

BIG BROTHER WATCH

**Big Brother Watch briefing
on the Public Order Bill for
House of Commons
consideration of Lords
amendments**

March 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 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 previous 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. 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 key Lords amendments Big Brother Watch believes MPs should support, engaging aspects of the legislation that will have a major detrimental impact on human rights and civil liberties. **Given the sweeping**

nature of the new powers set out in the Bill and the new systems of repression and surveillance that they will enable, Big Brother Watch urges MPs to support amendments 6, 18 and 20. These amendments would remove powers to issue so called protest banning orders to innocent people, as well as remove new protest-specific suspicion-less stop and search police powers. These powers constitute an unjustifiable restriction on civil liberties and must never become law in a liberal democracy like the UK.

PART 1: PUBLIC ORDER

Clause 11 - Powers to stop and search without suspicion

10. Clause 11 expands police suspicion-less stop and search powers to apply in protest-related settings. These powers set out that an 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 below may be committed in that area:

- *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 Act – Section 61)*
- *Locking on (Public Order Bill clause 1)*
- *Tunnelling offences (Public Order Bill clauses 3 and 4)*
- *Obstruction of major transport works (Public Order Bill clause 6)*
- *Interference with use or operation of key national infrastructure (Public Order Bill clause 7)*

Intentionally obstructing a constable in the exercise of their powers under clause 11 will also become a criminal offence.

11. 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.”⁴

12. Clauses 12 and 13 of the Bill 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.

13. 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.”⁵

14. 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”⁶ to which HMICFRS went on to state that they “agree with this sentiment.”⁷

⁴ HC Deb. 18 October 2022, vol. 720, col. 569

⁵ HC Deb, 23 May, vol. 715, col. 111

⁶ Getting the balance right?: An inspection of how effectively the police deal with protests, HMICFRS, March 2021, p. 109, <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>

⁷ Ibid.

15. Considered cumulatively with the offences referred to in the clause, 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 Act – 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 protest 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.
16. 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 clause 11 are manifest and given the discretion they grant police officers, they would likely be felt most significantly by those from minority groups.
17. During House of Lords report stage, peers across the whole House voted to remove clause 11 from the Bill by a margin of 285 to 208. Those who voted to remove the clause included 65 Crossbenchers and 5 Conservative peers. **It is vital that MPs now accept Lords amendment 6 and remove these new powers for good.**

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

18. Clauses 19 and 20 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 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).
19. SDPOs can be made:

(i) on conviction by a court to someone who has committed two 'protest-related offences' within the space of five years,

or

on conviction by a court to someone who has committed one 'protest-related offence' and either breached a protest-related injunction or 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 in a five year period;

(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.

20. 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.
21. 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.
22. 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.
23. 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.
24. Over 100,000 people have signed Big Brother Watch's [petition](#), calling for the Government to scrap protest banning orders completely.

25. 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.

26. 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.”*⁹

27. 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.

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

“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

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>

particular items and so on, without them having been convicted of an offence in a court of law.”¹⁰

29. 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”.¹¹ 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”¹² whereas SDPOs can be issued for simply committing a minor offence or committed no offence at all.
30. During House of Lords report stage, peers voted to remove clause 20 regarding SDPOs without conviction (amendment 20) by a margin of 247 to 192. Peers also voted for amendment 18 which establishes that non-criminal protest related activities cannot be considered as criteria when a court decides whether an individual is issued with an SDPO on conviction.
31. It is regrettable that Peers did not vote to remove SDPOs on conviction completely. The creation of these orders, which would create an entirely disproportionate restriction on an individual’s liberty, comparable to terror control orders, sets a dangerous precedent. It is possible that someone could have received two “protest-related convictions” for simply attending both the May 2020 BLM protest and Sarah Everard vigil. The idea that an individual could be subject to the intrusive conditions of an SDPO, for example a restriction of their internet activities, on such a basis is deeply concerning and is likely to be subject to legal challenge.
32. It is clear that dissatisfaction with SDPOs runs throughout the House of Commons and House of Lords, including amongst Conservative backbenchers. It is welcome that the Government removed provisions in the Bill which would have seen compliance with SDPOs enforced via electronic monitoring. However, given the threats that SDPOs still pose to civil liberties in the UK, we believe MPs should oppose the introduction of SDPOs completely.

¹⁰ HL Deb. 1 November 2022, vol. 825, col. 167
¹¹ HL Deb. 13 December 2022, vol 826, col. 632
¹² HL Deb. 13 December 2022, vol 826, col. 633

33. Accordingly we believe that MPs should accept Lords amendment 20 which would remove SDPOs without conviction. In the absence of being able to also remove SDPOs issued on conviction, we believe that as a minimum, MPs should support amendment 18 which would mean non-criminal protest related activities cannot be considered as criteria when a court decides whether an individual is issued with an SDPO.

CONCLUSION AND RECOMMENDATIONS

34. 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.

35. 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. Issuing individuals exercising their democratic rights who are not guilty of any crime, with control orders, takes the UK closer to becoming an oppressive surveillance state.

36. 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.

37. In order to safeguard civil liberties in the UK, Big Brother Watch urges MPs to vote for Lords amendments 6, 18 and 20 as a minimum. This would remove some of the most draconian aspects of the Bill including so called protest banning orders for entirely innocent people and new protest-specific suspensionless stop and search police powers; powers which must never become law in a liberal democracy like the UK.