

Fracking and individual rights: what do you need to know?

As the Government continues to grant licences for companies to undertake “unconventional gas drilling and exploration” (which for ease will be referred to as “fracking” in this note), serious concerns continue to grow amongst affected individuals and communities.

Much has been already published regarding the nature of fracking, the reasons why it gives rise to serious concerns, and the legal process involved in obtaining and the permissions required to undertake them, including by the SaFE Alliance.

However, there are a number of legal issues, in particular with regard to individual rights, that may be relevant to those involved in campaigning against and challenging decisions regarding fracking. These include issues relating to both understanding individual rights in the context of campaigning activities, and using rights to ensure that lawful and appropriate decisions are made about fracking. We consider a number of these issues below.

Bindmans has a long history of defending individual rights and representing both individuals and campaign groups in the environmental context.

The rights and risks of campaigning

Campaigning activities, including both direct personal protest and publishing campaign literature, carry some risks in both criminal and civil law. However, such activities are also protected in a number of ways of by individual rights, including the right to organize and protest collectively. It is important for campaigners to understand where the boundary lies between lawful and unlawful conduct. We consider below both the right to protest (and the risk of breaching the criminal law) and the right to freedom of expression

(and the risk of defamation or breaching the right to privacy).

The right to protest is derived from the European Convention on Human Rights. This in turn is part of English and Welsh law by virtue of the Human Right Act 1998. The Convention includes the right to protest - derived from freedom of assembly, article 11 and the linked freedom of expression, article 10 of the Convention.

However, these freedoms are not absolute rights. They can be subject to restrictions based, for example, on the needs of national security, public safety, the prevention of disorder or crime and the protection of the rights and freedoms of others. As a result, they are limited by the powers of the police and the scope of the criminal law.

There is, predictably, a huge amount of law and procedure which may apply to protesters and what follows is simply a snapshot of some of the criminal offences and police powers used against protesters, especially environmental protesters involved in campaigning against fracking.¹

Preventative police powers

As to police powers for dealing with demonstrations, the police, in some circumstances, can impose conditions on assemblies and processions.² If they think that a ‘breach of the peace’ has taken place, is happening or is about to happen, they have wide powers to stop it - this is their

¹ For more details see *The Law of Public Order and Protest* by Mike Schwarz and others, <http://ukcatalogue.oup.com/product/9780199566143.do>. Also *The Protest Handbook*, http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=733.

² And it is a criminal offence to break those conditions: Part II of Public Order Act 1986.

justification, for example, for 'kettling'. The Courts have given mixed judgments on the compatibility of kettling with human rights in a number of Bindmans' test cases: sometimes finding it justified; on other occasions ruling that here has been a disproportionate interference with freedom of expression and an unlawful deprivation of liberty.



Source: istockphoto

The police have wide powers to stop and search people if they think that they might be carrying weapons, drugs or things which have been stolen.³ If they have reasonable grounds to suspect someone has committed an offence and think it is necessary to do so, they can arrest that person and then must take that person to a police station. Following release from the police station, the police have the power to impose bail conditions - which might include a prohibition on going to certain places or meeting particular people - pending the outcome of the police investigation or any prosecution.

It is increasingly common for the police to require people to give their names and addresses, or photograph them, when they attend protests. Sometimes this information is retained on databases for long periods of time. These practices are highly questionable in legal terms and there are on-going cases in the Courts challenging them.

Criminal offences that may occur during protests

³ Eg Police and Criminal Evidence Act 1984, s1.

On the road or pavement the most common offence which might be committed is obstruction of the highway.⁴ It is an offence without lawful excuse to obstruct free passage along the highway.

The equivalent offence on private land is aggravated trespass.⁵ It is an offence to trespass on land with the intention of disrupting someone else's lawful activity. Also, the police have the power to direct people to leave an area if they, the police, think that aggravated trespass is going to happen and it is an offence to disobey a direction.

Offences which relate to regular protests against a particular target or at a particular place include the offence of "watching and besetting".⁶ It is an offence, even outside the context of trade union activities, to hang around someone's workplace with the intention of stopping them from doing what they are entitled to do.

Separately it is an offence to pursue a course of conduct which amounts to harassment⁷ and if you are involved in anti-social behaviour, you can have an 'ASBO' imposed on you and it is a criminal offence to breach it.⁸ However, from 20 October 2014 ASBOS will be abolished by the Anti-social Behaviour, Crime and Policing Act 2014. Of most relevance to protesters, this Act will introduce Public Spaces Protection Orders ("PSPOs"), which are intended to deal with a particular nuisance or problem in a particular area by imposing conditions on the use of that area. PSPOs can only be made by a local authority, although they must consult with the Chief Officer of the Police, the Police & Crime Commissioner and any representatives of the local community they consider appropriate. Specified conditions must also be met before a PSPO can

⁴ Highways Act 1980, s 137.

⁵ Criminal Justice and Public Order Act 1994, s68 (and s69).

⁶ Trade Union and Labour Relations Act 1992, s241.

⁷ Protection of Harassment Act 1997.

⁸ Crime and Disorder Act 1998.

be made. Breach of a PSPO is punishable by a Fixed Penalty Notice and a fine of £1,000.

At a demonstration, you commit an offence if you use threatening, abusive or insulting words or behaviour or disorderly conduct likely to cause someone harassment, alarm or distress.⁹ It is an offence, without lawful excuse, to damage someone else's property.¹⁰ Any person who obstructs a police officer in the execution of their duty commits an offence.¹¹

Other people linked to a demonstration can also be caught by some of these offences by the principles of joint enterprise, aiding and abetting, attempting an offence, conspiring to commit an offence, encouraging a criminal offence. Property used to commit an offence is liable to forfeiture.

Protesters can often be put off engaging in protest when they hear about the criminal laws and police powers. Some protesters find that risks are reduced by engaging with the police in advance of or during protests: others choose not to. It should be borne in mind that there is often a big difference between what might happen and what actually does happen and that the risks of arrest can be significantly greater than the risks of conviction, and prison. Endorsing lenient sentences in one celebrated protest case, a senior judge observed "*civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history... It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind.*"¹²

⁹ The Public Order Act 1986, s5. There are, of course, more serious public order offences.

¹⁰ Criminal Damage Act 1971, s1.

¹¹ Police Act 1996, s89.

¹² Lord Hoffman in the House of Lords case of *R v Jones (Margaret)* [2006] UKHL16; [2007] 1 AC 136.

Freedom of expression and defamation risks

The issues relating to freedom of expression outside of direct protest activity are likely to arise in the context of campaign material which is made available to third parties. This may include websites, tweets, leaflets, facebook posts and so on. Political and campaigning speech is generally well protected under Article 10 of the Convention on Human Rights- the right to Freedom of Expression. However, that right has to be balanced against the rights of others, including the rights to privacy and to reputation which are protected by Article 8. That means that the Court will balance the damage done by statements about identifiable individuals and companies against the need to protect freedom of expression; neither will take automatic precedence.



Source: istockphoto

The fact that statements relate to matters of public importance and a debate of general interest will weigh in the balance, as will the way in which the allegations are put. Generally speaking, a responsible and fair report about a matter of public interest will tip the balance towards freedom of expression.

Historically, defamatory allegations were presumed to cause damage. However, the Defamation Act 2013 now provides that a company has to show that an allegation causes it or is likely to cause it serious financial loss. That is the first hurdle for a corporate complainant to cross. Campaigners making statements in the public interest are also provided some protection by a public interest



defence which protects statements which a publisher (in this case anyone who makes statements available to third parties) reasonably believes to be in the public interest. Responsible campaigners who make defamatory allegations about companies involved in fracking have a good chance of establishing a public interest defence - particularly if they seek and publish responses from the companies concerned and do their research carefully. It is much better to rely on this defence than to seek to prove that the allegations are true, which can be very difficult and expensive.

The position is a little more difficult in relation to individuals - so take care when naming or identifying individual people, including CEOs or other employees of companies who are identifiable by their role or function. It is always easier to show that you reasonably believed an allegation to be in the public interest than it is to prove an allegation to be true. So if, for example, you publish well-sourced and well-researched allegations that a person responsible for granting fracking licences has shares in the company seeking permission, and so is guilty of a conflict of interest (and you obtain and publish their denials of any wrongdoing) you would be likely to succeed in a public interest defence even if the allegations turned out to be false.

If you publish private information about an individual, or confidential information about a company, you also risk being sued. Public interest is a defence to a privacy or breach of confidence claim, but you need to make sure that the information is closely connected to the public interest - if you publish photographs of someone in their house/coming out of a meeting you need a good reason to do so.

If you do receive a complaint about campaign publications, make sure that you have preserved the research material, including good notes of telephone conversations. Complaints need to be made within one year of first publication - and you have 14 days to

respond to a complaint. The best option is to say that you need longer to respond and get some legal advice quickly - libel claims can be expensive.

Alternatively you may find yourself the subject of defamatory allegations, or private information about you may be published. If so, you could have the right to sue for damages, obtain an apology and a statement in open court. That could achieve some helpful publicity as well as compensating the subject of the allegations for the breach of their rights. If you are libelled, or your privacy rights are violated, then you should move quickly to make a formal complaint and threaten proceedings.

Using legal rights to support campaigning activities

Individual rights can also be a useful tool in furthering campaigning activities, including in respect of access to information, lobbying and potentially ultimately bringing a legal challenge.

Aarhus and environmental information rights

There is a specific right of public participation in environmental matters that is protected by the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (more commonly known as the Aarhus Convention).

The first "pillar" of the Aarhus Convention is access to environmental information. This is implemented in the UK through the Environmental Information Regulations 2004, a similar but distinct regime to the Freedom of Information Act 2000. Anyone has the right to request environmental information from public authorities. Both environmental information and public authorities are given broad, open definitions. Such information must be disclosed unless one of a limited number of

exceptions applies. Even if an exception applies, in most cases it must also be considered whether the public interest favours disclosure or maintaining the exception.



Source: istockphoto

If disclosure is refused, then the public authority can be asked to undertake an internal review to reconsider the refusal. If it is still refused, a complaint can be made to the Information Commissioner. There are further rights of appeal to the First-tier Tribunal and the Upper Tribunal. The law on the application of exceptions and the public interest test is increasingly complex, and legal advice can therefore be of assistance.

The second “pillar of the Aarhus Convention is public participation in decision-making, which is achieved in the UK through various consultation and other public engagement processes, a number of which are described in “Concerned about fracking and the law”, also published by the SaFE Alliance. The third pillar is access to justice, which is considered in more detail below in the context of bringing a legal challenge.

Trespass, the right to property and the right to life

The Supreme Court has held that drilling under private property may constitute trespass to that property (although there are questions regarding the depth at which such drilling ceases to be trespass). It may therefore be possible for landowners to block drilling by formally objecting to a proposal.

It is also at least arguable that granting permissions for such drilling constitutes interference in the peaceful enjoyment of possessions contrary to Article 1 of Protocol 1 to the ECHR, as well as equivalent provisions of the EU Charter of Fundamental Rights, which may necessitate the payment of compensation.

The Government has, however, recently announced its intention, despite substantial opposition, to legislate to ensure that underground drilling does not constitute trespass and to provide for some form of compensation to affected landowners. This scheme, and the compensation provided will have to be judged against human rights standards, although it will make individual challenges to drilling under property more difficult.

There may also be a question as to whether the right to life, as protected by article 2 is engaged. This obliges public authorities to do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they ought to have knowledge. While this will be very fact specific and will raise similar issues as the right to privacy it remains worth considering.

Challenging police wrongdoing

When the police abuse or exceed their powers against groups or individuals it is possible to seek and obtain redress. Unlawful conduct by police officers may typically include using unlawful force or detention, imposing excessive bail conditions, maliciously causing an a person to be criminally prosecuted or breaching a person’s right assemble or speak freely.

People who have been treated unlawfully by the police are likely to have two main options:

- a civil claim to establish the liability of the police for the ‘wrong doing’, and obtain compensation for the victim for, for instance, their loss of liberty or injury.



- a complaint about the misconduct of a police officer with a view to seeing the officer investigated and disciplined by their professional standards department or the Independent Police Complaints Commission.

Police decisions to impose restrictions on a protest can often be challenged by way of judicial review as soon as knowledge of the restrictions comes to light.

Conclusion

Many of the above legal issues will hopefully be useful tools in campaigning in relation to fracking, although this note cannot replace specific legal advice taking into account relevant factual circumstances. Such advice can clearly assist in sharpening particular arguments and planning a campaigning strategy.

If a decision is to be challenged through the Courts, there are legal concerns even before a decision is made, or if any action is brought against groups or individuals to limit campaigning activities, it is important you discuss with a legal advisor at the earliest opportunity.

Challenges to the lawfulness of a decision (as opposed to seeking compensation) will usually need to be brought by way of judicial review and the deadlines for challenging decisions (or even unlawful steps in a process) are extremely short - in some cases three months, in others just six weeks and sometimes even less than that.

Bindmans is committed to supporting the right to protest, especially around environmental issues. Our firm has expertise across all areas of criminal, media, public law and actions against the police, and would be happy to discuss how we may be able to assist you or a group that you belong to. We can seek legal aid for eligible clients and are otherwise happy to discuss creative funding arrangements. There are also specific

protections against adverse costs awards in environmental cases in order to ensure access to justice is achieved in accordance with the Aarhus Convention.

There will be no charge for discussing if we are able to assist, so please do contact us at the earliest opportunity if you think we may be able to help.

For more information please contact:

Mike Schwarz
Partner, Crime team
T: +44 (0)20 7833 4433
E: m.schwarz@bindmans.com

Tamsin Allen
Partner, Head of Media team
T: +44 (0)20 7833 4433
E: t.allen@bindmans.com

Jules Carey
Partner, Head of Police Misconduct team
T: +44 (0)20 7833 4433
E: j.carey@bindmans.com

Jamie Potter
Associate, Public law team
T: +44 (0)20 7833 4433
E: j.potter@bindmans.com

October 2014

© Bindmans LLP

236 Gray's Inn Road | London WC1X 8 HB | T: +44 (0)20 7833 4433

Bindmans LLP has taken all reasonable precautions to ensure that information contained in this document is accurate, but stresses that the content is not intended to be legally comprehensive. Bindmans LLP recommends that no action be taken on matters covered in this document without taking full legal advice.