



# The Attorney General Falkland Islands

---

## AGG19

# The Attorney General's Guidance on Public Disorder and Public Protest

---

Published by Authority of the Attorney General

The Law and Regulation Directorate  
The Attorney General's Chambers  
PO Box 587, Stanley, Falkland Islands, FIQQ 1ZZ

# Contents

---

<b>1. Introduction</b> .....	<b>3</b>
<b>2. Public Disorder</b> .....	<b>4</b>
<b>Riot</b> .....	<b>4</b>
<b>Violent disorder</b> .....	<b>5</b>
<b>Affray</b> .....	<b>6</b>
<b>Fear or provocation of violence</b> .....	<b>8</b>
<b>Intentionally abusive conduct</b> .....	<b>9</b>
<b>Disorderly conduct</b> .....	<b>9</b>
<b>Additional charges and charge selection</b> .....	<b>11</b>
<b>Weapons</b> .....	<b>12</b>
<b>Criminal damage</b> .....	<b>12</b>
<b>3. Public Protest</b> .....	<b>13</b>
<b>Constitutional rights</b> .....	<b>13</b>
<b>Legal principles</b> .....	<b>14</b>
<b>Observations on the evidential stage</b> .....	<b>14</b>
<b>The public interest stage</b> .....	<b>15</b>
<b>Alternatives to prosecution</b> .....	<b>17</b>

# 1. Introduction

---

1. The purpose of the criminal law in respect of public order offences is to penalise the use of violence and/or intimidation by individuals or groups. The principal public order offences are contained in Part 21 of the Crimes Ordinance 2014 (“the Ordinance”).
2. Consideration of public order offences often arises as a result of alleged offences committed during public demonstrations or protests (“Public protests”). Public protests may take many different forms, ranging from action by one person acting alone to a demonstration attended by large numbers of people. Such cases are often complex because they require careful balance of a number of different principles including protecting the general public from behaviour which is violent or intimidating whilst permitting people to exercise the Constitutional right to freedom of speech and freedom of assembly.
3. The purpose of this document is to provide Guidance on the different types of public order offence and highlight specific considerations that may be relevant when applying the Code for Prosecutors to cases involving allegations of public disorder.

## 2. Public Disorder

---

4. Offences involving public disorder are often a precursor to, or part of, the commission of other offences. An offence under the Ordinance may, for example, also lead to or involve an assault, unlawful possession of a weapon or the causing of criminal damage.
5. When selecting appropriate charges prosecutors will apply the Code for Prosecutors and the following general principles:
  - (a) the charge(s) should accurately reflect the extent of the accused's alleged involvement and responsibility thereby allowing the courts the discretion to sentence appropriately;
  - (b) the choice of charges should ensure the clear and simple presentation of the case particularly when there is more than one accused;
  - (c) there should be no overloading of charges by selecting more charges than are necessary just to encourage the accused to plead guilty to a few;
  - (d) there should be no overcharging by selecting a charge which is not supported by the evidence in order to encourage a plea of guilty to a lesser allegation.

### Riot

6. The offence of riot consists of the following elements:
  - (a) twelve or more persons;
  - (b) present together;
  - (c) use or threaten unlawful violence (all charged must use);
  - (d) for a common purpose; and that
  - (e) the conduct of them (taken together);
  - (f) was such as to cause;
  - (g) a person of reasonable firmness;
  - (h) present at the scene;
  - (i) to fear for their personal safety.

7. Providing the above conditions are met each of the persons using unlawful violence for a common purpose is guilty of riot. Others can commit this offence by aiding, abetting, counselling or procuring the use of violence, by encouraging, planning, directing or coordinating the activities of those involved in violent action and people in this category should be charged as joint principals.
8. In general terms conduct which falls within the scope of this offence might have the one or more of the following characteristics:
  - (a) the normal forces of law and order have broken down;
  - (b) due to the intensity of the attacks on police and other civilian authorities normal access by emergency services is impeded by mob activity;
  - (c) due to the scale and ferocity of the disorder, severe disruption and fear is caused to members of the public;
  - (d) the violence carries with it the potential for a significant impact upon a significant number of non-participants for a significant length of time;
  - (e) organised or spontaneous large scale acts of violence on people and/or property.

### Violent disorder

9. The offence of violent disorder consists of the following elements:
  - (a) three or more persons;
  - (b) present together;
  - (c) use or threaten;
  - (d) unlawful violence;
  - (e) so that the conduct of them (taken together) would cause;
  - (f) a person of reasonable firmness;
  - (g) present at the scene;
  - (h) to fear for their personal safety.

10. This offence should only be charged in relation to instances of serious disorder falling short of those elements required to establish an offence of riot. Planning may be an important ingredient in a case of violent disorder but regard should be had for the potential of minor incidents to flare up into serious disorder sufficient to meet the requirements of this section.
11. The offence may be committed in a public or private place. The relevant conduct may be directed against a person or persons or against property.
12. Examples of the type of conduct which may be appropriate for a charge of violent disorder are:
  - (a) fighting between three or more people involving the use of weapons, between rival groups in a place to which members of the public have access (for example a town centre or a crowded bar) causing severe disruption and/or fear to members of the public;
  - (b) an outbreak of violence which carries with it the potential for significant impact on a moderate scale on non-participants;
  - (c) serious disorder at a public event where missiles are thrown and other violence is used against and directed towards the police and other civil authorities.
13. Whilst three or more persons must have been present and used or threatened unlawful violence, it is not necessary that three or more persons should actually be charged and prosecuted. The charge must make clear, however, that the defendant was one of the three or more involved in the commission of the offence.
14. The expression "present together" does not require any degree of co-operation between those who are using or threatening violence; all that is required is that they be present in the same place at the same time.

## Affray

15. The offence of affray consists of the following elements:
  - (a) a person uses or threatens unlawful violence towards another;
  - (b) and the conduct is such as would cause;
  - (c) a person of reasonable firmness;
  - (d) present at the scene;
  - (e) to fear for their personal safety.

16. The seriousness of the offence lies in the effect that the behaviour of the accused has on members of the public who may have been put in fear. There must be some conduct, beyond the use of words, which is threatening and directed towards a person or persons. Mere words are not enough. Violent conduct towards property alone is not sufficient for the purposes of an offence.
17. The offence may be committed in a public or private place. The notional bystander test means that the hypothetical bystander, rather than the victim, must be put in fear for his or her personal safety. Apart from the hypothetical bystander, there must be present a 'victim' against whom the violence is to be directed.
18. It is not enough for the prosecution to prove that unlawful violence has been used. There has to be violence of such a kind that a bystander would fear for his safety. Where the violence is focused solely and exclusively on the victim, such that it would be incapable of causing a person of reasonable firmness present at the scene to fear for his safety, then the offence is not made out.
19. Affray should be considered in circumstances of serious and indiscriminate violence. Examples of the type of conduct appropriate for the offence of affray include:
  - (a) A fight between two or more people in a place where members of the general public are present (for example in a public house, discotheque, restaurant or street) with a level of violence such as would put them in substantial fear (as opposed to passing concern) for their safety (even though the fighting is not directed towards them);
  - (b) Indiscriminate throwing of objects directed towards a group of people in circumstances where serious injury is or is likely to be caused;
  - (c) The wielding of a weapon of a type or in a manner likely to cause people substantial fear for their safety or a person armed with a weapon who, when approached by police officers, brandishes the weapon and threatens to use it against them;
20. Incidents within a dwelling should not be charged as affray merely because a lesser public order charge is not available. Offences of assault are likely to be more appropriate. Affray should be considered in circumstances analogous to those listed above where serious violence is used or threatened.
21. The accused must have intended to use or threaten violence; or have been aware that his conduct may be violent or may threaten violence.

## Fear or provocation of violence

22. The offence of fear or provocation of violence is committed where:
- (a) a person uses towards another person threatening, abusive or insulting words or behaviour; or
  - (b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,
  - (c) with intent to cause the person to believe that immediate unlawful violence will be used against them or another by any person; or
  - (d) to provoke the immediate use of unlawful violence by the person or another; or
  - (e) whereby the person is likely to believe that such violence will be used or it is likely that such violence will be provoked.
23. The following types of conduct are examples which may at least be capable of amounting to threatening, abusive or insulting words or behaviour:
- (a) threats made towards innocent bystanders or individuals carrying out public service duties;
  - (b) the throwing of missiles by a person taking part in a demonstration or other public gathering where no injury is caused;
  - (c) scuffles or incidents of violence or threats of violence committed in the context of a brawl (such as in or in the vicinity of a public house);
  - (d) incidents which do not justify a charge of assault where an individual is picked on by a gang.
24. Conduct which may be capable of amounting to threatening, abusive or insulting words or behaviour for the purposes of this offence will be more serious than that required for the offences of intentionally abusive conduct or disorderly conduct.



## Intentionally abusive conduct

25. The offence of intentionally abusive conduct is committed where:
- (a) a person who, with intent to cause another person, harassment, alarm or distress;
  - (b) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour; or
  - (c) displays any writing, sign or other visible representation which is threatening, abusive or insulting; and
  - (d) causes the person, or any other person, harassment, alarm or distress.
26. The offence is directed at persistent and targeted behaviour as these factors are required to prove the elements of intent and causation. The evidence of intention may be inferred from the targeting of a vulnerable victim.

## Disorderly conduct

27. The offence of disorderly conduct is committed where:
- (a) a person uses threatening or abusive words or behaviour, or disorderly behaviour; or
  - (b) displays any writing, sign or other visible representation which is threatening or abusive;
  - (c) within the hearing or sight of a person likely to be caused harassment, alarm or distress by such words, behaviour or representation.
28. The offence is not committed where:
- (a) a person has no reason to believe that there is any person within hearing or sight who is likely to be caused harassment, alarm or distress;
  - (b) the person is inside a dwelling and has no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, will be heard or seen by a person outside that or any other dwelling; or
  - (c) the person's conduct is reasonable.

29. The offence of disorderly conduct does not cover conduct that is merely insulting within the hearing of someone likely to be caused harassment, alarm or distress. Whether behaviour can be properly categorised as disorderly is a question of fact. Disorderly behaviour does not require any element of violence, actual or threatened; and it includes conduct that is not necessarily threatening or abusive.
30. The following types of conduct are examples, which may at least be capable of amounting to disorderly behaviour:
- (a) causing a disturbance in a residential area or common part of a block of flats;
  - (b) persistently shouting abuse or obscenities at passers-by;
  - (c) rowdy behaviour in a street late at night which might alarm residents or passers-by, especially those who may be vulnerable, such as the elderly or members of an ethnic minority group;
  - (d) causing a disturbance in an area to which the public have access or might otherwise gather.
31. The offence will apply in cases which amount to less serious incidents of anti-social behaviour. Where violence has been used, it is not normally appropriate to charge the offence of disorderly conduct unless the physical behaviour amounts merely to pushing or undirected lashing out of a type likely to cause no more than a glancing blow, minor bruising or grazing.
32. There must be a person within the sight or hearing of the suspect who is likely to be caused harassment, alarm or distress by the conduct in question. In deciding this question of fact the court is entitled to take into account the familiarity which the person present has with the words and conduct used. For example police officers regularly witness disorderly conduct and are expected to have a degree of fortitude in relation to such behaviour. This does not mean that a police officer cannot be a person who is likely to be caused harassment, alarm or distress but it is relevant in considering whether such a person was present.
33. Although the existence of a person who is caused harassment alarm and distress must be proved, there is no requirement that they actually give evidence so long as there is evidence that established their presence.

34. There is a difficult balance to be struck in dealing with behaviour that may be over exuberant, unwise, misguided or insensitive but does not necessarily cross the threshold to become criminally disorderly. In such cases informal methods of disposal may be appropriate and effective; such as words of advice or a warning to desist, but if this approach fails and the disorderly conduct continues then criminal proceedings may be necessary.
35. In deciding whether a charge of disorderly conduct is appropriate, the nature of the conduct must be considered in light of the penalty that the suspect is likely to receive on conviction.
36. Where there is reliable evidence that the accused was drunk in a public place at the time of the alleged offence to the extent that the accused had lost the power of self-control, a charge of drunk and disorderly behaviour should be preferred.

### Additional charges and charge selection

37. At public order incidents there may be evidence of other offences. Each course of conduct should therefore be considered in the light of the facts of the particular case. The following should be considered in deciding which combination of offences should be charged where more than one is possible:
  - (a) where the offence is basically one of Public Disorder in which other less serious offences are made out it may be appropriate to charge the Public Order Offences alone;
  - (b) where there are aggravating features to an assault, such as the use of a weapon, it is likely that an assault charge should be preferred;
  - (c) where a proper reflection of the defendant(s) conduct would involve charging an assault, that charge should be preferred;
  - (d) if the public order offence is needed as well as other charges to reflect the defendants conduct then both or all should be charged.
38. The purpose behind the careful selection of charges is to ensure that wherever possible there is one trial of the issues, and to avoid the risk of witnesses having to give the same evidence twice in different venues.

## Weapons

39. If firearms offences can be proved against individuals they should be charged.
40. Where any type of weapon is carried by those involved in public disorder, this is an aggravating factor to be taken into account in the presentation of the case. The approach to be taken will depend on the following factors:
  - (a) the type of weapon concerned;
  - (b) whether the weapon was used or its use threatened;
  - (c) how the weapon was used;
  - (d) the potential for serious injury;
  - (e) the time when the weapon was discovered or produced (i.e. was it produced during the incident or found on arrest).

## Criminal damage

41. Offences of criminal damage are often committed during public disorder. Where there is sufficient evidence to support both offences, consideration should be given to charging both offences. If criminal damage is minor and forms part of the public disorder offence then the criminal damage can be treated as an aggravating feature and only the public order offence need be charged. Where the criminal damage is additional to the public order offence or significant damage is caused separate offences should be charged.

## 3. Public Protest

---

### Constitutional rights

42. Freedom of speech, freedom of assembly and the right to protest peacefully are protected by the Constitution. These rights are afforded to every single person who is present within the jurisdiction of the Falkland Islands without exception whether the person is a permanent resident or not.
43. Freedom of speech and the right to peaceful protest are not absolute rights and the exercise of these rights can be restricted, so long as any restriction:
  - (a) is prescribed by law;
  - (b) is necessary; and
  - (c) proportionate.
44. The relationship between public order offences and the right to public protest are governed by the following principles:
  - (a) The starting point is always the importance of the right to freedom of expression and it must be recognised that legitimate protest can be offensive, at least to some, and the Constitution cannot simply protect those holding the majority view. The restrictions on the Constitution should be narrowly construed.
  - (b) There cannot be any universal test for when speech goes beyond legitimate protest and becomes criminalised as 'threatening, abusive or insulting'. But in striking the balance, the focus on minority rights should not result in overlooking the rights of the majority.
  - (c) Even if, on the face of it, there is evidence that behaviour has crossed the line or other elements of the offences are present, it still must be proportionate to bring a prosecution and necessary for preserving public order.

## Legal principles

45. As with all offences, prosecutors must apply the Full Code Test as set out in the Attorney General's Code for Prosecutors. The Full Code Test has two stages:

### **evidential stage**

*and*

### **public interest stage**

46. The evidential stage must be considered before the public interest stage. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be. Where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.
47. When deciding whether to charge an individual in relation to public protest cases, prosecutors should focus on whether a prosecution is necessary and whether a prosecution is proportionate.
48. Each individual case must be considered in accordance with the Code for Prosecutors, and this guidance should be read in conjunction with the Code, as it sets out the key considerations for prosecutors when they are deciding whether to prosecute a suspect for an offence arising out of a public protest.
49. Prosecutors must strike the balance between protecting the right to free speech and right to protest peacefully on the one hand, whilst ensuring that individuals and property are protected by the criminal law on the other hand.

## Observations on the evidential stage

50. In public protest cases, there may well be conduct which provides sufficient evidence to satisfy the evidential stage in respect of more than one offence. For example, a person acting as part of a large and violent group might individually commit another, non-public order offence, such as arson, criminal damage or going equipped. Prosecutors have the discretion to charge both for a public order offence (such as violent disorder) and for the further offence.
51. Public protests can vary hugely in organisation and size. However, if a protest becomes chaotic and/or involves very large groups of people, it can present significant evidential challenges, particularly concerning identification of offenders and the role they played. It is therefore essential that the evidence in public protest related cases is carefully scrutinised, especially where those involved have covered or partially covered their faces and/or where arrests take place sometime after the incident in question.

52. Prosecutors should have particular regard to whether there is evidence that a person had come to the protest equipped with clothes or mask to prevent identification, items that could be considered body protection, or an item that can be used as a weapon, as it may indicate the person came in anticipation of disorder at the protest or there was an element of planning before the commission of the offence.
53. In addition, prosecutors should also consider whether there is evidence of telephone or computer records or social network activity that show that the suspect was closely involved in the commission of the offence. There may also be CCTV coverage or video footage from the police or videos made by protestors uploaded onto the Internet that may provide evidence of a person's participation in an incident. In some cases, there could even be images in national and local media coverage that may also provide evidence of a person's participation in an offence.

### The public interest stage

54. It has never been the rule that a prosecution will automatically follow where the evidential stage is satisfied. This is an important and long standing principle.
55. Accordingly, where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.
56. In public protest cases, prosecutors must apply the public interest factors set out in the Code for Prosecutors, having regard to this Guidance. A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour, or unless the prosecutor is satisfied that the public interest may be properly served by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal.
57. Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. Each case must be considered on its own facts and on its own merits. Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and those factors put to the court for consideration when sentence is passed.
58. The list of public interest factors to consider as set out below are not exhaustive. Prosecutors must also have regard to the public interest considerations set out in the Code for Prosecutors.

59. Prosecutors should bear in mind that a prosecution for offences committed during a public protest is more likely to be required where:
- (a) Violent acts were committed that caused injury or it is reasonable to believe they could have caused injury;
  - (b) The suspect took a leading role in and/or encouraged others to commit violent acts;
  - (c) The suspect was in possession of a weapon at the time of the offence;
  - (d) The suspect took steps to conceal their identity;
  - (e) Significant disruption was caused to the public and businesses;
  - (f) Significant damage was caused to property;
  - (g) The suspect has a previous history of causing violence, damage, disruption or making threats at public protests;
  - (h) Threats were made against an individual or business that caused or it is reasonable to believe they could have caused alarm, fear or distress.
60. Applying the public interest factors set out in the Code for Prosecutors, prosecutors should bear in mind that a prosecution is less likely to be required where:
- (a) The public protest was essentially peaceful;
  - (b) The suspect had no more than a minor role;
  - (c) The suspect has no previous relevant history of offending at public protests or in general;
  - (d) The act committed was minor;
  - (e) The act committed was instinctive and in the heat of the moment.
61. Prosecutors **must not** take into account the nationality of the suspect. The nationality of the suspect is not a relevant public interest consideration because to take this factor into account would be to offend against the Constitutional right not to be discriminated against. A person should not be treated differently on the basis of sex, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.



62. Prosecutors should consider the incident as a whole in order to assess the context in which the offence was committed. It may be that the alleged act committed is so remote from the main action that it cannot be considered part of it and should be considered as an incident on its own.
63. If an act is committed by a youth, prosecutors must have regard to the principal aim of the youth justice system, which is to prevent offending by children and young people, and prosecutors must consider the interests of the youth when deciding if it is in the public interest to prosecute.

### Alternatives to prosecution

64. When considering the Public Interest in any case, an important early consideration will be whether the case can be appropriately dealt with by way of an out of court disposal. What is appropriate in the circumstances of each individual case will depend on the seriousness of the offence, the results of the offending behaviour, the antecedents of the offender and the likely outcome at court, particularly where it may be a nominal penalty.
65. Prosecutors may sometimes direct the police that a caution is an appropriate disposal and advise the police of this course of action.
66. Prosecutors must be satisfied that the Full Code Test is met and that there is a clear admission of guilt in any case disposed of by an out of court disposal.

# Document Control

---

Further copies of this document and information about alternative languages and formats are available from the Law and Regulation Directorate.

## Law and Regulation Directorate

### Attorney General's Chambers

PO Box 587  
Stanley  
Falkland Islands  
FIQQ 1ZZ

This document is also available online at: <http://www.fig.gov.fk/legal/>

### Document Reference:

AGG19: The Attorney General's Guidance on Public Disorder and Public Protest

### Issue Date:

November 2019

### Ownership and Review:

The Attorney General is the document owner for this document and the next scheduled review date is 2021