



House of Commons

House of Lords

Joint Committee on Human  
Rights

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# **Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)**

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**Second Report of Session 2021–22**

*Report, together with formal minutes relating  
to the report*

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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## Summary

Everyone has a right to engage in peaceful protest. The Human Rights Act 1998 incorporates the European Convention on Human Rights and in doing so guarantees our rights to freedom of expression (Article 10) and freedom of assembly (Article 11). The right to protest is not unlimited; it can be restricted where necessary and proportionate. The law currently provides the police with powers to deal with public assemblies and processions that descend into violence, but also contains some restrictions on non-violent demonstrations. Part 3 of the Government's Police, Crime, Sentencing and Courts Bill, which is currently before Parliament, would increase those restrictions on non-violent protest in a way that we believe is inconsistent with our rights. The proposed changes to the law will apply only in England and Wales (the law in Scotland would remain as it is now). This report sets out our concerns. The annex sets out amendments to Part 3 of the Bill which we believe are needed.

Making noise and being heard are fundamental to protest. They should only be limited in extreme circumstances. The police already have many powers to deal with noise which is seriously harmful or oppressive. Protests and processions can already be subject to conditions in order to fall within the law. The Bill introduces a new "trigger" for the police to impose restrictive conditions on public assemblies and processions based on the noise they produce. This new trigger is neither necessary nor proportionate, and should be removed from the Bill.

The new trigger, and one existing trigger, for the introduction of restrictions is concerned with protests causing "serious disruption". The Bill contains a regulation making power for the Secretary of State to clarify the meaning of serious disruption to organisations and the community by statutory instrument. This is unacceptable. The terms should be clearly defined in primary legislation where they can be effectively scrutinised and if necessary amended by Parliament. If the proposed content of the regulations is known, then they should be available for scrutiny along with the Bill. If it is not, it is hard to see how the power to create them can be necessary.

The Bill would remove all limits on the types of conditions that can be placed on public assemblies where necessary, to match the approach taken to processions. Whilst we have some sympathy for this proposal, we are not convinced that the case for unlimited conditions on assemblies has been made. We can see the sense, however, in a modest extension of existing powers to allow for conditions on start and finish times. We were also struck by the lack of systematic collection of data on the use of restrictions and conditions on protests. We recommend improved data collection and publication by the police.

Knowingly failing to comply with conditions imposed by the police on public protests is a criminal offence. The Bill intends to close a loophole in the offence that allows protesters to avoid prosecution by deliberately avoiding gaining knowledge of conditions. However, we believe the changes proposed in the Bill go much further than is necessary to close this loophole, increasing the risk of peaceful protesters being arrested or prosecuted for innocent mistakes. We recommend an amendment that would narrow the changes to avoid this risk.

The Bill introduces a new statutory offence of “intentionally or recklessly causing public nuisance”. Peaceful protests are by their nature liable to cause serious annoyance and inconvenience and criminalising such behaviour may dissuade individuals from participating. Offences are already available under existing laws to deal with public nuisance offences such as obstructing the highway. The current drafting risks the new statutory offence being broader than the common law offence it replaces. Moreover, the offence does not include references to the right to freedom of expression or freedom of assembly in its definition of ‘reasonable excuse’. As such, the Bill requires further amendment.

The Joint Committee on Human Rights has previously reported on protests around Parliament. We welcome the Government’s commitment to ensuring access to the Parliamentary estate for those that have business there but reiterate our previous recommendation that powers to restrict protest around Parliament should only be used when necessary.

The current rhetoric around protest tends to downplay the importance of the right to peaceful protest and treat it as an inconvenience in conflict with the public interest. To help address this, we propose the introduction of express statutory protection for the right to protest, setting out the obligation on public authorities to refrain from interfering unlawfully with the right but also the duty to facilitate protest.

# 1 Introduction

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1. The Police, Crime, Sentencing and Courts Bill ('PCSC Bill') was introduced in the House of Commons on 9 March 2021. We have identified it as a priority Bill for legislative scrutiny. This report concerns Part 3 of the Bill only, which is entitled 'Public Order'. The proposed changes in Part 3 of the Bill will apply only in England and Wales (the law in Scotland would remain as it is now). We will address other aspects of the Bill separately.
2. Part 3 of the PCSC Bill has four principal effects:
  - a) It introduces a new basis upon which the police can lawfully impose conditions on public processions and assemblies and, for the first time, on one-person protests;
  - b) It amends existing offences of failing to comply with conditions imposed by the police, making it easier to convict someone of the offences and increasing the maximum penalties available;
  - c) It expands the controlled area around Parliament and provides a new power to the police to prevent the obstruction of vehicular access to the Parliamentary Estate; and
  - d) It creates a statutory offence of public nuisance to replace the existing common law offence.

## Human rights in issue

3. The provisions of Part 3 of the PCSC Bill all engage the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) and the right to freedom of assembly under Article 11 ECHR, as guaranteed through the Human Rights Act 1998. These rights together provide an enforceable right to engage in peaceful protest. The potential for Part 3 of the PCSC Bill to have a discriminatory impact, in breach of Article 14 ECHR has also been raised in evidence to our inquiry.
4. Given the Committee's serious concerns about the implications of Part 3 of the PCSC Bill for these fundamental rights, the Annex contains proposed amendments to the Bill.

## Timetable

5. This report is timed to inform the Report stage of the PCSC Bill in the House of Commons.
6. The Committee launched an inquiry into the Bill on 15 March 2021, which coincided with the first of two days of second reading debate in the Commons. We received a large volume of responses many of which focused on Part 3 of the Bill, and heard from two panels of witnesses on the public order provisions. We are grateful to all those who have given evidence.

7. We wrote to the Home Office Minister, Victoria Atkins, on 19 May 2021 with a series of questions on the Bill.<sup>1</sup> A response from the Minister was provided on 8 June and published on our website.<sup>2</sup>

8. Some of our recent work raises similar issues to those arising from Part 3 of the PCSC Bill. We recently reported on the right to protest during the covid-19 pandemic in *The Government response to covid-19: freedom of assembly and the right to protest*.<sup>3</sup> We also reported on the over-policing of black people in our 2020 report on *Black people, racism and human rights*.<sup>4</sup> In the 2017–2019 Parliament, the Committee considered access to Parliament in the *Democracy, freedom of expression and freedom of association: Threats to MPs* report.<sup>5</sup>

## Government’s policy position

9. The Explanatory Notes to the PCSC Bill make it clear that the powers introduced in Part 3 of the Bill are intended to deal with non-violent protest:

*“Police powers to tackle non-violent protests*

66. Current legislation to manage protests provides predominantly for powers to counter behaviours at protests which are violent or distressing to the public [...]

67. Recent changes in the tactics employed by certain protesters, for example gluing themselves to buildings or vehicles, blocking bridges or otherwise obstructing access to buildings such as the Palace of Westminster and newspaper printing works, have highlighted some gaps in current legislation.”<sup>6</sup>

10. The Explanatory Notes also assert that Part 3 “gives effect to recommendations made by the Law Commission in their July 2015 Report on “Simplification of the Criminal Law: Public Nuisance and Outraging Public Decency”, that the common law offence of public nuisance should be replaced by a statutory offence covering any conduct which endangers the life, health, property or comfort of a section of the public or obstructs them in the exercise of their rights.”<sup>7</sup>

11. The ‘protest powers factsheet’ published with the Bill explains that the Government “asked Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) to consider five legislative proposals.”<sup>8</sup> These were to:

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1 Letter to Victoria Atkins MP, Parliamentary Under Secretary of State (Minister for Safeguarding), [regarding the Police, Crime, Sentencing and Courts Bill](#), dated 19 May 2021

2 Response from Victoria Atkins MP, Minister for Safeguarding, [regarding Part 3 of the Police, Crime, Sentencing and Courts Bill](#), dated 8 June

3 Joint Committee on Human Rights, Thirteenth Report of Session 2019–2021, [The Government response to covid-19: freedom of assembly and the right to protest](#), HC 1328/HL paper 252

4 Joint Committee on Human Rights, Eleventh Report of Session 2019–2021, [Black People, racism and human rights](#), HC 559/HL paper 165

5 Joint Committee on Human Rights, First Report of Session 2019–2021, [Democracy, freedom of expression and freedom of association: Threats to MPs](#), HC 37/HL paper 5

6 [Explanatory Notes to the Police, Crime, Sentencing and Courts Bill \[Bill 5 \(2021–22\) - EN\]](#), paras 66 and 67

7 [Explanatory Notes to the Police, Crime, Sentencing and Courts Bill \[Bill 5 \(2021–22\) - EN\]](#), para 70

8 Home Office, [Police, Crime, Sentencing and Courts Bill 2021: protest powers factsheet](#), May 2021

- widen the range of conditions that the police can impose on assemblies (static protests), to match existing police powers to impose conditions on processions;
- lower the fault element for offences relating to the breaching of conditions placed on [an assembly or procession];
- widen the range of circumstances in which the police can impose conditions on protests...;
- replace the existing common law offence of public nuisance with a new statutory offence as recommended by the Law Commission in 2015; and
- create new stop, search and seizure powers to prevent serious disruption caused by protests.”

12. The factsheet goes on to say that the resulting report by HMICFRS “concluded that, with some qualifications, all five proposals would improve police effectiveness without eroding the right to protest”.<sup>9</sup> The first four of these proposals are reflected in Part 3 of the PCSC Bill.

13. In respect of the provisions of Part 3 that concern access to Parliament, the Explanatory Notes state that the new measures “follow[s] the recommendation of the Joint Committee on Human Rights in their October 2019 Report Democracy, freedom of expression and freedom of association: Threats to MPs [...] for further legislation to protect the right of access to the Parliamentary estate for those with business there.”<sup>10</sup>

## The right to peaceful protest

14. As the Home Secretary described it in 2020, the right to peaceful protest is “a cornerstone of our democracy.”<sup>11</sup> Despite its importance, the right was not protected in legislation until the Human Rights Act 1998 (the HRA) brought the rights guaranteed by the ECHR into domestic law. Even within the ECHR, the right to protest is not set out in terms but rather drawn from the rights to free expression (Article 10 ECHR) and free assembly and association (Article 11 ECHR).<sup>12</sup>

15. Together, Articles 10 and 11 ECHR provide a positive right for any individual to organise and engage in public protest with others.

- a) Article 10 ECHR protects the expression of opinions in the form of protest, covering “not only the substance of the ideas and information expressed, but also the form in which they are conveyed”.<sup>13</sup> The right to free expression extends not only to information or ideas that are favourably received or regarded as inoffensive, but also to those that “offend, shock or disturb the State or any sector

9 The resulting report is Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services, [Getting the balance right? An inspection of how effectively the police deal with protests](#), March 2021

10 [Explanatory Notes to the Police, Crime, Sentencing and Courts Bill \[Bill 5 \(2021–22\) - EN\]](#), para 68

11 HC Deb, 15 March 2021, [col 64](#)

12 The European Court of Human Rights has described “the protection of personal opinions, secured by Article 10, [as] one of the objectives of freedom of peaceful assembly as enshrined in Article 11” (*Ezelin v France*, Application no. [11800/85](#), at 37) and noted that in cases of restrictions on protest it can be impossible for “the issue of freedom of expression [to be] entirely separated from that of freedom of assembly” (*Schwabe and MG v Germany*, Applications nos. 8080/08 and 8577/08, at 101).

13 *Palomo Sánchez and others v. Spain* [GC], Application nos. [28955/06](#), [28957/06](#), [28959/06](#), and [28964/06](#), at 53

of the population”.<sup>14</sup> The European Court of Human Rights has placed particular emphasis on the importance of political free expression: “in a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression.”<sup>15</sup>

- b) The Article 11 right to freedom of peaceful assembly extends to gathering together for a common purpose in private or in public, and being able to choose the time, place and form of the gathering, within the limits established by Article 11(2). In keeping with the protections of Article 10, Article 11 protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote.<sup>16</sup> However, Article 11 protects only the right to *peaceful* assembly. Violent protests and those organised with violent intentions will not receive the protection of Article 11.<sup>17</sup> An individual who remains peaceful will not lose the protection of the Convention merely because other participants in a demonstration engage in sporadic violence, however.<sup>18</sup>

16. The rights to free expression and assembly under Articles 10 and 11 ECHR require States to refrain from applying unjustified restrictions on the right to protest (the negative obligation), and also to safeguard the right to protest (the positive obligation). This positive obligation includes a duty to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, with participants kept safe.<sup>19</sup> It is often referred to as the duty to ‘facilitate peaceful protest’.<sup>20</sup>

### ***Lawful interferences with the right to protest***

17. As the rights guaranteed by both Articles 10 and 11 are qualified, the right to protest is not absolute. Article 10(2) and Article 11(2) establish that authorities may interfere with the right to protest for any of an exhaustive list of legitimate purposes. However, any interference with Article 10 or 11 will only be justified where it is properly prescribed by law, where there is a pressing social need for the interference and where the interference is proportionate to the aim of the measure.

18. The European Court of Human Rights has recognised that public demonstrations “may cause some disruption to ordinary life” but that “it is important to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of its substance.”<sup>21</sup>

14 *Handyside v United Kingdom*, Application no. [5493/72](#), at 49

15 *The United Macedonian Organisation Ilinden and Ivanov v Bulgaria*, Application No [59489/00](#), at 61

16 *Kudrevičius and Others v. Lithuania* [GC], Application no. [37553/05](#), at 145

17 *Navalnyy v. Russia* [GC], Application nos. [29580/12](#), [36847/12](#), [11252/13](#), [12317/13](#) and [43746/14](#), at 98

18 *Primov and Others v. Russia*, Application no. [17391/06](#), at 155

19 *The United Macedonian Organisation Ilinden and Ivanov v Bulgaria*, Application No [59489/00](#), at 115

20 See, for example, HMICFRS, [Getting the balance right? An inspection of how effectively the police deal with protests](#), March 2021, pp 71–72

21 *Kudrevičius and Others v. Lithuania* [GC], Application no. [37553/05](#), at 150

***The Human Rights Act 1998***

19. The HRA brings these obligations into domestic law. Section 6 HRA requires all public authorities in the UK to act compatibly with Convention rights, including Articles 10 and 11 ECHR. For the purposes of public protest the key public authorities are the police and the Government, particularly the Home Office. Section 7 HRA grants anyone who is a victim of a human rights breach the right to bring a legal challenge against the public authority responsible. This might be a High Court judicial review challenge, in which the available remedies would include an urgent order from the court quashing the offending decision of the public authority, or an action for damages (financial compensation) which can be brought in the county court.

## 2 Conditions on public processions and assemblies to address noise

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### Public Order Act 1986

20. The PCSC Bill would amend the Public Order Act 1986, which is the key piece of legislation governing the right to gather to engage in public protest. Part II of the Public Order Act 1986 gives the police powers to deal with public processions and public assemblies, including the power to impose conditions on the way in which they are conducted.

### *Public processions*

21. Public processions have been subject to statutory constraints since the Public Order Act 1936, with its provisions now largely replaced by the Public Order Act 1986. Under section 11 of the 1986 Act, advance notice must be given to the police of any proposal to hold a public procession demonstrating support for any person or group, publicising a cause or campaign or marking or commemorating an event.<sup>22</sup> The notice must be provided six clear days in advance of the procession and specify the date, time, route and the name of the organiser. However, the requirement to give advance notice only applies to the extent that it is reasonably practicable to do so.

22. Under section 12, the police have the power to impose conditions on public processions, but only where a senior officer reasonably believes that the procession may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or that the purpose of the organisers is to intimidate. These are often referred to as the ‘triggers’ for imposing conditions.

23. Once a trigger has been met, the police may impose such conditions on the procession as are necessary to prevent the disorder, damage, disruption or intimidation that it is believed may result. The Act places no limit on the type of condition that can be imposed on a procession.<sup>23</sup>

24. It is a criminal offence for an organiser or a participant to *knowingly* fail to comply with a condition placed on a public procession, or to incite another person to do so.

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22 Defined in the Public Order Act 1986, [section 16](#) as “a procession in a public place”.

23 Although banning processions is only permitted under section 13 of the 1986 Act. This provides that where a chief officer of police reasonably believes that the powers available under section 12 will not be sufficient to prevent processions resulting in serious public disorder, he may, with the consent of the Home Secretary, impose a ban on all or a class of processions in a specified area for a period of up to 3 months.

## Public assemblies

25. Powers to regulate static demonstrations or ‘public assemblies’ appeared for the first time in the Public Order Act 1986.<sup>24</sup> An assembly is now defined as a gathering of “2 or more persons in a public place which is wholly or partly open to the air”.<sup>25</sup>

26. Unlike in respect of processions, the Public Order Act 1986 does not require advance notice of a public assembly to be provided to the police (neither does it grant the police the power to impose a ban on public assemblies). However, section 14 of the 1986 Act does provide the police with the power to impose conditions on public assemblies.

27. The triggers for imposing conditions on public assemblies are the same as those for public processions. However, in contrast to the law on processions, the range of conditions that can be imposed on assemblies where necessary is limited to conditions as to the location, maximum duration and maximum numbers of participants. As with processions, *knowingly* failing to comply with a condition placed on a public assembly, or inciting another person to do so, is a criminal offence.

## Practical issues

28. These powers under the 1986 Act appear relatively straightforward, but we are sure their use poses a challenge to the police as well as to protesters. For the police, imposing conditions on processions and assemblies that prevent disorder and ‘serious disruption’ without disproportionately hindering the rights protected by Article 10 and 11 can involve a delicate and difficult assessment of competing rights - particularly where that assessment is being made when the demonstration is underway. For protesters, conditions can have a significant impact, depriving a protest of its intended effect and increasing the risk of participants being criminalised. While the police recognise that the HRA protects the right to protest, we heard evidence from protesters and their supporters that police decision-making often appears to prioritise the rights of those not involved in demonstrations and does not give due weight to the obligation on the police to facilitate protest. Yet the compatibility of conditions imposed by the police with Convention rights can often only be effectively challenged after the event, when the conditions have already had their impact.

## New trigger based on noise

29. Clauses 54 and 55 of the PCSC Bill amend sections 12 and 14 of the Public Order Act 1986 respectively, creating a new ‘trigger’ for imposing conditions on processions and assemblies in England and Wales (the law in Scotland would remain as it is now). Under the new ‘trigger’ a senior police officer would be empowered to impose a condition on a procession or assembly if they reasonably believe the “noise generated by those taking part”:

- a) May result in *serious disruption to the activities of an organisation* which are carried on in the vicinity of the procession or assembly (*the first limb*); or

24 The Public Order Act 1986 contains significant powers to prohibit and criminalise trespassory assemblies (i.e. assemblies on private rather than public land) that can have a substantial impact on the right to protest, but these are unaffected by the PCSC Bill and thus fall outside the remit of this report.

25 The case of *R (Baroness Jones & others) v Commissioner of Police* [2020] 1 WLR 519 confirmed that ‘linked’ gatherings in different locations could not be classed as a single assembly.

- b) May have a *relevant impact* on persons in the vicinity of the assembly, and the impact is *significant (the second limb)*.

30. Under the second limb, the noise generated by a procession or assembly will have a *relevant impact* if:

- a) it may result in the *intimidation or harassment* of persons of reasonable firmness with the characteristics of persons likely to be in the vicinity, or
- b) it may cause such persons to suffer *serious unease, alarm or distress*.

31. In determining whether the noise generated may have a significant impact on persons in the vicinity the senior police officer *must* consider: the number of persons who may experience a relevant impact, the likely duration of the impact and the intensity of the impact on such persons.

### ***The importance of noise to effective protest***

32. Articles 10 and 11 ECHR guarantee the right to peaceful protest. Any interference with *non-violent* protest is therefore a prima facie interference with these Convention rights.

33. A restriction on the right to protest that targets noise is of particular concern as it strikes at the very heart of why people gather together to protest—to have their voices heard about an issue that is of importance to them and which they want others to treat with importance. We also note that the larger and more well-supported a demonstration, the louder it is likely to be. Restrictions on noise could disproportionately impact the demonstrations that have the greatest public backing.

34. Much of the written evidence we received emphasised the centrality of noise to effective protest. For example, Liberty and Big Brother Watch highlighted that “protests, by their very nature, are noisy” and that “noise is also a crucial means of expressing collective solidarity or grief and, quite literally, making voices heard by those in power.”<sup>26</sup> This was echoed in oral evidence from Zehrah Hasan, Director, Black Protest Legal Support, who said that “[c]reating noise at a protest is quite literally a part of people making their voices heard.”<sup>27</sup>

35. The importance of being heard explains why some witnesses have suggested that restrictions on protests based on the noise they produce, pose an ‘existential threat’ to the right to protest. As Jules Carey, head of the actions against the police and state team at Bindmans LLP, forcefully put it in his oral evidence to us:

“this new trigger, which is noise, is an absolute affront to the right to protest. This noise trigger should not exist for the purposes of imposing

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26 Liberty, Big Brother Watch ([PCS0346](#))

27 [Q4](#) [Zehrah Hasan]

any conditions on assemblies and processions. It is essentially an existential threat to the right to protest. Protests should be heard and they should be seen. They lack value and are pointless if they cannot be heard and seen”.<sup>2829</sup>

**36. The ECHR is intended to provide rights that are “practical and effective” not “theoretical and illusory”.<sup>30</sup> A right to peaceful protest would not appear to us to fulfil this requirement if the peaceful protest cannot be seen and, crucially in this context, heard. A power that would allow the police to move the location of a demonstration, limit its numbers or duration, or even to silence certain shouts or chants, in order to suppress noise is therefore of significant concern.**

### *Legitimate aim*

37. The rights under Articles 10 and 11 ECHR, however, are not absolute. Interference with Articles 10 and 11 will be lawful if they comply with the strict requirements of Articles 10(2) and 11(2). The first of these is that the interference must have one of the legitimate aims listed in Articles 10(2) and 11(2), of which the most obviously relevant to public order situations are: in the interests of public safety; for the prevention of disorder or crime; and for the protection of the rights and freedoms of others.<sup>31</sup>

38. The second limb of the new trigger would allow for restrictions on peaceful protest to prevent “intimidation or harassment” of persons in the vicinity or them suffering “serious unease, alarm or distress” which is “significant”. Preventing intimidation and harassment, which are already criminal offences, would fall within the legitimate aim of preventing crime and disorder. However, prohibiting noise that causes alarm or distress, and particularly noise that causes ‘serious unease’ can only reasonably be justified on the basis of ‘the rights and freedoms of others’.

39. It is not clear to us what right the public has to be free from “serious unease” that might result from peaceful and otherwise lawful protest. Whilst the legitimate aim of protecting the ‘rights and freedoms of others’ is not limited to protecting those rights and freedoms set out in the Convention, this does not mean it is unbounded. We have been unable to identify any other examples of the law prohibiting behaviour that causes ‘serious unease’. There is a risk that relying on ‘serious unease’ to impose conditions on peaceful protests would breach Articles 10 and 11 by failing to meet a legitimate aim.

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28 [Q4](#) [Jules Carey]

29 The importance to a protest of being heard and seen has been recognised by the ECtHR: “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” *Lashmankin and others v Russia*, Application nos. 57818/08. See also the [Guidelines on Freedom of Peaceful Assembly \(3rd edition\)](#) prepared by the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe and the European Commission for Democracy through Law (the Venice Commission) of the Council of Europe, which states:

*“22...States have a positive duty to facilitate and protect the exercise of the right to freedom of peaceful assembly. This duty should be reflected in the legislative framework and relevant law enforcement regulations and practices. It includes a duty to facilitate assemblies at the organiser’s preferred location and within ‘sight and sound’ of the intended audience.”*

30 *Airey v Ireland*, Application no. 6289/73, at 24

31 The language used in Arts 10(2) and 11(2) differs slightly but the content is effectively the same for the purposes of public protest.

***Prescribed by law***

40. Once a legitimate aim has been identified, to comply with the ECHR restrictions on peaceful protests must also be ‘prescribed by law’. For an interference to be ‘prescribed by law’ for the purposes of Articles 10 and 11, the law governing it must be adequately accessible to those affected by it and the law’s consequences for them must be foreseeable.

41. We received numerous written evidence submissions raising concerns about the uncertain and subjective nature of the proposed new trigger. Amnesty International UK were concerned about “new highly subjective and ill-defined vague terms”<sup>32</sup> while Dr Jonathan Havercroft, Associate Professor in the Department of Politics and International Relations at the University of Southampton, noted:

“A further problem with the noise provisions in the law is that they are vague and subjective. Laws around noise normally set clear, objective criteria concerning decibel levels, time, location, and specific types of equipment causing the noise. This proposed law does not include any of these criteria, instead leaving the question of the noise level and its impact on bystanders to the discretionary power of the police officer on site.”<sup>33</sup>

42. The proposed new noise trigger involves uncertain standards that place considerable judgment in the hands of the police officer responsible for the decision whether to impose conditions. In respect of the first limb of the trigger the officer has to decide whether they believe that noise may result in “serious disruption” to an organisation’s activities. The second limb of the trigger involves several layers of judgment: the officer has to decide whether they believe noise may result in “intimidation or harassment of persons of reasonable firmness” or whether noise may cause “serious unease, alarm or distress”. They must then decide whether they believe any of these consequences are or may be “significant”, which involves taking into account not only the numbers affected and the duration of the noise but also its “intensity”.

43. While an element of objectivity is provided by the need for the officer’s belief to be a reasonable one, this is counterbalanced by the fact that the belief need only be that any of these negative consequences “may result” from the noise being generated. Furthermore, the objective reasonableness of any belief is unlikely to be assessed until well after the event, when any restriction of the right to peaceful protest will already have taken place.

44. What one person considers to be noise sufficiently “intense” to be likely to cause “serious unease, alarm or distress” may be very different to what another person would believe meets this threshold. When local authorities are assessing noise nuisance, they will use trained Environmental Health Officers and decibel readers.<sup>34</sup> Such assessments will obviously not be possible in advance of a demonstration, when conditions are often imposed, and are unlikely to be practicable if the need for conditions as a result of noise is identified during an ongoing protest.

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32 Amnesty International UK ([PCS0395](#))

33 Dr. Jonathan Havercroft ([PCS0041](#))

34 The [Noise Act 1996](#), which deals with excessive noise emitted from private premises, measures noise against an objective standard. The permitted level is now set at 34 dBA if the underlying level of noise is no more than 24 dBA, or 10 dBA above the underlying level of noise where this exceeds 24 dBA.

45. Uncertainty in the law makes it unclear whether a particular protest is going to meet police action or not, and is not consistent with the positive obligation on the state to facilitate protest. The lack of certainty in the threshold for imposing conditions also makes things harder for the police. As Liberty and Big Brother Watch put it in their written evidence:

“We are also concerned that this type of overbroad policing power may make public order situations more difficult for frontline officers by creating an unhelpful burden on the exercise of their professional discretion”.<sup>35</sup>

46. Kevin Blowe, Co-ordinator, Network for Police Monitoring, provided an example of a situation in which the proposed new trigger would leave the police making very difficult decisions under intense pressure:

“[...] we would imagine there will be considerable pressure from embassies for the police to use this new power, if it existed, to try to stop protest outside their embassies, particularly if they are the kind of repressive Governments that do not want human rights protests. The police will then be placed in a situation of having to make decisions about that.”<sup>36</sup>

47. Where the police are faced with organisations and individuals claiming that noise has had an intolerable impact on them, will they have to take that evidence at face value? How easily can an officer identify whether professed alarm, distress or serious unease is genuine? Once they have assessed the reliability of the claims, the police would then have to apply the uncertain threshold proposed in the Bill without trespassing on Article 10 and 11 rights.

48. To satisfy the requirement of being ‘prescribed by law’, the law must also contain adequate safeguards against arbitrary or discriminatory use.<sup>37</sup> The greater the latitude in the threshold being applied by police officers, the lesser these safeguards. In her response to our written questions, the Home Office Minister referred to the new trigger being used to deal with “noise from protests that is unjustifiable.”<sup>38</sup> Protests will frequently deal with controversial issues that raise strong feelings, whether that is the country’s membership of the European Union, institutional racism or climate change. Many people may consider that making noise in support of or in opposition to any of these causes is “unjustifiable.” Witnesses raised concerns that police officers considering something as inexact as whether noise generated by a protest would be likely result to in disruption or “relevant impact” could easily be swayed, consciously or otherwise, by their feelings towards the protest’s subject matter.

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35 Liberty, Big Brother Watch ([PCS0346](#))

36 [Q4](#)

37 See, in the context of mass protest, *Lashmankin and Others v. Russia*, Application nos. [57818/09](#), at 410–471.

38 Response from Victoria Atkins MP, Minister for Safeguarding, [regarding Part 3 of the Police, Crime, Sentencing and Courts Bill](#), dated 8 June

49. Uncertain terms granting broad police discretion also provide little protection against discrimination, which is prohibited by Article 14 ECHR.<sup>39</sup> Witnesses raised with us concerns about the over-policing of black people, and the risk of this being exacerbated in the protest environment by the PCSC Bill. For example, Zehrah Hasan said:

“We know, for example, that the police are five times more likely to use force against black people, that nearly one in three incidents involving the use of force are against black, brown and racialised people, and that a black person is twice as likely to die in police custody than a person from any other racial group in the UK. Given the institutional racism that has historically existed and currently still exists, we are concerned that giving the police more power will embolden them to act with impunity on the ground.”<sup>40</sup>

**50. Using multiple terms that are open to wide interpretation, such as “intensity” and “serious unease”, leaves an excessive degree of judgment in the hands of a police officer. This is likely to prove challenging to the police, who already have significant responsibility for ensuring that demonstrations are lawful and safe. It will also give rise to uncertainty for those organising and participating in demonstrations and fails to provide convincing safeguards against arbitrary or discriminatory use of these powers.**

### *Pressing social need*

51. To comply with Articles 10 and 11 ECHR, measures that interfere with the right to peaceful protest must also be “necessary in a democratic society”. This requires there to be a ‘pressing social need’ for the measure and also for the interference with Articles 10 and 11 it represents to be proportionate to the legitimate benefit it provides.

### *Evidence of need*

52. On the question of necessity, we were struck by the evidence we received from Chief Constable Harrington, the Public Order lead for the NPCC. Chief Constable Harrington provided significant insight into the policing needs identified by the police themselves. He expressed, and we acknowledge, the challenges that the police face in carrying out their obligation to facilitate the right to protest while preventing crime and disorder. Chief Constable Harrington stated that, in respect of the power to impose conditions on demonstrations, the police had identified “a need for a lower, broader threshold that is clearly understandable by policing and, most importantly, by those impacted and affected by it.”<sup>41</sup> It was telling, however, that he did not identify a need for additional powers or a new threshold concerned with *noise*.

53. The evidence of Matt Parr, HM Inspector of Constabulary and HM Inspector of Fire & Rescue Services, whose report was relied upon to justify the measures in Part 3 of the Bill, was also of interest. Significantly, while HMICFRS had been asked to report to the Home Office on five specific legislative proposals, and had commented in their report on

39 Article 14 ECHR does not provide a free-standing right not to be discriminated against, but rather prohibits discrimination in the enjoyment of other Convention rights. In the context of the policing of demonstrations, Article 10 and 11 rights will be engaged so any discriminatory treatment on grounds such as race would be prohibited by Article 14 taken together with Article 10 or 11 ECHR.

40 [Q6](#)

41 [Q14](#) [Chief Constable BJ Harrington]

nineteen proposals for legislative change made by the police, not one of these proposals concerned police powers to deal with noise. Indeed, Matt Parr specified that HMICFRS did not “look specifically at whether noise should be included and whether it was covered elsewhere [...]”<sup>42</sup>

54. In the course of his evidence Matt Parr also explained that HMICFRS had not been asked about necessity—they had been asked only whether the government’s proposals for legislative change “would enhance the efficiency and effectiveness of the way protests are policed”. He said:

“With some very strong caveats, we were broadly of the opinion that all five proposals would enhance effectiveness and efficiency. Whether or not they are necessary is really not a matter for us. That is a matter for the Government.”<sup>43</sup>

55. It might be expected that if new powers to impose conditions were considered necessary it would be because the existing powers were being used to their utmost extent but were proving ineffective. However, Chief Constable Harrington told us that police powers to impose conditions on processions and assemblies are rarely used. While limited data was available, he did provide the following:

“The National Police Chiefs’ Council assessed that there were over 2,500 protests between 21 January to 21 April. Some are not reported to us, but, where we have records, we have imposed conditions no more than a dozen times. It is important that we use those powers sparingly.”<sup>44</sup>

56. The Home Office Minister told us that the very infrequent use of the current powers to impose conditions “shows that the powers to manage protests are used with restraint when necessary and proportionate.”<sup>45</sup> We saw no evidence, however, that it indicates a gap in the law requiring the proposed new trigger based on noise.

57. One other potential justification for new powers that we have noted is the financial cost of protest. The factsheet on protest powers describes recent protests as “a drain on public funds”, referring in particular to Extinction Rebellion’s protests in April and October 2019 and the policing operation for which cost “£37m - more than twice the annual budget of London’s violent crime taskforce.”<sup>46</sup> The same point was made to us in the oral evidence of Matt Parr of HMICFRS, from whose report these figures were drawn. However, when he was asked to clarify whether this meant that expense should be weighed into the balancing exercise between the rights of protesters and others’ rights his response was: “I am absolutely not saying that. I do not think that should happen and there is no evidence of that.”<sup>47</sup>

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42 [Q14](#) [Matt Parr]

43 [Q9](#) [Matt Parr]. This evidence is of particular interest, as the Government chose the recommendations of HMICFRS to head their Protest Powers Factsheet that accompanied the Bill: Home Office, [Police, Crime, Sentencing and Courts Bill 2021: protest powers factsheet](#), May 2021

44 [Q9](#) [Chief Constable BJ Harrington]

45 Response from Victoria Atkins MP, Minister for Safeguarding, [regarding Part 3 of the Police, Crime, Sentencing and Courts Bill](#), dated 8 June

46 Home Office, [Police, Crime, Sentencing and Courts Bill 2021: protest powers factsheet](#), May 2021

47 [Q9](#) [Matt Parr]

58. We were reassured by this clarification from Mr Parr. The fundamental right to protest should not be restricted simply because its exercise is too expensive.

### *Existing powers*

59. The Explanatory Note that accompanies the Bill refers to “some gaps in the legislation” being highlighted by “[r]ecent changes in the tactics employed by certain protesters, for example gluing themselves to buildings or vehicles, blocking bridges or otherwise obstructing access to buildings such as the Palace of Westminster and newspaper printing works.” Quite apart from there being some doubt as to whether these tactics do indeed highlight gaps in the legislation,<sup>48</sup> none of them concern problematic noise. The protest powers factsheet answers the question ‘why are these measures needed?’ with a similar list, again with no reference to noise.<sup>49</sup>

60. Numerous witnesses told us that peaceful protest is already over-policed and unnecessarily criminalised. The police do already have a plethora of powers that can be brought to bear on those causing serious disruption through protest, including through noise.

- a) Most obviously, the existing ‘triggers’ under sections 12 and 14 of the Public Order Act 1986 already provide the police with the power to impose conditions on assemblies that seriously disrupt the life of the community. While this power raises its own concerns about certainty, there is no reason why this existing provision couldn’t be used to impose conditions on a procession or assembly making sustained and excessive noise that had a seriously disruptive effect on the local community.
- b) In addition, the Anti-social Behaviour, Crime and Policing Act 2014 provides for Public Space Protection Orders to deal with persistent and unreasonable activities in a public place, which have a detrimental effect on the quality of life of those in the locality. Under the same Act, if the police consider there is a likelihood that members of the public will suffer harassment, alarm or distress in a locality, they can authorise officers to disperse people from the area.<sup>50</sup> There are also numerous laws specifically covering types of excessive noise that causes disturbance and annoyance, such as the Control of Pollution Act 1974, which restricts the use of loudspeakers in the street.<sup>51</sup>
- c) In respect of more targeted noise, such as chanting or shouting directed at a particular person or organisation, the law already prohibits threatening or

48 Jules Carey, in his oral evidence ([Q1](#)), brought to our attention para 76 of the judgment in *R (Baroness Jones & others) v Commissioner of Police* [2020] 1 WLR 519. This was the challenge to the policing of the extinction rebellion protests in 2020. Para 76 states:  
*“76. It was common ground that there are powers contained in the 1986 Act which might be lawfully used to control future protests deliberately designed to “take police resources to breaking point”, to use the words set out in the October Rebellion Action Design.”*

49 Home Office, [Police, Crime, Sentencing and Courts Bill 2021: protest powers factsheet](#), May 2021. The factsheet does add in this section that a number of police officers were assaulted during demonstrations in 2020, which is undoubtedly a matter of serious concern that the criminal law should address. It does not, however, provide justification for introducing additional powers to deal with *non-violent* protest.

50 Anti-social Behaviour, Crime and Policing Act 2014, [sections 34](#) and [35](#)

51 Control of Pollution Act 1974, [section 62](#) prohibits (subject to conditions) the use of loudspeakers in the street between the hours of nine in the evening and eight in the following morning, and at any time for the purpose of advertising any entertainment, trade or business.

abusive words or behaviour that cause harassment, alarm or distress<sup>52</sup> and harassment itself.<sup>53</sup> The offence of harassment was widened by amendment in 2005, with the specific intention of dealing with animal rights protesters who were harassing and intimidating workers at animal testing laboratories.<sup>54</sup> A specific offence of harassing a person in their home was also introduced.<sup>55</sup>

- d) The police also have a common law power and duty to take action to prevent an ongoing or imminent breach of the peace, and may use force to do so. A breach of the peace occurs “whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.”<sup>56</sup> This power is frequently used by the police in the protest context.

61. The types of behaviour covered by the new trigger that the police do not already have powers to deal with are those at the very bottom of the scale; such as peaceful chanting, singing and shouting that does *not* cause harassment, alarm or distress, does *not* intimidate and does *not* cause serious disruption to the life of the community.<sup>57</sup> Yet this is where the impact of the proposed new trigger most obviously comes into conflict with the types of noise that are central to protest and critical to it being effective. While noise that has a relatively minor impact on an individual or a group, such as that which causes “serious unease”, might not be welcome to them, we do not think that such a low threshold would justify an interference with Articles 10 and 11 ECHR. We agree with the evidence of Matt Parr:

“I would have thought that “unease”—or even “serious unease”—would make it challenging to reach the threshold of being proportionate, justified and necessary.”<sup>58</sup>

**62. The proposed new trigger for imposing conditions on public processions and assemblies represents a restriction on the right to protest that is not necessary in a democratic society. Such a trigger would not address the forms of protest that have been identified by the Government as problematic. Neither the police nor HMCIFRS called for a new trigger based on the noise generated by demonstrations. In addition, the law already provides a range of powers to deal with noise that impacts on the**

52 Public Order Act 1986, [sections 4A and 5](#)

53 Protection from Harassment Act 1997, [section 2](#)

54 Serious Organised Crime and Police Act 2005, [section 125\(2\)\(c\)](#). The [Explanatory Notes](#) refer to the need for protection from animal rights protesters.

55 Criminal Justice and Police Act 2001, [section 42A](#)

56 *R. v. Howell* [1982] QB 416

57 It is notable that control by the state of noise that does not meet the threshold of harassment or amount to an existing public order offence is largely the responsibility of local authorities using powers under the Environmental Protection Act 1990 (EPA 1990) and Noise Act 1996. It is generally not a matter for the police. Furthermore, while the EPA 1990, [section 79\(1\)\(g\)](#) identifies “noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street or in Scotland, road” to be a statutory nuisance, it specifically excludes from this category noise made “by a political demonstration or a demonstration supporting or opposing a cause or campaign”. As pointed out to us in the written evidence of Dr Jonathan Havercroft ([PCS0041](#)), the effect of the proposed new trigger would therefore be to “move political protests from being exempt from noise ordinances to being the most harshly penalized activity due to loudness.”

58 [Q15](#)

**rights and freedoms of others to such an extent that interference with Article 10 and 11 rights would be justified. *The new trigger for imposing conditions on processions and assemblies based on the noise they generate should be removed from the Bill.***

### **One person demonstrations**

63. The Public Order Act 1986 originally defined an assembly as a gathering of “20 or more persons “. In 2003 this definition was amended to reduce the number of people required to constitute a public assembly down to two. Clause 60 of the PCSC Bill would introduce for the first time the power to impose conditions on one-person protests in England and Wales (the law in Scotland would remain as it is now). This power would only be available where the new ‘trigger’ based on noise, as introduced for processions and assemblies, was satisfied.

64. **While a single person will not be exercising their right of free assembly when protesting, they will still receive protection for their freedom of speech under Article 10 ECHR. All of the concerns set out above in respect of the proportionality of imposing conditions on processions and assemblies based on noise apply equally to this unprecedented power to impose conditions on one-person protests—with the addition that a single protester has less ability to produce seriously disruptive noise than a large assembly or procession. *Clause 60 should also be removed from the Bill.***

### 3 Other changes to the law governing processions and assemblies

65. This chapter will consider three other aspects of the PCSC Bill that would affect the police’s power to impose conditions on protests in England and Wales:

- a) The expansion of the conditions that may be imposed on public assemblies;
- b) The introduction of a power for the Secretary of State to make regulations clarifying the meaning of ‘serious disruption’ for the purpose of two of the triggers for imposing conditions; and
- c) Changes to the criminal offence of failing to comply with conditions and the penalties for doing so.

#### Expansion of available conditions on assemblies

66. Under the Public Order Act 1986 a senior police officer can only impose conditions on public assemblies concerning “the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it.” Clause 55(3) of the PCSC Bill would remove limits on the type of conditions that can be imposed on assemblies in England and Wales by allowing “such conditions as appear to the officer necessary” (the law in Scotland would remain as it is now). This would make the type of conditions that can be imposed on assemblies consistent with the current provisions on processions in the Public Order Act 1986.

67. The protest powers factsheet provides an idea of the types of conditions that might be imposed on assemblies, which are not currently permitted: “This measure will enable the police to impose conditions such as start and finish times and maximum noise levels on static protest”.<sup>59</sup>

68. Chief Constable Harrington informed us that:

“[W]ith a procession, we can apply reasonable conditions and meet the threshold, and we will often re-route it to avoid a particularly sensitive area or to make sure that it starts and finishes at agreed places. That allows us to balance the impact on other people and prevent or mitigate serious disruption. With an assembly, we cannot do that. We are limited. And we think that that is not clear for those involved.

It is difficult for police commanders to decide whether something is an assembly or a procession—at which point does it become one or the other? We think the proposals provide greater clarity to achieve both sides: to allow protesters to understand what is allowed and where we put conditions in place, and to allow us to protect other people and their rights. At the moment, we cannot do that because of the limitations in the powers.”<sup>60</sup>

59 Home Office, [Police, Crime, Sentencing and Courts Bill 2021: protest powers factsheet](#), May 2021, part 3

60 [Q10](#)

69. The Home Office Minister added that assemblies “are just as capable of causing as much disruption as processions, it is therefore right for the police to have the same ability to manage assemblies as they currently do for processions.”<sup>61</sup>

70. Liberty and Big Brother Watch provided us with a contrary view:

“The existing distinction between sections 12 and 14 reflects the less disruptive impact of, and the relative ease with which police can facilitate, static assemblies compared to marches. These provisions erode that necessary distinction [...]. As then Home Secretary Lord Hurd of Westwell noted during second reading of the Public Order Act 1986, ‘[w]e stopped short of a power to ban because we believed that that would be an excessive limit on the right of assembly and freedom of speech [...]’<sup>62</sup>

71. Prior to the 1986 Act it was not considered necessary to have any power to impose conditions on assemblies, and for the past 35 years the police have successfully operated within the limits imposed by the 1986 Act. It is once again important to recognise that the police have many other powers available to them in public order situations. While we understand the police desire to increase their powers, the convenience of their extension needs to be weighed against the potential impact on peaceful assemblies.

**72. We respect the police call for the types of conditions that can be imposed on assemblies to be expanded. However, the power to limit the numbers, duration and location of a public assembly already allow very significant controls to be placed on ongoing and prospective assemblies, and the longstanding distinction between processions and assemblies recognises the greater potential of moving demonstrations to cause serious disruption and the need to control their routes. Completely removing the limits on the conditions that can be imposed on assemblies, particularly when coupled with the proposed new trigger based on noise, would increase the risk of peaceful assemblies being unnecessarily restricted in breach of Articles 10 and 11 ECHR. Nevertheless, we can see that the ability to control an assembly’s start and finish times, where a trigger is satisfied, would be a reasonable and proportionate addition to police powers. *The Bill should be amended to limit the changes to the conditions that may be placed on public assemblies to the addition of a condition as to the start and finish times of an assembly.***

## Defining ‘serious disruption’ in secondary legislation

73. Clauses 54 and 55 of the Bill provide that the Secretary of State, in this case the Home Secretary, may by regulations make provision about the meaning of: (1) serious disruption to the activities of an organisation which are carried on in the vicinity of a public procession, and (2) serious disruption to the life of the community, for the purposes of processions and assemblies in England and Wales. This includes giving examples of cases in which those conditions are fulfilled. The draft regulations must be laid before and approved by a resolution of each House of Parliament (the draft affirmative procedure).

61 Response from Victoria Atkins MP, Minister for Safeguarding, [regarding Part 3 of the Police, Crime, Sentencing and Courts Bill](#), dated 8 June

62 Liberty, Big Brother Watch ([PCS0346](#))

74. It is not acceptable that clarification of these terms will appear in secondary legislation rather than within the Bill where it could be scrutinised more effectively. We have also been given no real indication of the likely content of the regulations, although the Home Office Minister has indicated that more detail may be available ahead of Report stage.<sup>63</sup>

75. This proposed power indicates that the terms which the regulations would cover require clarification. That is of itself of some concern, as primary legislation should be clear and able to be understood. Despite its vagueness,<sup>64</sup> the term “serious disruption to the life of the community” has been applied by the police and courts for almost 35 years, so it is somewhat surprising that it has been deemed necessary to provide legislative clarification of its meaning now.

76. A justification for introducing this power at this time appears in the Delegated Powers Memorandum:

“Protesters have become adept at rapidly changing their tactics to avoid the use of police powers, so the flexibility of a statutory instrument is needed rather than instead looking to provide this clarity on the face of the Bill, which could soon become out of date.”<sup>65</sup>

77. We find this explanation somewhat confusing. The Explanatory Notes that accompany the Bill refer to “[r]ecent changes in the tactics employed by certain protesters, for example gluing themselves to buildings or vehicles, blocking bridges or otherwise obstructing access to buildings such as the Palace of Westminster and newspaper printing works.” Even if these tactics are indeed novel, it is unclear why they would make it harder to establish the consequence of “serious disruption to the life of the community” than any other tactic.

78. Furthermore, the main recent protests that have been said to cause problems due to new tactics are those of Extinction Rebellion, who caused disruption in 2019 when mounting numerous protests across London at different locations over a short period. The police imposed conditions under s14 of the Public Order Act 1986 that amounted to an effective ban. This use of s14 was found to be unlawful, but that was because multiple assemblies at different locations and at different times could not lawfully be treated as a single ‘public assembly’. The obstacle to the police was not, therefore, the meaning of ‘serious disruption to the life of the community’.

79. Despite the use of the draft affirmative procedure, this proposed power would give the current and future Home Secretaries considerable control over the types of protest that can be subjected to restrictions by the police. The Home Office Minister told us that the “flexibility of secondary legislation...means that powers can be updated to mirror changes in protest tactics.”<sup>66</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

63 Response from Victoria Atkins MP, Minister for Safeguarding, [regarding Part 3 of the Police, Crime, Sentencing and Courts Bill](#), dated 8 June

64 Kevin Blowe, Co-Ordinator at NetPol, described the phrase as “already hugely open to interpretation by the police” ([Q3](#))

65 Home Office and Ministry of Justice, [Police, Crime, Sentencing and Courts Bill: Delegated Powers Memorandum](#), March 2021, para 137

66 Response from Victoria Atkins MP, Minister for Safeguarding, [regarding Part 3 of the Police, Crime, Sentencing and Courts Bill](#), dated 8 June

Government objects and specify those as falling within the ‘serious disruption’ triggers. It is of course vitally important that peaceful protests are policed on the basis of the harm they cause, not their political content (as long as it remains within the law).

80. **Any clarification of the meaning of ‘serious disruption’ will impact on the use of police powers to restrict the exercise of rights under Articles 10 and 11 ECHR and requires careful scrutiny. At this stage the content of the proposed regulations is unknown, which leaves us unable to assess their likely impact on the right to peaceful protest. If there is a particular clarification of ‘serious disruption’ that the Home Office considers is currently needed, perhaps as a result of the Extinction Rebellion protests of 2019, it should be made clear now so that it can be considered while the Bill is being scrutinised. If no need for particular clarification has yet been identified, then we struggle to see how the powers contained in the PCSC Bill can be considered necessary.**

81. *The Government should provide clarification of these terms on the face of the Bill. If they are not prepared to do that, at the very least the Government should publish the regulations they propose to make under this section promptly to allow Parliament, and in particular the Joint Committee on Human Rights, to consider them before scrutiny of the PCSC Bill has concluded.*

## Changes to criminal offences of breaching conditions

82. As the law stands, a person only commits an offence if they “knowingly” breach a condition imposed by the police on a public procession or assembly. Clause 56 of the PCSC Bill would, if enacted, lower the knowledge requirement for the offence of breaching a condition in England and Wales (the law in Scotland would remain as it is now). Clause 56 provides that an organiser or protestor will be guilty of an offence if they fail to comply with a condition and the person “*knows or ought to know* that the condition has been imposed”. However, they will still have a defence if they can prove that their failure “arose from circumstances beyond [their] control.”

83. As made clear in the factsheet, the intention of this provision is to “close a loophole which some protesters exploit. Some will cover their ears and tear up written conditions handed to them by the police”.<sup>67</sup> By so doing, these protesters give themselves the opportunity to defend themselves in court by arguing that they did not ‘knowingly’ breach conditions.

84. The actual extent of this problem is not clear, but there are a few high-profile examples of prosecutions failing because the requisite knowledge could not be established.<sup>68</sup> We accept that there is a potential loophole that could be exploited. However, the proposed amendment to the Public Order Act 1986 would go much further than is necessary to close this loophole. The meaning of ‘ought to know’ will be open to wide interpretation, potentially extending far beyond those who deliberately seek to avoid knowledge. It might be argued that anyone who goes on a major public demonstration ‘ought to’ look out for and know about any conditions imposed by the police. The proposed amendment would extend the offence to cover those who inadvertently missed the imposition of conditions due to circumstances that were not “outside their control”, such as genuinely not noticing a prominent sign.

67 Home Office, [Police, Crime, Sentencing and Courts Bill 2021: protest powers factsheet](#), May 2021, part 3

68 [“Green MP Caroline Lucas cleared over fracking protest”](#), BBC News, 17 April 2014

85. Furthermore, under the proposal, as long as the protester ‘ought to know’ that a condition is in place, there is no requirement that they know or ought to know their own actions amounted to a breach. Once they know or ought to know a condition is in place the offence is essentially one of strict liability. A person who attended a demonstration limited to 100 people would commit the offence if they knew or ought to know of this limit, even if they had no idea that they were the 101st person to join the assembly or procession. This is a particular concern if the condition in question relates to noise levels—how is a person who knows that a condition restricting noise levels is in place meant to know whether they personally have breached that condition?

86. **We accept that there is a potential loophole in the offence of failing to comply with a condition lawfully imposed by the police. However, we are concerned that the PCSC Bill would amend this offence in a manner that would go much further than is necessary to close this loophole, amounting to a disproportionate interference with the right to peaceful protest. Clause 56 must be amended to ensure that while the loophole identified is closed the offence cannot sweep up innocent participants in peaceful protests.**

## Sentencing

87. Clause 56 would also have the effect, in England and Wales, of increasing the maximum sentence for protest organisers who fail to comply with a condition imposed by the police from 3 months to 51 weeks. The maximum fine for participants in an assembly or procession who fail to comply with conditions would be also be increased, from £1,000 to £2,500.<sup>69</sup>

88. The European Court of Human Rights has recognised that “the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of an interference” with the right to protest. Criminal sanctions “require particular justification” and a “peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction.”<sup>70</sup>

89. We have not seen any evidence to establish that increased maximum penalties would prevent those intent on breaching conditions from doing so. We have, however, heard from witnesses that a risk of criminal conviction can have a chilling effect on those considering whether to attend lawful and peaceful protests.<sup>71</sup> The HMCIFRS report considered a proposal from the police to increase sentences to “act as a deterrent to those who would otherwise remain law-abiding”, and rejected it, concluding:

“Imposing harsher sentences for non-violent offences committed during protests is likely to be difficult to justify without reference to the individual facts of any particular case. This is because of the importance of any such sanction being proportionate in order to avoid violating the protester’s Articles 10 and 11 ECHR rights.”<sup>72</sup>

69 For example, increased to a level 4 fine from a level 3 fine.

70 *Kudrevičius and Others v. Lithuania* [GC], Application no. 37553/05

71 E.g. [Q6](#) (Kevin Blowe); Extinction Rebellion Families ([PCS0174](#))

72 HMCIFRS, [Getting the balance right? An inspection of how effectively the police deal with protests](#), March 2021, p 140

90. The Home Office Minister cited examples of assaults on journalists and police officers at recent protests to justify the increased sentences in the Bill - but these were not mere breaches of conditions. Violence of this type is already covered by other offences with appropriate sentences.<sup>73</sup> It is of real concern that this significant change to the available penalties would allow for a person engaged in *peaceful* protest to face a sentence of a year in prison. Taken together with the proposal to extend the offence to cover those who do not “knowingly” commit the offence, it raises a serious question of proportionality under Articles 10 and 11.

**91. Criminal sanctions for peaceful protest require compelling justification. We do not believe that the need for increased penalties for failing to comply with conditions imposed by the police has been made out. There is a real risk that more substantial penalties would have the effect of dissuading people from exercising their right to engage in peaceful protest. The clauses that increase penalties for breaching conditions placed on protests should be removed from the Bill.**

### The need for better data collection

92. In the course of oral evidence, it became clear that the National Police Chiefs Council (NPCC) does not routinely collect or publish data on conditions imposed on protests. It appears that local police forces do not routinely collect data on conditions either. In *Getting the balance right? An inspection of how effectively the police deal with protests*, HMICFRS noted that, of the “ten police forces with recent experience of policing protests” they surveyed,<sup>74</sup> only the Metropolitan Police Service were able to provide data on the number of conditions imposed on assemblies in 2019 and 2020.<sup>75</sup> It is not clear whether that data was not available because the local police force had not imposed any conditions in the survey period, or whether the data was not collected. In his oral evidence Matt Parr, HM Inspector of Constabulary and HM Inspector of Fire & Rescue Service, said data on conditions would be useful for HMICFRS.<sup>76</sup>

**93. The lack of collection and publication of data on conditions makes it harder to assess the efficacy of existing laws and the need for new ones like those contained in the PCSC Bill. The collection and publication of data on conditions in one central database would assist local police forces, the NPCC and protest organisers. Local police forces could use this data to inform their own decision-making processes, and any useful lessons could be reflected in the NPCC Public Order Authorised Professional Guidance. It would also improve police accountability to the public and help protest organisers understand the nature of conditions that are imposed. The NPCC and local police forces should work together to ensure the routine recording, collection, and publication of data on conditions imposed at protests. Any data must be easily accessible to the public.**

73 Response from Victoria Atkins MP, Minister for Safeguarding, [regarding Part 3 of the Police, Crime, Sentencing and Courts Bill](#), dated 8 June

74 Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services, [Getting the balance right? An inspection of how effectively the police deal with protests](#), March 2021, p 1

75 Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services, [Getting the balance right? An inspection of how effectively the police deal with protests](#), March 2021, p 105

76 [Q12](#)

## 4 Statutory public nuisance offence

### The new statutory offence

94. The Bill introduces a new statutory offence of “intentionally or recklessly causing public nuisance”, which was previously an offence at common law. There is a wide range of non-violent conduct that may be caught by the statutory offence, which potentially criminalises some forms of peaceful protest. The offence carries a maximum sentence of 12 months if tried summarily and 10 years if tried on indictment. A person can also be issued with a fine.<sup>77</sup> A number of our witnesses raised concerns about the impact of these changes and its compatibility with Articles 10 and 11 of the ECHR. We share some of those concerns.

#### Box 1: The statutory public nuisance offence: clause 59 of the Bill

##### 59 Intentionally or recklessly causing public nuisance

- 1) A person commits an offence if—
  - a) the person—
    - i) does an act, or
    - ii) omits to do an act that they are required to do by any enactment or rule of law,
  - b) the person’s act or omission—
    - i) causes serious harm to the public or a section of the public, or
    - ii) obstructs the public or a section of the public in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large, and
  - c) the person intends that their act or omission will have a consequence mentioned in paragraph (b) or is reckless as to whether it will have such a consequence.
- 2) For the purposes of subsection (1) an act or omission causes serious harm to a person if, as a result, the person—
  - a) suffers death, personal injury or disease,
  - b) suffers loss of, or damage to, property,
  - c) suffers serious distress, serious annoyance, serious inconvenience or serious loss of amenity, or
  - d) is put at risk of suffering anything mentioned in paragraphs (a) to (c).
- 3) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for the act or omission mentioned in paragraph (a) of that subsection.

Source: Police, Crime, Sentencing and Courts Bill

77 [Police, Crime, Sentencing and Courts Bill](#), Clause 59(4) [Bill 5 (2021–22)]

## The Law Commission report

95. As highlighted in paragraph 10 above the Explanatory Notes to the PCSC Bill state that the new statutory public nuisance offence “gives effect to recommendations made by the Law Commission in their July 2015 Report on “Simplification of the Criminal Law: Public Nuisance and Outraging Public Decency”. In the report the Law Commission recommended the common law offence of public nuisance should be “restated in statute.”<sup>78</sup> The Law Commission also recommended the statutory offence should contain a reasonable excuse defence.

96. Many of the Law Commission’s recommendations are reflected in the new offence. However, as the Bar Council highlighted in their written evidence, the Law Commission did not specifically consider use of the public nuisance offence against protesters:

“At no point in the Report is there any suggestion that the common law offence or its statutory replacement is a necessary or desirable measure to control or limit political protest...

...The Law Commission Report upon which it is based makes clear that the defence of reasonableness: -

*“would include cases where the defendant’s conduct is in exercise of a right under Article 10 (freedom of expression) or 11 (freedom of assembly and association) of the European Convention on Human Rights. Under section 3 of the Human Rights Act 1998, legislation must be read and given effect in a way which is compatible with the Convention rights; accordingly, references to reasonableness would be read as including the exercise of Convention rights.”*

In other words, conduct which the government says the Act seeks to criminalise is specifically excluded in the Law Commission’s report from being treated as unlawful and indeed they suggest that it would not be unlawful as the defence contained in their draft would provide a defence.”<sup>79</sup>

97. We agree with the Bar Council. It is concerning that the Government is using the Law Commission report, which did not specifically consider protests, to justify the inclusion of the new offence in Part 3 of the PCSC Bill which deals with “non-violent protest”.

## Human rights analysis

### *Criminalising peaceful protest*

98. We are seriously concerned that, as currently drafted, the public nuisance offence may be used to criminalise non-violent protest that would be protected by Articles 10 and 11 of the ECHR. The offence would catch not only individuals who cause “serious annoyance” or “serious inconvenience” to the public but also those who create a *risk* of causing serious annoyance or serious inconvenience. In their written submission to us UNISON stated:

78 Law Commission, [Simplification of Criminal Law: Public Nuisance and Outraging Public Decency](#), June 2015, para 3.33

79 The Bar Council ([PCS0359](#))

“...Alarminglly this new offence is complete (and permits the police to arrest someone) in circumstances [where a person] “suffers serious distress, serious annoyance, serious inconvenience or serious loss of amenity”. This is an unreasonably low threshold for a criminal offence to be made out. There will be few legitimate public protests where the public are not subject to serious annoyance or inconvenience; in part this is the point of public protests.

To lower the threshold of criminal offending to such a level will empower the police to curtail legitimate public protest to such an extent that erodes or seriously diminishes the rights of free protest as well as protestors Article 10 and 11 ECHR rights. This new offence places the police in the role of guardians of such rights which is unacceptable.

These new provisions go beyond what the government describes as a modest reset of the current public order law and venture into a wholly undesirable erosion of fundamental common law and human rights.”<sup>80</sup>

99. As we noted at paragraph 91 any criminal sanctions for peaceful protest require compelling justification. The risk of criminalisation for participating in peaceful protest creates a real possibility that individuals will be dissuaded from exercising their right to engage in peaceful protest, and the broad drafting leaves significant discretion to the police, making it difficult for protesters to predict when they may be deemed to have committed the offence. However, as the offence is used in a wide array of circumstances, not just protests, we are not suggesting it is omitted from the PCSC Bill altogether.

### ***Why is the new offence needed?***

100. It is not entirely clear what behaviour the Government and police are trying to tackle with the new offence. In oral evidence Chief Constable Harrington told us:

“It provides clarity for us and for those who would be impacted. At the moment, it is common law, informed by precedents, decisions and case law. It will provide clarity, currency and consistency around how we do this, which is important to us.”<sup>81</sup>

101. We agree that clarity and consistency for both police and protesters is important, however Chief Constable Harrington went on to tell us:

“What is in the proposals goes beyond the issues of inconvenience and loss of amenity and talks about serious damage to property, allowing us to take preventive action against those who would conspire to cause serious damage. Usually in protests, we find those individuals to be a very small minority.

It also allows us to protect public safety. As we have seen in a number of protests, there are issues of public safety for those who are legitimately and

80 UNISON: the public service union ([PCS0093](#))

81 [Q15](#)

rightfully exercising their rights under the Human Rights Act, the officers involved, and the wider public. We have seen injuries, including to officers, particularly in relation to counterprotests.

We think the proposals provide clarity and consistency, and, importantly, give policing the ability to take preventive measures, not to limit the right to protest but to try to deal with those who would have an adverse impact and cause public nuisance within the terms set out here.”<sup>82</sup>

102. It is not clear why the new offence is needed to prosecute those who “conspire to cause serious damage” or inflict injuries upon officers. The former would be caught by the Criminal Damage Act 1971 and the latter by the Offences Against the Person Act 1861 or the more specific offence of assaulting an emergency worker.

103. As we highlight at para 60 above, there are already a plethora of offences available to police in the context of protests; these include obstructing the highway and the offences in the Public Order Act 1986. The Law Commission acknowledged this in their report. They noted:

“Historically the core examples of public nuisance are obstructing the highway and creating local nuisances such as noise and smells. These are the cases in which we argue above that it would be legitimate to prosecute for public nuisance given the underlying purpose of the offence. However, these are also the very cases most likely to be covered by other offences.”<sup>83</sup>

104. We have strong reservations about public nuisance being used as a catch-all offence because of the wide range of conduct it covers. This would run the risk of criminalising a vast number of peaceful protesters, or at least being used to justify arrest and the use of force. A number of those who gave evidence to us expressed a similar concern. Kevin Blowe told us:

“Back in February of last year, the Metropolitan Police Commissioner told the London Assembly that this power was needed to provide greater clarity for officers seeking to prosecute protesters. I have made the point before that, even though it may well be the case that people are not subsequently charged and do not get convicted, this is still likely to be a power that is used massively.”<sup>84</sup>

105. To ensure the offence is used sparingly, we support the suggestion of Matt Parr, HM Inspector of Constabulary and HM Inspector of Fire & Rescue Services, who told us in his evidence:

“...the Law Commission said, and we strongly agree, that this should not be used where a more specific offence is available. That is absolutely right. I do not see the offence as likely to give rise to a huge outbreak of prosecutions, but it does provide clarity for both the police and protesters.”<sup>85</sup>

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82 [Q15](#)

83 Law Commission, [Simplification of Criminal Law: Public Nuisance and Outraging Public Decency](#), June 2015, para 3.18

84 [Q7](#)

85 [Q15](#)

106. We have serious concerns about the new offence being included in Part 3 of the PCSC Bill, especially given the broad drafting which would catch non-violent protest. Protests are by their nature liable to cause serious annoyance and inconvenience and criminalising such behaviour may dissuade individuals from participating in peaceful protest. Under the current law there are a plethora of offences already available to the police, such as obstructing the highway. *As a matter of practice, where a more specific offence is available the police should charge that offence unless there is a strong justification for not doing so.*

### ***Accessible and foreseeable***

#### *The meaning of serious harm*

107. As currently drafted the definition of “serious harm” is unclear for police and protesters. An individual commits the new offence if they cause “serious harm to *the public or a section of the public*”, or obstruct “*the public or a section of the public* in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large.” Confusingly, however, the draft offence explains the meaning of serious harm “to the public or a section of the public” by stating that a *person* suffers serious harm if they suffer “death, personal injury or disease...” This unhelpful drafting runs the risk of police relying on the offence where a protester causes harm to an individual member of the public rather than to the public as a whole or a section of the public.

108. As the Law Commission stated in their report, the underlying aim of common law offence is to “protect the rights of members of the public to enjoy public spaces and use public rights (such as rights of way) without danger, interference or annoyance,”<sup>86</sup> not the protection of individuals. Moreover, in *R v Rimmington* Lord Bingham held that using the common law offence to criminalise conduct aimed at an individual would risk falling foul of the clarity of law requirement in the ECHR. He noted:

“To permit a conviction of causing a public nuisance to rest on an injury caused to separate individuals rather than on an injury suffered by the community or a significant section of it as a whole was to contradict the rationale of the offence and pervert its nature, in Convention terms to change the essential constituent elements of the offence to the detriment of the accused.”<sup>87</sup>

109. The definition of “serious harm” is also overly broad, insofar as it covers putting a person “at risk” of any of the listed types of harm. This does not adequately reflect the aim of the common law offence, which was to prevent the public being endangered. The current definition could be read to include a very small risk of harm, which is not sufficient to justify criminal sanction and, in the public order context, could result in the criminalisation of those exercising their Article 10 and 11 rights legitimately.

86 Law Commission, [Simplification of Criminal Law: Public Nuisance and Outraging Public Decency](#), June 2015, para 3.12

87 *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459, at [37]

110. We are concerned that the current drafting of the statutory offence does not actually achieve clarity for police or protesters and risks going further than public nuisance at common law. It risks confusing police and resulting in convictions where the harm is directed at an individual rather than the public or a section of the public.

**111. The essence of the public nuisance offence is causing harm to the public or a section of the public. However, as drafted, the offence is confusing and could be read as meaning the offence is committed where serious harm is caused to one person rather than the public or a section of the public. This does not achieve clarity for either the police or protesters. The current drafting also risks the offence being broader than the common law offence it replaces. *The Bill must be amended to make clear that the offence of public nuisance will only be committed where serious harm is caused to the public or a section of the public.***

#### *Reasonable excuse defence*

112. We are concerned that the new reasonable excuse defence does not refer to the rights guaranteed by Article 10 and 11, given that the offence could be used to prosecute non-violent protest. This is concerning as the defence is the only safeguard for individuals engaging in non-violent protests who may otherwise commit the elements of the offence. The term is subjective and would give significant discretion to the police to decide when peaceful and otherwise lawful protest would amount to public nuisance. The new offence may have a chilling effect on the right to protest if individuals are dissuaded from protesting because they are unsure whether their non-violent conduct will amount to public nuisance.

113. As noted at paragraph 96 above, the Law Commission report acknowledged that the reasonable excuse defence would apply where an individual was exercising their rights under Articles 10 and 11 of the ECHR and that “legislation must be read and given effect in a way which is compatible with the Convention rights; accordingly, references to reasonableness would be read as including the exercise of Convention rights”. We think it would be unsatisfactory to leave it to the courts to read in Convention rights once an individual has been charged with an offence. There should be an express reference to Articles 10 and 11 in the reasonable excuse defence, so the police are clear any decision they make must take account of Convention rights.

**114. The reasonable excuse defence in the statutory public nuisance offence is not clear enough for police and protesters. As the Law Commission report noted, the defence should apply where an individual is exercising their Convention rights. *The Government must amend the reasonable excuse defence to public nuisance to include an express reference to Articles 10 and 11 in the defence. This would provide clarity for the courts and make clear to the police that they must give significant weight to the right to protest when deciding whether to charge the offence. This is especially important where the offence is being considered in the context of non-violent protest.***

## 5 Protests in the vicinity of Parliament

### Controlled area around Parliament

115. The police have additional powers to deal with protests in the vicinity of Parliament. Part 3 of the Police Reform and Social Responsibility Act 2011 (Parliament Square etc) designates the “controlled area of Parliament Square”, to which was added the “Palace of Westminster controlled area” in 2014.<sup>88</sup> In these limited areas the police are empowered to direct persons to stop certain prohibited activities: essentially the use of amplified noise equipment (without authorisation) and the erection of tents or use of other equipment for the purpose of sleeping overnight. A person commits an offence if they fail to comply with the direction of an officer without reasonable excuse.<sup>89</sup>

116. The PCSC Bill would amend the 2011 Act by expanding the controlled area around the Palace of Westminster to Canon Row, Parliament Street, Derby Gate, Parliament Square and the Victoria Embankment. The Bill also adds obstructing vehicular access to entrances or exits on the Parliamentary Estate within the controlled area to the list of prohibited activities.<sup>90</sup> Obstruction is defined to include “making the passage of a vehicle more difficult.”<sup>91</sup>

### *The JCHR’s previous work*

117. In the factsheet accompanying the Bill the Government state that the new clause regarding restricting vehicular access to Parliament:

“[R]esponds to a recommendation made by the cross-party Joint Committee on Human Rights to prioritise the protection of democratic institutions and the importance of access to Parliament for everyone with business there in their October 2019 report “Democracy, freedom of expression and freedom of association: Threats to MPs”.<sup>92</sup>

118. In that report the JCHR recommended:

“[...] that the Government include in a future Bill a statutory duty on the police to protect the UK’s democratic institutions and to protect the right of access to the Parliamentary estate for those with business there. Moreover, in making decisions about policing demonstrations around Parliament, or activities on Parliament Square, the [Metropolitan Police Service] and the [Greater London Authority] should consult with Parliament and should give greater emphasis to the importance of ensuring access to Parliament than it appears they have done up until now.”<sup>93</sup>

88 Police Reform and Social Responsibility Act 2011 (Parliament Square etc), [ss 142](#) and [142A](#) as amended by Anti-Social Behaviour and Policing Act 2014, [section 153](#)

89 Police Reform and Social Responsibility Act 2011 (Parliament Square etc), [section 143\(8\)](#)

90 [Police, Crime, Sentencing and Courts Bill](#), Clause 57(3) [Bill 5 (2021–22)]

91 [Police, Crime, Sentencing and Courts Bill](#), Clause 57(3)(c) [Bill 5 (2021–22)]

92 Home Office, [Police, Crime, Sentencing and Courts Bill 2021: protest powers factsheet](#), May 2021, para 4.3

93 Joint Committee on Human Rights, First Report of Session 2019–2021, [Democracy, freedom of expression and freedom of association: Threats to MPs](#), HC 37/HL paper 5, para 72

119. Whilst we welcome the Government's commitment to ensuring access to Parliament for those who have business there, we would emphasise that the 2019 report was clear that protecting access to Parliament does not mean there should be an outright ban on protest in the area. Instead the police should balance the rights of protesters against the need to ensure the effective functioning of democratic institutions.<sup>94</sup> We note that the Government has decided not to impose a specific statutory duty on the police to protect access to Parliament as the JCHR recommended. Instead, the Government has decided to secure access to the estate by making obstructing vehicular access to Parliament a prohibited activity and widening the controlled area to protect access to the Parliamentary estate. To ensure the rights of protesters, the police should use the new power regarding vehicles only when necessary to ensure access to and from the Parliamentary estate, rather than to impose general restrictions on protests in the vicinity of Parliament.

**120. We welcome the Government's commitment to ensuring access to the Parliamentary estate for those who have business there. However, it is important that protesters can protest outside democratic institutions and have their voices heard. The police should use the new powers sparingly and only when necessary to ensure access to the Parliamentary estate.**

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94 Joint Committee on Human Rights, First Report of Session 2019–2021, [Democracy, freedom of expression and freedom of association: Threats to MPs](#), HC 37/HL paper 5, para 76

## 6 Greater recognition of the right to protest in legislation

### Recognising the right to protest in statute

121. At present, there is no express “right to protest” set out in UK legislation. The right to protest is instead derived from Articles 10 and 11 of the ECHR, and protection guaranteed through the Human Rights Act 1998. Notwithstanding the absence of a statutory right to protest in UK law, it has long been recognised that the right is fundamental in a democratic society. In the 1985 White Paper Review of Public Order Law the Government recognised:

“The rights of peaceful protest and assembly are amongst our fundamental freedoms: they are numbered among the touchstones which distinguish a free society from a totalitarian one.”<sup>95</sup>

122. Despite the Government professing to retain this view of peaceful protest,<sup>96</sup> the evidence we received suggested that stakeholders do not believe that the law effectively respects and facilitates their right to protest. Indeed, despite receiving a large number of submissions addressing Part 3 of the PCSC Bill, we did not receive a single piece of written evidence welcoming the changes it proposes. One way of reaffirming the Government’s commitment to the right to peaceful protest would be to make it explicit within the legislation. This would assist in emphasising the importance of protest in a democratic society.

### ***‘Balancing’ the rights of protesters and the rights of the public***

123. Current rhetoric around protest tends to downplay the importance of the right to protest, and instead focuses on discussions about “balancing” the rights of protesters against the rights of members of the public. We see two problems with this. First, it often leads to the right to protest being given insufficient weight in the “balancing” compared to the rights of the public. Given that the right to protest is protected by the Convention it should be facilitated so far as possible. Second, it automatically assumes the rights of protesters are inevitably in conflict with the public interest. Whilst protests may cause inconvenience, they are also fundamental in a democratic society to facilitate debate and discussions on contentious issues and this is of value to the public generally. An example of this “balancing” can be seen in the HMICRFS report *Getting the balance right*. The report concludes that at present:

“The balance may tip too readily in favour of protesters when—as is often the case—the police do not accurately assess the level of disruption caused, or likely to be caused, by a protest.

These and other observations led us to conclude that a modest reset of the scales is needed.”<sup>97</sup>

95 Home Office, *Review of Public Order Law*, (Cm 9510), para 1.7

96 HC Deb, 15 March 2021, [col 64](#)

97 Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services, [Getting the balance right? An inspection of how effectively the police deal with protests](#), March 2021, p 2

124. Whilst the ECHR provides that protests can be limited in order to protect the rights of others, any restriction of the right is only lawful if it is both proportionate and necessary. The scales are, therefore, weighted in favour of protecting the right to protest, rather than equally balanced. We support the view expressed by NetPol in their submission to the All Party Parliamentary Group on Democracy and the Constitution's Inquiry into *Respect for the Constitutional Rights to Free Expression and Free Assembly at the Clapham Common Vigil on 13 March 2021 and the Bristol Protests in March 2021* that:

“The language of ‘balancing’, used frequently by policing bodies, is not always helpful. If protest is viewed as inherently problematic and ‘inconvenient’ rather than as a necessary and important element of a free society, the ‘balance’ will almost always fall on the side of maintaining order and preventing crime.”<sup>98</sup>

125. The starting position should always be that peaceful protests should not be restricted and should be facilitated so far as possible. A statutory right to protest would signal the fundamental importance of the right to protest in a democratic society.

126. We accept, however, that recognising the right to protest is not alone sufficient to ensure the right to protests. As Zehrah Hasan told us:

“Having a statutory right to protest within this Bill alongside all the other very problematic provisions in it, ... would be rendered meaningless. Ultimately, the right to protest means something only if you do not have conflicting legislation that undermines that right, which is what this Bill very much does.”<sup>99</sup>

127. We agree. Our recommendation regarding a statutory right to protest supplements, rather than substitutes, our recommendations regarding the relevant clauses in the PCSC Bill above.

**128. The right to protest is a fundamental right in a healthy democratic society. Public authorities, including the police, are under a negative obligation not to interfere with the right to protest unlawfully and a positive obligation to facilitate peaceful protest. Therefore, it is concerning that current rhetoric focuses on the inconvenience sometimes caused by protest rather than its value to society. This must be addressed. *The Police, Crime, Sentencing and Courts Bill should introduce statutory protection for the right to protest, setting out both the negative and positive obligations of the State in relation to protest.***

98 Network for Police Monitoring, [Submission to the Inquiry Into Respect For The Constitutional Rights To Free Expression And Free Assembly At The Clapham Common Vigil On 13 March 2021 And The Bristol Protests In March 2021](#), March 2021

99 [Q2](#)

## Annex: Proposed amendments

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1) Insert a new clause 53A:

“(1) The Public Order Act 1986 Part II (Processions and Assemblies) is amended as follows.

(2) Before section 11 insert –

*10A The right to protest*

(1) Everyone has the right to engage in peaceful protest, both alone and with others.

(2) Public authorities have a duty to:

- a) Respect the right to protest;
- b) Protect the right to protest; and
- c) Facilitate the right to protest.

(3) A public authority may only interfere with the right to protest, including by placing restrictions upon its exercise, when it is necessary and proportionate to do so to protect national security or public safety, prevent disorder or crime, protect public health or the rights and freedoms of others.

(4) For the purposes of this section “public authority” has the same meaning as in section 6 of the Human Rights Act 1998.”

*This amendment would introduce an express statutory right to protest, imposing both negative and positive obligations on public authorities whilst recognising that the right to protest may need to be limited to protect other legitimate public interests.*

2) Omit clause 54(1) to 54(3)

*This amendment would remove the proposed new trigger for imposing conditions on public processions based on noise in England and Wales.*

3) Omit clause 55(2) and 55(5) and in clause 55(3) remove “, impact”

*This amendment would remove the proposed new trigger for imposing conditions on public assemblies based on noise in England and Wales.*

4) Replace clause 55(3) with the following:

(3) After subsection (1) insert—

“(1A) The senior police officer may give directions imposing on the persons organising or taking part in the assembly—

(a) in the case of an assembly in England and Wales, such conditions as to the place at which the assembly may be (or continue to be) held, the time at which it is to start and/or conclude, its maximum duration, or the maximum number of persons who may constitute it, as appear to the officer necessary to prevent the disorder, damage, disruption, impact or intimidation mentioned in subsection (1);

(b) in the case of an assembly in Scotland, such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to the officer necessary to prevent the disorder, damage, disruption or intimidation mentioned in subsection (1)(a) or (b).”

*This amendment removes the proposed ability to impose any necessary conditions on public assemblies in England and Wales and replace it with the existing available conditions plus conditions concerning the time at which the public assembly must start and finish. The law in Scotland would remain as it is now.*

5) Replace clause 56(5) with the following:

“(5) After subsection (5) insert -

(5A) A person is guilty of an offence under subsection (4) or (5) only if -

(a) in the case of a public procession in England and Wales, at the time the person fails to comply with the condition the person:

(i) knows that the condition has been imposed or has deliberately or recklessly avoided gaining knowledge that the condition has been imposed; and

(ii) knows or ought to know that their action or inaction amounts to a failure to comply with the condition.

(b) in the case of a public procession in Scotland, the person knowingly fails to comply with the condition.”

*This amendment prevents a person who fails to comply with a condition on a public procession in England and Wales avoiding criminal liability by deliberately or recklessly avoiding knowledge of the relevant condition, without extending the criminal offence to cover persons who breach conditions accidentally. The law in Scotland would remain as it is now.*

6) Omit clause 56(6)

*This amendment removes unnecessary and disproportionate increases in sentences for non-violent offences by those who organise and attend public processions.*

7) Replace clause 56(10) with the following:

“(5) After subsection (5) insert -

(5A) A person is guilty of an offence under subsection (4) or (5) only if -

(a) in the case of a public assembly in England and Wales, at the time the person fails to comply with the condition the person:

(i) knows that the condition has been imposed or has deliberately or recklessly avoided gaining knowledge that the condition has been imposed; and

(ii) knows or ought to know that their action or inaction amounts to a failure to comply with the condition.

(b) in the case of a public assembly in Scotland, the person knowingly fails to comply with the condition.”

*This amendment prevents a person who fails to comply with a condition on a public assembly in England and Wales avoiding criminal liability by deliberately or recklessly avoiding knowledge of the relevant condition, without extending the criminal offence to cover persons who breach conditions accidentally. The law in Scotland would remain as it is now.*

8) Omit clauses 56(11) and 56(12)

*This amendment removes increases in sentences for non-violent offences by those who organise and attend public assemblies.*

9) Replace clause 59(2) with the following:

“(2) For the purposes of subsection (1) “serious harm” means:

(a) death, personal injury or disease,

(b) loss of, or damage to, property,

(c) serious distress, serious annoyance, serious inconvenience or serious loss of amenity, or

(d) being put at serious risk of suffering anything mentioned in paragraphs (a) to (c).

*This amendment removes the reference to the experience of a ‘person’ when defining what serious harm means in the context of ‘serious harm to the public or a section of the public’. It also requires the public to be put at significant risk of harm before criminal liability arises, to avoid the offence being excessively broad in its reach.*

10) After 59(3) insert:

“(3A) In determining whether a person had a reasonable excuse for the purposes of subsection (3) a court must have particular regard to the importance of the right to protest, including freedom of expression under Article 10 and the right to freedom of association under Article 11 of Part 1 of Schedule 1 to the Human Rights Act 1998.”

*This amendment ensures that the right to protest is given particular regard when a court considers whether a person has a reasonable excuse defence to a charge of public nuisance.*

11) Omit clause 60

*This amendment would remove the proposed power to impose conditions on one-person protests based on noise.*

## Conclusions and recommendations

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### Conditions on public processions and assemblies to address noise

1. The ECHR is intended to provide rights that are “practical and effective” not “theoretical and illusory”. A right to peaceful protest would not appear to us to fulfil this requirement if the peaceful protest cannot be seen and, crucially in this context, heard. A power that would allow the police to move the location of a demonstration, limit its numbers or duration, or even to silence certain shouts or chants, in order to suppress noise is therefore of significant concern. (Paragraph 36)
2. Using multiple terms that are open to wide interpretation, such as “intensity” and “serious unease”, leaves an excessive degree of judgment in the hands of a police officer. This is likely to prove challenging to the police, who already have significant responsibility for ensuring that demonstrations are lawful and safe. It will also give rise to uncertainty for those organising and participating in demonstrations and fails to provide convincing safeguards against arbitrary or discriminatory use of these powers. (Paragraph 50)
3. The proposed new trigger for imposing conditions on public processions and assemblies represents a restriction on the right to protest that is not necessary in a democratic society. Such a trigger would not address the forms of protest that have been identified by the Government as problematic. Neither the police nor HMCIFRS called for a new trigger based on the noise generated by demonstrations. In addition, the law already provides a range of powers to deal with noise that impacts on the rights and freedoms of others to such an extent that interference with Article 10 and 11 rights would be justified. *The new trigger for imposing conditions on processions and assemblies based on the noise they generate should be removed from the Bill.* (Paragraph 62)
4. While a single person will not be exercising their right of free assembly when protesting, they will still receive protection for their freedom of speech under Article 10 ECHR. All of the concerns set out above in respect of the proportionality of imposing conditions on processions and assemblies based on noise apply equally to this unprecedented power to impose conditions on one-person protests—with the addition that a single protester has less ability to produce seriously disruptive noise than a large assembly or procession. *Clause 60 should also be removed from the Bill.* (Paragraph 64)

### Other changes to the law governing processions and assemblies

5. We respect the police call for the types of conditions that can be imposed on assemblies to be expanded. However, the power to limit the numbers, duration and location of a public assembly already allow very significant controls to be placed on ongoing and prospective assemblies, and the longstanding distinction between processions and assemblies recognises the greater potential of moving demonstrations to cause serious disruption and the need to control their routes. Completely removing the limits on the conditions that can be imposed on assemblies, particularly when coupled with the proposed new trigger based on noise, would increase the risk of

peaceful assemblies being unnecessarily restricted in breach of Articles 10 and 11 ECHR. Nevertheless, we can see that the ability to control an assembly's start and finish times, where a trigger is satisfied, would be a reasonable and proportionate addition to police powers. *The Bill should be amended to limit the changes to the conditions that may be placed on public assemblies to the addition of a condition as to the start and finish times of an assembly.* (Paragraph 72)

6. Any clarification of the meaning of 'serious disruption' will impact on the use of police powers to restrict the exercise of rights under Articles 10 and 11 ECHR and requires careful scrutiny. At this stage the content of the proposed regulations is unknown, which leaves us unable to assess their likely impact on the right to peaceful protest. If there is a particular clarification of 'serious disruption' that the Home Office considers is currently needed, perhaps as a result of the Extinction Rebellion protests of 2019, it should be made clear now so that it can be considered while the Bill is being scrutinised. If no need for particular clarification has yet been identified, then we struggle to see how the powers contained in the PCSC Bill can be considered necessary. (Paragraph 80)
7. *The Government should provide clarification of these terms on the face of the Bill. If they are not prepared to do that, at the very least the Government should publish the regulations they propose to make under this section promptly to allow Parliament, and in particular the Joint Committee on Human Rights, to consider them before scrutiny of the PCSC Bill has concluded.* (Paragraph 81)
8. We accept that there is a potential loophole in the offence of failing to comply with a condition lawfully imposed by the police. However, we are concerned that the PCSC Bill would amend this offence in a manner that would go much further than is necessary to close this loophole, amounting to a disproportionate interference with the right to peaceful protest. *Clause 56 must be amended to ensure that while the loophole identified is closed the offence cannot sweep up innocent participants in peaceful protests.* (Paragraph 86)
9. Criminal sanctions for peaceful protest require compelling justification. We do not believe that the need for increased penalties for failing to comply with conditions imposed by the police has been made out. There is a real risk that more substantial penalties would have the effect of dissuading people from exercising their right to engage in peaceful protest. *The clauses that increase penalties for breaching conditions placed on protests should be removed from the Bill.* (Paragraph 91)
10. The lack of collection and publication of data on conditions makes it harder to assess the efficacy of existing laws and the need for new ones like those contained in the PCSC Bill. The collection and publication of data on conditions in one central database would assist local police forces, the NPCC and protest organisers. Local police forces could use this data to inform their own decision-making processes, and any useful lessons could be reflected in the NPCC Public Order Authorised Professional Guidance. It would also improve police accountability to the public and help protest organisers understand the nature of conditions that are imposed. *The NPCC and local police forces should work together to ensure the routine recording, collection, and publication of data on conditions imposed at protests. Any data must be easily accessible to the public.* (Paragraph 93)

### Statutory public nuisance offence

11. We have serious concerns about the new offence being included in Part 3 of the PCSC Bill, especially given the broad drafting which would catch non-violent protest. Protests are by their nature liable to cause serious annoyance and inconvenience and criminalising such behaviour may dissuade individuals from participating in peaceful protest. Under the current law there are a plethora of offences already available to the police, such as obstructing the highway. *As a matter of practice, where a more specific offence is available the police should charge that offence unless there is a strong justification for not doing so.* (Paragraph 106)
12. The essence of the public nuisance offence is causing harm to the public or a section of the public. However, as drafted, the offence is confusing and could be read as meaning the offence is committed where serious harm is caused to one person rather than the public or a section of the public. This does not achieve clarity for either the police or protesters. The current drafting also risks the offence being broader than the common law offence it replaces. *The Bill must be amended to make clear that the offence of public nuisance will only be committed where serious harm is caused to the public or a section of the public.* (Paragraph 111)
13. The reasonable excuse defence in the statutory public nuisance offence is not clear enough for police and protesters. As the Law Commission report noted, the defence should apply where an individual is exercising their Convention rights. *The Government must amend the reasonable excuse defence to public nuisance to include an express reference to Articles 10 and 11 in the defence. This would provide clarity for the courts and make clear to the police that they must give significant weight to the right to protest when deciding whether to charge the offence. This is especially important where the offence is being considered in the context of non-violent protest.* (Paragraph 114)
14. We welcome the Government's commitment to ensuring access to the Parliamentary estate for those who have business there. However, it is important that protesters can protest outside democratic institutions and have their voices heard. The police should use the new powers sparingly and only when necessary to ensure access to the Parliamentary estate. (Paragraph 120)
15. The right to protest is a fundamental right in a healthy democratic society. Public authorities, including the police, are under a negative obligation not to interfere with the right to protest unlawfully and a positive obligation to facilitate peaceful protest. Therefore, it is concerning that current rhetoric focuses on the inconvenience sometimes caused by protest rather than its value to society. This must be addressed. *The Police, Crime, Sentencing and Courts Bill should introduce statutory protection for the right to protest, setting out both the negative and positive obligations of the State in relation to protest.* (Paragraph 128)

## Declaration of interests<sup>100</sup>

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### *Lord Brabazon of Tara*

- No relevant interests to declare

### *Lord Dubs*

- No relevant interests to declare

### *Lord Henley*

- No relevant interests to declare

### *Baroness Ludford*

- No relevant interests to declare

### *Baroness Massey of Darwen*

- No relevant interests to declare

### *Lord Singh of Wimbledon*

- No relevant interests to declare

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<sup>100</sup> A full list of Members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mpslords-and-offices/standards-and-interests/register-of-lords-interests/>

# Formal minutes

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**Wednesday 16 June 2021**

Virtual Meeting

Members present:

Ms Harriet Harman MP, in the Chair

Lord Brabazon of Tara

Lord Singh of Wimbledon

Joanna Cherry MP

Baroness Massey of Darwen

Lord Dubs

Baroness Ludford

Lord Henley

Draft Report (*Legislative scrutiny: The Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)*), proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 128 read and agreed to.

Annex and Summary agreed to.

*Resolved*, That the Report be the Second Report of the Committee to both Houses.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till 23 June at 2.40pm.]

## Witnesses

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The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

### Wednesday 28 April 2021

**Jules Carey**, Head of Actions against Police and State Team, Bindmans LLP;  
**Kevin Blowe**, Coordinator, The Network for Police Monitoring; **Zehrah Hasan**,  
Director, Black Protest Legal Support

[Q1–8](#)

**Matt Parr, CB, HM Inspector of Constabulary and HM Inspector of Fire & Rescue Services**, HM Inspector of Constabulary and HM Inspector of Fire & Rescue Services, HM Inspectorate of Constabulary and Fire and Rescue Services; **Chief Constable Ben-Julian Harrington**, Public Order Lead, National Police Chiefs' Council [Q9–15](#)

## Published written evidence

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The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

PCS numbers are generated by the evidence processing system and so may not be complete.

- 1 Amnesty International UK ([PCS0395](#))
- 2 Dr. Jonathan Havercroft ([PCS0041](#))
- 3 Extinction Rebellion Families ([PCS0174](#))
- 4 Liberty, Big Brother Watch ([PCS0346](#))
- 5 The Bar Council ([PCS0359](#))
- 6 UNISON: the public service union ([PCS0093](#))

## List of Reports from the Committee during the current Parliament

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All publications from the Committee are available on the [publications page](#) of the Committee's website.

### Session 2021–22

<b>Number</b>	<b>Title</b>	<b>Reference</b>
1st	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill	HC 90