on how protest organisers should conduct a risk assessment, then this should be made more readily available. If such guidance has not been produced, then the Government should ensure that this happens as soon as possible. The Scottish Government has produced guidance for protest organisers that can be used as a template.³⁴

³² Health and Safety Executive, “Managing risks and risk assessment at work” at <https://www.hse.gov.uk/simple-health-safety/risk/steps-needed-to-manage-risk.htm#_Review>

³³ Available at <<https://www.hse.gov.uk/coronavirus/assets/docs/risk-assessment.pdf>>

³⁴ Available at <<https://www.gov.scot/publications/coronavirus-covid-19-protests-and-demonstrations/pages/assessing-risk/>>

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
E binghamcentre@biicl.org

www.binghamcentre.biicl.org

The Bingham Centre for the Rule
of Law is a constituent part of the
British Institute of International and
Comparative Law (www.biicl.org).

Registered Charity No. 209425