

LIBERTY

LIBERTY'S BRIEFING ON THE GOVERNMENT'S AMENDMENTS TO THE POLICE, CRIME, SENTENCING, AND COURTS BILL (PROTEST)

NOVEMBER 2021

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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INTRODUCTION

1. On 15 November, the Government published more than 15 pages of new amendments to the Police, Crime, Sentencing and Courts (PCSC) Bill. The new measures include the establishment of new Serious Disruption Prevention Orders (SDPOs) that could effectively ban individuals from participating in certain protests, restrict their freedom of movement and expression, and bar their participation in public life; a drastic expansion of stop and search powers in relation to protest; increased sentences for existing offences; offences of locking-on, going equipped to lock-on, and obstructing major transport works.
2. These amendments – tacked on to a Bill whose breadth and size has already prompted significant criticism from various parliamentarians¹ and committees² given the impact this has on democratic scrutiny, and some of which are not even wanted by the police or indeed the Home Office – are a staggering attack on the right to protest. In combination with the rest of the measures in the Bill – including the much-criticised power given to the Secretary of State of the day to define what constitutes “serious disruption” by way of secondary legislation – these powers threaten to extinguish a crucial means by which people can stand up to power. That the Bill is already being rushed through Parliament and experiencing significant delays in the House of Lords means that these provisions – which we believe may infringe on human rights protected by the European Convention on Human Rights, as incorporated in UK domestic law by the Human Rights Act 1998 - are unlikely to be afforded even the limited parliamentary scrutiny that other aspects of the Bill have had, with grave implications for everyone’s rights and indeed, the health of our democracy.

OFFENCE OF LOCKING ON (AMENDMENT 319A)

Measure

3. Amendment 319A 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, a fine, or both. Under clauses 55 and 61 of Part 3 of the Bill, the Home Secretary will have the power to define “serious disruption” by way of secondary legislation.

¹ Lord Falconer of Thoroton, Police, Crime, Sentencing and Courts Bill, Second Reading (Lords), Hansard, 14 September 2021, Vol. 814, Col. 1284

² Delegated Powers and Regulatory Reform Committee, *6th Report of Session 2021-2022: Police, Crime, Sentencing and Courts Bill; Public Service Pensions and Judicial Offices Bill*, House of Lords, 13 September 2021, available at: <https://committees.parliament.uk/publications/7279/documents/76344/default/>

Analysis

4. Case law confirms that we have a right to choose how we protest,³ and the diversity of protest tactics throughout history demonstrates the deeply interconnected nature of free expression, creativity, and dissent.⁴ 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 Parliament⁵), but also any activities involving people ‘attaching’ themselves to other people, an object, or land; or ‘attaching’ objects to other objects and land. 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 another⁶ and trees,⁷ or locking their wheelchairs to traffic lights.⁸ As it is unclear what the offence means when it refers to ‘attaching an object to another object or land’, we are also concerned that this measure will clamp down on the use of props in protests, further constraining people’s right to choose the manner and form of their expressions of dissent.⁹

5. We are highly concerned that, in criminalising activities that, but for the creation of this offence, would not be illegal activities, this offence will create a chilling effect on the right to protest and prevent people from exercising their rights. In our view, the defence of ‘reasonable excuse’ provides an inadequate safeguard for the exercise of Convention rights, given that it is unclear in what circumstances doing each one of these activities would constitute a ‘reasonable excuse’. The potential threat posed by this offence – and indeed by many of the Government’s new proposals – is exacerbated by the power of the Secretary of State to determine what constitutes “serious disruption” by way of secondary legislation.

³ “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).

⁴ 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>

⁵ 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/>

⁶ 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>

⁷ 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>

⁸ 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/>

⁹ Neary, H., *Extinction Rebellion’s huge pink table torn down after Covent Garden protest*, *MyLondon*, 24 August 2021, available at: <https://www.mylondon.news/news/west-london-news/extinction-rebellions-huge-pink-table-21390596>

6. It is important to note that this proposal is not supported by the police. When consulted on a similar proposal by Her Majesty’s Inspectorate of Constabulary and Fire and Rescue Services (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.”¹⁰

OFFENCE OF BEING EQUIPPED FOR LOCKING ON (AMENDMENT 319B)

Measure

7. Amendment 319B creates a new criminal offence, targeting people who have an object with them in a public place with the intention that it will be used ‘in the course of or in connection with’ the commission, by any person, of the offence established by Amendment 319A. The punishment for this offence is an unspecified – and therefore potentially unlimited – fine.

Analysis

8. Our worries about the vague and potentially unlimited list of activities covered by Amendment 319A are compounded by Amendment 319B. We note that the ‘object’ in Amendment 319B 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, potentially encompassing any activities that relate to one of the activities in Amendment 319A.
9. Altogether, this means that someone could be convicted and given a fine simply for having an object in their possession with the intention that they themselves – or anyone else – would use it in the course of or in connection with someone attaching themselves or someone else to another person, an object, or land; or someone attaching an object to an object, or land. As we have noted, the activities in 319A would not be an offence but for the provision; 319B therefore compounds the criminalisation of certain protest tactics, dragging more people into the criminal justice system in the process.

WILFUL OBSTRUCTION OF A HIGHWAY (AMENDMENT 319C)

Measure

10. Amendment 319C increases the sentence for the existing offence of wilful obstruction of a highway, provided for in s.137 of the Highways Act 1980. The current penalty is a fine, whereas Amendment 319C raises it to maximum 51 weeks’ imprisonment, or a fine (maximum level 3 on the standard scale), or both.

Analysis

¹⁰ 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>

11. We echo concerns voiced by civil society organisations and parliamentarians about the impact of heavy sentences for protest. As noted by Lord Dubs in the PCSC Bill's committee stage in the House of Lords: "An overly severe penalty may have a chilling effect on those considering exercising their right to protest."¹¹ Indeed, we have previously warned of the chilling effect that clause 57 of the PCSC Bill will have, in its lowering of the knowledge threshold and raising of the penalty for the offence of breaching a police-imposed condition on protest under section 12 and 14 of the Public Order Act (POA) 1986) from three months to 51 weeks' imprisonment and the increase of the maximum fine that may be imposed on organisers and attendees of a protest from level 3 to level 4 on the standard scale.
12. We note that provisions that increase maximum sentences are not rooted in evidence. As recently reported by the Prison Reform Trust, recent changes to sentencing have not been driven by an increase in the incidence of serious crime.¹² In the protest context, the increase in sentences may well deter some people from engaging in these activities; but for those who deliberately choose to break the law as a tactic of protest, this is not likely to have a significant effect. What this provision does is to create a chilling effect on people's exercise of their right to protest and their right to choose the manner and form of their protest.

OBSTRUCTION OF MAJOR TRANSPORT WORKS (AMENDMENT 319D)

Measure

13. Amendment 319D 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'. 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. There is a defence of 'reasonable excuse'. The maximum penalty for this offence is 51 weeks' imprisonment, or a fine, or both.
14. The list of works to which this offence would apply includes construction works in England and Wales relating to transport infrastructure authorised by an Act of Parliament; and construction works which are or form part of projects under paragraphs (h) to (l) of s.14(1) Planning Act including highway-related developments,¹³ airport-related developments,¹⁴ the construction or alteration of harbour facilities,

¹¹ Lord Dubs, Police, Crime, Sentencing and Courts Bill, Committee Stage (Lords), Hansard, 24 November 2021, Vol. 816, Col. 924

¹² Prison Reform Trust (October 2021) Long-term prisoners: the facts

¹³ Taylor, D., *HS2 protesters Swampy and Satchel leave Wendover tunnel after 35 days*, The Guardian, 13 November 2021, available at: <https://www.theguardian.com/uk-news/2021/nov/13/hs2-protesters-swampy-and-satchel-leave-wendover-tunnel-after-35-days>

¹⁴ Mortimer, C., *Plane Stupid climate change activists block Heathrow runway in protest at airport expansion*, The Independent, 14 July 2015, available at: <https://www.independent.co.uk/news/uk/home-news/heathrow-protest-live-plane-stupid-climate-change-activists-block-runway-protest-airport-expansion-10384280.html>

the construction or alteration of a railway, and the construction or alteration of a rail freight interchange.

Analysis

15. We are highly concerned that the number of acts potentially criminalised by this offence are extremely broad – they include 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’. In relation to the offence on interference with apparatuses relating to major transport works, we note that the term ‘apparatus’ is left largely undefined and the terms ‘interfere, move, or remove’ could catch a wide range of actions. We are concerned about the implications of this offence for pickets of construction workers at their places of work.¹⁵ We reiterate our concerns about the heavy maximum sentence of 51 weeks’ imprisonment, a fine, or both, that accompanies this offence.

POWERS TO STOP AND SEARCH ON SUSPICION (AMENDMENT 319E)

Measure

16. Amendment 319E amends s.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 (clause 60), the offence of locking-on and other activities (amendment 319A), and the offence of obstruction of major transport works (amendment 319D). The police may seize any prohibited item found during a search.

Analysis

17. This amendment constitutes a mass expansion of police powers through the creation of protest-specific stop and search. We note that the list of objects that could be ‘made, adapted, or intended for use in the course of or in connection with’ the listed offences is potentially endless (so broad are the terms in this definition); indeed, it could include such commonplace items as bike-locks, posters, placards, fliers, and banners. Crucially, most of these objects would not relate to criminal activity but for the creation of these new, broadly-defined offences. In terms of their practical effect, we are concerned that these powers may debilitate protests before they are even able to begin, by deterring people from attending in the first place (particularly members of marginalised communities who already experience over-policing and bear the brunt of stop and search powers) and watering down the potential impact of any protest action by enabling the police to confiscate people’s protest materials.
18. 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

¹⁵ Turnbull, E., *The Story of the Shrewsbury Pickets*, 24 February 2021, available at: <https://www.shrewsbury24campaign.org.uk/2016/02/the-story-of-the-shrewsbury-pickets/>

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.”¹⁶ In particular, we are highly concerned that the expansion of stop and search powers will entrench racial disproportionality in the criminal justice system. 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.¹⁷

19. Crucially, 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**”¹⁸ to which HMICFRS went on to state that they “agree with this sentiment.”¹⁹

20. The experience of being stopped and searched can be a mentally and physically traumatising one – for some people, it takes place frequently, even daily.²⁰ 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”.²¹ 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.²²

21. The impact of discriminatory stop and search on affected communities is deep and enduring. Research by Dr Patrick Williams with young people on the Metropolitan Police Service (MPS)’s ‘Gangs Matrix’ found that respondents identified stop and search as “the catalyst for the onset of their negative relationship with the police.”²³

¹⁶ 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>

¹⁷ 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>

¹⁸ 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>

¹⁹ As above.

²⁰ 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

²¹ 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>

²² 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

²³ Williams, P. and StopWatch, *Being Matrixed: The (Over)Policing of Gang Suspects In London*, August 2018, at p. 6. Available here: http://www.stop-watch.org/uploads/documents/Being_Matrixed.pdf

A report by the Criminal Justice Alliance spoke to young BAME people with first-hand experience of stop and search. They described feeling harassed, targeted, provoked, and even violated by these coercive encounters.²⁴ We are concerned that the new stop and search powers created by the Government will only entrench these inequalities further.

POWERS TO STOP AND SEARCH WITHOUT SUSPICION (AMENDMENT 319F)

Measure

22. Amendment 319F 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 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 listed offences – wilful obstruction of a highway, intentionally or recklessly causing public nuisance (clause 60), locking on (amendment 319A), or obstruction of major transport works (amendment 319D) may be committed in the area. 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 (319F(2)). There are additional requirements, whereby the officer must also reasonably believe that the authorisation is necessary to prevent the commission of the above offences or the carrying of prohibited objects; the specified locality is no greater than is necessary to prevent such activity; and the specified period is 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).²⁵
23. If in the course of a search under this section a police officer discovers an object which they have reasonable grounds for suspecting to be a prohibited object, they may seize it (319F(8)). Any object seized by a police officer under this section may be retained in accordance with regulations made by the Secretary of State (319H(5)). The Secretary of State may make regulations regulating the retention and safe keeping, and the disposal or destruction in circumstances prescribed in the regulations, of such an object (319H(6)).

Analysis

²⁴ Criminal Justice Alliance, *No respect: Young BAME men, the police and stop and search*. Available here: <http://criminaljusticealliance.org/wp-content/uploads/2017/06/No-Respect-290617-1.pdf>. The IPCC identified stop and search as the leading cause of tension between young people and the police. See the London Assembly’s, *Stop and search: An investigation of the Met’s new approach to stop and search*, available here: https://www.london.gov.uk/sites/default/files/14-02-06-Stop%20and%20search%20FINAL_1.pdf. Additionally, as David Lammy MP pointed out in his 2017 report on the treatment and outcomes for BAME people in the criminal justice system, this drains trust in the whole system. See: David Lammy MP, *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, September 2017, at p. 17.

²⁵ 319F(5)

24. This amendment furthers the wholesale expansion of stop and search powers within the PCSC Bill through expanding the use of suspicion-less stop and search powers, otherwise contained in s.60 of the Criminal Justice and Public Order Act 1994 (CJPOA). We are concerned that in practice, they will result in a significant increase in the use of such powers in the vicinity of, and in advance of, any protest, because arguably all protests could risk causing public nuisance. It cannot be overstated that the so-called ‘prohibited objects’ defined in Amendment 319F – 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 – would not be ‘prohibited’ but for the creation of new and vague offences targeting protest.
25. We echo our concerns voiced above in respect of the potential for this new power to entrench the harms of existing suspicion-less stop and search powers, with particular 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 the year ending March 2020, Black people were 9 times more likely to be stopped and searched under regular powers; when the reasonable grounds requirement was removed, they were 18x more likely to be stopped and searched.²⁶ Multiple policing bodies (including HMICFRS²⁷ and the College of Policing²⁸) and former police chiefs and frontline officers,²⁹ former Prime Minister and Home Secretary Theresa May,³⁰ parliamentarians,³¹ and countless community groups³² have highlighted issues with s.60 suspicionless stop and search, including its ineffectiveness, contribution to racial disproportionality and erosion of trust in the criminal justice system.

²⁶ *No respect: Young BAME men, the police and stop and search*, Peter Keeling, 2017

<http://criminaljusticealliance.org/wp-content/uploads/2017/06/No-Respect-290617.pdf> as at 17 September 2021

²⁷ 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/>

²⁸ College of Policing, *Stop and search: Transparent*, available at: <https://www.app.college.police.uk/app-content/stop-and-search/transparent/>

²⁹ 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>

³⁰ 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>

³¹ Liberal Democrats, *Ending suspicion-less Stop and Search: your questions answered*, 17 July 2020, available at: <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>

³² 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>

26. We are highly concerned that the Government is rolling out new suspicion-less stop and search powers in a protest context, while evading scrutiny over existing powers. In July 2021, despite failing to publish any impact assessment of their pilot which removed the best use of stop and search safeguards (BUSSS) for s.60 suspicionless stop and search, the Government announced its ‘Beating crime plan’, which will permanently relax the BUSSS safeguards. As of the date of publication of this briefing, in spite of a FOI request by the Criminal Justice Alliance and an intervention on the part of the Information Commissioner’s Office, the Government has yet to provide any evidence of why the permanent relaxation of safeguards is necessary and what effects this withdrawal of restrictions has had on racial disproportionality.³³
27. More generally, we are worried that the addition of more stop and search powers to the police’s arsenal of tools may result in further abuses of power. The breadth of the powers in both Amendment 319E and 319F mean that the police will be given more grounds to stop and search people. We are concerned that this will ultimately drag more people – especially already overpoliced communities – into the criminal justice system.

OFFENCES RELATING TO SECTION (POWERS TO STOP AND SEARCH WITHOUT SUSPICION) (AMENDMENT 319J)

Measure

28. Amendment 319J 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 week’s imprisonment, a fine not exceeding level 3 on the standard scale, or both.

Analysis

29. We are concerned that this offence will compound the harms of the new suspicion-less stop and search power in Amendment 319F. We reiterate that the so-called ‘prohibited objects’ targeted by Amendment 319F 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.
30. 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 arrested at a protest just this year.³⁴ For example, we can envision a situation whereby a legal

³³ Criminal Justice Alliance, *Government fails to produce evidence behind expansion of stop and search*, 1 November 2021, available at: <https://www.criminaljusticealliance.org/blog/government-fails-to-produce-evidence-behind-expansion-of-stop-and-search/>

³⁴ 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->

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 (319F(2)) – in this case, in order to scrutinise the police’s response to people engaging in certain kinds of protest tactics, or indeed to provide people with knowledge of their rights in relation to these offences (including the defence of ‘reasonable excuse’). 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.

SERIOUS DISRUPTION PREVENTION ORDERS (AMENDMENT 319K)

Measure

31. Serious Disruption Prevention Orders (SDPOs) are a new civil order that can be imposed on individuals who have participated in at least two protests within a five year period, either on conviction (342L) or without conviction (342M). People who are given an SDPO will be subject to a set of conditions, requirements, and prohibitions, which can limit their ability to associate with certain people, to be at certain places at certain times, to have certain articles in their possession, and even to use the internet in certain ways (342N). Breach of an SDPO can result in 51 weeks’ imprisonment or a fine or both (342S). The court has to be satisfied that the SDPO is necessary for a listed reason, including to prevent the person from committing any ‘protest-related offences’/‘protest-related’ breaches of an injunction; 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; *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 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 (342L(5) and 342M(4)).
32. **SDPOs on conviction (342L)** can be given by a court to any person over the age of 18 who has committed a ‘protest-related offence’ within the last five years. The court must be satisfied to the civil standard (the balance of probabilities) that the offence is ‘directly related to a protest’ (and in the case of a ‘protest-related breach’ of an injunction, the breach must be ‘directly related to a protest’; see 342X); and that the current offence and the earlier offence relate to different protests or were committed on different days. The court also has to be satisfied that one of the listed reasons above applies.
33. **SDPOs made otherwise than on conviction (342M)** can be given to a person by a magistrates’ court on application by one of the listed police officers (including a chief police officer in the area in which the person lives and a chief officer who simply

[protest-arrests/](#) and <https://www.libertyhumanrights.org.uk/issue/case-update-police-drop-protest-fines-after-liberty-legal-action/>

believes that the person is in, or *is intending to come to*, that officer's area) (342M(1) and 342M(7) respectively). Before an SDPO without a conviction can be made, the magistrates' court has to be satisfied that on at least two occasions in the last five years up to the day on which the order is made, the person has either been:

- a. Convicted of a protest-related offence (342M(2)(a)(i));
- b. Been found in contempt of court for a protest-related breach of an injunction (342M(2)(a)(ii));
- c. 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 (342M(2)(a)(iii));
- d. *Caused or contributed to* the commission by *any other person* of a protest-related offence or a protest-related breach of an injunction (342M(2)(a)(iv));
or
- e. *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 disruption to two or more individuals, or to an organisation, in England and Wales (342M(2)(a)(v)) (emphases added).

The court also has to be satisfied that one of the listed reasons above applies.

Analysis

34. SDPOs are an unprecedented and highly draconian measure, which could amount to a ban on named individuals' fundamental right to protest and their ability to participate in a political community. As drafted, the conditions for imposing an SDPO are extremely wide and vague – for example, in respect of SDPOs on conviction, the term 'protest-related offences' has the potential to encompass an extremely wide range of offences;³⁵ in respect of SDPOs without conviction, the scope of activities that someone needs to have carried out themselves, or even caused or contributed to the commission or carrying out of by someone else, is sweeping.
35. Measures akin to SDPOs are not supported by the police, HMICFRS, or the Home Office. When consulted on a similar proposal to create protest banning orders, which 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

³⁵ 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 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>

individual poses, and where a court would therefore accept that it was proportionate to impose a banning order” (emphasis added).³⁶

In the same report, some senior police officers said protest banning orders would “unnecessarily 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 rights to protest and in reality, is unworkable”.³⁷

36. The introduction of SDPOs marks a significant expansion of state surveillance on those who protest, in respect of which the UK already has a shameful history.³⁸ It merits noting that the original proposal for ‘protest banning orders’, which was considered by HMICFRS, was based on existing football banning orders (FBOs). There are significant parallels between the drafting of the new SDPOs and already-existing FBOs, including most importantly the fact that both orders rely on (and will therefore give rise to) far-reaching and intrusive surveillance on people’s activities and behaviour, which informs the making of, and conditions attached to, these orders. 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”³⁹ The use of even more secretive tactics such as informants in the policing of football fans⁴⁰ adds to our concerns that in the protest-context, SDPOs may create additional pretexts under which the police can interlope in protests.

37. At their core, SDPOs (both with and without conviction) defy logic and common sense. They impute a causal connection between past and future activities (based on a person’s participation in two protests over a period of five years) and appear to be based on a model of preventative justice. This is highly concerning, not least given that the activities that might lead an individual to be given an SDPO would not be criminal activities but for the establishment of the above new offences and their designation as ‘protest-related offences’ – for SDPOs without conviction, they might not be criminal activities at all. To give an example, an SDPO without conviction could be imposed on someone who, in the last five years, has attended two protests in which they *contributed* to the carrying out *by another person* of activities *related to* a protest that *were likely to result* in serious disruption (342M(2)(v), in order to

³⁶ Pg. 16, 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>

³⁷ Pg. 137, 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>

³⁸ 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>

³⁹ 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%202019_.pdf

⁴⁰ 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>

prevent them from *contributing to* the carrying out by *another person of activities related to* a protest that *are likely to* result in serious disruption at an unspecified point in the future (342M(4)(c)(ii); emphases added). The terms used throughout the SDPO conditions are so broad so as to potentially catch any and all forms of activity related to a protest. Further, the connections between the actual activities that a person given an SDPO needs to have engaged in, the impact of these activities, and the preventative aims of the order are incredibly remote. These measures are particularly dangerous when we consider the Secretary of State's power guaranteed elsewhere in Part 3 of the Bill to define serious disruption: it is not difficult to imagine SDPOs being used to target individuals who engage in kinds of activities related to protests that the Government of the day simply does not like or approve of.

38. For those who are given an SDPO, the wide scope of conditions, requirements, and prohibitions furthermore risk infringing on people's rights to liberty, respect for the private and family life, freedom of thought, belief, and religion, freedom of expression, freedom of assembly and association, among others. SDPOs may include reporting requirements requiring the person with an SDPO to present themselves to a particular person at a particular place at or between particular times on particular days (342N(1)). They may also include prohibitions, including ones that would prevent the person with an SDPO from being at a particular place (between particular times on particular days, and/or between particular times on any day); being with particular persons; participating in particular activities; having particular articles with them; and using the internet to facilitate or encourage persons to commit a protest-related offence/breach of an injunction *or* carry out activities related to a protest that result in, or are likely to result in serious disruption to two or more individuals or an organisation in England and Wales (342N(3)). The requirements or prohibitions which are imposed on a person by a serious disruption prevention order must, so far as practicable, be such as to avoid— (342N(7)) (a) any conflict with the person's religious beliefs, and (b) any interference with the times, if any, at which the person normally works or attends any educational establishment. But we do not believe this is by any means an adequate safeguard for the disproportionate infringements of fundamental rights that SDPOs could give rise to.
39. That breach of an SDPO can attract criminal sanction compounds the harms of this oppressive measure (342S). None of the breaches of conditions, requirements, or prohibitions imposed via an order would be criminal activities but for the imposition of an SDPO. Furthermore, an SDPO lasts for between a week and 2 years, but 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 (342T(7)). This risks plunging people into cycles of criminalisation.
40. The extensive harms 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, rather than beyond reasonable doubt (342L(2)(a) and

342M(2)). 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 (according to 342L(9), 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); 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 (342M(7)(a) and (8)(b)) – a highly subjective judgment that could have drastic implications for a person’s freedom of movement.

CONCLUSION

41. The Government’s amendments to the PCSC Bill make an already draconian piece of legislation even worse. We are incredibly concerned by the fact that at committee stage in the House of Lords, these amendments were withdrawn, meaning that there was no opportunity for substantive debate – especially as they were already introduced at an incredibly late stage in the Bill’s passage through Parliament. **We strongly urge Parliamentarians to oppose these proposals, and the other rights-infringing measures of the Bill.**