

BIG BROTHER WATCH

**Big Brother Watch briefing
on the Police, Crime,
Sentencing and Courts Bill;
Committee Stage**

May 2021

About Big Brother Watch

Big Brother Watch is a civil liberties and privacy campaigning organisation, fighting for a free future. We're determined to reclaim our privacy and defend freedoms at this time of enormous technological change.

We're a fiercely independent, non-partisan and non-profit group who work to roll back the surveillance state and protect rights in parliament, the media or the courts if we have to. We publish unique investigations and pursue powerful public campaigns. We work relentlessly to inform, amplify and empower the public voice so we can collectively reclaim our privacy, defend our civil liberties and protect freedoms for the future.

Contact

Silkie Carlo

Director

Email: silkie.carlo@bigbrotherwatch.org.uk

Mark Johnson

Legal & Policy Officer

Email: mark.johnson@bigbrotherwatch.org.uk

INTRODUCTION

1. The Police, Crime, Sentencing and Courts Bill poses a direct threat to the right to protest. This Bill has been roundly condemned by hundreds of civil society organisations¹ and legal academics,² former Home Secretaries,³ police chiefs,⁴ and over half a million signatories to petitions launched by organisations calling for the Bill to be removed,⁵ as well as people across the UK who have demonstrated to protect their right to do so.
2. Measures which interfere with the fundamental rights to freedom of expression and freedom of assembly, protected by Article 10 and Article 11 of the European Convention on Human Rights (ECHR) respectively, will only be lawful where they are provided by law, necessary and proportionate. The European Court of Human Rights (ECtHR) has warned that “any measures interfering with [these rights] other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it.”⁶ The presumption must rest in favour of protecting these rights and the authorities have a positive obligation to facilitate their enactment.
3. Unnecessary criminalisation of dissent, which this Bill seeks to do, goes against the very best traditions of our history and undermines the public’s right to protest. The trajectory of public order legislation has largely moved in one direction – incrementally chipping away at people’s fundamental rights and weighting the balance of power heavily towards the authorities. Under the Public Order Act 1986 (POA), police have wide powers to impose conditions and prohibit protests, as well as broad discretion in how those powers are applied. It appears that this Bill attempts to plug non-existent gaps and is intent on further strengthening State power. Should this Bill with its expansion of State power pass through Parliament in its current form, it will drastically limit the ability for all people to stand up for what they believe in.

¹ Friends of the Earth, Open Letter to the Home Secretary and Secretary of State for Justice (March 2021) <https://friendsoftheearth.uk/system-change/open-letter-home-secretary-and-secretary-state-justice>

² Andrew Woodcock, ‘More than 700 legal scholars urge Boris Johnson to ditch ‘draconian’ restrictions on right to protest’, The Independent (17 March 2021) <https://www.independent.co.uk/news/uk/politics/police-bill-academics-letterpriti-patel-b1818695.html>

³ HC Deb 15 March 2021 vol 691. See also Tobi Thomas, ‘Police and crime bill will create toxic legacy, warns Blunkett’, The Guardian (02 April 2021) <https://www.theguardian.com/uk-news/2021/apr/02/police-and-bill-will-create-toxic-legacy-warns-blunkett>

⁴ Rob Merrick, ‘Police should be ‘really worried’ about new crackdown on right to protest, ex-police chief says,’ The Independent (15 March 2021) <https://www.independent.co.uk/news/uk/politics/policing-bill-protest-priti-patel-b1817225.html>. Maya Oppenheim, ‘UK heading towards ‘paramilitary policing’ under proposed policing protest laws, warns ex-police chief,’ The Independent (28 March 2021) <https://www.independent.co.uk/news/uk/home-news/policing-bill-paramilitary-warning-b1823618.html>.

⁵ See, for example petitions by [Greenpeace](#) (146,498 signatories), [350.org](#) (132,330 signatories) and [Friends of the Earth](#) (90,468 signatories). See also the quarter of a million signatories to the “Do Not Restrict our Right to Peaceful Protest” petition, UK Government and Parliament Petitions, <https://petition.parliament.uk/petitions/579012>

⁶ *Navalnyy v Russia* [2018] ECHR 1062 (15 November 2018)

4. This briefing is solely focused on protest rights and the Police, Crime, Sentencing and Courts Bill and therefore, engages Part 3 of the Bill. However, Big Brother Watch has also issued a briefing to members of the Public Bill Committee regarding Part 2, Chapter 3 of the legislation, which relates to digital strip searches. Given the sweeping nature of these powers and the gravity of harm that they will enable, Big Brother Watch believes that those measures governing public assemblies, processions and one-person protests within the legislation are neither necessary, nor proportionate and pose a fundamental threat to the right to protest. **Further, we believe that the provisions within Part 3 of the Bill actively undermine the right to assembly and the right to free expression. It is our belief that these measures must be excised from the Bill entirely.** Below are our key concerns.

IMPOSING CONDITIONS ON PUBLIC PROCESSIONS – CLAUSE 54

5. Clause 54 of the Bill amends section 12 of the POA to allow the police to impose conditions on a procession if they have a reasonable belief that the noise generated by persons taking part in the procession may “result in serious disruption to the activities of an organisation which are carried on in the vicinity of the procession” or may “have a significant and relevant impact on persons in the vicinity”. It confers a power on the Home Secretary to make regulations detailing the meaning of “serious disruption to the activities of an organisation carried on in the vicinity”.
6. These proposals would constitute a gross expansion of police powers, which strike at the heart of the fundamental right to protest. Protests, by their very nature, are noisy. Noise is also a crucial means of expressing collective solidarity or grief and, quite literally, making voices heard by those in power. The noise protests generate may simply be a product of the number of people who assemble, which is often a central ingredient of effective protest. As legal academic Professor David Mead commented, the proposed power to regulate protests simply because it will generate noise that might have certain effects is an “existential threat to protest, so closely entangled are protests with noise”.⁷
7. Big Brother Watch is concerned by the wide discretion this and other powers established by Part 3 afford to the police. Broad discretion is likely to lead to the police facilitating some protests while clamping down on others, based on a range of political and structural factors. We are also concerned that this type of overbroad policing power may make public order situations more difficult for

⁷ David Mead ‘Yes, you can... but only if you’re quiet,’ *Verfassungsblog* (17 March 2021) <https://verfassungsblog.de/uk-silence-protest/>

frontline officers by creating an unhelpful burden on the exercise of their professional discretion.

8. Clause 54 (4) allows the Secretary of State for the Home Department the power to delineate by way of secondary legislation what constitutes the “serious disruption to the life of the community” test under the POA and the new “serious disruption to the activities of an organisation which are carried on in the vicinity” test which this Bill seeks to establish. These regulations may “give examples of cases in which a public procession is or is not to be treated” as meeting these thresholds. This inappropriately gives the Government of the day an expansive power – subject to limited Parliamentary scrutiny – to effectively declare the kind of protests and causes it deems inconvenient or unacceptable, and provide the police a licence to limit them.

IMPOSING CONDITIONS ON PUBLIC ASSEMBLIES – CLAUSE 55

9. Clause 55 replicates the power to impose conditions based on noisiness contained in clause 54 and applies them to static assemblies. This reiterates the concerns outlined at paragraphs 6-7.
10. Additionally, Clause 55 removes the caveat under section 14 of the POA that conditions on static assemblies may only be imposed on the place an assembly may be held, its maximum duration or the maximum number of people attending, in so far as they apply to assemblies in England and Wales. Under clause 55 any conditions that “appear necessary” could be imposed on static assemblies, aligning sections 12 and 14 of the POA.
11. Big Brother Watch is concerned by the attempt to reduce the limits on powers to regulate static assemblies. The existing distinction between sections 12 and 14 reflects the less disruptive impact of, and the relative ease with which police can facilitate, static assemblies compared to marches. These provisions erode that necessary distinction. If the impetus for this change is so that powers in relation to processions and assemblies are “equalised” in the interests of clarity, we query why they are being levelled down (i.e. via repeal of the limits on the nature of the conditions that can be imposed on assemblies) rather than levelled up (i.e. via imposition of limits on the nature of conditions that can be imposed on processions). As then Home Secretary Lord Hurd of Westwell noted during second reading of the Public Order Act 1986, “[w]e stopped short of a power to ban because we believed that that would be an excessive limit on the right of assembly and freedom of speech. For this reason, clause 14 does not permit the police to impose conditions changing the date and time of an

assembly. They will be able only to impose conditions limiting its size, location or duration”.⁸

12. Further, it is not clear what conditions the Government are seeking to give the police the power to impose on protests beyond those which restrict the place an assembly may be held, its maximum duration or the maximum number. This subtle change, regarding the limits that can be placed on conditions imposed, could conceivably have dramatic consequences for protesters – affording the police near unfettered discretion to impose any condition they see fit including, for example, restrictions on the words or slogans that can be expressed on placards. Big Brother Watch considers that extending the wide-ranging powers police are afforded to regulate processions is a disproportionate interference with the right to protest.

BREACH OF POLICE-IMPOSED CONDITIONS – CLAUSE 56

13. Clause 56 reduces the knowledge requirement for an offence to be committed under sections 12 and 14 of the POA, so it is no longer necessary to prove that a person actually knew of the conditions, just that they “ought to have known” a condition was in force. These provisions risk criminalising people who unwittingly breach conditions the police impose.
14. Legal experts have pointed out how the terminology ‘ought to have known’ is a “vague term, hard to define, harder to enforce and possibly impossible to effectively convict.”⁹ With the inconsistent approach to protest that we have witnessed during this pandemic, such terminology will only serve to further entrench discriminatory policing and could have a chilling effect on protests more widely.
15. Clause 56 is rendered more worrying by provisions which significantly increase the maximum sentence for breaching a police-imposed condition. The Bill manifestly increases the maximum sentence for an organiser who falls foul of a condition, from three to eleven months imprisonment. It also increases the maximum fines that may be imposed on a protest organiser or attendee.

LIMITING PROTESTS AROUND PARLIAMENT – CLAUSE 57

16. Clause 57 amends 142A of the Police Reform and Social Responsibility Act 2011 (PRSR) to widen the geographical scope of the controlled area around Westminster where particular activities cannot take place. It also adds

⁸ HC Deb 13 January 1986 vol 89 797

⁹ Richard Gibbs ‘The headline criticisms thrown at the Police, Crime, Sentencing and Courts Bill are simply wrong,’ April 21 2021 <https://www.conservativehome.com/platform/2021/04/richard-gibbs-the-headline-criticisms-thrown-at-the-police-crime-sentencing-and-courts-bill-are-simply-wrong.html>

“obstructing, by the use of any item or otherwise, the passage of a vehicle” that is entering or exiting the Parliamentary Estate to the activities that are prohibited in the controlled area under section 143 of the PRSR. This would create a de facto buffer zone around Parliament, shielding those in power from dissent.

17. Expanding the geographical scope where restrictions can be applied and the type of restrictions that can be imposed would be a retrograde step, which would mirror the effect of the widely criticised provisions in the Serious Organised Crime and Police Act 2005 which the PRSR repealed. As a matter of human rights law, States have a duty not to place unnecessary obstacles in the way of people wishing to protest and a positive obligation to facilitate protest.¹⁰ As the Court of Appeal has held, protest “becomes effectively worthless if the protestor’s choice of ‘when and where’ to protest is not respected as far as possible.”¹¹

INTENTIONALLY OR RECKLESSLY CAUSING PUBLIC NUISANCE – CLAUSE 59

18. Clause 59 abolishes the common law offence of public nuisance and replaces it with a wider offence of intentionally or recklessly causing serious harm or risk of serious harm to the public, or obstructing the public in the exercise or enjoyment of a right.
19. The new statutory offence that this clause intends to create would be committed by intentionally or recklessly causing serious harm. This is interpreted broadly to include not only “serious distress, serious annoyance, serious inconvenience or serious loss of amenity” but also the *risk* of someone suffering those things. The maximum custodial sentence is ten years. While there is a “reasonable excuse” defence, this is an attenuated safeguard as it is only available once a person has been criminally charged.
20. The proposed statutory offence is incredibly broad. Given that many if not most protests may cause, or may risk causing, “serious annoyance”, a vast array of protestors may fall foul of an offence that involves a sentence of up to ten years imprisonment. This is an unacceptably broad basis upon which to regulate protest and could render protest-related “nuisances” criminal acts.
21. These provisions have been described as entrenching an “almost moribund” common law offence, in that it had been rendered redundant by the establishment of environmental protection offences and offences relating to

¹⁰*Ollinger v Austria*, Application No. 76900/01.

¹¹*Singh and ors, R (on the Application of) v Chief Constable of West Midlands Police* [2006] EWCA Civ 1118, at para 87

grossly offensive communications.¹² When the common law offence has been used against protesters it has been subject to legal challenge – in 2018 the Court of Appeal quashed the custodial sentences that had been imposed on people protesting against fracking on the basis that they were “manifestly excessive”.¹³ It is precisely this sort of “manifestly excessive” sentence that the Government is proposing to legislate, despite guidance from case law that this would be inappropriate.

22. While clause 59 does seek to implement the Law Commission’s 2015 recommendation to codify the public nuisance offence, the 2015 report did not consider the application of public nuisance to protests. Further, the Law Commission did not propose a maximum custodial sentence of a decade, demonstrating a repurposing of these proposals from the Government.

IMPOSING CONDITIONS ON ONE-PERSON PROTESTS – CLAUSE 60

23. Clause 60 establishes a new police power to impose conditions on one-person protests on the basis that the noise generated will seriously disrupt the activities of an organisation or cause significant impact on people in the vicinity. It may be punished with a maximum sentence of 51 weeks imprisonment or a level 4 fine.
24. Big Brother Watch considers these clauses – designed to stifle individuals protesting alone from exercising their fundamental rights – entirely disproportionate. We note that a one-person protestor does not need to actually know that a condition has been applied in order to be guilty of the offence, just that they *ought to have known*. Moreover, Clause 50 (11) makes it a criminal offence for someone to incite someone to engage in a one-person protest, should conditions be applied to them that they have then proceeded to ignore. It is unclear how such a measure will be policed, with interested members of the public simply stopping to engage in conversation with a one-person protestor potentially at risk of triggering the offence.
25. This clause largely mirrors clause 54 and reiterates the concerns outlined at paragraphs 8-11.

CONCLUSION AND RECOMMENDATIONS

¹² David Mead, ‘Some initial thoughts on the Police, Crime, Sentencing and Courts Bill – The New Public Order Powers in Clauses 54-60’, *Protest Matters*, 12 March 2021, <https://protestmatters.wordpress.com/2021/03/12/some-initial-thoughts-on-the-police-crime-sentencing-courts-bill-the-new-public-order-powers-in-clauses-54-60/>

¹³ *R v Roberts (Richard)* [2018] EWCA Crim 2739

26. Taken into consideration individually, the preceding clauses in Part 3 of the Police, Crime, Sentencing and Courts Bill give rise to grave concerns. But they become even more damaging when understood cumulatively. By targeting the tools that make protest meaningful, not only do you dissuade people from expressing their views and standing up for what they believe in, but you undermine democracy, and the crucial measures of accountability and scrutiny that uphold it.
27. **As such, Big Brother Watch urges MPs to give notice of their intention to oppose the question that Clauses 54 – 60 stand part.**
28. Protest is not a gift from the State, but a fundamental right. And many of this country's most hard-won and deeply cherished freedoms have been won through its enactment. We strongly urge Parliament to remove these aspects of the Bill in their entirety.