



Joint Committee on Human Rights

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From Rt Hon Harriet Harman MP, Chair

Baroness Williams of Trafford

Minister of State
Home Office
2 Marsham Street
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29 November 2021

Proposed Government amendments to the Police Crime, Sentencing and Courts Bill

Dear Baroness Williams,

As you will be aware, the Joint Committee on Human Rights (JCHR) has undertaken extensive legislative scrutiny of the Police, Crime, Sentencing and Courts (PCSC) Bill. The output of that scrutiny was a number of reports intended to contribute to the debate on the Bill as it passed through Parliament, including a report on Part 3 of the Bill (Public Order), which was published on 22 June 2021. In that report we expressed a number of concerns regarding the Government's proposals for changes to the law and their compatibility with the right to engage in peaceful protest, as guaranteed by Articles 10 and 11 of the European Convention on Human Rights (ECHR) (the rights of free expression and free assembly, respectively).

Amendments to the PCSC Bill

I am writing to you now because the JCHR has noted the Home Office's tabling of a raft of amendments (319A to 319K) at the Committee Stage of the Bill's passage through the House of Lords. These amendments would make a number of further significant changes to the law affecting protest – arguably more significant than the changes proposed in Part 3 of the Bill at Second Reading. It appears that these amendments are a response to the disruptive protests carried out by Insulate Britain over recent months. However, as the actions that group have taken, such as blocking roads, are not novel, it is unclear why they justify late changes to the legislation that were presumably not considered necessary when the Bill was first drawn up.



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Since the Government's amendments would introduce new criminal offences, civil orders and police powers directed at individuals engaged in protest, they have the potential to amount to significant new restrictions on the rights guaranteed by Articles 10 and 11 ECHR. While we are glad that a new ECHR memorandum has been published to accompany the amendments, we are disappointed that proposals with profound implications for the right to protest have been put forward by the Government at such a late stage of the legislative process. The lateness of these amendments severely hampers the ability of the JCHR to scrutinise the proposed legislation effectively, as well as limiting the time available for parliamentarians and stakeholders more widely to consider the proposals.

1. *Can you explain the necessity for these amendments over and above the current powers available to the police? In particular, why it was necessary to introduce them at this late stage with such limited opportunity for scrutiny and debate?*

Particular concerns

We have a number of concerns and questions arising from an initial consideration of the amendments.

Excessive breadth and pre-emptive effect

Most fundamentally, we are concerned that the amendments proposed could stifle legitimate protest, in breach of Article 10 and 11 ECHR and the Human Rights Act 1998. While the right to protest is qualified, it does extend to peaceful protest which causes disruption.¹ Restrictions on protest may be justified where necessary and proportionate to prevent crime and disorder and protect the rights of others, does extend to peaceful protest which causes disruption. The key question is whether a particular restriction on a disruptive protest is necessary and proportionate on the particular facts of the case. This is a standard that is far harder to establish when action is taken pre-emptively, as would be the case with many uses of the measures in the new amendments.

To provide a few examples:

- a. The new offence of obstructing major transport works would cover a wide range of minor acts including moving any apparatus that 'relates to' construction or maintenance of major transport works or, indeed, moving any apparatus that belongs to a person acting under the authority of the

¹ As confirmed by the Supreme Court in *Ziegler v DPP* [2021] UKSC 23



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person in charge of the works. It contains no requirement that these acts are committed with any destructive or even disruptive intention.

- b. The new ‘serious disruption prevention orders’ (SDPOs) have significant implications for Article 10 and 11 rights as they are civil orders, backed with criminal sanctions, specifically aimed at those engaged in protest-related activity. They are likely to involve a substantial pre-emptive restriction on the right to protest. For persons who have previously caused serious disruption or committed a ‘protest-related offence’, they would criminalise behaviour that for others would be perfectly lawful and indeed a legitimate exercise of their Convention rights.
 - c. The amendment to the police power to stop and search under section 1 of the Police and Criminal Evidence Act 1984 (PACE) will allow the police to take pre-emptive action against those suspected of being about to engage in protest-related offences. The proposal to introduce new powers to stop and search without the need for any reasonable suspicion to justify its use goes significantly further. It would inevitably result in police officers exercising invasive and potentially intimidating control over potentially large numbers engaged in the legitimate exercise of the right to protest, potentially justified only by the need to prevent minor public order offences.
2. *Do you accept that the new offences and powers in the Government’s amendments, particularly those with pre-emptive effect, are likely to affect acts of public protest that fall within the protection of Articles 10 and 11 ECHR? How do each of the amendments take into account the fact that the exercise of these rights may legitimately cause a level of disruption?*

Inadequate protections against misuse

When legislation introduces new or extends police powers, it should also introduce adequate safeguards to prevent these powers being misused. This need is particularly acute when those powers directly target individuals seeking to speak out and demonstrate as the potential to violate Articles 10 and 11 and stifle legitimate protest is so obvious. Respecting these rights includes an obligation on the State to safeguard their exercise. It is far from clear that the amendments recently introduced to the PCSC Bill contain adequate safeguards beyond the general duty on public authorities to comply with Convention rights contained in section 6 of the Human Rights Act (HRA). For example:

- a. The new offences of ‘locking on’ (essentially attaching oneself or others to an object, building or the ground) and of obstructing major transport works



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does provide a defence of ‘reasonable excuse’. While this should allow a defendant to argue that they must not be criminalised for their actions because they amounted to a legitimate exercise of Article 10 and 11 rights, it places a significant burden on the protester and is, in any event, highly unlikely to be enough to prevent their initial arrest and thus a direct interference with those rights. Can an individual police officer tasked with arresting persons engaged in civil disobedience really be expected to conduct the careful balancing exercise required to assess whether disruptive actions are or are not protected by Article 10 and 11?

- b. SDPOs can impose restrictions and requirements directly limiting the right to protest on satisfaction of what appears to be a very low threshold. For a post-conviction PSDO the main trigger is having committed two previous “protest related offences”. There is no requirement that these offences were serious or even disruptive. For a free-standing PSDO, the trigger can be as minor as, on more than one occasion, carrying out activities related to a protest that were likely to result in serious disruption (undefined) to two or more people. Furthermore, it is unclear how restrictions or requirements, once imposed by an SDPO, could realistically allow for participation in even non-disruptive protest.
 - c. Most starkly, the introduction of a new power to stop and search without reasonable suspicion would permit stop and search to take place where there is no reason to suspect the subject, or indeed where there is a suspicion but suspicion is *unreasonable*. Where the police can stop and search without the need to justify their target on any rational basis, the potential for discrimination, arbitrariness and disproportionality in the use of that power is inevitably far greater. This threatens not only Articles 10 and 11 ECHR but also the right to respect for privacy under Article 8 ECHR, the right to liberty under Article 5 ECHR and freedom from discrimination under Article 14 ECHR.
3. *Can you identify the safeguards within the new amendments, over and above the general duty in s.6 HRA, that will prevent the powers they contain being used in breach of Convention rights?*



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Uncertainty

One of the concerns that we raised in our report on Part 3 of the PCSC Bill was that new provisions included terms that were insufficiently precise. This made it difficult for protesters to know when their behaviour was or was not lawful, risking compliance with the requirement under Article 10 and 11 ECHR for any legal restriction on protest to be accessible and foreseeable. It also left excessive discretion in the hands of police officers, increasing the possibility of misuse and potentially making it more difficult for them to enforce the law.

Several of the new amendments include terms that appear likely to raise the same problems. To take one example, the new offence of 'locking on', the new powers of stop and search and the new SDPOs all rely on the phrase "serious disruption" without providing a statutory definition. This could leave demonstrators and police officers unsure of where the line between lawful and non-lawful protest lies, with further potential for unjustified restrictions on the exercise of the right to engage in peaceful protest. Another example is the phrase "protest-related offence" which forms part of the pre-condition for imposition of an SDPO, and is defined only as "an offence which is directly related to a protest." The term "protest" itself is given no further definition.

4. *Why have no or limited statutory definitions been provided for uncertain terms used in the amendments? Where imprecise terms are used what steps will be taken to ensure that the public and the police understand the limits of the new restrictions and powers?*

We would be grateful for a response to this letter in advance of the concluding legislative stages of the Police, Crime, Sentencing and Courts Bill in the House of Lords, so that it is able to inform Parliamentary scrutiny of this important legislation.

Yours sincerely,

Rt Hon Harriet Harman MP

Chair of the Joint Committee on Human Rights