

BIG BROTHER WATCH

Big Brother Watch briefing on the Public Order Bill for Report Stage in the House of Lords

January 2023

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 2022, 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 earlier this year, 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. The lack of necessity to create further restrictions on the right to protest, due to the vast body of existing law in this area, was a point made by Conservative MP Charles Walker, during House of Commons report stage. After issuing a list of existing laws which dictate the limitations on the right to protest, he said:

*"the Government's attraction to SDPOs [Serious Disruption Prevention Orders] demonstrates our own impotence as legislators and the impotence of the police as law enforcers to get to grips with the laws already in place and to enforce them. This is what we do now in politics: we have these machismo laws where something must be done, so we go out and do it, and that makes a good headline in The Daily Telegraph and The Times, but we do it and then very little happens, or if it does happen it is way over the top."*³

9. This briefing covers Big Brother Watch's key concerns, addressing where this legislation will have a major detrimental impact on human rights and civil

² HL Deb, 24 November 2021, vol. 816, col. 990
³ HC Deb, 18 October 2022, vol. 720, col. 581

liberties. Given the sweeping nature of these powers and the new systems of repression and surveillance that they will enable, Big Brother Watch urges Members of the House of Lords to oppose the Public Order Bill. In particular, we call on Peers to support stand part amendments in the name of Lords Paddick and Coaker which would remove clauses 10 and 11 and stand part amendments in the name of Lord Ponsoby which would remove clauses 19 and 20 from the Bill. This would remove so called protest banning orders and new protest-specific stop and search police powers. Failure to remove these clauses would allow protesters to be stopped and searched or subject to intrusive state surveillance and must never become law in a liberal democracy like the UK.

PART 1: PUBLIC ORDER

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

10. 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

11. 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 the person in question intends the act to have this consequence or is 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.

12. 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 (locking on). The offence is punishable by a fine.

13. 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.”⁴

14. 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.

Clauses 3, 4 & 5 – New “tunnelling” offences

15. In advance of House of Commons committee stage, the Government proposed a series of its own amendments to the Bill. These included 3 new criminal offences.

16. Clause 3 makes “tunnelling” a criminal offence and states that an individual will commit an offence if:

(a) they create, or participate in the creation of, a tunnel,
(b) the creation or existence of the tunnel causes, or is capable of causing, serious disruption to—

(i) two or more individuals, or

(ii) an organisation, in a place other than a dwelling, and

(c) they intend the creation or existence of the tunnel to have a consequence mentioned in paragraph (b) or are reckless as to whether its creation or existence will have such a consequence.

17. The offence is punishable by a custodial sentence of up to 3 years, a fine, or both. Clause 4 also criminalises “being present in a tunnel”, with the same maximum sentence.
18. Clause 3 attempts to define what constitutes a tunnel by setting out that this is an “excavation” that need not be “big enough to permit the entry or passage of an individual” or “lead to a particular destination”. Only private dwellings are expressly exempt from the scope of the offence.

⁴ Getting the balance right?: An inspection of how effectively the police deal with protests, HMICFRS, p. 125, March 2021, p.125, <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>

19. The breadth of this definition is staggering. It is clear that the Government are writing this legislation with a narrow set of instances and groups in mind, despite the fact that many of the behaviours described in clause 3 are captured by a range of existing offences. This would include aggravated trespass, criminal damage and laws around trespassory assemblies. This is no way to make law in a country like the UK.

20. When consulted on being awarded these new powers it was made clear by police officers themselves that they are not wanted. In a submission to the House of Commons Public Order Bill Committee, the National Police Chiefs' council said:

*"Whilst forces have experienced tunnelling in recent operations, we do not believe that a specific offence around tunnelling will add anything above and beyond our current available powers."*⁵

21. Clause 5 also makes being equipped for tunnelling a criminal offence. It states:

A person commits an offence if they have an object with them in a place other than a dwelling with the intention that it may be used in the course of or in connection with the commission by any person of section 3(1) or 4(1) (offences relating to tunnelling)

22. The "objects" in question are undefined and the person commits an offence if the object "may" be used in connection with a tunnelling offence. The object does not actually have to be used to dig a tunnel.

23. This leaves open the possibility that the offence set out in clause 5 could be used to criminalise individuals in a range of absurd scenarios. This means that someone in possession of gardening equipment or construction tools could be found guilty of an offence if they are in the wrong place at the wrong time.

24. Peers raised objections to the new tunnelling offences at House of Lords Second Reading, including former Supreme Court Justice, Lord Hope of Craighead, who criticised the Government's approach of creating criminal offences based on hyper-specific activities. He said:

"I recognise the problems, but there is already a huge range of legislation that confers power on the police to control public protests and assemblies: causing criminal damage, obstructing a police officer,

⁵ Evidence submission to the Public Order Bill Committee by the National Police Chiefs' Council, National Police Chiefs' Council, 9 June 2022, <https://bills.parliament.uk/Publications/46825/Documents/1960>

obstructing a highway, endangering road users and so on. These existing offences are defined by the purpose or effect of the activity rather than the method by which it is carried out. Directing attention to the method, as Part 1 does, rather than to its purpose or effect, may be good box office but it requires a high degree of precision if it is not to criminalise activities that have nothing to do with the protests.”⁶

25. In addition to the creation of the 3 new criminal offences described above, it is particularly concerning that the Government have also chosen to add the offences of tunnelling and being present in a tunnel to the list of offences connected to police stop and search powers. These powers grant officers the power to stop and search someone with suspicion and without suspicion. This means that if an officer reasonably believes that tunnelling or being present in a tunnel could be happening in a locality, they may stop anyone and search them for articles which could be used in connection with those offences.
26. This takes stop and search to a new level. With each expansion of stop and search powers, for non-violent crimes, where officers can act without suspicion, the UK moves closer to a checkpoint society where police officers can stop anyone on the street without good reason to do so.

Clause 6 - Obstruction etc of major transport works

27. Clause 6 creates a new criminal offence targeting obstruction of major transport works. A person will commit an offence where they:
- (a) obstruct the undertaker or a person acting under the authority of the undertaker—*
 - (i) in setting out the lines of any major transport works,*
 - (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) interfere with, move or remove any apparatus which—*
 - (i) relates to the construction or maintenance of any major transport works, and*
 - (ii) belongs to a person within subsection (5).*
28. The offence is punishable by a custodial sentence of up to 51 weeks, or a fine, or both.

29. 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.
30. 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.
31. 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 reasons. No rationalisation for this inconsistency has been provided by the Government.
32. The new offence is neither necessary nor proportionate and should be opposed.

Clause 7 - Interference with use or operation of key national infrastructure & Clause 8 - Key national infrastructure

33. Clause 7 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.
34. 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.*

35. Clause 8 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.
36. 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 30 and 31.
37. 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, clause 7 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 9 - Offence of interference with access to or provision of abortion services

38. Clause 9 creates a new criminal offence of interfering with "any person's decision to access, provide, or facilitate the provision of abortion services in a designated buffer zone". A "buffer zone" is defined as "150 metres from any part of an abortion clinic or any access point to any building or site that contains an abortion clinic".
39. The term "interferes with" is defined as:

- (a) seeks to influence,*

- (b) persistently, continuously or repeatedly occupies,*
- (c) impedes or threatens,*
- (d) intimidates or harasses,*
- (e) advises or persuades, attempts to advise or persuade, or otherwise expresses opinion,*
- (f) informs or attempts to inform about abortion services by any means, including, without limitation, graphic, physical, verbal or written means, or*
- (g) sketches, photographs, records, stores, broadcasts, or transmits images, audio, likenesses or personal data of any person without express consent.*

40. Persons found guilty of committing this offence can face a custodial sentence of up to 6 months, a level 5 fine or both. The offence does not include any stated defence.
41. This clause was added to the Bill by Members of Parliament during report stage of the Bill in the House of Commons. Members voted 297 to 110 in favour of adding NC11, which was tabled by Stella Creasy MP, to the Bill. MPs were told by whips in advance of the division that they would be given a free vote.
42. The issues at the heart of the debate around abortion buffer zones engage competing rights. It is absolutely vital that women are able to safely access reproductive health care services. Obstructing access to such services could violate Article 2 of the ECHR, the right to life; Article 3, freedom from torture and inhuman or degrading treatment; and Article 8, the right to privacy and family life. Women's right to access healthcare without obstruction or harassment must be protected.
43. It is clear, however, that that the new criminal offence set out in clause 9 is likely to violate Articles 10 and 11 of the ECHR, the rights to freedom of expression and freedom of assembly. The offence also engages Article 9, the right to freedom of thought, belief and religion.
44. In particular, the breadth of the offence set out in clause 9 has real scope to result in a violation of these rights. The offence draws a buffer zone of up to 150 metres around the clinics in question, which could result in the criminalisation of protest activities, speech, or the delivery of information in an area with abortion clinics.

45. The offence can also expressly criminalise any individual who “expresses opinion” within the designated area. This is an intolerably broad threshold at which to incur criminality.
46. Public order laws already exist to prevent people from harassing, abusing or intimidating people entering or leaving abortion clinics. Given the importance of the rights at stake, it is particularly important that police use their resources and existing powers appropriately to protect staff and service users alike.
47. It is notable that the Parliamentary Under Secretary of State in the Home Office, Lord Sharpe of Epsom, issued a written statement following the House of Commons vote to include clause 9 in the Bill. In the statement, Lord Sharpe said:
- “Section 19(1) of the Human Rights Act provides a mechanism to notify Parliamentarians if a statement cannot be made that a clause is compatible with the ECHR, but this does not fetter the right of Parliament to legislate in such a way, should it wish.*
- I am unable, but only because of clause 9, to make a statement that, in my view, the provisions of the Bill are presently compatible with Convention rights but the Government nevertheless wishes to proceed with the Bill.”⁷*
48. This appears to be an admission by the Government that the Public Order Bill is incompatible with the human rights framework that provides the foundation for liberty in Europe. It is unconscionable that the Government should intentionally legislate to create policing powers that are incompatible with the British public’s protected right to free speech. As such, the Bill requires urgent review and revision.
49. Given that the Public Order Bill has been amended to include clause 9 since the Government issued the memorandum of compatibility with the ECHR, it is vital that this document is now revised. The Government should also take this opportunity to review the compatibility of other sections of the legislation which are also likely to violate convention rights. Further, the Bill’s impact assessment and Equality Impact Assessment now require urgent revision.
50. Big Brother Watch acknowledges the critical importance of protecting women’s right to access reproductive healthcare and to seek health services

safely, without obstruction or harassment. However, creating prohibitions on protests on an issue by issue basis – particularly where doing so is incompatible with ECHR – is not an appropriate way to make law, threatens protected rights, and sets a precedent that will inevitably lead to attempts to prevent speech, expression, information sharing, assembly or the holding of protected beliefs around other sites, or in relation to other controversial or unpopular causes in the future.

Clause 10 - Powers to stop and search on suspicion & Clause 11 - Powers to stop and search without suspicion

51. Clause 10 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)*
- *Tunnelling offences (clauses 3 and 4)*
- *Obstruction of major transport works (clause 6)*
- *Interference with use or operation of key national infrastructure (clause 7)*

52. Clause 11 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 51 may be committed in that area. Intentionally obstructing a constable in the exercise of their powers under clause 11 will also become a criminal offence.

53. 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 report stage of the Bill in the House of Commons, the Chair of the Joint Committee on Human Rights, Joanna Cherry said:

*"The most concerning part of the Bill is the power to stop and search without reasonable suspicion. That is a highly exceptional power and will inevitably give rise to the risk of arbitrary or discriminatory use. Such powers have previously been authorised only in respect of serious violence and terrorism. The Committee believes their introduction in response to problems caused by disruptive protest would be disproportionate and inconsistent with the right to engage in peaceful protest."*⁸

54. Clauses 12 and 13 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.

55. Discussing the new protest-specific stop and search powers during House of Commons second reading, Alex Cunningham MP asked:

*"If Parliament Square were designated as an area for suspicionless stop and search, which the Bill introduces, could Members of Parliament and our staff coming to work on the estate be stopped and searched by police? It seems far-fetched, but that may be a logical conclusion of the measures in the Bill. I would be grateful if the Minister shared his thoughts on his staff potentially being caught by these measures as they head into the office."*⁹

56. 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

8 HC Deb. 18 October 2022, vol. 720, col. 569
9 HC Deb, 23 May, vol. 715, col. 111

stated that “a little inconvenience is more acceptable than a police state”¹⁰ to which HMICFRS went on to state that they “agree with this sentiment.”¹¹

57. 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.

58. 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 10 and 11 is manifest and given the discretion they grant police officers, they would likely be felt most significantly by those from minority groups. **It is vital that these clauses are removed from the Bill.**

Clause 16 - Assemblies and one-person protests: British Transport Police and MoD Police

59. Clause 16 was added to the Bill as a Government amendment, laid before House of Commons committee stage. This new clause grants officers from British Transport Police and Ministry of Defence Police powers to add conditions to (and therefore limit) assemblies and one-person protests. The Bill also gives officers from these police forces new powers to request permission to prohibit “trespassory assemblies”.

60. This constitutes a further expansion of police powers. It is unclear why existing powers are deemed insufficient to deal with disruptive protests.

61. Problems with granting these powers were raised by Peers at House of Lords Second Reading, including by Lord Beith, who pointed out that British Transport Police is “a force that is not locally accountable”¹² and therefore

¹⁰ Getting the balance right?: An inspection of how effectively the police deal with protests, HMICFRS, March 2021, p. 109, <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>

¹¹ Ibid.

¹² HL Deb. 1 November 2022, vol. 825, col. 152

may not be scrutinised in the same way as local forces are when exercising their powers to facilitate protests.

Clauses 17 and 18 - Power of Secretary of State to bring proceedings and Injunctions in Secretary of State proceedings: power of arrest and remand

62. Clauses 17 and 18 confer new powers to the Secretary of State to bring civil injunctions to prohibit protests in specific instances. At present civil injunctions can only be applied for by people who are affected, such as a Highway Authority or a company such as HS2 Limited¹³.
63. Clause 17 allows the Secretary of State to apply for a 'quia timet' injunction (i.e. a precautionary injunction) to prevent people from carrying out a protest or protest-related activities, despite not being affected or a party in the normal sense.
64. The Secretary of State can seek such an injunction if they reasonably believe that the activities are causing, or are likely to cause, serious disruption to—
- (a) the use or operation of any key national infrastructure in England and Wales, or*
- (b) access to any essential goods, or to any essential service, in England and Wales.*
65. The Secretary of State can also seek an injunction if they reasonably believe that the activities are having, or are likely to have, a serious adverse effect on public safety in England and Wales.
66. Clause 18 allows the Secretary of State to seek from the court, the ability to add the power of arrest to injunctions granted under clause 17.
67. Curiously, clause 18 says that the addition of these powers of arrest may be sought where injunctions have been granted to prohibit conduct which
- (a) is capable of causing nuisance or annoyance to a person, or*
- (b) is capable of having a serious adverse effect on public safety,*
68. It is notable clause 17 does not allow the Secretary of State the power to seek injunctions on the grounds of preventing nuisance or annoyance. Whether the inconsistency in these clauses is a result of a drafting error or a deliberate

¹³ HS2 route-wide injunction, HS2 Limited, <https://www.hs2.org.uk/in-your-area/hs2-route-wide-injunction/>

attempt at mission creep, this warrants an urgent clarification from the Government.

69. Clauses 17 and 18 constitute a deeply concerning step in the development of public order legislation in the UK. Where previously only affected parties could apply for injunctions to prevent certain protests, this now gives a single politician the power to prohibit individual demonstrations based on incredibly broad criteria. This approach will grant the state overwhelming power to restrict specific protests and poses the risk that this could be done on a political basis.

70. During the report stage debate on these new powers, Caroline Lucas set out how they might be used to criminalise entirely innocent behaviours when she said:

*"Let us suppose that the Government set their sights on a group of countryside ramblers planning a walk headed in the direction of a nature reserve that is home to a protected species and about to be dug up by investment zone bulldozers. The Secretary of State might decide that there is a risk that the ramblers will link hands to try to close down a major bridge that is required for vehicle access to the nature reserve. The Government might then apply for an injunction to stop the walk and for the power to arrest anyone who breaches that injunction and goes rambling in the countryside—regardless of their intentions. If successful, a new public order offence will have effectively been created on the basis of potential disruption of key national infrastructure, and the ramblers concerned will be at risk of being fined or even imprisoned."*¹⁴

71. The Government have adopted these powers following suggestions from the Labour Party that injunctions should be used to suppress demonstrations which are deemed to be "disruptive". Given the manifest threats to civil liberties presented by clauses 17 and 18, the opposition should abandon this policy position and the Government should remove these powers from the Bill.

PART 2: SERIOUS DISRUPTION PREVENTION ORDERS

Clause 19 - Serious disruption prevention order made on conviction & Clause 20 - Serious disruption prevention order made otherwise than on conviction

72. Clauses 19 and 20 establish Serious Disruption Prevention Orders (SDPOs) or protest banning orders. SDPOs constitute a new civil order that will impose

¹⁴ HC Deb. 18 October 2022, vol. 720, col. 595

significant requirements and wide-ranging prohibitions on individuals who have carried out activities related to 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).

73. 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.

74. This criteria is incredibly broad. The term "serious disruption" is broad, creating a low threshold which could result in draconian measures being placed on many individuals who are simply exercising their democratic rights. As will be discussed later in this briefing, the Government are only seeking to lower this threshold further.

75. An order can be brought based on the individual that has "carried out activities related to" two or more protests in the previous 5 years and can last for any time between 1 week and 2 years.

76. 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 21. 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.

77. 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.

78. 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.

79. This is dystopian and wholly unacceptable. GPS tagging uses location data to monitor an individual's whereabouts for 24 hours a day.¹⁵ This could involve placing an individual under an extreme level of surveillance, despite the fact that the individual is explicitly innocent of committing any crime.

80. 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.

81. Despite this significant intrusion into the lives of those subject to a protest banning order, the data protection safeguards are insufficient. Clause 32 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"

82. 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".

83. These provisions were referred to in the speech of Caroline Lucas MP during House of Commons second reading when she said:

*"the Bill takes state surveillance to chilling new levels—for example, allowing electronic monitoring of someone subjected to an SDPO, with only the vaguest of safeguards applying to any data collected, and the potential for associated negative impacts on individuals' privacy and the wider community. It bears repeating that this could happen to someone who has committed no crime."*¹⁶

¹⁵ 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

¹⁶ HC Deb. 23 May, vol. 715, col. 100

84. Over 100,000 people have now signed Big Brother Watch's [petition](#), calling for the Government to scrap protest banning orders completely.

85. 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"¹⁷. Ministers should take heed of this warning and not introduce a power that officers themselves do not want.

86. Discussing protest banning orders during the Bill's second reading in the House of Commons, Conservative MP, Richard Fuller said:

*"[Then] Clause 14(4) lists the prohibitions that may be imposed on someone subject to a serious disruption prevention order. Let me tell the Minister what this reminds me of. Earlier in my time as Member of Parliament for Bedford, I had a constituent who was under a control order. Control orders were brought in for people who our intelligence services said were terrorists or were at high risk of causing a major terrorist incident. Some of the provisions in clause 14(4) remind me very much of the control order provisions that my constituent was under. I ask the Minister please to look at whether that level of intervention on the activities of an individual, who has merely gone about protesting in a way that, yes, may have caused disruption and, yes, may have been subject to the provisions of this Bill, is truly what we should be seeing in a free society."*¹⁸

87. Two amendments were laid by Charles Walker MP and supported by Big Brother Watch at House of Commons Report Stage, to remove protest banning orders from the Bill. The amendments received cross-party support and were given the backing of senior Conservative MPs Graham Brady, David Davis and William Wragg as well as the Labour, SNP and Liberal Democrat front benches. Despite this support, the amendment was defeated when pushed to a division.

88. Opposition to these measures were echoed by Conservative Members of the House of Lords at Second Reading when Lord Frost said:

¹⁷ 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>

¹⁸

HC Deb, 23 May, vol. 715, col. 104

*"I have concerns about Clause 20, on SDPOs made "otherwise than on conviction". I think—and, again, our experience in the pandemic is part of this—that it is fundamentally unacceptable in a free society to restrict individuals' free movement or right to protest, to free speech, to carry particular items and so on, without them having been convicted of an offence in a court of law."*¹⁹

89. This opposition was continued during House of Lords committee stage. In a powerful speech deconstructing the serious rights implications of SDPOs, Lord Anderson of Ipswich also compared these orders to terrorism prevention and investigation measures (formerly terror control orders), which he described as "the most extreme forms of restriction known to our law, short of imprisonment".²⁰ He observed that "TPIMs can be imposed only when it is reasonably believed that the subject is or has been involved in terrorism-related activity and that the TPIM is necessary to protect the public"²¹ whereas SDPOs can be issued for simply committing a minor offence or committed no offence at all.

90. It is clear that dissatisfaction with clauses 19 and 20 runs throughout the House of Commons and House of Lords, including amongst Conservative backbenchers. Whilst it is welcome that the Government have now laid their own amendments which would strip out the digital monitoring aspect of SDPOs, given the damage that they would cause to civil liberties in the UK, we continue to believe Peers must remove these clauses from the Bill.

GOVERNMENT AMENDMENTS

91. In advance of House of Lords Report Stage, the Government announced their intention to add further amendments in the Bill. These amendments were laid in the name of Lord Sharpe of Epsom and in summary:

- Introduce definitions of 'serious disruption' to specific new criminal offences in the Bill, with extremely low thresholds, e.g: 'more than minor' hindrances to daily activities
- Limit the scope of the reasonable excuse defence for certain new offences
- Introduce three 'more than minor' disruption triggers to enable the police to pre-emptively impose conditions on, and potentially "prevent", protests

¹⁹ HL Deb. 1 November 2022, vol. 825, col. 167

²⁰ HL Deb. 13 December 2022, vol 826, col. 632

²¹ HL Deb. 13 December 2022, vol 826, col. 633

92. In the case of the latter, the Government's amendments create new triggers for the police to be able to pre-emptively restrict protests, by amending sections 12 and 14 of the Public Order Act 1986 which give the police the ability to give directions imposing unlimited conditions on public processions and assemblies respectively.
93. The Police Crime Sentencing and Courts Act previously introduced a 'noise trigger' to sections 12 and 14 of the POA, giving the police an expansive new power to restrict protests if they reasonably believe the noise produced by protests would result in serious disruption. The Government amendments to the Public Order Bill go a step further, by creating three triggers with extremely low thresholds; namely where "disruption" causes "more than a minor delay". This creates an intolerably low threshold at which to restrict protests. That these powers could also be used "preventatively" i.e. where no disruption has actually been caused, is also cause for concern.
94. Further, the PCSC Act gave the Home Secretary the ability to amend the definition of "serious disruption" where it relates to these very same powers to restrict demonstrations. It is therefore clear that these new amendments are not necessary.
95. These amendments do not provide helpful definitions or clarifications but simply seek to lower the threshold at which the authorities can restrict protests. They should therefore be opposed.

CONCLUSION AND RECOMMENDATIONS

96. 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.
97. 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.

98. 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.
99. In order to safeguard civil liberties in the UK, Big Brother Watch urges members of the House of Lords to oppose the Public Order Bill. In particular, we call on Peers to support stand part amendments in the name of Lords Paddick and Coaker which would remove clauses 10 and 11 and stand part amendments in the name of Lord Ponsoby which would remove clauses 19 and 20 from the Bill. This would remove so called protest banning orders and new protest-specific stop and search police powers. Failure to remove these clauses would allow protesters to be stopped and searched or subject to intrusive state surveillance and must never become law in a liberal democracy like the UK.