

LIBERTY

**LIBERTY'S BRIEFING ON THE PUBLIC ORDER
BILL FOR SECOND READING IN THE HOUSE
OF LORDS**

NOVEMBER 2022

ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at libertyhumanrights.org.uk/policy.

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CONTENTS

<u>INTRODUCTION</u>	1
<u>SERIOUS DISRUPTION PREVENTION ORDERS</u>	3
<u>PROTEST-SPECIFIC POWERS TO STOP AND SEARCH ON SUSPICION</u>	8
<u>PROTEST-SPECIFIC POWERS TO STOP AND SEARCH WITHOUT SUSPICION</u>	10
<u>OFFENCE RELATING TO SUSPICION-LESS STOP AND SEARCH</u>	13
<u>OFFENCE OF LOCKING ON</u>	14
<u>OFFENCE OF BEING EQUIPPED FOR LOCKING ON</u>	17
<u>OFFENCE OF TUNNELLING, CAUSING SERIOUS DISRUPTION BY BEING IN A</u>	18
<u>TUNNEL AND BEING EQUIPPED FOR TUNNELLING</u>	
<u>OBSTRUCTION OF MAJOR TRANSPORT WORKS</u>	19
<u>INTERFERENCE WITH USE OR OPERATION OF KEY NATIONAL INFRASTRUCTURE</u>	20
<u>SECRETARY OF STATE POWERS: CIVIL INJUNCTIONS</u>	21
<u>CONCLUSION</u>	22
<u>APPENDIX: SERIOUS DISRUPTION PREVENTION ORDERS</u>	22

INTRODUCTION

1. **The right to protest is the lifeblood of any democracy.** It allows us to hold the powerful to account and actively participate and organise in our communities. History shows us that protest often underpins progressive change. Some of our most fundamental freedoms have been won in spite of Governments of the day seeking to quell these demands – from some women gaining the right to vote, to the abolition of the slave trade.
2. **The Public Order Bill is a staggering escalation of the Government’s clampdown on dissent.** It establishes Serious Disruption Prevention Orders (SDPOs) that could ban individuals from participating in certain protests, require them to be subject to 24/7 GPS monitoring, and bar their participation in public life. It also introduces new suspicion-based and suspicion-less stop and search powers for protest and creates new offences criminalising certain protest tactics.
3. The Public Order Bill’s passage through Parliament comes just months after the Police, Crime, Sentencing and Courts Act (PCSC Act) gained Royal Assent, a significant expansion of police powers that was roundly opposed by parliamentarians across the political spectrum, hundreds of civil society groups, former Prime Ministers and former police officers. During debates on the Act, Conservative MP David Davis and former police chiefs¹ warned that its measures would further politicise the policing of public order, with detrimental effects on trust in public institutions.² **Before the full effects of the Act have even been scrutinised, and the need for new public order measures properly established, the Government is pushing forward with plans to further restrict our civil liberties – a move which has come under significant opposition from civil society and parliamentarians across the political spectrum.**³
4. **Identical measures to those proposed in the Public Order Bill were rejected by peers in the House of Lords earlier this year.** When these measures were first introduced at the eleventh hour as amendments to the PCSC Act, peers argued that they were a dangerous power grab and a blatant attempt to sideline parliamentary scrutiny. Lord Beith, a Liberal Democrat peer, remarked: “it seems... political considerations have taken precedence over all considerations relating to making good law and, indeed, policing protests satisfactorily and effectively.”⁴ Ultimately, peers voted overwhelmingly to object to their inclusion in the Act.

¹ Hamilton, F., *Policing bill ‘is harmful to democracy’*, The Times, 5 July 2021, available at: <https://www.thetimes.co.uk/article/policing-bill-is-harmful-to-democracy-ft9dg6r3x>; see also: West, O., *The Policing Bill will leave officers in an impossible position*, The Times, 7 July 2021, available at: https://www.thetimes.co.uk/article/the-policing-bill-will-leave-officers-in-an-impossible-position-979fpzbs?CMP=INLEmail_2014964_14271412_119

² David Davis, Police, Crime, Sentencing and Courts Bill, Second Reading (Commons), Hansard, 5 July 2021, Vol. 698, Col. 568

³ Many parliamentarians, including three Conservative MPs, opposed the third reading of the Bill.

⁴ HL Deb 24 Nov 2021, vol.816, col. 980

5. **Many of the measures in the Public Order Bill have been rejected by police officers as potentially violative of human rights, not to mention ineffective and highly difficult to implement.**⁵ Purportedly a response to the recent tactics of Insulate Britain and Just Stop Oil protesters, some of the measures in the Public Order Bill had been consulted on as early as autumn 2020 by Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS). With regard to protest banning orders, HMICFRS, the police, and the Home Office said that “such orders would neither be compatible with human rights legislation nor create an effective deterrent.”⁶ Further, arguing against the creation of a new stop and search powers, a police officer said, “a little inconvenience is more acceptable than a police state,” a sentiment with which HMICFRS said it agreed. At report stage in the Commons, Wendy Chamberlain MP, a former police officer, asserted that “the police do not need this Bill to respond when protests cross the line”. She further noted: “Policing by consent is one of the greatest attributes of our country, and it is something that I am passionate about. The Bill undermines that.”

6. **There is simply no case for introducing these far-reaching new powers, in a context where there are already reams of protest legislation on the statute book, and much of it is already weighted in favour of the authorities.** Sir Charles Walker MP enumerated some of these laws during report stage of the Bill: “obstructing a police officer, Police Act 1996; obstructing a highway, Highways Act 1980; obstruction of an engine, Malicious Damage Act 1861, endangering road users, Road Traffic Act 1988; aggravated trespass, Criminal Justice and Public Order Act 1994; criminal damage, Criminal Damage Act 1971; and public nuisance, the Police, Crime, Sentencing and Courts Act 2022.”⁷ As then-Home secretary Sajid Javid MP noted in 2018, citing the vast legislation that “already exists to restrict protest activities that cause harm to others... [I]t is a long-standing tradition that people are free to gather together and to demonstrate their views. This is something to be rightly proud of.”⁸

7. The police’s recent, heavy-handed treatment of anti-monarchy protesters in the run up to Queen Elizabeth II’s funeral is a stark demonstration of the effects of greater curbs on protest, with the police appearing to misuse their powers to arrest people on multiple occasions.⁹ This led parliamentarians across the political spectrum to

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

⁶ *Ibid.*, pg.109.

⁷ HC Deb 18 Oct 2022, vol. 720, col.581.

⁸ House of Commons, Abortion Clinic Protest Review, 13 September 2018, <https://hansard.parliament.uk/Commons/2018-09-13/debates/18091329000018/AbortionClinicProtestReview?contribution-974CF934-8681-4514-88EC-1A2397C66011>

⁹ Notable cases include the three people who were charged with ‘breach of the peace’ in Edinburgh: a woman who was seen holding up a sign saying “Abolish the Monarchy, F*** Imperialism” during the Accession Proclamation of King Charles III; a man who allegedly heckled Prince Andrew; and another man who was allegedly holding eggs near the funeral cortege (see: Morrison, H., *Police Scotland actions during anti-monarchy protests to be reviewed by force*, The National, 21 September 2022: <https://www.thenational.scot/news/22454228.police-scotland-actions-anti-monarchy-protests-reviewed-force/>).

In Oxford, a man was arrested and then de-arrested after shouting “who elected him” at a proclamation ceremony. He said he was told that he was arrested under the PCSC Act but Thames Valley Police later clarified that he had been arrested on suspicion of committing an offence under

speak out in defense of individuals' right to freedom of expression, with David Davis MP expressing his hope that members of the public will "remain free to share their opinions and protest in regard to issues about which they feel strongly".¹⁰ The numerous incidents eventually forced the National Police Chiefs' Council to issue a statement affirming that "[t]he ability to protest is a fundamental part of democracy and it is a long-established right in this country."¹¹

8. During debates on the PCSC Act, crossbench peer and one of the UK's leading advocates, Lord Pannick, said "the ability to demonstrate... is a very valuable safety valve in our civil society. If you close off that safety valve, you are going to cause a far greater mischief than is currently the case."¹² **The Public Order Bill risks pouring cement into the valve, by criminalising activities with only the most tenuous links to protest and plunging more and more people into the criminal justice system.** The Government cannot legislate and punish people into silence; as such, the ultimate effect of the Bill will be to push people towards seeking more urgent routes to protest, while potentially decimating their trust in public institutions. **In a global context, the JCHR warns that "[i]ntroducing... oppressive measures could also damage the UK's international standing and our credibility when criticising other nations for cracking down on peaceful protest."**¹³ For all the above reasons, we urge peers to decline that the Bill be given a second reading.

SERIOUS DISRUPTION PREVENTION ORDERS

9. Part 2 of the Bill introduces Serious Disruption Prevention Orders (SDPOs), a new civil order that can be imposed on individuals who have participated in at least two protests within a five-year period, whether or not they have actually been convicted of a crime (see Appendix for the full list of conditions under which an SDPO can be imposed). They can last anywhere from a week to two years, with the potential to be renewed indefinitely (clauses 25(2) and 28(7)).
10. SDPOs are effectively 'protest banning orders', with the potential to ban named individuals from protesting, associating with certain people at certain times, and even using the internet in certain ways. Those subject to SDPOs may also be subject to a range of onerous requirements, including reporting to certain places at certain times

section 5 of the Public Order Act (See: Seaward, T., *Anti-monarchist 'arrested for shouting' during Oxford proclamation*, 11 September 2022: <https://www.oxfordmail.co.uk/news/21276222.anti-monarchist-arrested-shouting-oxford-proclamation/>). Another man was threatened with arrest over holding a blank piece of paper (Kingsley, T., *UK compared to Russia after barrister threatened with arrest over blank piece of paper*, 14 September 2022: <https://www.independent.co.uk/news/uk/home-news/anti-monarchy-protest-russia-police-b2166183.html>)

¹⁰ Letter from Rt Hon David Davis MP to Chief Constable Sir Iain Livingstone KPM, 12 September 2022: <https://twitter.com/DavidDavisMP/status/1569700441490857988/photo/1>

¹¹ NPCC response to recent protest activity during this time of national mourning, 13 September 2022: <https://news.npcc.police.uk/releases/npcc-response-to-recent-protest-activity-during-this-time-of-national-mourning>

¹² HL Deb 17 January 2022, vol.817, col. 1405

¹³ Joint Committee on Human Rights, *Government creating hostile environment for peaceful protest, report finds*, 17 June 2022, available at: <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/171503/government-creating-hostile-environment-for-peaceful-protest-report-finds/>

and electronic monitoring. A person subject to a SDPO will commit a criminal offence if they fail without reasonable excuse to fulfil one of the requirements of the SDPO, violate one of the SDPO's prohibitions, or notify to the police any information which they know to be false. The consequence of committing this offence is maximum 51 weeks' imprisonment,¹⁴ a fine, or both.

11. **SDPOs are an unprecedented and highly draconian measure that stand to extinguish named individuals' fundamental right to protest as well as their ability to participate in a political community. They will also have the effect of subjecting individuals and wider communities to intrusive surveillance.**
12. **The introduction of measures akin to SDPOs are not supported by the police, Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS), or the Home Office.** When consulted on plans to introduce protest banning orders that would restrict individuals' right to protest, HMICFRS and the Home Office stated:

“Such orders would neither be compatible with human rights legislation nor create an effective deterrent. All things considered, legislation creating protest banning orders would be legally very problematic because, however many safeguards might be put in place, a banning order would completely remove an individual's right to attend a protest. It is difficult to envisage a case where less intrusive measures could not be taken to address the risk that an individual poses, and where a court would therefore accept that it was proportionate to impose a banning order (emphasis added)”.¹⁵

13. The same report quoted senior police officers that said protest banning orders would “unnecessary curtail people's democratic right to protest”; that such orders would be “a massive civil liberty infringement”; and that “the proposal is a severe restriction on a person's right to protest and in reality, is unworkable.”¹⁶
14. **At their core, SDPOs (both with and without conviction) defy logic and common sense.** In and of itself, ‘protest-related offences’ – defined in clause 33 as “an offence which is directly related to a protest” – is an expansive and legally uncertain category.¹⁷ Beyond this, the fact that an SDPO could be imposed on a person who has

¹⁴ The offence provides that a person who commits an offence under this section is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both. If the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, the maximum sentence will be six months; (b) if the offence is committed after that time, the maximum sentence will be 51 weeks.

¹⁵ Pg. 16, HMICFRS, *Getting the balance right? An inspection of how effectively the police deal with protests*, March 2021, available at: <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>

¹⁶ Pg. 137, HMICFRS, *Getting the balance right? An inspection of how effectively the police deal with protests*, March 2021, available at: <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>

¹⁷ Analogously, Football Banning Orders (on which the ‘protest banning orders’ considered and criticised by HMICFRS in its March 2021 report are based) (FBOs) can be imposed on the basis of an extremely wide list of offences, including driving etc. when under the

not committed a criminal offence at all, but merely *contributed to* the carrying out by *another person* of activities related to a protest that *were likely to* result in serious disruption **is simply absurd** (see Appendix). SDPOs could effectively place any activist, commentator, or politician who voices an opinion on any issue, that inspires someone else to protest in such a way as to cause ‘serious disruption’ at risk – even if this is a person they do not know and have never met. The link between a person’s past conduct and the effect of ‘serious disruption’ need only be incredibly tenuous for someone to be given an SDPO; and yet being given an SDPO can completely alter the course of a person’s life. **As Liberal Democrat peer Lord Paddick noted during Report Stage of the PCSC Act where these measures were first introduced and resoundingly rejected, “you do not even have to have been to a protest to be banned from future ones.”**¹⁸

15. For those who are given an SDPO, the wide scope of requirements and prohibitions furthermore risk disproportionately interfering with people’s rights to liberty, respect for the private and family life (Article 8), freedom of thought, belief, and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), among others. The JCHR highlights that “if a court considered it necessary, an SDPO imposed on a peaceful protester could contain measures akin to those imposed on high priority terrorist suspects under a Terrorism Prevention and Investigation Measure (TPIM).”¹⁹ Individuals with an SDPO could be prevented from associating with their loved ones or community members; having certain everyday items such as a bike lock, superglue, paint, banners, or flyers in their possession; and crucially, participating in protests. They could also be barred from entering places of worship and community, for example, if they are a Quaker, for whom direct action and civil disobedience are a key part of their faith. On this, the Public Order Bill provides a limited safeguard whereby any prohibitions/requirements imposed by an SDPO must, as far as practicable, be such as to avoid any conflict with the person’s religious beliefs and work or educational commitments (clause 14(8)) – however, we do not believe this is a sufficient safeguard.
16. **The introduction of SDPOs marks a significant expansion of State surveillance over those who protest.**²⁰ SDPOs, like other hybrid civil-criminal orders, rely on (and will therefore give rise to) far-reaching and intrusive surveillance on people’s activities and behaviour, to inform the making of, and conditions and prohibitions attached to, such orders. It merits noting that the original proposal for ‘protest

influence of drink or drugs or with an alcohol concentration above the prescribed limit. See Annex B of the CPS’s guidance on FBOs: <https://www.cps.gov.uk/legal-guidance/football-related-offences-and-football-banning-orders>

¹⁸ HL Deb 17 Jan 2022, vol.817, col. 1439

¹⁹ Joint Committee on Human Rights, *Government creating hostile environment for peaceful protest, report finds*, 17 June 2022, available at: <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/171503/government-creating-hostile-environment-for-peaceful-protest-report-finds/>

²⁰ Lewis, P. and Evans, R., *Secrets and lies: untangling the UK ‘spy cops’ scandal*, The Guardian, 28 October 2020, available at: <https://www.theguardian.com/uk-news/2020/oct/28/secrets-and-lies-untangling-the-uk-spy-cops-scandal>

banning orders', which was considered by HMICFRS, was based on existing football banning orders (FBOs). Research into the use of FBOs in Scotland noted the use of extensive surveillance methods such as body-worn video, increased CCTV and plain-clothed police officers and that such methods were "disproportionate and unfairly selective."²¹ The use of even more secretive tactics such as informants in the policing of football fans²² adds to our concerns that in the protest-context, SDPOs may create additional pretexts under which the police can interlope in protests.

17. **Not only do SDPOs risk eroding individuals' rights, they risk diminishing trust in the police.** Sir Peter Fahy, a retired chief constable of Greater Manchester police and Cheshire constabulary and a police officer for 34 years, noted during his Public Bill Committee session that most protests are often "very local protests about things like fracking and road developments". He said: "**If the police are involved in gathering intelligence around those people [who protest] and criminalising them in a way that those local people do not think is fair, and it destroys their confidence in what their local police force is there to do, there is absolutely a risk in that.**"²³ Drawing on her previous experience as a police officer, Wendy Chamberlain MP voiced concerns that SDPOs might "freeze the police's relationships with a wide range of activist groups, which involve constant dialogue to balance the facilitation of protests with the rights of others to go about their daily business."²⁴
18. One of the requirements that can be imposed on an individual is **electronic monitoring** (EM) in relation to an SDPO condition or prohibition, such as a ban on seeing certain people or engaging in certain activities. Electronic monitoring is used in criminal justice, probation, and immigration bail contexts as a way of remotely monitoring and recording information on an individual's movements, using an electronic tag fitted to someone's ankle. In 2018, the Ministry of Justice began using location monitoring (GPS) tags, as opposed to traditional radio frequency tags, for electronic monitoring conditions. Whereas radio frequency tags work by detecting if someone has moved out of a defined vicinity past a certain curfew, GPS tags provide the State with 24/7 real-time location monitoring.²⁵
19. **In and of themselves, electronic monitoring conditions are highly intrusive, and risk interfering with individuals' rights to privacy, freedom of expression and assembly.** The psychological harm caused by electronic monitoring is well-documented. Tag-wearers report that tags have an impact on almost every area of

²¹ Hamilton-Smith, N, McBride, M and Atkinson, C. 2019. *Lights, camera, provocation? Exploring experiences of surveillance in the policing of Scottish football*, available at: https://dspace.stir.ac.uk/bitstream/1893/30568/1/20191003%20-%20DOC%20-%20Football%20surveillance%20revised%20-%2014th%20Octo%2019_.pdf

²² Atkinson, C, McBride, M and Moore, A. 2020. *Pitched! Informants and the covert policing of football fans in Scotland*, available at: <https://www.tandfonline.com/doi/full/10.1080/10439463.2020.1795168?needAccess=true>

²³ Public Order Bill Deb 9 June 2022, col.51

²⁴ HC Deb 18 Oct 2022, vol. 720, col.591.

²⁵ Privacy International, *Electronic monitoring using GPS tags: a tech primer*, 9 February 2022, available at: <https://privacyinternational.org/explainer/4796/electronic-monitoring-using-gps-tags-tech-primer>

life including the ability to participate in society; relationships; financial and emotional stress; sleep; feelings of dehumanisation and stigma.²⁶

20. **Electronic monitoring conditions imposed as part of an SDPO are likely to be a highly disproportionate interference with people’s human rights, including and especially if they employ GPS tracking, especially given the broad and vague purposes for which they can be imposed.** Geolocation data is highly sensitive: it tells you where someone has been, which GP practice they attend, where they shop, and much more. These are intimate details of one’s private life that bear no relation to one’s protest-related activities. Once an individual is subject to a 24/7 GPS tag, all of this data is potentially laid bare to the State, with the further potential to cause people to alter their behaviour and actions. These harms are exacerbated by the potential lengthy duration of an electronic monitoring condition. Clause 25(6) limits the duration of an electronic monitoring requirement to 12 months but according to the explanatory notes “this does not preclude a further extension... if the SDPO is renewed.”²⁷
21. **The Public Order Bill provides a worrying lack of safeguards for individual data collected as part of electronic monitoring conditions imposed as part of SDPOs, which risk endangering not only individuals’ privacy but wider communities.** Clause 32 of the Public Order Bill states that the Secretary of State must issue a code of practice relating to the processing of data gathered in the course of EM conditions imposed by an SDPO. Worryingly, while the explanatory notes provide that the processing of such data will be subject to the requirements of the General Data Protection Regulation and the Data Protection Act 2018, they also state that the code could set out “the circumstances in which it may be permissible to share data with the police to assist with crime detection.”²⁸ The ‘crime detection’ exemption in data protection legislation is already wide; in the protest-context, we are concerned that it could be used to justify even more intrusive monitoring of individuals’ whereabouts and associations. Not only does this risk infringing on the privacy of the individual with the SDPO, it could also endanger their associates and loved ones by subjecting the latter to surveillance and targeting as well.
22. **That breach of an SDPO can attract criminal sanction compounds the harms of this oppressive measure.** Failure to comply with any of these actions is tantamount to a breach of an SDPO condition, which could result in a maximum 51 week²⁹ prison

²⁶ See Bhatia, Monish “Racial surveillance and the mental health impacts of electronic monitoring on migrants”

²⁷ Para 130, Public Order Bill: Explanatory Notes, May 2022, <https://publications.parliament.uk/pa/bills/cbill/58-03/0008/en/220008en.pdf>

²⁸ Para 146, Public Order Bill: Explanatory Notes, May 2022, <https://publications.parliament.uk/pa/bills/cbill/58-03/0008/en/220008en.pdf>

²⁹ The offence provides that a person who commits an offence under this section is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both. If the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, the maximum sentence will be six months; (b) if the offence is committed after that time, the maximum sentence will be 51 weeks.

sentence, a fine, or both. **Ultimately, none of the breaches of requirements or prohibitions imposed via an order would be criminal activities but for the imposition of an SDPO.** Furthermore, while an SDPO lasts for between a week and 2 years, there is no limit to the number of times an SDPO can be renewed by the court; the court simply needs to be satisfied that the SDPO is necessary for one of the stated purposes. This risks plunging people into cycles of criminalisation and indefinite periods of not being allowed to protest.

23. **The harmful and potentially indefinite effects of SDPOs are exacerbated by the fact that they can be established on a weak procedural basis.** The SDPO regime uses a civil standard of proof, meaning that the conditions for making an SDPO only need to be proven to the balance of probabilities (clauses 19(2)(a) and 20(2)), rather than beyond reasonable doubt. In terms of evidence that can be used to make an SDPO, SDPOs on conviction can be made on the basis of lower quality evidence: evidence that would not have been admissible in the current offence is admissible for the making of the SDPO, meaning that information collected via intrusive surveillance as detailed above may be admissible) (clause 19(9)); for SDPOs made without conviction, there are no requirements in respect of what evidence can be used, meaning that ostensibly any information – including that which is collected covertly or through intrusive technologies such as facial recognition technology – could be used to establish if a person was at a protest and engaged in any of the listed activities. An SDPO without conviction can be applied for by a wide range of police officers, including the chief officer of an area who simply believes that a person *intends to* come to their area (clause 20(8)(b))– a highly subjective judgment that could have drastic implications for a person’s freedom of movement. On the low threshold for imposition of an SDPO, Labour MP Diane Abbott remarked during the Second Reading debate on this Bill: “The truth is that no citizen should ever be subject to the arbitrary and unsubstantiated curbing of important civil rights by the state”.³⁰

PROTEST-SPECIFIC POWERS TO STOP AND SEARCH ON SUSPICION

24. Clause 9 amends section 1 of the Police and Criminal Evidence Act (PACE) 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 offences of wilful obstruction of a highway (section 137 Highways Act 1980), intentionally or recklessly causing public nuisance (section 78 of the PCSC Act), locking-on (clause 1), causing serious disruption by tunnelling (clause 3), causing serious disruption by being present in a tunnel (clause 4), obstructing major transport works (clause 6), or interfering with the use or operation of key national

³⁰ HC Deb, 23 May 2022, vol. 715, col. 74

infrastructure (clause 7). The police may seize any prohibited item found during a search.

25. **There is no consensus among the police that protest-specific stop and search is necessary or desirable.** When HMICFRS consulted police 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”**³¹ to which HMICFRS went on to state that they “agree with this sentiment.”³²
26. **We are concerned that this clause will give the police a new and broad power to stop and search people.** There is a potentially endless list of objects that could be ‘made, adapted, or intended for use in the course of or in connection with’ the listed offences, so broad are the terms in this definition; indeed, it could include such commonplace items as bike-locks, posters, placards, fliers, and banners. Arguably the police could have a reasonable suspicion that *any* person on the street would have a bike lock or any other such item on them; how would they subsequently establish if that person intended to use such an item “in the course of or in connection with” a protest – would it be based on one’s vicinity to a protest site? What if there happened to be a bike shop nearby, and one simply crossed the road to see what was happening at the demonstration? In the words of the JCHR, “a suspicion of such an offence, even a reasonable one, in the course of a protest represents an unjustifiably low threshold for a power to require a person to submit to a search.”³³ **We believe that this stop and search power risks disproportionately interfering with individuals’ rights to a private and family life as well as freedom of expression and assembly, and have knock-on effects for their willingness and ability to exercise their fundamental rights.**
27. While these stop and search powers are being introduced in a protest-specific context, we are concerned that they will replicate the same harms of existing stop and search. Indeed, as HMICFRS identified in their recent report into police use of stop and search, “some of the most intrusive and contentious police powers are those that allow the police to use force and to stop and search people.”³⁴ **In particular, we are highly concerned that the expansion of stop and search powers will entrench racial disproportionality in the criminal justice system and further erode trust in public institutions, contrary to the prohibition against discrimination**

³¹ HMICFRS, *Getting the balance right? An inspection of how effectively the police deal with protests*, March 2021, available at: <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>

³² As above.

³³ Joint Committee on Human Rights, *Government creating hostile environment for peaceful protest, report finds*, 17 June 2022, available at: <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/171503/government-creating-hostile-environment-for-peaceful-protest-report-finds/>

³⁴ HMICFRS, *Disproportionate use of police powers: A spotlight on stop and search and the use of force*, February 2021, available at: <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/disproportionate-use-of-police-powers-spotlight-on-stop-search-and-use-of-force.pdf>

in Article 14 of the ECHR as protected under the HRA. In November 2021, the Home Office released its annual stop and search data which showed a sharp rise in the use of s.1 PACE, and according to the most recent statistics, Black people were 7 times more likely to be stopped and searched than white people.³⁵ At Second Reading of the Bill, Conservative MP Richard Fuller urged the Government to “think carefully” about extending such powers given the sheer amount of evidence on how they are already used disproportionately against communities of colour, particularly the Black community.³⁶ The JCHR has highlighted that the creation of suspicion-based stop and search powers could have a chilling effect, dissuading people from exercising their rights to protest and to freedom of assembly.³⁷

28. The experience of being stopped and searched can be a mentally and physically traumatising one – for some people, it takes place frequently, even daily.³⁸ Hackney Account – a youth-led social action project – conducted participatory research with young people in Hackney, and found that the practice of stop and search can have “a damaging impact on mental wellbeing, causing feelings of embarrassment, humiliation or anger”.³⁹ This is further exacerbated by the fact that the police are empowered to use reasonable force to carry out a stop and search if necessary, including using taser, firearms, batons, and handcuffs.⁴⁰ The impact of discriminatory stop and search on affected communities is deep and enduring. The Home Office itself acknowledges that the expansion of stop and search “would risk having a negative effect on a part of the community where trust and confidence levels are relatively low.”⁴¹

PROTEST-SPECIFIC POWERS TO STOP AND SEARCH WITHOUT SUSPICION

29. The Public Order Bill extends suspicion-less stop and search powers – which until now, have been used to target serious violent crime and terrorism – to the protest context. Clause 11 creates a new suspicion-less stop and search power, such that a police officer of or above the rank of inspector may make an authorisation applying

³⁵ Home Office, *Police powers and procedures: Stop and search and arrests, England and Wales, year ending 31 March 2021*, 18 November 2021 available at: <https://www.gov.uk/government/statistics/police-powers-and-procedures-stop-and-search-and-arrests-england-and-wales-year-ending-31-march-2021>

³⁶ HC Deb, 23 May 2022, vol. 715, col. 103

³⁷ Joint Committee on Human Rights, *Government creating hostile environment for peaceful protest, report finds*, 17 June 2022, available at: <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/171503/government-creating-hostile-environment-for-peaceful-protest-report-finds/>

³⁸ Ali A. and Champion, N. for the Criminal Justice Alliance, *More harm than good - A super-complaint on the harms caused by ‘suspicion-less’ stop and searches and inadequate scrutiny of stop and search powers*, May 2021, available at: https://www.criminaljusticealliance.org/wp-content/uploads/CJA-super-complaint-into-section-60-and-scrutiny-of-stop-and-search_FINAL.pdf

³⁹ Hackney Account, *Policing in Hackney: Challenges from youth in 2020*, 2020, available at: <https://static1.squarespace.com/static/5d234a046f941b0001dd1741/t/5f77795b9e2fdb6bf67d3c7d/1601665467995/Final+Draft+-+Report+-+Account+%28Online%29.pdf>

⁴⁰ Ali A. and Champion, N. for the Criminal Justice Alliance, *More harm than good - A super-complaint on the harms caused by ‘suspicion-less’ stop and searches and inadequate scrutiny of stop and search powers*, May 2021, available at: https://www.criminaljusticealliance.org/wp-content/uploads/CJA-super-complaint-into-section-60-and-scrutiny-of-stop-and-search_FINAL.pdf

⁴¹ Home Office, *Public Order Bill: Equality Impact Assessment*, 2022, <https://www.gov.uk/government/publications/public-order-bill-overarching-documents/public-order-bill-equality-impact-assessment>

to a particular place for a specified period, which would allow police officers to stop and search someone or a vehicle without suspicion. They will be able to do this if they reasonably believe that one of the following offences may be committed in the area: wilful obstruction of a highway (section 137 of the Highways Act 1980), intentionally or recklessly causing public nuisance (section 78 of the PCSC Act), locking on (clause 1), causing serious disruption by tunnelling (clause 3), causing serious disruption by being present in a tunnel (clause 4), obstructing major transport works (clause 6), interfering with the use or operation of key national infrastructure (clause 7). Such authorisation can also arise if the officer reasonably believes that people in the area are carrying ‘prohibited objects’. ‘Prohibited object’ is defined as an object which is either made or adapted for the use in the course of or in connection with one of the listed offences, or is intended by the person who has it in their possession for such use by them or someone else.

30. **Arguably all protests could risk causing public nuisance; this could mean that there is a mass expansion of the use of suspicion-less stop and search in the vicinity of protests.** In our view, this could give rise to significant and disproportionate interferences with people’s Article 8, 10, and 11 rights, as noted above in relation to suspicion-based stop and search, and further deter people from exercising their right to protest. This is exacerbated by the vague wording of this power: it cannot be overstated that the so-called ‘prohibited objects’ within the offence – defined as objects either made or adapted for the use *in the course of or in connection with* one of the listed offences (in other words, not even actually in the conduct of the offence itself), or which are intended by the person who has it in their possession for such use by them *or someone else* – is extremely broad, and would furthermore not be ‘prohibited’ but for the creation of new and vague offences targeting protest.
31. **During the debate over this proposed power in the House of Lords during the passage of the PCSC Act, crossbench peer Lord Carlile of Berriew warned that “the dilution of without-suspicion stop and search powers is a menacing and dangerous measure” and that the power is “disproportionate, and the Government should think twice about it.”**⁴² Echoing this, the JCHR highlights that the power to stop and search without reasonable suspicion has previously been introduced only to deal with “the most serious offending”, including where “serious violence” is anticipated or where it is believed weapons are being carried; or “where it is reasonable suspected that an act of terrorism will take place. In the JCHR’s words, “It is surprising and concerning that the Bill would introduce similar powers to deal not with serious offences punishable with very lengthy prison terms, but with the possibility of non-violent offences relating to protest, most of which cover conduct

⁴² HL Deb 17 Jan 2022, vol.817, col. 1435

that is not even currently criminal.” The JCHR has recommended that this power be removed from the Bill.

32. **The expansion of suspicion-less stop and search will have disproportionate effects on marginalised communities – in this case, people of colour exercising their right to protest.** Indeed, suspicion-less stop and search powers are an even greater contributor to racial disproportionality in the criminal justice system than regular stop and search powers. In 2021, while Black people were 7 times more likely to be stopped and searched under regular powers; when the reasonable grounds requirement was removed, they were 14 times more likely to be stopped and searched.⁴³ Multiple policing bodies (including HMICFRS⁴⁴ and the College of Policing⁴⁵) and former police chiefs and frontline officers,⁴⁶ former Prime Minister and Home Secretary Theresa May,⁴⁷ parliamentarians,⁴⁸ and countless community groups⁴⁹ have highlighted issues with existing suspicion-less stop and search powers, including its ineffectiveness, contribution to racial disproportionality and erosion of trust in the criminal justice system.
33. There are additional requirements that must be satisfied before suspicion-less stop and search powers can be used. For example, the police officer must reasonably believe that the authorisation is necessary to prevent the commission of the above offences or the carrying of prohibited objects; the specified locality must be no greater than is necessary to prevent such activity; and the specified period must be no longer than is necessary to prevent such activity. The authorisation can be in force for up to 24 hours (extendable by a further 24 hours if authorised by an officer of the rank of superintendent or above).⁵⁰ **However, we do not believe these safeguards are sufficient to mitigate the harms of this power.**

⁴³ Home Office, *Public Order Bill: Equality Impact Assessment*, 2022, <https://www.gov.uk/government/publications/public-order-bill-overarching-documents/public-order-bill-equality-impact-assessment>

⁴⁴ HMICFRS, *Disproportionate use of police powers - A spotlight on stop and search and the use of force*, 26 February 2021, available at: <https://www.justiceinspectorates.gov.uk/hmicfrs/publications/disproportionate-use-of-police-powers-a-spotlight-on-stop-and-search-and-the-use-of-force/>

⁴⁵ College of Policing, *Stop and search: Transparent*, available at: <https://www.app.college.police.uk/app-content/stop-and-search/transparent/>

⁴⁶ ITV News, *Policing bill 'disproportionately impacts black men' and 'exacerbates violence', ex-chiefs warn*, 25 October 2021, available at: <https://www.itv.com/news/2021-10-25/policing-bill-could-undermine-trust-and-exacerbate-violence-ex-chiefs-warn>

⁴⁷ Home Office and The Rt Hon Theresa May MP, *Oral Statement to Parliament: Stop and Search: comprehensive package of reform for police stop and search powers*, 30 April 2014, available at: <https://www.gov.uk/government/speeches/stop-and-search-comprehensive-package-of-reform-for-police-stop-and-search-powers>

⁴⁸ Liberal Democrats, *Ending suspicion-less Stop and Search: your questions answered*, 17 July 2020, available at: <https://www.libdems.org.uk/stopandsearch-qna> <https://www.libdems.org.uk/stopandsearch-qna>; Lammy, D., *Stop and search is inherently unfair, unjust and ineffectual*, The Guardian, 13 October 2018, available at: <https://www.theguardian.com/law/2018/oct/13/stop-and-search-is-unjust-unfair-ineffectual-david-lammy> <https://www.theguardian.com/law/2018/oct/13/stop-and-search-is-unjust-unfair-ineffectual-david-lammy>

⁴⁹ See for example: Eugene K., *A sus law by any other name stinks as much*, Stopwatch, 19 March 2021, available at: <https://www.stop-watch.org/news-opinion/a-sus-law-by-any-other-name-stinks-as-much/>; Hackney Account, *Policing in Hackney: Challenges from youth in 2020*, 2020, available at: <https://static1.squarespace.com/static/5d234a046f941b0001dd1741/t/5f77795b9e2fdb6bf67d3c7d/1601665467995/Final+Draft+-+Report+-+Account+%28Online%29.pdf>

⁵⁰ 319F(5)

OFFENCE RELATING TO SUSPICIONLESS STOP AND SEARCH

34. Clause 14 creates a specific offence for intentional obstruction during the course of a suspicion-less, protest-specific stop and search. The maximum penalty for obstruction is 51 weeks' imprisonment, a fine not exceeding level 3 on the standard scale, or both.
35. We are concerned that this offence will compound the harms of the new suspicion-less stop and search power. The so-called 'prohibited objects' targeted by the suspicion-less stop and search power would not be 'prohibited' but for the creation of the new offences. Furthermore, while replicating the existing offence of 'wilful obstruction' of a constable in the execution of their duty, the new offence drastically increases the penalty from one month's imprisonment, a fine, or both, to 51 weeks' imprisonment, a fine, or both.
36. One of the consequences of this offence is that it might be used to target legal observers, with Liberty having represented legal observers who were wrongly arrested at a protest in 2021.⁵¹ For example, we can envision a situation whereby a legal observer on their way to a protest may be stopped and searched for carrying items such as bust cards or wearing an identifiable yellow bib, on the basis that these are 'prohibited objects' because they are made for use 'in the course of or in connection with' the conduct of others of one of the listed offences). This will have a disempowering effect on protests and on our ability to hold the police and the State to account over unlawful violations of our rights.⁵²

OFFENCE OF LOCKING ON

37. Clause 1 establishes a new criminal offence targeting people who engage in one of the following activities: attach themselves to another person, an object, or land; attach a person to another person, an object, or land; or attach an object to another object or to land; if such activities cause, or are capable of causing, 'serious disruption' to two or more people or to an organisation in a public place. For the offence to apply, the person must intend the act to have this consequence or be reckless as to whether it will have this consequence. There is a defence of 'reasonable excuse'. Breach of this offence is maximum 51 weeks' imprisonment,⁵³ a fine, or both.

⁵¹ For example, during protests against the very Bill that these amendments would effect, legal observers have been arrested alongside protestors - many of which have been from marginalised communities, including legal observers of colour, and LGBT+ legal observers. In March, Liberty lawyers sent a pre-action protocol letter to the Met, arguing that their arrests at a recent protest were unlawful and a dangerous attack on the right to protest. The Metropolitan Police proceeded to drop these charges. See here:

<https://www.libertyhumanrights.org.uk/issue/liberty-files-legal-action-over-protest-arrests/> and <https://www.libertyhumanrights.org.uk/issue/case-update-police-drop-protest-fines-after-liberty-legal-action/>

⁵² Netpol, *Protecting protest: Why independent legal observers remain essential*, 11 May 2022, available at: <https://netpol.org/2022/05/11/protecting-protest-article11/>

⁵³ The offence provides that a person who commits an offence under this section is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both. If the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, the maximum sentence will be six months; (b) if the offence is committed after that time, the maximum sentence will be 51 weeks.

38. Case law confirms that we have a right to choose how we protest,⁵⁴ and the diversity of protest tactics throughout history demonstrates the deeply interconnected nature of free expression, creativity, and dissent.⁵⁵ For example, suffragettes from the Women’s Freedom League chained themselves to the grille in the Ladies’ Gallery in order to protest their exclusion from the Parliament.⁵⁶ This offence not only defies those principles, but criminalises an innumerable list of activities – not only what would typically be understood as ‘lock-on protests’ (where people lock themselves to one another via a ‘lock-on’ device or chain themselves to Parliament⁵⁷), but also any activities involving people ‘attaching’ themselves to other people, an object, or land; or ‘attaching’ objects to other objects and land.⁵⁸
39. Notwithstanding the Government’s claim that the wording of this offence is sufficiently precise to be foreseeable and that the provisions are in accordance with the law,⁵⁹ we are concerned that it risks disproportionately interfering with individuals’ Article 10 and Article 11 rights. The broad and vague nature of the word ‘attach’ – which is not defined in the Bill – means that this offence could potentially catch people engaged in activities such as linking arms with one another⁶⁰ and trees,⁶¹ or locking their wheelchairs to traffic lights.⁶² The JCHR further highlights that the term “serious disruption” is not defined in the Bill, nor is there provision for the term to be defined by regulations, as is the case in respect of its use in the PCSC Act. This means that it is an “extremely broad term with no clear boundaries”, with it being “unclear who or what would need to be seriously disrupted, what level of disruption is needed before it becomes serious and how these questions are meant to be determined by protesters and police officers on the ground - or even the courts. This gives rise to the risk of disproportionality and also uncertainty.”⁶³

⁵⁴ “Organisers’ autonomy in determining the assembly’s location, time and manner of conduct, such as, for example, whether it is static or moving or whether its message is expressed by way of speeches, slogans, banners or by other ways, are *important aspects of freedom of assembly*. Thus, the purpose of an assembly is often *linked to a certain location and/or time, to allow it to take place within sight and sound of its target object and at a time when the message may have the strongest impact.*” See *Lashmankin v Russia* (Application No.57818/09).

⁵⁵ Gabbatt, A., *Hundreds attend kiss-in outside John Snow pub after venue closes its doors*, *The Guardian*, 15 April 2011, available at: <https://www.theguardian.com/uk/2011/apr/15/john-snow-kiss-in-london>

⁵⁶ The Grille Incident, UK Parliament. <https://www.parliament.uk/about/living-heritage/transformatingsociety/electionsvoting/womenvote/parliamentary-collections/ladies-gallery-grille/grille-incident/>

⁵⁷ Sisters Uncut, “*We are the suffragettes!*”: *Sisters Uncut chain themselves to Parliament at government art launch*, 8 June 2016, available at: <https://www.sistersuncut.org/2016/06/08/we-are-the-suffragettes-sisters-uncut-chain-themselves-to-parliament-at-government-art-launch/>

⁵⁸ HL Deb 17 Jan 2022, vol.817, col. 1433.

⁵⁹ Para 10, Public Order Bill, ECHR Memorandum, <https://www.gov.uk/government/publications/public-order-bill-overarching-documents/public-order-bill-european-convention-on-human-rights-memorandum>

⁶⁰ Stead, J., *The Greenham Common peace camp and legacy*, *The Guardian*, 5 September 2006, available at: <https://www.theguardian.com/uk/2006/sep/05/greenham5>

⁶¹ Topham, G., *Priest to chain herself to tree at Euston in protest against HS2 felling plans*, *The Guardian*, 11 January 2018, available at: <https://www.theguardian.com/environment/2018/jan/11/priest-chain-tree-protest-euston-hs2-felling-plans-london>

⁶² Susan Archibald is a disability rights campaigner who shut down Trafalgar Square with fellow activists in 2012 when they chained their wheelchairs to traffic lights in a protest against the UK welfare assessment regime, then administered by Atos. See: Paterson, K., *WATCH: Scots wheelchair stunt activist hits out at Policing Bill*, *The National*, 24 November 2021, available at: <https://www.thenational.scot/news/19739616.watch-scots-wheelchair-stunt-activist-hits-policing-bill/> and Liberty’s series of videos showcasing the power of protest in which Susan is featured: <https://www.libertyhumanrights.org.uk/fundamental/we-protest/>

⁶³ Joint Committee on Human Rights, *Government creating hostile environment for peaceful protest, report finds*, 17 June 2022, available at: <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/171503/government-creating-hostile-environment-for-peaceful-protest-report-finds/>

40. As well as covering a wide range of activities, the new offence of locking-on also “provides an exceptionally low threshold for a broad offence,” as highlighted by Labour peer Lord Rosser, given that such activities do not have to *actually* cause, but merely have to be “capable of causing” serious disruption. Liberal Democrat peer Lord Paddick flagged the difficulties this would create in practice: “If it were on a different road or at a different time, it would be capable of causing serious disruption. But if it is 3 am on a Sunday, is that still capable of causing serious disruption?”⁶⁴
41. **This proposal is not supported by the police.** When consulted on a similar proposal by HMICFRS, police respondents said: “most interviewees [junior police officers] did not wish to criminalise protest actions through the creation of a specific offence concerning locking-on.”⁶⁵ On this, Lord Rosser noted, “The reality is that powers already exist for dealing with lock-ons. What we should be looking at is proper guidance, training and, as the inspectorate raised, improving our use of existing resources and specialist officers.”⁶⁶
42. **The maximum penalty for this offence is extremely severe.** The JCHR notes that the maximum term of imprisonment for this offence is significantly harsher than the maximum penalties that, until recently, applied to existing ‘protest-related’ non-violent offences such as obstructing the highway (level 3 fine) or aggravated trespass (3 months imprisonment).⁶⁷
43. **The defence of ‘reasonable excuse’ provides an inadequate safeguard for the exercise of Convention rights, given that someone would have to be arrested before being able to plead the defence of reasonable excuse.** In other words, as explained by the JCHR, “while this defence may protect an individual against wrongful conviction in breach of their Convention rights, it is less likely to protect them against prosecution and, particularly, arrest. Police officers are unlikely to refrain from arresting someone if all the elements of the offence are made out, meaning a protester with a ‘reasonable excuse’ based on exercise of Article 10 and 11 rights is likely to face arrest regardless.” The very threat of arrest would be an interference with individuals’ human rights, while also contributing to the chilling effect of the Public Order Bill on those exercising their fundamental rights.
44. As highlighted by the JCHR, the requirement on the defendant to show that they had a ‘reasonable excuse’ for locking on is also notable for its reversal of the presumption of innocence, a central principle of criminal justice and an aspect of the Article 6 ECHR right to a fair trial. In contrast to an offence like obstruction of the highway, where the

⁶⁴ HL Deb 24 Nov 2021, vol.816, col. 980

⁶⁵ Pg 125, HMICFRS, *Getting the balance right? An inspection of how effectively the police deal with protests*, March 2021, available at: <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>

⁶⁶ HL Deb 17 Jan 2022, vol.817, col. 1433

⁶⁷ Joint Committee on Human Rights, *Government creating hostile environment for peaceful protest, report finds*, 17 June 2022, available at: <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/171503/government-creating-hostile-environment-for-peaceful-protest-report-finds/>

prosecution must prove that the defendant did not have ‘lawful authority or excuse’ for their actions, for the new ‘locking-on’ offence the burden of proof would be on *the defendant* to show that he or she has a ‘reasonable excuse’, to a balance of probabilities. Where the constituent elements of the offence have been proved, a court may be 49% convinced that the defendant did have a reasonable excuse, but would still be required to convict. What this means in practice is that defendants may find it more difficult to rely on this defence. This is exacerbated by the fact that it is unclear in what circumstances doing each one of these activities would constitute a ‘reasonable excuse’, which again is likely to deter people from protesting for fear of the risk of arrest, conviction, and imprisonment.⁶⁸

OFFENCE OF BEING EQUIPPED FOR LOCKING ON

45. 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 new offence of locking on. The punishment for this offence is an unlimited fine.
46. Our worries about the vague and potentially unlimited list of activities covered by the offence of locking on are exacerbated by the ambiguity of the offence of being equipped for locking on. We note that the ‘object’ in the offence of locking on does not have to be related to a protest at all – it must simply be established that a person intended for it to be used in a certain way. Nor does the object have to be used by the person who has it in their possession; the offence refers to the commission by ‘any person’ of the offence. The phrase, ‘in the course of or in connection with’, casts an extremely wide net as to what activities might be criminalised under this offence.
47. Effectively, any person walking around with a bike lock, packet of glue, roll of tape or twine, or any number of other everyday objects could be at risk of having found to have committed this offence, so wide is the net cast by it. During debates on this amendment during the passage of the PCSC Act, Lord Paddick raised the following example: “You could buy a tube of superglue to repair a broken chair at home, then get caught up in a protest and be accused of going equipped for locking on.”⁶⁹ Labour peer Baroness Chakrabarti further expressed concern for people possessing everyday items, that could be caught by these provisions: “I am worried about young people going about their business, sometimes riding to a demonstration or being in the vicinity of potential demonstrations, carrying bicycle locks.”⁷⁰ The possibilities are endless: the phrase “used in the course of or in connection with” an offence of locking on by *any* person could include the provision of bottled water or food to other people

⁶⁸ Joint Committee on Human Rights, *Government creating hostile environment for peaceful protest, report finds*, 17 June 2022, available at: <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/171503/government-creating-hostile-environment-for-peaceful-protest-report-finds/>

⁶⁹ HL Deb 24 Nov 2021, vol.816, col. 980

⁷⁰ HL Deb 24 Nov 2021, vol.816, col. 987

“in connection with” their direct action of locking on, or potentially just having on one’s person a mobile phone to livestream or record the action. This will not only have the effect of further deterring people from going to protests – or even walking in the vicinity of them – it could compound the criminalisation of people exercising their right to choose different methods of protest.

48. It is also significant that, unlike the substantive offence of locking on, there is no “reasonable excuse” defence in the wording of this offence, which means that individuals will find it even more difficult to challenge.

OFFENCES OF CAUSING SERIOUS DISRUPTION BY TUNNELLING, CAUSING SERIOUS DISRUPTION BY BEING PRESENT IN A TUNNEL, AND BEING EQUIPPED FOR TUNNELLING

49. The Public Order Bill creates the new offences of causing serious disruption by tunnelling, causing serious disruption by being present in a tunnel, and being equipped for tunnelling. Clause 3 provides that a person will commit an offence if they create or participate in the creation of a tunnel; the creation or existence of the tunnel causes, or is capable of causing, serious disruption to two or more individuals or an organisation in a public place; and the individual intends by the creation or existence of the tunnel to create serious disruption or are reckless as to that consequence. There is a defence of reasonable excuse, including if the creation of the tunnel was authorised by a person with an interest in land which entitled them to authorise its creation. The maximum penalty for this offence on summary conviction is a term of imprisonment not exceeding the general limit in a magistrates’ court, a fine, or both. On conviction on indictment, the maximum penalty is three years’ imprisonment, a fine, or both.
50. Clause 4 creates the new offence of causing serious disruption by being present in a tunnel. Clause 4 replicates the language of clause 3, and provides that a person commits an offence if they are present in a tunnel, their presence in the tunnel causes, or is capable of causing, serious disruption, and they intend their presence in the tunnel to have such a consequence or are reckless as to whether their presence will have such a consequence. As with clause 3, the maximum penalty for this offence on summary conviction is a term of imprisonment not exceeding the general limit in a magistrates’ court, a fine, or both. On conviction on indictment, the maximum penalty is three years’ imprisonment, a fine, or both.
51. Clause 5 creates a new offence of being equipped for tunnelling. A person will commit 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 the above two tunnelling offences. A person who commits this offence

is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both. The term ‘object’ is not defined; we are concerned that this could include an innumerable number of objects, even if there is only a remote possibility that they will be used in connection with one of the offences.

52. We reiterate our concerns above that the Government is cracking down on different protest tactics for politically expedient reasons, without considering the impact of these measures on individuals’ rights to protest, nor providing an evidence base for them. The defence of reasonable excuse is unlikely to provide an effective safeguard for the reasons highlighted above. We note that these offences were added to the Public Order Bill by the Government during committee stage in the House of Commons, and as a result, have not been subject to full parliamentary scrutiny, including by the Joint Committee on Human Rights.

OBSTRUCTION OF MAJOR TRANSPORT WORKS

53. Clause 6 creates a new criminal offence, whereby a person will commit an offence if they obstruct an undertaker (e.g. a construction worker) in setting out the lines of any major transport works, constructing or maintaining any major transport works, or in taking ‘any steps that are reasonably necessary for facilitating, or in connection with, the construction or maintenance of any major transport works’ (clause 6(1)(a)). It will also be an offence to interfere with, move, or remove any apparatus which relates to the construction or maintenance of any major transport works, and which belongs to the undertaker (clause 6(1)(b)). There is a defence of ‘reasonable excuse’. The maximum penalty for this offence is 51 weeks’ imprisonment,⁷¹ or a fine, or both.
54. The list of major transport works includes works in England and Wales relating to transport infrastructure, the construction of which is authorised directly by an Act of Parliament; or works the construction of which comprises development (defined in clause 6(7)) that has been granted development consent by an order under section 114 of the Planning Act.
55. Under human rights law, States have an obligation not to place unnecessary obstacles in the way of people wishing to protest, as well as a positive obligation to facilitate protest.⁷² Any restrictions on the rights to freedom of assembly and freedom of expression must be defined in law, pursue a legitimate aim and be necessary and proportionate. Moreover, the right to freedom of assembly includes the right to

⁷¹ The offence provides that a person who commits an offence under this section is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both. If the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, the maximum sentence will be six months; (b) if the offence is committed after that time, the maximum sentence will be 51 weeks.

⁷² *Ollinger v Austria*, Application no. 76900/01.

choose the time, place and modalities of any protest.⁷³ As the Court of Appeal has held, protest “becomes effectively worthless if the protestor’s choice of ‘when and where’ to protest is not respected as far as possible.”⁷⁴

56. Lord Rosser previously highlighted the particular impact that this offence will have on environmental protesters, remarking: “Frankly, we have reached a sorry state of affairs when we legislate still further specifically against those concerned about the proven threat of climate change and its impact on our way of life and that of our children and grandchildren, and the tardy action on environmental issues.”⁷⁵ We share similar concerns, but further note that this offence criminalises a much broader range of acts – including the obstruction of not only actual construction work, but ‘any steps that are reasonably necessary for *facilitating the construction or maintenance* of major transport works’. This is an extremely low threshold, and as such, we do not agree with the Home Office’s assessment that this offence is sufficiently precise to be foreseeable, and believe it risks disproportionately interfering with individuals’ Article 10 and 11 rights. **As noted by Lord Beith, “[i]f you try to write legislation around an individual set of circumstances that has arisen, you get into trouble. You turn into general law attempts to deal with very specific cases.”**⁷⁶ We reiterate our concerns about the heavy maximum sentence of 51 weeks’ imprisonment, a fine, or both, that accompanies this offence. We do not believe the defence of reasonable excuse goes far enough to mitigate these issues.

INTERFERENCE WITH USE OR OPERATION OF KEY NATIONAL INFRASTRUCTURE

57. Clause 7 of the Bill creates an offence where a person does an act which interferes with the use or operation of key national infrastructure in England and Wales, intending or being reckless as to whether the act will interfere with the use or operation. Key national infrastructure is defined to include road transport, rail, air transport, harbour, downstream oil, downstream gas, onshore oil and gas exploration and production, electricity generating, and newspaper printing infrastructure. The maximum penalty for this offence is 51 weeks’ imprisonment,⁷⁷ or a fine, or both.

58. Clause 7(4) defines ‘interference’ extremely broadly, as any act that “prevents the infrastructure from being used or operated *to any extent* for *any* of its intended

⁷³ *Sáska v. Hungary*, Application no. 58050/08.

⁷⁴ *Singh and ors, R (on the Application of) v Chief Constable of West Midlands Police* [2006] EWCA Civ 1118, at para 87

⁷⁵ HL Deb 17 Jan 2022, vol.817, col. 1433

⁷⁶ HL Deb 24 November 2021, vol.816, col. 986

⁷⁷ The offence provides that a person who commits an offence under this section is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both. If the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, the maximum sentence will be six months; (b) if the offence is committed after that time, the maximum sentence will be 51 weeks.

purposes (emphasis added).” This low threshold appears to contradict with the Supreme Court’s finding that deliberately obstructive protest can come under the protection of Articles 10 and 11, and risks criminalising an extremely wide range of activities. This includes where the use or operation of infrastructure is “significantly delayed” (clause 7(5)) – a term that is not defined in the offence.

59. One of the key ways that people seek to make their protests effective is to draw attention to sites of power. We echo our concerns above that the ‘reasonable excuse’ defence is insufficient to mitigating the harms of this offence.

SECRETARY OF STATE POWERS: CIVIL INJUNCTIONS

60. Currently, civil injunctions can only be applied for by people who are affected, such as a Highway Authority or company such as HS2 Limited.⁷⁸ The majority of civil injunctions do not give the police powers of arrest. Expansive civil injunctions are being used with growing and alarming frequency to clamp down on direct action tactics, with a wider chilling effect on the right to protest.

61. 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. The threshold for applying for such an injunction is if the Secretary of State reasonably believes that the activities are causing or likely to cause serious disruption to the use or operation of any key national infrastructure or access to essential goods or services; or if they are having or likely to have a serious adverse effect on public safety. The significance of clause 17 is that it effectively gives the Secretary of State the power to bring themselves into civil injunction proceedings even where they are not an affected party in the usual sense.

62. Clause 18 gives the Secretary of State the power to apply to the court to attach a power of arrest and remand to injunctions granted under 17 which prohibit conduct that causes nuisance or annoyance or is capable of having an adverse effect on public safety. With clause 17 giving the Secretary of State the power to apply for injunctions on their own behalf, and clause 18 enabling them to apply to attach a power of arrest and remand to such injunctions, this would effectively appear to give the Government the ability to create new public order ‘offences’ as and when it decides to do so (in the sense that they will be able to apply to the court to arrest people for engaging in activities fitting the broad descriptions stipulated in the Bill).

63. At report stage in the House of Commons, Caroline Lucas MP provided an example of how these measures would work in practice: “Let us suppose that the Government

⁷⁸ <https://www.hs2.org.uk/in-your-area/hs2-route-wide-injunction/>

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.” We concur with her assessment that these powers are “anti-freedom, anti-human rights and anti-democratic.”

CONCLUSION

64. Successive Governments have sought to restrict our fundamental right to protest. We have yet to see the full implications of the PCSC Act’s expansion of police powers, yet the Government are already pushing through a Public Order Bill full of rehashed provisions that were resoundingly rejected by peers in the House of Lords just months ago. More widely, Sir Charles Walker MP has argued that the Bill must be situated in the wider context of the Government’s attempts to ban protest during the pandemic: “I warned... that once the Government and politicians were emboldened by placing restrictions on a right and turning it into a freedom, they would not stop.”⁷⁹
65. During the last parliamentary session, the Government passed legislation to introduce photographic voter ID and restrict judicial review, further limiting people’s ability to make their voices heard at the ballot box and challenge public bodies in the courts. Though its plan to scrap the Human Rights Act and replace it with an inferior ‘Rights Removal Bill’ that will make it harder for people to challenge violations of their rights and further centralise power in the hands of the executive has been ‘shelved’, we are clear-eyed and vigilant about the possibility of its return, in whatever form.
66. In the face of social, political, and economic upheaval, the right to protest remains a cherished way for all of us – regardless of political affiliation or party - to make our voices heard. **For this reason, and for all of the positive changes that protest has brought about in our society, Liberty urges peers to oppose the second reading of the Public Order Bill.**

⁷⁹ HC Deb 18 Oct 2022, vol. 720 col.581.

APPENDIX: SERIOUS DISRUPTION PREVENTION ORDERS (PROTEST BANNING ORDERS)

	On conviction	Otherwise than on conviction
How is it made?	A magistrate’s court can impose an SDPO on an individual after they are sentenced or given a conditional discharge. The court can also adjourn proceedings for an SDPO until a later date.	A magistrate’s court, on application by: <ol style="list-style-type: none"> 1) The chief police officer where P lives; 2) A chief police officer who believes that P is in, or intends to come to, their area; or 3) The chief constable of the British Transport Police Force, Civil Nuclear Constabulary, or Ministry of Defence Police
Conditions for imposing an SDPO	<ol style="list-style-type: none"> 1) P has committed an offence. 2) The court is satisfied that the offence is “directly related to a protest” (clause 26). 3) P must have: <ol style="list-style-type: none"> i. Committed a ‘protest-related offence’; ii. Committed a protest-related breach of an injunction for which they were found in contempt of court; iii. Carried out activities related to a protest that resulted in, or were likely to result in, serious disruption to two or more individuals or to an organisation in England and Wales; iv. Caused or contributed to the commission by any other person of a protest-related offence or a protest-related breach of an injunction; or v. Caused or contributed to the carrying out by any other person of activities related to a 	<p>The court is satisfied on the balance of probabilities that on at least two occasions in the last five years, P has been:</p> <ol style="list-style-type: none"> i. Convicted of a protest-related offence; ii. Been found in contempt of court for a protest-related breach of an injunction; iii. Carried out activities related to a protest that resulted in or were likely to result in serious disruption to two or more individuals, or to an organisation, in England and Wales; iv. Caused or contributed to the commission by any other person of a protest-related offence or a protest-related breach of an injunction; or v. Caused or contributed to the carrying out by any other person of activities related to a protest that resulted or were likely to result in, serious

	<p>protest that resulted in, or were likely to result in, serious disruption to two or more individuals, or to an organisation, in England and Wales.</p>	<p>disruption to two or more individuals, or to an organisation, in England and Wales.</p>
Necessity	<p>The court has to be satisfied that the SDPO is necessary to prevent P from:</p> <ul style="list-style-type: none"> i. committing any ‘protest-related offences’ or ‘protest-related’ breaches of an injunction; ii. carrying out activities related to a protest that result in or are likely to result in serious disruption to two or more people or an organisation in England and Wales; iii. causing or contributing to the commission by any other person of such an offence/breaches of an injunction or the carrying out of such activities; or iv. protecting two or more people or an organisation from the risk of serious disruption arising from a protest-related offence, a protest-related breach of an injunction, or activities related to a protest. 	