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## BRIEFING ON THE PUBLIC ORDER BILL FOR REPORT STAGE IN THE HOUSE OF LORDS: NEW GOVERNMENT AMENDMENTS, JANUARY 2023

1. The Government continues to escalate its attack on our right to protest. Shortly before the Public Order Bill's Report Stage in the House of Lords, the Government announced that it would be amending the Bill to "give police officers absolute clarity" over when to intervene to stop disruptive protest,<sup>1</sup> following requests from the police<sup>2</sup> and extended parliamentary debates over the failure of the Bill to define 'serious disruption.'<sup>3</sup> **Instead, the Government's amendments will give the police extraordinary powers to restrict protest and exacerbate legal uncertainty by:**
  - **Introducing offence-specific definitions of 'serious disruption' with extremely low thresholds, e.g. 'more than minor' hindrances to daily activities**
  - **Limiting the scope of the reasonable excuse defence for certain new offences**
  - **Introducing three 'more than minor' disruption triggers to enable the police to pre-emptively impose conditions on, and potentially prevent, protests**
2. Lowering the threshold for 'serious disruption' and giving the police greater discretion to restrict protests is an attack on our fundamental rights. It is highly worrying to see the Government propose potentially controversial amendments so late in the Bill's passage, when there is limited time for scrutiny – indeed, a similar move during the passage of the PCSC Act resulted in significant Government defeats in January 2022.<sup>4</sup>
3. **We urge Peers to oppose these amendments, and the anti-protest measures in the Public Order Bill in their entirety.**

### OFFENCE-SPECIFIC DEFINITIONS OF SERIOUS DISRUPTION

4. The Government proposes to create separate definitions of 'serious disruption' in relation to the new offences of locking on, tunnelling, and causing serious disruption by being in a tunnel. The importance of these definitions is that once the threshold for 'serious disruption' is met, a person may be committing a criminal offence, meaning that the police may intervene to stop it.

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<sup>1</sup> Prime Minister's Office, 10 Downing Street and The Rt Hon Rishi Sunak MP, PM takes action to stop disruptive protests, 16 January 2023: <https://www.gov.uk/government/news/pm-takes-action-to-stop-disruptive-protests>

<sup>2</sup> Sir Mark Rowley QPM, Commissioner of Police of the Metropolis: "I think Parliament has created a problem for policing with the rules set for protest. The first point of law is that law should be clear. The balance between what is lawful and reasonable and what is not is very unclear... Basically, Parliament has left a very grey space about what is lawful and what is unreasonable disruption, and expects police to work out a line through the middle of it... That grey space has been defined through that very painful police decision-making and litigation process." Q73, Home Affairs Committee Oral evidence: Policing priorities, HC 635, 14 December 2022.

<sup>3</sup> Throughout the passage of the Public Order Bill, parliamentarians and the Joint Committee on Human Rights have repeatedly highlighted the failure of the Government to define 'serious disruption', a term which is pervasive across the Public Order Bill. See for example: HL Deb, 16 Nov 2022, vol. 825 cols.911-926. Similar concerns had also been raised by the Constitution Committee and the Delegated Powers and Regulatory Reform Committee when the Government failed to provide a definition for 'serious disruption' in the Police, Crime, Sentencing and Courts Act 2022. See: House of Lords Select Committee on the Constitution, *7<sup>th</sup> Report of Session 2021-2022: Police, Crime, Sentencing and Courts Bill*, 9 September 2021: <https://committees.parliament.uk/publications/7225/documents/75867/default> and Delegated Powers and Regulatory Reform Committee, *6<sup>th</sup> Report of Session 2021-2022: Police, Crime, Sentencing and Courts Bill, Public Service Pensions and Judicial Offices Bill*, 13 September 2021: <https://committees.parliament.uk/publications/7279/documents/76344/default/>

<sup>4</sup> BBC News, *Crime bill: Lords defeats for government's protest clamp-down plans*, 18 January 2022: <https://www.bbc.co.uk/news/uk-politics-60032465>.

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Locking on	“(1A) For the purposes of subsection (1)(b) the act will result in, or will be capable of causing, serious disruption if it prevents or would hinder to <b>more than a minor degree</b> the individuals or the organisation from carrying out their daily activities (emphasis added).” <sup>5</sup>
Tunnelling	“(1A) For the purposes of subsection (1)(b) the act will result in, or will be capable of causing, serious disruption if it prevents or would hinder to <b>more than a minor degree</b> the individuals or the organisation from carrying out their daily activities.” <sup>6</sup>
Causing serious disruption by being in a tunnel	“(1A) For the purposes of subsection (1)(b) the person’s presence in the tunnel will result in, or will be capable of causing, serious disruption if it prevents or would hinder to <b>more than a minor degree</b> any construction or maintenance works or other activities that are being, or are to be, performed or carried on by the individuals or the organisation above the tunnel or in its vicinity.” <sup>7</sup>

5. **These amendments significantly lower the threshold for these offences, so that ‘more than minor’ hindrances to the carrying out of daily activities or construction/maintenance works or other activities could result in police intervention and arrest.** The common threshold set for each definition – ‘more than a minor degree’ – is fundamentally illogical. Simply put, ‘serious’ does not mean ‘more than a minor degree’; and yet, this is what ‘serious disruption’ will mean, should the Government amendments pass.
6. **Lowering the threshold for police intervention is likely to be incompatible with the rights to freedom of expression and assembly protected by articles 10 and 11 of the European Convention on Human Rights (ECHR) as incorporated by the Human Rights Act 1998.** The European Court of Human Rights has acknowledged that public authorities should show “a certain degree of tolerance” towards demonstrations that cause a certain level of disruption to ordinary life, including disruption of traffic, with the appropriate degree of tolerance dependent on the particular circumstances of the case and the extent of the disruption.<sup>8</sup> While Articles 10 and 11 do not prevent the state from taking proportionate action against those who cause severe disruption, they provide a much higher threshold than the ‘more than a minor degree’ threshold set out in the new amendments.
7. **The ‘more than minor’ threshold risks being insufficiently legally certain, and thus disproportionate.** It is unclear what ‘more than minor’ hindrances to each of the activities set out in the three definitions would amount to. For example, if a person attached themselves to a traffic light and if that hindered two or more people from crossing the street for 10 minutes, would this be a ‘more than minor’ hindrance to

<sup>5</sup> Amendment in the name of Lord Hope of Craighead, Lord Faulks, and Lord Sharpe of Epsom to clause 1, page 1, line 15, Running list of all amendments on Report tabled up to and including 17 January 2023.

<sup>6</sup> Amendment in the name of Lord Hope of Craighead, Lord Faulks, and Lord Sharpe of Epsom to clause 3, page 2, line 33, Running list of all amendments on Report tabled up to and including 17 January 2023.

<sup>7</sup> Amendment in the name of Lord Hope of Craighead, Lord Faulks, and Lord Sharpe of Epsom to clause 4, page 3, line 37, Running list of all amendments on Report tabled up to and including 17 January 2023.

<sup>8</sup> Kudrevicius and Others v Lithuania (Application no.37553/05). Also see: Director of Public Prosecutions (Respondent) v Ziegler and others (Appellants), [2021] UKSC 23.

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those individuals' daily activities, requiring police intervention? Would this be different if it was a busy crossroad near Parliament or in a quiet suburb? This is exacerbated by the fact that the definitions fail to distinguish between the different thresholds for 'serious disruption' that would be proportionate for each of the offences. For example, as highlighted by Lord Anderson of Ipswich in relation to the offence of 'locking on', echoing a recommendation by the JCHR:<sup>9</sup>

“[I]t seems right that **the threshold should be a very high one**: ‘prolonged disruption of access’ to homes, workplaces or other places to which there is an urgent need to travel, or significant delay in the delivery of time sensitive products or essential goods and services [emphasis added].”

Rather than establishing different thresholds of 'serious disruption' for each offence, the Government has opted to apply the same low threshold to all of them.

## LIMITING REASONABLE EXCUSE

8. The Government amendments also seek to limit the scope of the reasonable excuse defence for the following offences, so that the person who committed the act cannot rely on the fact that they were doing so as part of a protest as a reasonable excuse: locking on, tunnelling, causing serious disruption by being in a tunnel, obstructing major transport works, and interfering with key national infrastructure.<sup>10</sup>
9. **This is a highly concerning attempt to exclude certain acts from the protection of the right to freedom of expression.** This is because the ingredients in the relevant offences are likely to capture expressive conduct that does engage and attract the protection of Convention rights – one example is the offence of locking on, which could include people linking arms and causing a more than minor hindrance to two individuals engaging in daily activities (such as crossing the road). This will exacerbate the existing difficulties that protesters will face in trying to rely on the reasonable excuse defences as drafted, as identified by the JCHR and others.<sup>11</sup>

## NEW TRIGGERS TO PRE-EMPTIVELY RESTRICT PROTEST

10. **The Government's amendments create new triggers for the police to be able to pre-emptively restrict protests,** by amending sections 12 and 14 of the Public Order Act 1986 which give the police the ability to give directions imposing unlimited conditions on public processions and assemblies respectively. Examples of conditions could include preventing a trade union from marching past their employer's building;<sup>12</sup> limiting the number of people who can attend a protest, and requiring a protest to end at a certain time. If a person fails to comply with a condition, and knows or ought to

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<sup>9</sup> Joint Committee on Human Rights, *First Report of Session 2022-2023: Public Order Bill*, 17 June 2022: <https://committees.parliament.uk/publications/22681/documents/166680/default/>.

<sup>10</sup> Amendments in the name of Lord Hope of Craighead, Lord Faulks, and Lord Sharpe of Epsom to clause 1, page 1, line 18; clause 3, page 2, line 36; clause 4, page 3, line 39; clause 6, page 5, line 20; and clause 7, page 7, line 16 (respectively), Running list of all amendments on Report tabled up to and including 17 January 2023.

<sup>11</sup> Joint Committee on Human Rights, *First Report of Session 2022-2023: Public Order Bill*, 17 June 2022: <https://committees.parliament.uk/publications/22681/documents/166680/default/>.

<sup>12</sup> In November, West Yorkshire Police attempted to use s.12 POA to impose conditions on a march planned by Leeds University UCU which would have prevented them from marching past the university. They were forced to back down after Liberty threatened legal action: [https://twitter.com/libertyhq/status/1597969151410466818?s=20&t=m4M8xMFDTs0CYgtB\\_KRmjQ](https://twitter.com/libertyhq/status/1597969151410466818?s=20&t=m4M8xMFDTs0CYgtB_KRmjQ)

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have known that it had been imposed, they could commit an offence and face a maximum 51 week prison sentence, a fine not exceeding level 4, or both.<sup>13</sup>

11. The PCSC Act previously introduced a ‘noise trigger’ to sections 12 and 14 of the POA, giving the police an expansive new power to restrict protests if they reasonably believe the noise produced by protests would result in serious disruption. **The Government amendments to the Public Order Bill go a step further, by creating three triggers with extremely low thresholds:**<sup>14</sup>

- A ‘**physical obstruction resulting in the prevention of or more than minor hindrance to the carrying out of daily activities**’ trigger<sup>15</sup> - this appears to target ‘slow walking’ tactics used by Just Stop Oil protesters.
- A ‘**prevention of or more than minor delay to delivery of time-sensitive products to consumers**’ trigger.<sup>16</sup>
- A ‘**prevention or more than minor delay to access to essential goods or services**’ trigger.<sup>17</sup>
- Additionally, when considering if a protest will have one of the above effects, the police may have regard to the “cumulative disruption to the life of the community” resulting from the protest; any protest previously held, currently being held, or intended to be held in the same area; and any other protest that will take place in the same area.<sup>18</sup>

12. *Power to treat multiple protests as one protest:* Further, the Government amendments provide that where a protest is being held or intended to be held, if it appears to a senior police officer that there is a connection between the protest **and one or more other protests** and the protests may result in serious disruption, they may give directions imposing conditions on any of those protests.<sup>19</sup>

13. Protest is the lifeblood of our democracy; the importance accorded to the rights to freedom of expression and assembly mean that restrictions on them must be proportionate, clear, and robustly justified. **The words ‘serious disruption’ imply a high threshold – they simply cannot mean a ‘more than minor’ hindrance to the**

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<sup>13</sup> This is the position in England and Wales – see s.12(5A) and s.14(5A) of the POA. In Scotland, a person will commit an offence if they knowingly fail to comply with a condition and the maximum sentence is a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both (see s.14(8)).

<sup>14</sup> The PCSC Act 2022 amended sections 12 and 14 of the POA to create a ‘noise trigger’, giving the police the power to impose conditions on protests if they reasonably believed the noise generated would cause serious disruption.

<sup>15</sup> See Government amendment amending s.12 of the POA: A public procession may result in serious disruption where “(za) it may, by way of physical obstruction, result in the prevention of, or a hindrance that is more than minor to, the carrying out of daily activities (including in particular the making of a journey).”

<sup>16</sup> The Government’s amendment raises the existing threshold from ‘a significant delay’ to a ‘more than minor’ delay.

<sup>17</sup> The police may impose conditions if a protest may result in “the prevention of or a more than minor delay access to any essential goods or any essential service, including, in particular, access to the supply of money, food, water, energy or fuel; a system of communication; a place of worship; a transport facility; an educational institution, or a service relating to health.” The Government’s amendment raises the existing threshold from ‘a prolonged disruption’ to a ‘more than minor’ disruption.

<sup>18</sup> It does not matter if the protests are organised by the same person; if any of the same persons take part in the different protests; the protests take place at the same time; or if directions have been given in relation to the other protest. The Government amendment provides that “‘area’ means such area as the senior police officer considers appropriate, having regard to the nature and extent of the disruption that may result from the assembly and the procession.”

<sup>19</sup> The amendments note that “all disruption to the life of the community” that may result from the protest or that may occur regardless of whether the protest is held is to be taken into account.

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carrying out of everyday activities, delay to the delivery of a time-sensitive product, or access to any essential goods or services.

14. **These new triggers would give the police unprecedented power and discretion to impose conditions on protests.** The unlimited nature of the conditions that could be imposed means that the police could effectively gut protests of their relevance and effectiveness (e.g. by rerouting them away from sites of power). The police could even effectively stop protests from happening altogether, if the conditions imposed are too onerous and/or if people are deterred from protesting as a result of the risk of the criminal consequences of breaching a condition.
15. **Such broad discretion, in the context of a broader clampdown on particular protest movements, may result in the police facilitating some protests while imposing restrictions on others.** This has practical implications for public order policing, placing an unhelpful political burden on frontline officers exercising their professional discretion. These concerns were similarly raised during the passage of the PCSC Act by a range of former police chiefs such as Sir Peter Fahy, the former chief constable of Greater Manchester Police, who stated people should be “really worried” about the Government “bringing in legislation on the back of the Black Lives Matter and Extinction Rebellion demonstrations...putting in some really dodgy definitions which the police are supposed to make sense of”.<sup>20</sup>
16. **The potential for these powers to be used to target specific protests is heightened by the fact that Secretary of State retains an extraordinary power to change the definition of ‘serious disruption’ through regulations (subject to the draft affirmative procedure).**<sup>21</sup> During the passage of the PCSC Act, the Joint Committee on Human Rights warned that this power could enable the Government of the day to clamp down on particular protests that it disagrees with.<sup>22</sup> The Select Committee on the Constitution went so far as to recommend the removal of this power, arguing that it could result in executive overreach into the police’s statutory functions.<sup>23</sup>

## CONCLUSION

17. The Government’s proposed amendments will expand the police’s powers to intervene in and restrict protest, while exacerbating legal uncertainty. **At Report Stage, we urge parliamentarians to oppose them, and to support clause stand part amendments to remove Serious Disruption Prevention Orders, protest-specific stop and search, and the offence of locking on from the Public Order Bill.**

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<sup>20</sup> Sophia Sleigh, ‘Really dodgy definitions’: Ex-police chief sounds warning over proposed powers for policing protests’, *Evening Standard*, 15 March 2021 <https://www.standard.co.uk/news/politics/policing-bill-protests-warning-sir-peter-fahy-b924136.html>

<sup>21</sup> Sections 12(12) (public processions) and 14(11) (public assemblies), Public Order Act 1986) (as amended by the PCSC Act 2022).

<sup>22</sup> The retention of powers to amend what falls within and without lawful protest where this is deemed necessary by the Secretary of State raises the risk that a future Home Secretary could respond to particular protests to which the Government objects and specify those as falling within the ‘serious disruption’ trigger.” Joint Committee on Human Rights, *Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)*, 16 June 2021: <https://committees.parliament.uk/publications/6367/documents/69842/default/>

<sup>23</sup> “The provisions on the use of secondary legislation raise two distinct concerns. The first is that the Secretary of State is authorised to define a statutory term whose function is central in regulating the relationship between public protest and police powers. Secondly, the power to “give examples of cases in which a public procession is or is not to be treated as resulting in serious disruption” comes close to a power to control and perhaps even effectively ban particular protests by discretion.” House of Lords Select Committee on the Constitution 7<sup>th</sup> Report of Session 2021-2022, *Police, Crime, Sentencing and Courts Bill*, 9 September 2021: <https://committees.parliament.uk/publications/7225/documents/75867/default/>.