

BIG BROTHER WATCH

**Big Brother Watch briefing
on the Public Order Bill for
Second Reading in the
House of Commons**

May 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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INTRODUCTION

1. The Public Order Bill poses a direct threat to the right to protest. Consisting largely of provisions that the Government failed to pass in the recent Police, Crime Sentencing and Courts Act 2022 (PCSC Act), the Bill places draconian new powers in the hands of the state to criminalise and stifle the freedoms of those who exercise their democratic rights.
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."¹ The presumption must rest in favour of protecting these rights and the authorities have a positive obligation to facilitate their enactment.
3. Unnecessary suppression and criminalisation of dissent, which this Bill would do, goes against the very best democratic traditions of the UK 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 both the Public Order Act 1986 (POA) and now the PCSC Act, police have vast powers to impose conditions and prohibit certain protests, as well as broad discretion in how those powers are applied.
4. This Bill would further strengthen state power and weaken public freedoms. Should this Bill pass through Parliament in its current form, it would drastically limit the ability for people to participate in British democratic life.
5. The Bill seeks to introduce a raft of measures which the Government had previously sought to tack on the (then) PCSC Bill. The amendments were **all rejected outright** by the House of Lords. The measures included in these amendments, which now make up the Public Order Bill, include the introduction of new offences of "locking on", obstruction of "major transport works" and interference with "key national infrastructure". In each case, these offences are broadly worded. Whilst these activities are very serious,

¹ Navalnyy v Russia [2018] ECHR 1062 (15 November 2018)

we are concerned about the introduction of broad new criminal laws in areas that are already legislated for. The Government has not justified the necessity of these new offences.

6. In addition to these new offences, the Government has also sought to introduce draconian new police powers which target protesters, and to bring in punitive civil orders which can be placed on people, restricting their movement, subjecting them to invasive electronic surveillance or even banning them from attending protests entirely. These chilling new orders can specifically be applied to innocent people who have never committed or even been suspected of any offence. As peers observed during debates on these provisions, in the House of Lords, these measures should have no place in a free and democratic society.²
7. The Government frequently cite cases of protesters blocking emergency services as justification for creating many of these draconian new measures. However, it is already a criminal offence to obstruct or hinder emergency workers under the Emergency Workers (Obstruction) Act 2006 and a criminal offence to obstruct a public highway under the Highways Act 1980. Therefore, instances of individuals deliberately blocking the routes of ambulances or obstructing major thoroughfares could be dealt with under existing criminal law. Chilling and broad new anti-democratic laws should not be passed in order to paper over the cracks of policing failures.
8. This briefing covers Big Brother Watch's key concerns, addressing where this legislation will have a major detrimental impact on human rights and civil liberties. **Given the sweeping nature of these powers and the new systems of repression and surveillance that they will enable, Big Brother Watch recommends that MPs vote against the Public Order Bill at Second Reading. In particular, in order to protect civil liberties in the UK, measures which would allow protesters to be stopped and searched or subject to intrusive state surveillance must never become law.**

PART 1: PUBLIC ORDER

Clause 1 – Offence of locking on & Clause 2 – Offence of being equipped for locking on

9. Clause 1 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

10. This offence applies 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 a 'reasonable excuse'. The offence is punishable by a custodial sentence of up to 51 weeks, a fine, or both.
11. Clause 2 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 clause 1, including locking on. The offence is punishable by a fine.
12. 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 breach the peace. When consulted by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) on this proposal police officers were not supportive 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."³
13. These proposed offences are overly broad and will have wider consequences. For example, given that clause 1 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.

Clause 3 - Obstruction etc of major transport works

14. Clause 3 creates a new criminal offence targeting obstruction of major transport works. A person will commit an offence where they either:
- (a) obstructs the undertaker or a person acting under the authority of the undertaker—*
- (i) in setting out the lines of any major transport works,*

³ Getting the balance right?: An inspection of how effectively the police deal with protests, HMICFRS, p. 125, March 2021, p.125, <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>

(ii) in constructing or maintaining any major transport works, or
(iii) in taking any steps that are reasonably necessary for the purposes of facilitating, or in connection with, the construction or maintenance of any major transport works, or

(b) interferes with, moves or removes any apparatus which—

(i) relates to the construction or maintenance of any major transport works, and
(ii) belongs to a person within subsection (5).

15. The offence is punishable by a custodial sentence of up to 51 weeks, or a fine, or both.
16. The new offence has not been adequately justified. A number of offences, including public order offences, could already apply in such circumstances. The Trades Union and Labour Relations (Consolidation) Act 1992 even makes it an offence to “watch or beset” a workplace with a view to obstruction, and this incredibly broad offence has been used to successfully prosecute environmental campaigners in recent years.
17. This new offence 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. While the offence 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.
18. This qualification 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 reasons. No rationalisation for this inconsistency has been provided by the Government.
19. The new offence is neither necessary nor proportionate and should be opposed.

Clause 4 - Interference with use or operation of key national infrastructure & Clause 5 - Key national infrastructure

20. Clause 4 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 a maximum 12-month custodial sentence, a fine, or both.

21. The clause defines “key national infrastructure” as including:

(a) road transport infrastructure,

(b) rail infrastructure,

(c) air transport infrastructure,

(d) harbour infrastructure,

(e) downstream oil infrastructure,

(f) downstream gas infrastructure,

(g) onshore oil and gas exploration and production infrastructure,

(h) onshore electricity generation infrastructure, or

(i) newspaper printing infrastructure.

22. Clause 5 further elaborates on what constitutes, for example “road transport infrastructure”. Whether all of these areas, such as the independent press, constitute “national infrastructure” could reasonably be debated, as should the wider consequences of designating them as such.

23. 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 17 and 18.

24. Disruptive behaviour which matches much of that described in this clause 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.

Clause 6 - Powers to stop and search on suspicion & Clause 7 - Powers to stop and search without suspicion

25. Clause 6 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 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 (Police, Crime, Sentencing and Courts Bill – Section 61)*
- *Locking on (Clause 1)*
- *Obstruction of major transport works (Clause 3)*
- *Interference with use or operation of key national infrastructure (Clause 4)*

26. Clause 7 expands suspicion-less 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 24 may be committed in that area. Intentionally obstructing a constable in the exercise of their powers under clause 7 will also become a criminal offence.

27. This is a serious expansion of stop and search powers specifically in relation to freedom of expression and constitutes a major infringement on the ability of citizens in the UK to freely exercise their right to protest. During Committee Stage of the PCSC Bill in the House of Lords, 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.”⁴

28. Clauses 8 and 9 set out obligations placed on officers who make use of the aforementioned powers. These include reporting obligations on officers and an entitlement conferred to those who have been stopped and searched to receive a corresponding written statement, following the incident. These are entirely insufficient safeguards to a manifestly disproportionate and overbearing new police power.
29. These are not provisions that police have asked for. 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. 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"⁵ to which HMICFRS went on to state that they "agree with this sentiment."⁶
30. 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 serious annoyance (Public Nuisance Offence, Police, Crime, Sentencing and Courts Bill – Section 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.
31. 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 clauses 6 and 7 is manifest and given the discretion they grant police officers, they would likely be felt most significantly by those from minority groups.

PART 2:SERIOUS DISRUPTION PREVENTION ORDERS

- Clause 12 - Serious disruption prevention order made on conviction & Clause 13 - Serious disruption prevention order made otherwise than on conviction**

⁵ Getting the balance right?: An inspection of how effectively the police deal with protests, HMICFRS, March 2021, p. 109, <https://www.justiceinspectrates.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>

⁶ Ibid.

32. Clauses 12 and 13 establish 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 attended 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).

33. 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) on two or more occasions. This can be applied for by a chief police officer to a magistrates court.

34. This criteria is incredibly broad. The term "serious disruption" is not defined in the Bill and is subjective, creating a low threshold which could result in draconian measures being placed on many individuals who are simply exercising their democratic rights.

35. An order can be brought based on the individual attending two or more protests in the previous 5 years and can last for any time between 1 week and 2 years.

36. Once an SDPO has been placed on an individual, they must fulfil certain obligations including both prohibitions and positive requirements, as set out in clause 14. Fulfilment of these obligations could constitute surveillance of the individual in question and could also include a prohibition on attending future protests. It could also include a prohibition on "using the internet" to "encourage" people to carry out "activities related to a protest" protests if they are "likely to result" in "serious disruption" to two or more individuals.

37. The idea that any free and innocent citizen in England or Wales should be banned from exercising their right to freedom of expression is deeply chilling and an affront to Articles 10 and 11 of the European Convention on Human Rights.

38. Chillingly, the requirements may also include an obligation:

(c) to submit to electronic monitoring of P's compliance with other requirements and prohibitions imposed by the order.

39. This is dystopian and wholly unacceptable. GPS tagging uses location data to monitor an individual's whereabouts for 24 hours a day.⁷ This could and involve placing an individual under an extreme level of surveillance, despite the fact that the individual is explicitly innocent of committing any crime.
40. Using GPS tagging to prohibit individuals from exercising their right to free expression and free assembly would be a violation of their fundamental rights. However, this level of monitoring would also allow the state to follow the individual's movements all of the time, including any religious, medical or other confidential activities. This itself is a violation of the right to privacy.
41. Despite this significant intrusion into the lives of those subject to a protest banning order, the data protection safeguards are insufficient. Clause 25 of the Bill establishes that the Secretary of State:
- "must issue a code of practice relating to the processing of data gathered in the course of electronic monitoring of individuals under electronic monitoring requirements imposed by serious disruption prevention orders"*
42. However, this code is not binding. Further the Bill's explanatory notes set out that while the processing of data collected in the course of electronic tagging an individual will be subject to GDPR requirements, the code will establish "the circumstances in which it may be permissible to share data with the police to assist with crime detection".
43. When consulted on the concept of protest banning orders, police officers themselves roundly rejected the concept. In the HMICFRS report on expanding police powers to facilitate protests, officers said that protest banning orders "would neither be compatible with human rights legislation nor create an effective deterrent"⁸. Ministers should take heed of this warning and not introduce a power that officers themselves do not want.
44. Discussing protest banning orders during the Committee Stage of the Police, Crime, Sentencing and Courts Bill in the House of Lords, Lord Oates said:

⁷ Tagging: Everything you need to know about being tagged, UK Government Electronic Monitoring Services, 2018, p. 19 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/823813/Subject_Handbook.pdf

⁸ Getting the balance right?: An inspection of how effectively the police deal with protests, HMICFRS, March 2021, p. 16 <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>

*"...we have heard about ... 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."*⁹

CONCLUSION AND RECOMMENDATIONS

45. The sweeping clauses in the Public Order Bill give rise to serious concerns. It is without doubt that they include some of the most undemocratic anti-protest measures seen in the UK for decades. New stop and search powers that specifically target protesters and protest banning orders that would prevent individuals from exercising their democratic rights altogether, are chilling.
46. Not only do these measures constitute a violation of the rights to free expression and freedom of assembly, they are also an affront to the right to privacy. The electronic tagging of individuals exercising their democratic rights, who are not guilty of any crime, takes the UK closer to becoming an oppressive surveillance state.
47. Considered cumulatively and following in the wake of the Police, Crime, Sentencing and Courts Act, these measures present as a concerted attack on the right to protest and risk a chilling effect, which will impact those considering exercising this right in the future.
48. **In order to safeguard the rights to freedom of assembly, freedom of expression and privacy, Big Brother Watch urges MPs to vote against the Public Order Bill at Second Reading.**