

# **BIG BROTHER WATCH**

**Big Brother Watch briefing on  
the Police, Crime, Sentencing  
and Courts Bill; House of Lords  
Report Stage**

**January 2022**

## **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.

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## SUMMARY

- The Police, Crime, Sentencing and Courts Bill poses a direct threat to the right to protest. The Bill has been condemned across civil society and was branded by Amnesty International as an “assault on our freedoms”<sup>1</sup>.
- Part 3 of the Bill seeks to introduce an array of provisions which will materially restrict citizens’ ability to protest freely. These include allowing police to restrict a protest based on the new criteria of noise, giving the Secretary of State the power to define key terms in the legislation such as what constitutes “serious disruption to the life of the community”, granting the Police more power to restrict static assemblies and criminalising those in breach of Police conditions at an assembly or procession where they were unaware of said conditions but “ought to have known” about them.
- Further, Part 3 of the Bill also creates further restrictions on protests which take place outside of Parliament, introduces a new public nuisance offence which criminalises those who are deemed “seriously annoying” and could criminalise those in protest settings who deemed to risk causing another person to “suffer disease”, and introduces new restrictions on “one-person protests”.
- **Big Brother Watch believe that these measures are neither necessary nor proportionate and could do serious damage to the health of our democracy. As such we urge Members of the House of Lords to safeguard protest rights and support amendments by Lords Paddick and Hain, which seek to remove Clauses 56 – 62 from the Bill.**
- **We also urge Peers to support amendment 137A to clause 61. This amendment seeks to remove reference to “disease” from the newly proposed public nuisance offence, which as currently worded, could have broad application and result in the curtailment of protest rights and infringement of civil liberties, particularly in the context of the pandemic.**
- At this late stage in the passage of the Bill through Parliament, the Government have sought to introduce their own amendments which would restrict citizens’ protest rights further. Amendments 148-159 create new offences for those involved in

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<sup>1</sup> “UK GOVERNMENT: STOP THE ASSAULT ON OUR FREEDOMS”, Amnesty International, <https://www.amnesty.org.uk/actions/uk-government-stop-assault-our-freedoms/thank-you-0>

“locking on”, increases the maximum sentence for those found guilty of obstructing a public highway and introduce broad new offences for “obstruction of major transport works” and “interference with use or operation of key national infrastructure”.

- Further, these amendments award the police unprecedented new powers to stop and search protestors and introduce new protest banning orders, which could prevent individuals from exercising their right to protest entirely.
- **These measures, set out in amendments 148-159, constitute a vast and unjustified expansion of police powers, would do a serious degree of damage to British democracy and pose a significant threat to protected rights to freedom of expression, freedom of association and the right to privacy. Particularly in the absence of full and proper Parliamentary scrutiny of these proposals, Peers must vote to reject their addition to the Bill.**

# 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 organisations<sup>2</sup> and legal academics,<sup>3</sup> former Home Secretaries,<sup>4</sup> police chiefs,<sup>5</sup> and over half a million signatories to petitions launched by organisations calling for the Bill to be removed,<sup>6</sup> 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.”<sup>7</sup> 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 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.

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<sup>2</sup> 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>

<sup>3</sup> 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>

<sup>4</sup> 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>

<sup>5</sup> 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>.

<sup>6</sup> 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>

<sup>7</sup> *Navalnyy v Russia* [2018] ECHR 1062 (15 November 2018)

4. Before entering the House of Lords in September, the Bill completed its passage through the House of Commons on 5 July. The Commons made no changes to Part 3 of the Bill, which relates to protests. As such, no steps have been taken so far to remove those damaging provisions within the legislation which would do fundamental damage to protest rights in the UK.
5. During the passage of the Bill through the Commons, the Home Office Parliamentary Under Secretary of State, Victoria Atkins MP, argued that the legislation will not explicitly ban protests.<sup>8</sup> The use of such a claim in defence of a Government's Bill is a remarkable reflection on the extreme, undemocratic nature of the provisions in the Bill. Clearly, a blanket ban on the right to protest would breach the right to freedom of expression protected by Article 10 of the Human Rights Act. However, the Bill would drastically restrict the right to protest in a wide range of circumstances, including preventing some protests from taking place outside of Parliament and rescinding limits on how the police may restrict assemblies. This could result in the application of conditions which could nullify such a demonstration entirely.
6. The Minister also argued that the provisions in Part 3 will not result in the imprisonment of more people.<sup>9</sup> However, changing the law so that those in breach of protest conditions who "ought to have known" about them will be committing an offence; increasing penalties for such breaches; codifying a broad, otherwise "moribund", Public Nuisance Offence; and creating an expansive catalogue of protest offences will not only result in excessive criminalisation – it will have a broader chilling effect on protest.
7. During the passage of the Bill through Parliament, the Government have cited cases of protesters blocking emergency services as justification for provisions within this Bill<sup>10</sup>. It is important to note that it is already a criminal offence to obstruct or hinder emergency workers responding to emergency circumstances under the Emergency Workers (Obstruction) Act 2006. Therefore, instances of individuals deliberately blocking the routes of ambulances can be dealt with under existing criminal law.
8. During the House of Commons' Third Reading of the Bill, which saw it receive criticism from all sides of the House, Conservative backbencher Steve Brine MP actively encouraged Members of the House of Lords to address the problems posed by Part 3 of the legislation. Speaking during the debate he said, "I actually agree with some of what my right hon.

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<sup>8</sup> POLICE, CRIME, SENTENCING AND COURTS BILL, Public Bill Committee, House of Commons Official Report, 8 June 2021, [file:///C:/Users/User/Downloads/Commons-2021-06-08-Police,%20Crime,%20Sentencing%20and%20Courts%20Bill%20\(Ninth%20sitting\).p.pdf](file:///C:/Users/User/Downloads/Commons-2021-06-08-Police,%20Crime,%20Sentencing%20and%20Courts%20Bill%20(Ninth%20sitting).p.pdf)

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

Friend the Member for Haltemprice and Howden (Mr Davis) said. The parts of the Bill on protest are not right just yet, and I predict that they will have a challenging time in the other place.”<sup>11</sup>. It is imperative that peers act upon these words and move to protect our protest rights by amending the legislation.

9. In November 2021, the Government tabled its own set of amendments to Part 3 of the Bill ahead of Committee Stage scrutiny in the House of Lords. These amendments are vast in scope, could constitute a bill of their own and taken on their own merits would do further damage to protest rights in the UK. Given that the Bill has already passed through all of its stages in the Commons and halfway through the House of Lords, the Government’s late proposal of these amendments is an entirely cynical attempt to bypass Parliamentary scrutiny and does a disservice to both Houses. Any legislative proposals which engage fundamental rights, such as the rights to freedom of expression, freedom of association and the right to privacy, should undergo full and proper scrutiny by both Houses of Parliament. On these grounds alone, we believe that Peers should reject the addition of these amendments at Report Stage.
10. In and of themselves, these amendments present further threats to protest rights in the UK. In seeking to give police officers powers to stop and search protesters (including without suspicion) and introducing new civil protest banning orders, these amendments are entirely unprecedented and significantly threaten the health of British democracy.
11. This briefing is solely focused on protest rights affected by the Police, Crime, Sentencing and Courts Bill, specifically Part 3 of the Bill. 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 and that Peers should also vote against Government amendments, which threaten these fundamental rights further.** Below are our key concerns.

## IMPOSING CONDITIONS ON PUBLIC PROCESSIONS – CLAUSE 56

12. Clause 56 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

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<sup>11</sup> HC Deb, 5 July 2021, vol. 698, col. 604

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”.

13. 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”.<sup>12</sup>
14. 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 frontline officers by creating an unhelpful burden on the exercise of their professional discretion. This was reflected in a speech by Lord Oates during Report Stage in the House of Commons when he asked “Do we really think that a senior police officer should be put in a position where they have to take on the responsibility of determining whether a protest should go ahead at the place proposed or on the route planned on the basis of the noise that protest may generate and the impact that it may have on people?”<sup>13</sup>
15. During Committee Stage in the House of Commons, the Minister, Victoria Atkins, inferred that the new noise criteria for adding conditions to a protest may vary in its application depending on whether the buildings surrounding the protest in question are double or single-glazed.<sup>14</sup> This demonstrates the absurd nature of this provision which would be subjective in its application and could result in the curtailment of almost any protest in practice.
16. Clause 56 (4) also allows the Secretary of State power to delineate by way of secondary legislation what constitutes the “serious disruption to the life of the community” test

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<sup>12</sup> David Mead ‘Yes, you can... but only if you’re quiet,’ *Verfassungsblog* (17 March 2021) <https://verfassungsblog.de/uk-silence-protest/>

<sup>13</sup> HL Deb, 24 November 2021, vol. 816, col. 939

<sup>14</sup> POLICE, CRIME, SENTENCING AND COURTS BILL, Public Bill Committee, House of Commons Official Report, 8 June 2021, [file:///C:/Users/User/Downloads/Commons-2021-06-08-Police,%20Crime,%20Sentencing%20and%20Courts%20Bill%20\(Tenth%20sitting\).p.pdf](file:///C:/Users/User/Downloads/Commons-2021-06-08-Police,%20Crime,%20Sentencing%20and%20Courts%20Bill%20(Tenth%20sitting).p.pdf)



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 57

17. Clause 57 replicates the power to impose conditions based on noisiness contained in Clause 56 and applies them to static assemblies. This reiterates the concerns outlined at paragraphs 12-13.
18. Additionally, Clause 57 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 57, any conditions that “appear necessary” could be imposed on static assemblies, aligning sections 12 and 14 of the POA.
19. 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”.<sup>15</sup>
20. 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

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HC Deb, 13 January 1986, vol. 89, col. 797

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 58

- 21.** Clause 58 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 complex conditions the police impose.
- 22.** 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.”<sup>16</sup> 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.
- 23.** Clause 58 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. The damaging consequences of this provision were set out by Baroness Chakrabarti during the Bill’s passage through the House of Lords when she said “We have talked about the conditions and whether people ought to know about them. We are talking about imprisonment for up to 51 weeks. I do not think it is hyperbolic to suggest that this legislation, if passed unamended, will be as notorious as was the Cat and Mouse Act in the context of the suffragettes.”<sup>17</sup>

## LIMITING PROTESTS AROUND PARLIAMENT – CLAUSE 59

- 24.** Clause 59 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

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<sup>16</sup> 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>

<sup>17</sup>

HL Debate, 24 November 2021, vol. 816 col. 935

activities cannot take place. It also adds “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.

25. 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.<sup>18</sup> As the Court of Appeal has held, protest “becomes effectively worthless if the protester’s choice of ‘when and where’ to protest is not respected as far as possible.”<sup>19</sup>

26. During Committee Stage in the House of Commons, Victoria Atkins argued that Clause 59 was a “clear recommendation from the Joint Committee on Human Rights”.<sup>20</sup> However, in their report on Part 3 of the Bill, the Joint Committee on Human Rights emphasised that their recommendation protecting access to Parliament does not mean there should be an outright ban on protest in the area. They note that:

“the Government has decided not to impose a specific statutory duty on the police to protect access to Parliament as the JCHR recommended. Instead, the Government has decided to secure access to the estate by making obstructing vehicular access to Parliament a prohibited activity and widening the controlled area to protect access to the Parliamentary estate.”<sup>21</sup>

27. It is important that parliamentarians can access parliament and do their jobs free from violence or abuse. However, these wide-ranging provisions risk creating a dissent-free zone around the corridors of power, where protest is banned.

## INTENTIONALLY OR RECKLESSLY CAUSING PUBLIC NUISANCE – CLAUSE 61

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<sup>18</sup> *Ollinger v Austria*, Application No. 76900/01.

<sup>19</sup> *Singh and ors, R (on the Application of) v Chief Constable of West Midlands Police* [2006] EWCA Civ 1118, at para 87

<sup>20</sup> POLICE, CRIME, SENTENCING AND COURTS BILL, Public Bill Committee, House of Commons Official Report, 8 June 2021, [file:///C:/Users/User/Downloads/Commons-2021-06-08-Police,%20Crime,%20Sentencing%20and%20Courts%20Bill%20\(Tenth%20sitting\).p.pdf](file:///C:/Users/User/Downloads/Commons-2021-06-08-Police,%20Crime,%20Sentencing%20and%20Courts%20Bill%20(Tenth%20sitting).p.pdf)

<sup>21</sup> *Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order) Report*, JCHR, June 2021, <https://committees.parliament.uk/publications/6367/documents/69842/default/>

- 28.** Clause 61 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.
- 29.** 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. Given that many if not most protests may cause, or may risk causing, “serious annoyance”, a vast array of protesters 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.
- 30.** The definition of harm also includes an act or omission which causes another person to “suffer disease” or to risk doing so. This is an overly-broad inclusion that would give huge discretion to the police to arrest individuals they decide could “risk” spreading disease. In the context of the current COVID-19 pandemic, where a large proportion of cases are asymptomatic, there is a threat that the offence could lead to the arbitrary arrest of individuals, particularly in protest settings.
- 31.** The maximum custodial sentence for those found guilty of committing this offence 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.
- 32.** Reference to “disease” within the wording of the new offence and the impact that this could have on protest rights has been raised by Parliamentarians across the House. During the Bill’s Report Stage in the House of Lords, Lord Paddick remarked “we saw during the coronavirus pandemic, particularly with the attempt the ban the vigil for Sarah Everard on Clapham Common, restrictions on protest on public health grounds... Although the provisions under which the Sarah Everard vigil was done have been repealed, this appears to be an attempt to reintroduce them. As drafted, it matters not whether the protesters intend to spread disease. They must only be reckless as to whether it would have such a consequence.”<sup>22</sup>
- 33.** Holistically, 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 grossly offensive

communications.<sup>23</sup> 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”.<sup>24</sup> 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.

34. While Clause 61 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 62

35. Clause 62 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.
36. 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 protester 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 62 (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 protester potentially at risk of triggering the offence.
37. This clause largely mirrors Clause 56 and reiterates the concerns outlined at paragraphs 12-13.

## PROPOSED GOVERNMENT AMENDMENTS TO PART 3

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<sup>23</sup> 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/>

<sup>24</sup> *R v Roberts (Richard)* [2018] EWCA Crim 2739

## AMENDMENTS 148 & 149 – OFFENCE OF LOCKING ON & OFFENCE OF BEING EQUIPPED FOR LOCKING ON

**38.** Amendment 148 creates a new criminal offence of “locking on”. The offence targets people who commit one of the following:

- (i) Attach themselves to another person, to an object, or to land
- (ii) Attach a person to another person, to an object, or to land
- (iii) Attach an object to another object or to land

where this behaviour causes, or is capable of causing, “serious disruption” to two or more individuals or to an organisation in a public place, and they intend the act to have this consequence or are reckless as to whether it will have this consequence. There is a defence of ‘reasonable excuse’. The offence is punishable by a custodial sentence of up to 51 weeks, a fine, or both.

**39.** Amendment 149 creates a new criminal offence targeting people who have an object with them in a public place with the intention that it will be used in the course of or in connection with the commission by any person of the offence in 148 including locking on. The offence is punishable by a fine.

**40.** It is not clear that these measures are necessary or proportionate. A body of existing law gives the police powers to arrest individuals who obstruct public highways, obstruct emergency service vehicles or even make arrests where there is a breach of the peace. When consulted by Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) on this proposal police officers were not supportive when consulted and when asked, “most interviewees [junior police officers] did not wish to criminalise protest actions through the creation of a specific offence concerning locking-on.”<sup>25</sup>

**41.** It is not for the Government to decide how individuals should protest. These proposed offences are overly broad and will have wider consequences. For example, given that Amendment 148 makes reference to an individual attaching themselves to another person, it is unclear whether two people simply linking arms at a protest could fall foul of the offence.

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<sup>25</sup> Getting the balance right?: An inspection of how effectively the police deal with protests, HMICFRS, p. 125, March 2021, <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>

## AMENDMENT 150 – WILFUL OBSTRUCTION OF HIGHWAY

**42.** Amendment 150 increases the maximum sentence for the existing offence of wilfully obstructing a public highway to a custodial sentence of up to 51 weeks, a fine, or both. It is unlikely that this amendment will have any significant impact on the behaviour of those who choose to commit this offence but alongside the other proposals both in the Bill and the Government's proposed amendments, will likely have a wider chilling effect on those who may consider attending a protest in the future.

## AMENDMENT 151 – OBSTRUCTION OF MAJOR TRANSPORT WORKS

**43.** Amendment 151 creates a new criminal offence targeting obstruction of major transport works. A person will commit an offence either

- (i) if they obstruct an undertaker (e.g. construction worker) in setting out the lines of, constructing, maintaining, or taking any steps that are reasonably necessary for facilitating, or in connection with, the construction or maintenance of any major transport works
- (ii) if they interfere with, move, or remove any apparatus relating to the construction or maintenance of any major transport works and belonging to an undertaker.

The offence is punishable by a custodial sentence of up to 51 weeks, or a fine, or both.

**44.** This provision is incredibly broad and would likely have an array of seriously detrimental consequences for peaceful protest. For example, it is quite possible that such a measure could apply to those partaking in picket lines outside of workplaces which match the definitions set out in the offence. And while the amendment sets out a defence of "reasonable excuse" or where the act in question is "done wholly or mainly in contemplation or furtherance of a trade dispute", this would apply only after an individual was arrested and charged

**45.** This qualification also begs the question why such a defence should only apply in instances of those exercising their right to freedom of assembly as part of wider trade disputes and not to those protesting outside of a major transport works for other ends, for example a climate change protest. No rationalisation for this inconsistency has been provided by the Government.

**46.** The new offence is neither necessary nor proportionate and as a measure which will impact upon fundamental rights, merits more scrutiny than that which the Government have afforded it.

## AMENDMENT 152 – INTERFERENCE WITH USE OR OPERATION OF KEY NATIONAL INFRASTRUCTURE

**47.** Amendment 152 creates a new criminal offence of “interference with use or operation of key national infrastructure”. A person will commit an offence if they “do an act which interferes with the use or operation of any key national infrastructure in England and Wales” and “they intend that act to interfere with the use or operation of such infrastructure or are reckless as to whether it will do so”. The punishment for this offence is maximum 12-month custodial sentence, a fine, or both.

**48.** This Amendment defines “key national infrastructure” as including:

- (i) Road transport infrastructure;
- (ii) Rail infrastructure;
- (iii) Air transport infrastructure;
- (iv) Harbour infrastructure;
- (v) Downstream oil infrastructure; and
- (vi) Newspaper printing infrastructure.

**49.** There is a defence of “reasonable excuse” or that the act in question is “done wholly or mainly in contemplation or furtherance of a trade dispute”. As this offence could also have a bearing on industrial action, concerns here mirror those set out in paragraphs 44 and 45.

**50.** Disruptive behaviour which matches much of that described in the amendment is already captured by an array of existing offences such as wilfully obstructing a public highway or the obstruction of engines (trains), and as such, the offence is unnecessary. Further, the amendment enables the Home Secretary of the day to amend, and add to, the list of defined “key national infrastructure”. This provision offers unprecedented power to the Secretary of State to clamp down on particular protest sites and is entirely open to politicisation.

## AMENDMENTS 154 & 155 - POWERS TO STOP AND SEARCH WITH SUSPICION & POWERS TO STOP AND SEARCH WITHOUT SUSPICION



- 51.** Amendment 154 amends section 1 of the Police and Criminal Evidence Act 1984 to expand the types of offences that allow a police officer to stop and search a person or vehicle. The police officer must have reasonable grounds for suspecting they will find an article made, adapted or intended for use in the course of or in connection with the following new offences:
- Wilful obstruction (section 137 Highways Act 1980) of the free passage along a highway involving activity which causes or is capable of causing serious disruption to two or more individuals, or to an organisation;
  - Intentionally or recklessly causing public nuisance (clause 61)
  - Locking on (amendment 148)
  - Obstruction of major transport works (amendment 151)
- 52.** Amendment 155 expands suspicionless stop and search powers such that a police officer of or above the rank of inspector may make an authorisation applying to a particular place for a specified period that allows police officers to stop and search someone or a vehicle without suspicion where they reasonably believe that one of the offences described in Paragraph 51 may be committed in that area.
- 53.** This is an unprecedented expansion of stop and search powers, usually reserved for areas of serious criminal activity and constitutes a major infringement on the ability of citizens in the UK to freely exercise their right to protest. This was a point made during Committee Stage of the Bill in the House of Lords, during which Lord Kennedy said “On suspicion-less stop and search, and the serious disruption prevention orders, the Government are mirroring laws that currently exist for serious violence and knife crime. Unless I am wrong, and I am sure the Minister will correct me if I am, these measures apply to peaceful protesters, not people carrying knives or causing violence, and that is a huge issue for us.”<sup>26</sup>
- 54.** Once again, these are not provisions that would be actively welcomed by police officers themselves. Amongst the list of the police’s 19 potential proposals in the HMICFRS report, a protest-specific stop and search power was not one of them and it is not clear that it is desirable among police. When asked about their views on the Home Office’s proposal for a new stop and search power, one police officer stated that “a little inconvenience is more

acceptable than a police state”<sup>27</sup> to which HMICFRS went on to state that they “agree with this sentiment.”<sup>28</sup>

55. Considered cumulatively with the offences referred to in the amendment, this would mean that under these powers an individual could be stopped and searched by an officer, without suspicion, where it is believed that the individual in question could merely *risk* causing another person to suffer serious annoyance (public nuisance offence – Clause 61). Coupled with the breadth of the offences previously discussed, these powers grant officers an unacceptably large amount of power and discretion to stop and search almost anyone in a political setting. Such a measure should not be considered tolerable in a liberal democracy and it is likely that instances such as the hypothetical scenario described above, carried out in a protest setting, would be an unlawful violation of Article 11 rights (the right to freedom of assembly and association) as enshrined in law by the Human Rights Act 1998.
56. Such authoritarian powers at the police’s disposal would have a serious chilling effect on those who may consider exercising their right to protest. The broader implications of amendments 157 and 158 is manifest and given the discretion they grant police officers, they would likely be felt most significantly by those from minority groups.

## AMENDMENT 159 – SERIOUS DISRUPTION PREVENTION ORDERS

57. Amendment 159 establishes Serious Disruption Prevention Orders (SDPOs) or protest banning orders. SDPOs constitute a new civil order that will impose significant requirements and wide-ranging prohibitions on individuals who have participated in multiple protests (even if they have not been convicted of any offence), the breach of which could result in 51 weeks’ imprisonment or a fine (or both).

58. SDPOs can be made:

- (i) on conviction by a court of someone who has committed two ‘protest-related offences’ within the space of five years;
- (ii) without conviction if someone has carried out activities or contributed to the carrying out of activities by any other person related to a protest that resulted in/were likely to result in serious disruption (among a range of other scenarios).

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<sup>27</sup> Getting the balance right?: An inspection of how effectively the police deal with protests, HMICFRS, March 2021, <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>

<sup>28</sup> Ibid.

59. This criteria is incredibly broad. The term “serious disruption” is in itself subjective and creates a low threshold which could result in draconian measures being placed on many individuals who are simply exercising their democratic right to protest.
60. Once an SDPO has been placed on an individual, they must fulfil certain obligations including both prohibitions and positive requirements. Fulfilment of these obligations could require de facto surveillance of the individual in question and could also include a prohibition on attending future protests.
61. The idea that any free citizen in England or Wales should be banned from exercising their right to protest is deeply chilling and an affront to Articles 10 and 11 of the European Convention on Human Rights.
62. Discussing this proposal at Lords Committee Stage, Lord Oates said “...we have heard about government Amendment 319K [now 159], which introduces serious disruption prevention orders, creating criminal liability based on the civil burden of proof, and imposing a series of potential restrictions on individuals. The penalty for breaching any of those conditions is imprisonment. As my noble friend Lord Paddick said, these are protest banning orders, and they have no place in our society.”<sup>29</sup>

## CONCLUSION AND RECOMMENDATIONS

63. Taken into consideration individually, the preceding clauses in Part 3 of the Police, Crime, Sentencing and Courts Bill and proposed amendments to this Part give rise to grave concerns. But they become even more damaging when understood cumulatively. By targeting the tools that make protest meaningful, not only will Government dissuade people from expressing their views and standing up for what they believe in, but undermine democracy, and the crucial measures of accountability and scrutiny that uphold it.
64. **As such, Big Brother Watch urges Members of the House of Lords to safeguard protest rights and support amendments by Lords Paddick and Hain, which seek to remove Clauses 56 – 62 from the Bill.**
65. **We also urge Peers to support amendment 137A to clause 61. This amendment seeks to remove reference to “disease” from the newly proposed public nuisance offence, which as currently worded, could have broad application and result in the curtailment**

**of protest rights and infringement of civil liberties, particularly in the context of the pandemic.**

**66. The Government's own amendments (148-159) constitute a vast and unjustified expansion of police powers, would do a serious degree of damage to British democracy and pose a significant threat to protected rights to freedom of expression, freedom of association and the right to privacy. Particularly in the absence of full and proper Parliamentary scrutiny of these proposals, Peers must vote to reject their addition to the Bill.**

**67. 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 the public's ability to protest. We strongly urge Parliament to excise these aspects of the Bill, and reject the Government's proposed amendments to this part, in their entirety.**