

A consideration of the human rights, civil liberties and freedom of expression in Wales, in the light of the arrest of members of Occupy Cardiff during November 2011.

Report into the policing of Occupy Cardiff

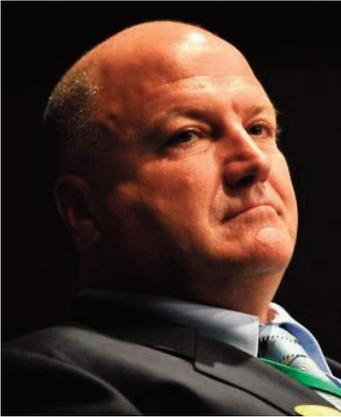
presented by NetPol - the network for police monitoring, in conjunction with Defend the Right to Protest.

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Endorsements:



"RMT supports the right to protest. In a democracy the role of the police should be to protect rights and not to clamp down on free expression"

Bob Crow RMT



"PCS supports any peaceful protest, demonstration or occupation that draws attention to the harm being caused by this government's failed austerity policies. We support the Occupy movement, the direct action protests of UK Uncut, and are organising for thousands of people to join the mass demonstrations in London, Glasgow and Belfast on 20 October."

"During this period of government austerity, the police have a duty to facilitate peaceful protest and not to clamp down on dissent. We know, from our members in the police service, that they are not immune from the cuts being imposed across the public sector - or from being demonised."

Mark Serwotka PCS



"In this case, I believe that the police action constituted an attack on the right to peacefully protest. Furthermore, the subsequent decision to prosecute, far from serving any public interest, posed an interference free expression that risks chilling democracy."

Tony Benn



"We still live in a world marred by poverty, injustice, inequality and oppression. All of us have a right and a duty to protest against that and to do our utmost to make a real difference"

"As Christians we believe God is involved in every aspect of our lives and that Jesus came 'to preach good news to the poor, to proclaim freedom for the prisoners, recovery of sight for the blind and release for the oppressed'. That's a radical agenda which means trying to change the structures of our society and world to become the people God wants us to be".

The Most Reverend Barry Morgan, Archbishop of Wales

Briefing Assembly Members re Occupy Cardiff.

On Friday 11 November, Occupy Cardiff held a demonstration with a view to setting up camp on the grass verge outside Cardiff Castle. Within hours and in heavy rain, South Wales Police used force to remove approximately 40 demonstrators from the land. The demonstration was observed by legal observers trained and supported by the Network for Police Monitoring (Netpol).

The freedom of peaceful assembly is recognized as one of the foundations of a functioning democracy, and its protection is crucial for creating a tolerant and just society. We believe that the dispersal and removal of this demonstration raises issues of significant failures on the part of South Wales Police. These include the failure to protect and facilitate lawful assembly; the failure to uphold the rights of individuals under the European Convention of Human Rights; and the failure to ensure that the use of force was proportionate and reasonable.

The creation and eviction of the Cardiff Occupy protest camp.



Occupy Cardiff had made a decision to set up a protest camp on the grassed area between Cardiff Castle and road. Like other camps around the world, its aim was to publicly challenge both the growing inequality and democratic deficit caused by "our" failed financial system.

The occupation of a public space was important to the Occupy protesters. The park area around the castle is freely accessible and is frequently by individuals and groups for picnics or relaxation and has been used for long-term protests on previous occasions. The area is in the centre of the city, but also close to the statue of Nye Bevan, which has developed into a recognised location for political rallies and protest.

The nature of this area clearly meets the OSCE¹ criteria of a public space in which the freedom of assembly must be protected in their Guidelines on Freedom of Peaceful Assembly²:

These Guidelines apply to assemblies held in public places that everyone has an equal right to use and that are not buildings or structures (such as public parks, squares, streets, avenues, sidewalks, pavements, and footpaths). Participants in public assemblies have as much a claim to use such sites for a reasonable period as everyone else. Indeed, public protest, and freedom of assembly in general, should be regarded as an equally legitimate use of public space as the more routine purposes for which public space is used.

The occupiers publicly announced that there would be a rally of Occupy on the 11th November, at the Nye Bevan Statue, with the intention of initiating an Occupy protest site. From documents obtained by Occupy Cardiff under the Freedom of Information act, it is clear that the police were aware of the group's intentions. The Command Log made on the day by the senior police officer on the scene makes explicit reference to prior police consultation of 'open-source' data relating to the Occupy protest, specifically articles in the

South Wales Echo and on BBC Wales news.

The Occupy protesters assembled at the edge of Queen Street, and crossed the road to the castle at 2.25pm. The police did not attempt to prevent their movement. Security staff, presumably employed by the council, did prevent protesters from entering the grassed area to the front of the castle. This area had been fenced off, and contained a promotional stand for a car company. Any protester entering this area was asked to leave, and most did so without argument. The only observed exception was one photographer who wanted to make use of the higher ground to take photographs. He was forcefully removed from the area.

It is noteworthy that, in contrast to the preparations made at the front of the castle, no measures had been put in place to prevent protesters entering the grounds to the side of the castle. It was here that the protesters assembled and began to put up tents.

The police reacted by immediately informing protesters that they were breaching Cardiff byelaws and could be arrested. Three hours later, at 5.35pm, a spokesman from Cardiff council arrived to withdraw permission for the protesters to be on site. At this time the police announced that they were issuing a direction to leave the site, and anyone who did not leave could be arrested under s61 of the Criminal Justice and Public Order Act. The police began to carry out a forced eviction at 7.25pm, which was completed at 7.45pm. Six people were arrested.

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- 1** The Organisation for Security and Co-operation in Europe
 - 2** The Guidelines on Freedom of Peaceful Assembly together with the Interpretative Notes were prepared by the Panel of Experts on Freedom of Assembly of the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) in consultation with the European Commission for Democracy through Law (the Venice Commission) of the Council of Europe.

The failure of South Wales Police to facilitate peaceful protest.

The police have a duty to facilitate peaceful protest and to ensure that protesters rights under the Human Rights Act 1998 are protected. We believe that the documents obtained by Occupy Cardiff under the Freedom of Information Act demonstrate that no consideration was made of these duties.

The HMIC³ found that⁴;

It has become clear that a number of police forces in England and Wales approach peaceful protest in terms of “is the protest lawful or unlawful”. That is an incorrect starting point...the right guaranteed by ECHR⁵ Article 11 is the right to ‘peaceful assembly’ not ‘lawful assembly’.

The correct starting point is the presumption in favour of facilitating peaceful assembly.

Inspector Whitcombe was the ‘silver commander’ and senior officer at the scene. His log demonstrates that he did not adopt a presumption in favour of facilitating peaceful assembly. Instead he appears to have adopted an assumption of criminality, deciding from the outset that the camp would be removed. Having made this decision, he then appears to search for legislation that would enable the police to prevent or remove the protest. Throughout this process the log indicates that no consideration is made of the impact of human rights legislation on the demonstration, or the lawfulness of the police action.

This is a serious lapse of duty or training. The OSCE states⁶:

The duty to protect peaceful assembly also implies that law enforcement officials be appropriately trained to deal with public assemblies, and that the culture and ethos of law enforcement agencies adequately prioritize the protection of human rights. This not only means that they should be skilled in techniques of crowd management that minimize the risk of harm to all concerned, but also that they should be fully aware of, and understand, their responsibility to facilitate as far as possible the holding of peaceful assemblies.

3 Her Majesties Inspectorate of Constabulary

4 Adapting to Protest – Nurturing the British Model of Policing 2009

5 European Convention on Human Rights

6 Guidelines on Freedom of Peaceful Assembly para 29.

Public Order Act

The Command Log reveals that the initial position of Inspector Whitcombe was to seek to rely on powers under the Public Order Act to remove the protest. Section 14 allows the police to place such restrictions where there is a threat of serious violence or serious disruption to the community.

The following entries appear in the command log:

- 12:15hrs: Ask them to take tents down, or take them down. Five or six tents erected not an issue, 5-20 tents will cause serious disruption
- 13:00: I have considered the potential of using s14 POA particularly the aspect of serious disruption.
- 13:30hrs: Supt G – conversation with [redacted] – s14 – I explained my considerations. I don't expect serious violence but of the four elements of the section, serious disruption. One to three tents does not constitute serious disruption on its own but any more may impede the highway and prevent the movement of people.

It is not accepted that more than five tents could possibly have caused 'serious disruption' to the community. In the event between 10- 20 tents were erected. These were all placed on the grassed area, and none impeded the road or the pathway. In no way did they impede the highway or prevent the movement of people. The protest did attract some attention from passers-by and members of the press, who congregated on the pavement. This was the only obstruction that did, or was likely to, take place.

Section 14 of the Public Order Act 1986 is intended for circumstances in which the senior officer 'reasonably believes' an assembly may result in serious public disorder, serious damage to property, serious disruption to the life of the community or the intimidation of others. We consider that Inspector Whitcombe's approach to the policing of this protest demonstrates a disturbing willingness to 'stretch' the application of police powers that are designed to be used in exceptional circumstances.

We consider that Inspector Whitcombe failed to ensure that the operation by South Wales Police to evict Occupy Cardiff was compliant with the Human Rights Act, or that initial policing decisions were made within an appropriate legal framework.

We believe that there should be an examination of the background and reasons for these failures, and an investigation as to whether the training provided to South Wales Police officers on human rights issues is currently sufficient, particularly in relation to officers taking charge of events involving public order or public safety issues.

The use of byelaws to prevent camping in the castle grounds.

Ultimately Inspector Whitcombe concedes that he is not able to make use of s14. This should have given him an opportunity to reconsider the legality of the protest and to reassess the human rights implications. This he does not do. Instead he records that he intends to rely on a byelaw to enforce the removal of the protest.

- 15:12hrs. Presently s14 is not applicable. I would look to legislation under the byelaw or CADW in order for the protesters to move.

This entry was made almost an hour after police officers had begun to inform protesters they could be arrested for breach of the byelaw.

The clauses of the byelaw relied upon are listed below.

Persons must not;

- preach, lecture, or hold or take part in any meeting, demonstration, religious service or religious discussion in the pleasure ground (s4)
- affix any bill, placard or notice to or upon any wall or fence (s9)
- remove, cut or displace any soil, turf or plant (s11)
- erect any post, rail, fence, pole, tent, booth, stand, building or other structure without permission. (s17)

It is highly unlikely that the police could lawfully have relied on this byelaw in order to justify removing the protest. The Human Rights Act 1998 provides that public bodies, in this case Cardiff council and South Wales Police, are under a legal obligation to interpret secondary legislation (such as byelaws) in a way which is compliant with Convention rights, including the rights to freedom of assembly and expression. Public authorities cannot lawfully act in a way which is incompatible with a Convention right.

We are concerned in this case that a byelaw which predates the Human Rights Act has been used to enforce the removal of peaceful protest from publically owned property. We do not accept that Cardiff council or South Wales Police gave sufficient, or indeed any, consideration to the matter of whether the byelaw was compliant with human rights legislation, or whether they were acting reasonably or proportionately in enforcing it.

South Wales Police officers began attempts to enforce the byelaw immediately after protesters began to pitch tents on the castle grounds, and continued through the afternoon to insist that the

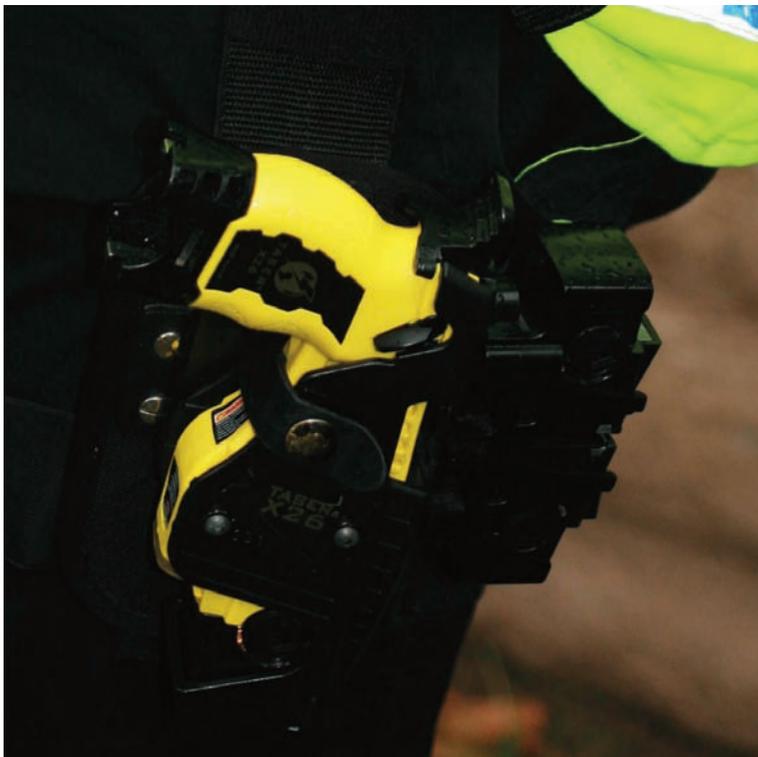
breach of this byelaw would be sufficient to remove protesters from the site.

Legal observers noted that at 14.30, a mere five minutes after protesters arrived at the site, police officers were telling protesters that they were acting unlawfully.

- 14:30 Police are wandering around talking to people individually. Officer 3371 says byelaws mean no camping permitted, and tents will be removed.
- 14:35 Officer 4301 tells a protester that they are in breach of a byelaw and will be arrested. Says force will be used to remove them.

At around the same time, Inspector Whitcombe records in the command log:

- 14.32: "Assembly / protesters in breach of four (4) points of byelaw
 - Damage to turf due to tent pegs
 - Banner being erected
 - Assembly for purpose other than religious assembly
 - Disrupt/annoy/obstruct/disturb any person in the proper use of the pleasure ground (persons attending Wales rally GB event)"



We note that this rationale for enforcing the byelaw includes a reference to protesters obstructing persons attending the Wales GB rally event. We are not aware that any evidence has been put forward to suggest that the presence of the protest camp would disrupt the event, and this is not mentioned elsewhere in the documents Occupy Cardiff obtained.

There has been no evidence that the turf was damaged due to tent pegs, and we suggest that in any case this is an absurd claim. We also suggest that the outlawing of an assembly in a public place on the grounds of it being a 'non-religious assembly' is highly unlikely to be compatible with the Human Rights Act which, as primary legislation, should take precedence.

The police did not, despite having made repeated threats, ultimately

make any arrests directly for breach of the byelaw. The command log suggests that the police themselves came to the conclusion that such actions may not be lawful;

- 15:40hrs: [name redacted] from Cadw attended to confer with Silver commander and SWP lawyers. Upon initial viewing of CCTV: the protesters are in breach of byelaw but they are not necessarily committing any criminal offence

Despite the fact that the protesters were “not necessarily committing any criminal offence”, Inspector Whitcombe had authorised and instructed officers to inform protesters that they were acting criminally, and that they may be arrested or force used to remove them.

We believe that Inspector Whitcombe should be obliged to justify his actions, and consideration should be made as to whether it would be appropriate for him to face disciplinary action.

The use of section 61 of the Criminal Justice and Public Order Act.

Having failed in to use the byelaw to enforce the removal of protesters from Cardiff castle, South Wales Police took a different approach. Having recorded, at 15:40 that protesters may not be committing criminal offences, there is then a gap of over an hour in which no entries were made. It is assumed that Inspector Whitcombe was in discussion with others during this time, although these discussions are not recorded.

By 17:05 a new plan is in place, this time to make use of s61 of the Criminal Justice and Public Order Act 1994. This act states:

Power to remove trespassers on land..

(1)If the senior police officer present at the scene reasonably believes that two or more persons are trespassing on land and are present there with the common purpose of residing there for any period, that reasonable steps have been taken by or on behalf of the occupier to ask them to leave and— .

(a)that any of those persons has caused damage to the land or to property on the land or used threatening, abusive or insulting words or behaviour towards the occupier, a member of his family or an employee or agent of his, or .

(b)that those persons have between them six or more vehicles on the land, .

he may direct those persons, or any of them, to leave the land and to remove any vehicles or other property they have with them on the land.

This provision was enacted as a response to ‘new age travellers’, people who took lorries and caravans onto trespassed land intending to live there.

This however also presented the police with problems. They needed to establish

- a) That the protesters were trespassing
- b) That ‘reasonable steps’ had been taken by or on behalf of the lawful ‘occupier’ of the land to ask them to leave
- c) That they had caused damage to the land or property on the land.

It has never been established that there was any damage to the land, other than an unavoidable level of damage to the grass caused by

both protesters and police officers walking on it. This did not however, dissuade the police from pursuing the use of this provision.

The police arranged that a representative of Cardiff council should attend to inform protesters that they were trespassing, and to make a formal request for them to leave.

At 17.35 legal observers noted that Martin Hamilton, the chief officer for city management of Cardiff Council arrived to give a statement to the protestors, and to formally withdraw permission for protesters to be on the site. He did this by relying on the terms of the bye-law discussed above.

“I’m Martin Hamilton, I’m addressing you to withdraw the right of access to our land, based on breach of city council bye-laws under section 164 of the Public Health Act 1875. Last updated in 1983, the byelaws that have been breached are section 4,9,11 and 17. I would also advise that this is scheduled ancient monument and a protected site and that CADW are uncomfortable [with the use of the site] and are will be monitoring the site for damage”#

As soon as Martin Hamilton finished speaking, a police officer stepped forward, and informed that gathered protesters that the police were issuing a direction to leave under s61 CJPOA, and that anyone who failed to leave may be arrested. At 19:25hrs the police began to evict protesters from the site. Force was used to remove them and six people were arrested for breach of section 61 of the Criminal Justice and Public Order Act.

7 A video of this can be found at this website.

<http://thegirlwithredhair.wordpress.com/2011/11/13/occupy-cardiff-111111/>

Criminalisation of protest.

The use of s61 powers was the third in a series of attempts by South Wales Police to criminalise the protest taking place at Cardiff Castle. S61 CJPOA 1994 was not intended by Parliament to be used to stifle political protest, and we question the appropriateness of its use.

We consider that the evidence presented shows that South Wales Police had taken the decision to evict the protesters without having the lawful means to do so. By 16:00hrs it was clear that attempts to persuade protesters to leave the site voluntarily had failed. Having reached this position, they were under pressure to find legislation that would enable a forced eviction.

It is not clear what action was then taken by South Wales Police, nor is it clear how the decision to make use of s61 was arrived at. We believe that the following information should be placed in the public domain:

- Were other policing bodies or national units, such as the National Domestic Extremism Unit (NDEU), consulted by South Wales Police, or asked to suggest legislation that could be used to remove the protesters? If so, what input was provided?
- Was legal advice sought by South Wales Police in relation to the operation of s61 CJPOA, and the potential impact of human rights considerations? If so, what advice was given?
- What steps were taken by South Wales Police to consult with Cardiff council on the use of s61 CJPOA? At what time, and with whom, did these consultations take place?

We believe that there should be a greater degree of transparency in relation to the decision taken by South Wales Police to use force against protesters. In the interests of maintaining public confidence we believe that all relevant documents, including the legal advice given and any input from national policing units, as well as the steps taken to consult with Cardiff council, should be placed in the public domain.

The use of force

We have concerns as to whether the use of force by South Wales Police during the eviction was proportionate and reasonable.

Having taken the decision to remove protesters, this was achieved by moving forward a line of police officers to physically push protesters from the site. Protesters responded by offering passive resistance. During this process six protesters were arrested. We question the need for these arrests, given that no protester reacted with aggression or violence.

The protest had been peaceful throughout, yet South Wales Police also deployed mounted officers to assist with the eviction. We have had reports of horses being ridden aggressively at protesters, including at one stage a legal observer. We do not accept there was any need for the deployment of horses at a peaceful protest.

Officers carrying tasers were present throughout the policing operation at Cardiff castle. Although these weapons were not used, the fact that they were being carried by officers caused anxiety and alarm to protesters. We consider the deployment of such weapons at a peaceful protest to be wholly inappropriate.

We consider that the use of deployment of officers armed with tasers and the use of mounted police at a peaceful protest involving in the region of 100 people was excessive. We believe that South Wales Police should revise their policy of taser deployment as a matter of urgency. We also call for South Wales Police to publish their rationale for the deployment of mounted police.

The prosecution of offences.

The six people arrested were taken to Cardiff Police Station where they were held for several hours. Four of those arrested accepted cautions. Two refused, and faced two court hearings and a great deal of emotional stress before proceedings were finally discontinued.

We are concerned that the South Wales Police considered it appropriate to issue cautions to those arrested. Crown Prosecution Service (CPS) guidelines make it clear that persons detained can be charged with an offence or cautioned only where 'there is enough evidence to provide a realistic prospect of conviction and that it is in the public interest to proceed'. We do not accept that this test was met on either limb.

The prosecution of the defendants was discontinued after the second court hearing. It is not clear why this decision was not taken at an earlier stage. The delay caused the defendants additional distress and anxiety, as well as increased costs to the public purse.

It is our view that there were insufficient grounds to caution or prosecute those arrested. The cautions issued should not be allowed to stand, and we would invite South Wales Police to act in the public interest and withdraw those cautions. We would also suggest that there should be a review of the way that charging decisions are made by South Wales Police and by the South Wales CPS.

The use of intelligence and evidence gathering teams.

Throughout the short-lived protest at Cardiff castle, the Occupy protesters were filmed by police evidence gathering and intelligence officers. While we recognise the right of the police to take video and photographs in a public place, we are concerned that the purpose of this may have been to gather intelligence on the assembled group.

The photographing or video recording of assemblies for the purpose of gathering intelligence can discourage individuals from enjoying the freedom of peaceful assembly. Further, the retention of images on police databases, creating a 'virtual' police file, can constitute an interference with the Article 8 right to a private life.

The court of appeal in the case of Wood v the Commission of Police for the Metropolis established that images taken by the police can be lawfully retained only for as long as is necessary, proportionate and justified. Given the peaceful nature of the Occupy protest, we do not believe that the retention of this data is justified for any purpose other than for the purposes of on-going civil actions or complaint investigations. We therefore seek the following assurances.

We would seek reassurance that footage is being retained only for the purposes of any on-going complaint or civil actions; that no information or images have been extracted from the footage for intelligence purposes; that no information or images have been extracted from the footage for inclusion on the Police National Database or the Niche database; that no information or images extracted from the footage, or any amount of the footage itself, has been shared with or retained by the National Domestic Extremism Unit or Special Branch.