House of Commons
House of Lords

Joint Committee on Human Rights

# Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order): Government Response to the Committee's Second Report

## Fifth Special Report of Session 2021–22

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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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The current staff of the Committee are Chloe Cockett (Senior Specialist), Olivia Crabtree (Lords Clerk), Busayo Esan (Inquiry Manager), Liam Evans (Committee Specialist), Thiago Froio Simoes (Committee Specialist), Alexander Gask (Deputy Counsel), Samantha Granger (Deputy Counsel for Human Rights and International Law), Eleanor Hourigan (Counsel), Natalia Janiec-Janicki (Committee Operations Manager), Lucinda Maer (Commons Clerk), George Perry (Media Officer) and Nicholas Taylor (Second Commons Clerk).

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# Fifth Special Report

The Joint Committee on Human Rights published its Second Report of Session 2021–22, Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order) (HC 331 / HL Paper 23) on 22 June 2021. The Government response was received on 15 September 2021 and is appended below.

# Appendix: Government Response

The Government welcomes the Joint Committee on Human Rights' (JCHR) legislative scrutiny of Part 3 (Public Order) of the Police, Crime, Sentencing and Courts (PCSC) Bill. The Government has carefully considered the conclusions and recommendations in the committee's Second Report of Session 2021–22, published on 22 June 2021, and in what follows responds to each in turn.

In their recent inspection of how effectively the police deal with protests, Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) concluded that the police do not always strike the right balance, sometimes tipping 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. They therefore recommended as a result of this assessment, as well as other observations such as the fact public order legislation is 35 years old, a modest reset of the scales is needed. These measures, which were drafted following engagement with the police and consideration of reports published by the Law Commission and the JCHR, will support the police in ensuring the correct balance is struck.

## 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)

As the Committee acknowledges, the rights to freedom of expression and assembly under Articles 10 and 11 of the ECHR are qualified rights, the right to protest is not absolute. The Public Order Act 1986 and its predecessors have long recognised this by enabling the police to attach conditions to public processions, including to move the location of a procession and to limit its numbers or duration. As such, the powers to impose such conditions on a protest are not new. The imposition of conditions may pursue various legitimate aims, including the prevention of disorder and crime, and protecting the rights of others. The actual legitimate aim pursued will depend on the factual context of the procession, assembly, or (under the provisions of the Bill) one-person protest.

As set out in our ECHR memorandum, the Government considers that the provisions are proportionate as conditions can only be imposed to the extent that they appear to the

senior police officer to be necessary to prevent the disruption. When imposing conditions, it is also unlawful for the police, as a public authority, to act in a way which is incompatible with a Convention right (subject to section 6(2) Human Rights Act 1998).

In relation to the new powers to impose conditions on a protest in respect of the generation of noise, the police will only be able to impose conditions on unjustifiably noisy protests that may result in significant harm to others or may cause serious disruption to the activities of an organisation. The threshold for being able to impose conditions on noisy protests will be appropriately high. The police will only use it in cases where it is deemed necessary and proportionate.

It is not the case that the Bill confers a power on the police "to silence **certain** shouts or chants". As the former Northern Ireland Attorney General, John Larkin QC, has set out in the recent paper ("The Police, Crime, Sentencing and Courts Bill: myth and reality") published by Policy Exchange—

> "[the] power to impose a condition in respect of noise that may cause persons of reasonable firmness to suffer serious unease is unconnected with the nature of the ideas and opinions that protesters seek to express. That a person of reasonable firmness may be offended, shocked or disturbed by what is said will not permit the imposition of conditions; it is only if noise unconnected with content may have that effect that conditions may be imposed."

Moreover, while it may be that the police deem it necessary to impose conditions around the generation of noise, such conditions, if they are to satisfy the requirement of proportionality, are likely to relate to the overall volume or duration of the noise (for example, conditions may prohibit or restrict the use of amplification equipment or certain musical instruments, such as drums, or other devices for generating noise).

The Committee specifically states that "restrictions on noise could disproportionately impact the demonstrations that have the greatest public backing" (paragraph 33). This is a concerning statement. The level of public support for any particular protest is not a relevant consideration for the police when determining whether a protest should have conditions placed on it or not. The police must be impartial as to the policing of the great variety of protests that occur and therefore the popularity of any particular protest is rightly not relevant to operational policing.

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)

We reject this entirely. Part 3 of the Bill uses many terms, such as intimidation, harassment, alarm, and distress that are already used in the Public Order Act 1986. Furthermore, "intensity of impact" is not a novel concept in legislation, for example "intensity of suffering" already exists in the Animals (Scientific Procedures) Act 1986. The police are well versed in applying the tests set out in legislation in an operational context. The tests in

sections 12 and 14 of the 1986 Act as currently drafted necessarily require the exercise of judgement based on the circumstances of a particular protest and the amendments to the 1986 Act do not change that. To assist them in this, the police receive extensive training in public order delivered by the College of Policing.

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.

3. ***The new trigger for imposing conditions on processions and assemblies based on the noise they generate should be removed from the Bill.*** (Paragraph 62)

We reject this entirely. Of course, the Government fully accepts that it is the nature of many acts of protest that they are noisy. But significant and prolonged noise from a protest often does have a detrimental effect on others living or working in the vicinity of a protest. The Government is therefore of the view that the ability of the police to attach conditions on a protest relating to the generation of noise is necessary in a democratic society to protect the rights of others. However, the ability to impose such conditions should be subject to a high threshold for which the Bill provides, namely where the level of noise may have a significant impact on those in the vicinity or may result in serious disruption to the activities of an organisation. We welcome the Committee's recognition that noise that impacts on the rights and freedoms of others may justify interference with Article 10 and 11 rights, but the Government does not accept that existing powers to tackle noise pollution are apt in terms of dealing with noise generated by protests.

The noise from most protests in England and Wales is unlikely to meet the threshold for imposing conditions and will therefore be unaffected by this legislation. In his evidence to the Committee, the NPCC public order lead, Chief Constable Harrington, said "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." We do not believe that the numbers of protests being subject to conditions will significantly change because of the measures in the Bill.

As with existing public powers, the police will need to use the power to place conditions on the generation of noise compatibly with the Convention rights.

For these reasons, we do not accept the Committee's recommendation that these provisions be removed from the Bill. We note that an amendment to remove clause 55 from the Bill at Commons Report stage was rejected by the House by a majority of 81.

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)

The Government considers it necessary to apply these provisions to single person protests as a single protester, through use of amplification equipment, can create just as much noise as a large protest. The police will only be able to impose conditions on a single person protest for reasons relating to noise and not for any other reason.

The application of this legislation will be applied in the same way between single-person and multiple-person protests, with the same safeguards. This will only lead to conditions being placed on a single person protest in exceptional of circumstances given that that single person will need to produce an excessive amount of noise, considering its local effects, duration and disruption caused, in the same way and with the exact same considerations. Due to the high threshold of the use of this power and the requirement to act compatibly with the ECHR, we do not believe this clause amounts to an unjustified interference with Convention rights. Therefore, the Government does not accept the Committee's recommendation that this clause be removed from the Bill.

## 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)

The Government welcomes the Committee's acceptance of the case for extending the range of conditions that the police may impose on a public assembly. The measure broadening the range of conditions the police can place in a public assembly will align their ability to do so with existing powers for public processions.

HMICFRS' inspection into the policing of protests found that—

> "protests are fluid, and it is not always possible to make this distinction [between assemblies and processions]. Some begin as assemblies and become processions, and vice versa. The practical challenges of safely policing a protest are not necessarily greater in the case of processions than in the case of assemblies, so this would not justify making a wider range of conditions available for processions than for assemblies".

This Government agrees with HMICFRS' findings that this alignment on the ability to place conditions on assemblies and processions is needed to improve operational effectiveness. Chief Constable Harrington, the NPCC's Lead for Public Order and Public Safety made this clear in his evidence to the Committee stating—

> "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."

The definitions in the Public Order Act 1986 reflect the nature of protests that occurred at the time the legislation was enacted. The police and HMICFRS have been clear that current legislation is not fit for purpose when dealing with the protests we see today, contrary to the statement in the report that "for the past 35 years police have successfully operated within the limits imposed by the 1986 act."

Given the findings of HMICFRS and the evidence provided by the police, we believe it is necessary and proportionate to ensure the police have the same power to place the same conditions on assemblies and they do for processions. This could include conditions such as prohibiting the use of equipment which the police have reason to believe protesters will lock-on to and as a result cause serious disruption to the life of the community.

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)

These regulation-making powers are required to clarify ambiguous cases where, if they arise, it would not be clear that there would be "serious disruption to the life of the community" or "serious disruption to the activities of an organisation which are carried on in the vicinity of a public procession/public assembly/one-person protest". This will enable the police to make use of the powers available in sections 12, 14, and 14ZA of the 1986 Act with the confidence that they are doing so legally. 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.

Since the publication of the Committee's report, the Government has published an indicative draft statutory instrument on the meaning of "serious disruption to the life of the community" and "serious disruption to the activities of an organisation".[1]

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)

We welcome the Committee's recognition of the loophole in the offence of failing to comply with a condition lawfully imposed by the police. Clause 56 will close that loophole which some protesters exploit. Some will cover their ears and tear up written conditions handed to them by the police so that they are likely to evade conviction for breaching conditions on a protest as the prosecution must prove that the person "knowingly fails to comply with a condition imposed". The Bill will change the threshold for the offence so that it is committed where a person "knows or ought to have known" that the condition has been imposed.

On this matter, the HMICFRS inspection found that—

> "the fault element in sections 12(4) and (5) and sections 14(4) and (5) of the Public Order Act 1986 is currently set too high. The loophole in the current law could be closed with a slight shift in the legal test that is applied to whether protesters should have known about the conditions imposed on them. On balance, we see no good reason not to close this loophole."

The police will be required to demonstrate that they took the necessary steps to inform protesters of the conditions they then go on to breach. However, it is to be noted that, if the police cannot evidence the fact that they made appropriate efforts to inform protesters then those who accidentally break conditions will also not be at fault.

The police already take significant steps to ensure protesters are aware of conditions placed on a protest. These include the use of written leaflets, loud hailers, and direct engagement with protesters. We expect the police to continue this extensive level of engagement and under the proposed measure they will be required to demonstrate that they have taken reasonable measures to ensure all those at a protest are aware of conditions in place, making it highly unlikely that an individual could accidently breach conditions without being aware of them.

Therefore, we do not believe the Committee's amendment is necessary.

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)

1 Draft Regulations laid before Parliament under sections 12(15), 14(14) and 14ZA(18) of the Public Order Act 1986

As previously stated in the Minister for Safeguarding's response on 8 June to the JCHR's letter regarding Part 3 of the PCSC Bill—

> "The Government believes that the current maximum penalties for breaching conditions are disproportionately low compared to the harm suffered in the most extreme examples of protests. Recent protest activity has had a significant detrimental effect on many communities across the country, and we believe these sentences are a proportionate response to the harms experienced by those affected by such protests.
>
> The offence of breaching conditions on a protest is not limited to conditions imposed to prevent 'serious disruption to the life of the community' but also conditions imposed to prevent other harms such as 'serious damage to property' and 'serious public disorder'."

The Committee's report states that violence "is already covered by other offences with appropriate sentences," but fails to address the fact that conditions are placed to prevent such violence in the first place, therefore warranting appropriate penalties.

It will be for the independent judiciary to pass sentences appropriate to the circumstances of each case such as the risks and implications resulting from an individual breaching conditions in place.

Therefore, we do not agree that it is necessary to remove the increase in sentences for breaching conditions placed on assemblies and processions.

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)

This is a recommendation to the NPCC. However, the Home Office will provide support to the NPCC in fulfilling this recommendation as appropriate. We understand that the NPCC intend to make improvements to intelligence sharing processes through their change programme, chaired by BJ Harrington, the NPCC lead, which is follow up to the recommendations that came with the HMICFRS report: "Getting the balance right? An inspection of how effectively the police deal with protests".

## 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)

Clause 60 (as it now is) reflects recommendations of the Law Commission in their report "Simplification of Criminal Law: Public Nuisance and Outraging Public Decency". As implied within the title, this is not a new offence, this is a codifying of an already existing common law offence. Whilst putting this offence on a statutory footing we are in fact decreasing maximum sentences and removing some aspects of the common law offence, for instance, a reference to "comfort".

The report states that—

> "There may also be cases where the conduct is covered by a statutory offence, but that offence is not adequate to label or punish the full extent of the defendant's wrongdoing. An example is the case of a person who causes a police siege by threatening to burn his house down. The threat is covered by the offence of threatening to destroy or damage property, which includes threatening to destroy or damage one's own property to endanger the life of another. The powers of punishment are adequate, as this offence, depending on the circumstances, carries a maximum sentence of ten years or life imprisonment. However, as a matter of labelling, this offence does not reflect the disruption caused by the incident, such as the necessity to cordon off and evacuate the area. Causing this disruption is properly described, and prosecuted, as public nuisance."

We agree with the Law Commission's assessment, who also go on to recommend that—

> "If a statutory offence of public nuisance is created, the [Crown Prosecution Service] may wish to consider drawing up prosecution guidelines to clarify the proper scope of the offence. Among other things, this guidance could state that the offence should not be used when a more specific offence is available except for good reasons."

The Crown Prosecution Service is developing such guidelines.

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)

The scope of the new public nuisance offence is set out in subsection (1) of clause 60 (as it now is). This makes it clear that the harm caused by the accused's act or omission must be to the public or a section of the public. Subsection (2) is an interpretive provision which does not alter the ambit of the offence. That said, the Government will reflect further whether the clarity of the drafting of subsection (2) could be strengthened.

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)

The statutory offence of public nuisance already includes a reasonableness defence. As the Committee's report points out—

> "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.'"

In their written evidence to the Commons Public Bill Committee, the Law Commission said in relation to the drafting of clause 60(3) "This is consistent with our recommendation that the codified offence should incorporate a defence where "the defendant's conduct was reasonable in the circumstances as he or she knew or reasonably believed them to be."

As public authorities, the police, CPS, and courts are subject to the requirement in section 6 of the Human Rights Act 1998, namely that they must not act in a way which is incompatible with a Convention right. Given this provision in the 1998 Act, the Government considers it unnecessary to include within clause 60 an express reference to Articles 10 and 11 in the defence. The government considers the protection provided by the HRA to be sufficient and effective and there is no need for the clause to include statutory protection for the right to protest specifically beyond what is already available.

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)

The measure relating to Parliament enables a police officer to direct an individual to cease, or not begin, obstructing the passage of a vehicle into or out of Parliament. As well as ensuring unimpeded vehicular access to the Parliamentary estate by MPs, Peers and others, this measure helps counter the increased security risks to individuals as a result of being held stationary outside of Parliament's gates.

As with the amendments to the Public Order Act 1986, we would expect the police to use these enhanced powers only where it is necessary and proportionate to do so.

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)

The Committee's report points out that—

> "The right to protest is instead derived from Articles 10 and 11 of the ECHR, and protection guaranteed through the Human Rights Act 1998."

The Government considers the protection provided by the HRA to be sufficient and effective and there is no need for the 1986 Act to include statutory protection for the right to protest specifically beyond what is already available.

We again thank the committee for their scrutiny of the Police, Crime Sentencing and Courts Bill.