BINGHAM CENTRE FOR THE RULE OF LAW

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Date: 20 May 2021

Location: Virtual meeting on Zoom

APPG on the Rule of Law

Policing, Protest and the Rule of Law: ***Briefing on Part 3 of the Police Crime Sentencing and Courts Bill***

Parliamentarians in Attendance

Attending: Sir Bob Neill MP, Joanna Cherry QC MP, Lord Pannick QC, Baroness Lister CBE, Baroness Jones of Moulsecoomb, Kim Johnson MP, Sir Paul Beresford MP, Lord Ramsbotham, Baroness Blower, Lord Tyler CBE, Baroness Ludford, Lord Dubs, Jonathan Djanogly MP, Angela Crawley MP, Anne McLaughlin MP.

Apologies: Lord Anderson of Ipswich QC, The Lord Bishop of Leeds, Baroness Hamwee, Lord Garnier QC, Allan Dorans MP, Lord Woolf, Apsana Begum MP, Maria Eagle MP, Lord Thomas of Cwmgiedd QC

Report

Sir Bob Neill MP introduced the subject of the meeting, part 3 of the Police Crime Sentencing and Courts Bill, a carry-over Bill which at the time of the meeting was being scrutinised by a Public Bill Committee. Sir Bob highlighted the importance of the right to protest in the ECHR article rights to freedom of expression and freedom of Assembly and whether the proposals in Part 3 infringe on these rights.

Roz Comyn, Policy and Campaigns Manager at Liberty gave an overview of some of Liberty's Concerns about the Bill in general then examined the use of existing police powers to manage protests, and some of the specific changes proposed in the Bill.

She said that under the *Public Order Act 1986* the police have extensive powers to impose conditions on protests and broad discretion on how to apply them. In Liberty's view the use of the powers is often disproportionate and unfair and difficult to challenge. In *R (on application of Baroness Jenny Jones and others) v Commissioner of Police for the Metropolis* [2019] EWHC 2957 (Admin) judicial review, the Metropolitan Police Commissioner conceded that police have sufficient powers to manage protests under the current law, even where protestors seek to stretch the limits of those powers.

Liberty is concerned by what could be construed as attempts to limit the civil liberties of groups the Government of the day finds inconvenient or dislikes, such as Extinction Rebellion and Black Lives Matter.

Comyn continued by saying the proposals in part 3 do not address the purported problem they seek to resolve. The legislation would not change the decision reached in *Jones*. Comyn also said the changes would most likely not deter protestors seeking to be arrested as an

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act of civil disobedience but will likely have a chilling effect on the rights of others and result in the criminalisation of other protestors.

She raised concerns about clauses 54 and 55, that conditions may be imposed if an officer reasonably believes noise generated may lead to significant disruption to an organisation in the vicinity of a protest. Relevant is defined as likely to cause serious unease alarm or distress, which will be defined by the Home Secretary in secondary legislation. As there is such a close link between protest and noise, Liberty is very concerned it would allow police to restrict any well attended protest.

On changes proposed in Clause 54 aligning police powers for issuing conditions on assemblies and processions it is unclear why powers are being levelled down rather than levelled up. The line between Intrusive conditions, for example, preventing a demonstration taking place in a certain location, limits on numbers, bans on placard wording; and an outright ban could be hard to perceive.

In Conclusion, Roz Comyn said that a binary view of protest as protestors and everyone else entrenches an impoverished view of social value of protest. Protest is valuable in changing views. She quoted Laws LJ in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23: "rights worth having are unruly things", saying that there are impacts of protest that we tolerate and accept because we cherish and we know it is something that should not be hollowed out lightly.

Chief Constable BJ Harrington, lead on public order and public safety for the National Police Chiefs' Council, said that the right to protest is fundamental and emphasised that the police seek to facilitate peaceful protest using an approach focussed on the necessity and proportionality of intervention. He noted that compared with the rest of the world, Britain has a fine policing tradition, and most protests are peaceful and require no police intervention.

He said that proportionality is the overarching consideration for police interpretation of any legislation, and that the police have to justify restrictions when challenged through Judicial Review and the ordinary courts.

CC Harrington said the NPCC have not asked for additional protest banning powers or used limited powers to ban they have had since 2011. However, they did ask for parity of powers on conditions for assemblies and processions, which increases flexibility for police. This allows for more effective balancing of police resources.

On the current law and powers under the Public Order Act, CC Harrington said that serious disruption is a very high bar to meet before imposing conditions. For a single person protest, it can be about the significance of impact on the wider community, for example bus routes being diverted or impacts on emergency service vehicle routes. The NPCC think the bar is too high and welcome the new definition of causing a significant impact for imposing conditions on protests.

On Breaching protest conditions, CC Harrington explained the NPCC view that there is currently a loophole where despite police efforts to inform protestors of conditions, protestors seek to ignore all attempts to communicate on purpose. To convict those in breach of conditions the test is they 'ought to know' they are in breach, but

protestors say they were not aware of conditions using these tactics. CC Harrington noted that the police do not seek the presumption to be on the protestor to prove that they did not know, it is reasonable for the police to prove that a defendant ought to have known they were in breach of a condition, which removes the defence of trying very hard to ignore communication of conditions on protests.

The NPCC view is that the common law offence of public nuisance is rarely used. But where assemblies or protests have been a nuisance, it is clearer for the pubic if the offence is in statute.

CC Harrington mentioned the case of *Redmond-Bate v DPP* [1999] EWHC Admin 733[1] – acknowledging that protest is meant to be noisy. Sometimes police have decisions to make about finding the balance where there is a disproportionate disruption on, for example a business.

In conclusion the NPCC view is that the Police Crime Sentencing and Courts Bill is 21st century legislation, an update compliant with Human Rights Act. The Bill is more consistent, very clear for the public and police on what the powers are for managing protests.

Matt Parr CB, Her Majesty's Inspector of Constabulary was commissioned by the Home Secretary to examine proposals for changes to protest law. He looked not just at balancing protestors' rights with the prevention of disorder and crime, but also the rights of others.

In Parr's experience, all police forces recognised that exercise of powers needs justification and to be proportionate. They also recognised that tactics, training and the allocation of resources were also important factors in getting the best outcomes around public order policing.

Examining the proposed legislative changes in part 3. HMIC saw the existing distinction between assemblies and processions as an anachronism – it would need a high threshold for restricting the content of written protest messages, it would not be proportionate to restrict those. With regard to the use of powers to impose conditions on processions under the current law, it is very rare they are used except in London.

On lowering the fault element for breach of conditions, one interviewee said the current 'should have known' test was an absurdly high barrier for police. Matt Parr said there was huge evidence of protestors doing all they can to avoid listening to conditions being imposed. This meant it was a loophole overdue to be closed, and it was right the burden of proof stays with police.

Something Parr and HMIC identified as more contentious was the threshold for imposing conditions currently being too high. In Parr's view, significant is a better description than serious to decide the test. It can be hard to get evidence to prove the impact of a protest is serious. Serious disruption a high threshold and there is merit in move from serious to significant. In practical terms, this change would cover Abortion clinics, schools, where the Home Office note it

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[1] In *Redmond-Bate*, women street preachers attracted a hostile crowd who disagreed with their evangelistic views on abortion. A police officer arrested the women when they refused to stop preaching, because of the risk of violence from the crowd if they did not. The Court of Appeal found that there was no lawful basis for the arrest or subsequent conviction the women had not broken any law and there was no justification for the police arresting them for exercising their rights.

might not meet serious disruption, but there would be a significant impact. Any condition imposed would always would have to be proportionate.

Concluding, Matt Parr said the debate around the Bill was sometimes portrayed as an all-out war on protests – nobody he interviewed for his report saw it that way. Police do not want no protest or no disruption. It is essential, to the healthy functioning of democracy. He felt a modest reset on protest law is what is needed. In that sense the Bill is not a swing to the other side. He noted that public opinion and polling suggested quite strongly that there was a desire for this modest reset and for the police to be able to reduce the impact of protests.

Kirsty Brimelow QC – Doughty Street Chambers and Bar Human Rights Committee

Kirsty Brimelow QC brought a practitioners experience to the discussion, with 20 years of experience representing and prosecuting protestors. She said it was interesting to reflect on the questions: why now this Bill, and whether we have sufficient laws or if this new Bill is required?

Brimelow questioned whether there had been a change in protest tactics requiring new legislation. She note there were jauntier props, the pink boat at the Extinction Rebellion protests but that glue ons and lock ons are nothing new. She also raised some concern about the figures on the cost of policing protests, saying they haven't been dug down into.

Citing an example from a case Brimelow was defending in – half of a group of protestors who had glued onto a corporate building were given the option of moving away to avoid a charge by a police officer but the sergeant overruled the officer; meaning her client spent 13 hours in custody on a charge that could have been avoided, and was successfully defended.

On legal certainty, and the question of how far the Bill is compatible with A10 and A11 of the Convention on Human Rights, one aspect Brimelow noted in relation to protest is that if there was better dialogue in advance then some issues could be diverted. The Sarah Everard vigil provided an example of this, the police view seemed to be that the domestic legislation under emergency laws meant there was no right to hold the protest. A doubling down after the organisers decided not to go ahead exacerbated the problem. The police could have communicated with the organisers, instead there was chaos, with no one direct line of communication.

The Public Order Act gives powers to restrict protests, but there are other relevant offences available to police around protest disruption e.g. aggravated trespass, blocking a public highway, public nuisance, all are used on a regular basis. Injunctions can be brought to restrict protests around particular sites. The existing legal framework provides multiple tools to manage protests. There is a lack of legal certainly in the new powers as to what 'serious unease' means, it is extremely vague.

Brimelow questioned whether the new powers are lawful under the Human Rights Act. Her concern is that to be compatible with A10 and 11, powers need to be necessary and proportionate for one of the legitimate aims. In this case it is not clear what the legitimate aim being pursued is.

Brimelow noted that there are quite limited safeguards to ensure police use their powers lawfully. If police reasonably believe conditions are imposed then it is only judicial review that can be used to challenge and there are costs risks. She said that state costs claims have risen in recent years to eye watering levels which is a deterrent to challenging the actions of public authorities.

She also felt that the lowering of the threshold for awareness of protest conditions was concerning given it resulted in a criminal penalty. She said the police did not have a particularly high bar to meet under the current law, and that courts regularly make the inference on the current test. Lowering that test potentially criminalises more people unnecessarily.

On making Public nuisance a statutory offence Brimelow said she was in favour of making common law clearer through statute but queried the proposed maximum sentence of 10 years, noting that is a top end in sentence signalling serious criminality.

Discussion

Questions were raised about the proportionality of the proposed powers in the Bill and how this worked with the rights to protest under Articles 10 & 11 being qualified rights. It was noted that the broad definition of some terms might be difficult to stand up following European Court of Human Rights jurisprudence.

There was discussion of how the law would not apply in Scotland, but would still apply to Scots travelling to London to protest against Westminster Government on topics of national significance.

There was further discussion of how best to ensure that the balance could be struck between the right to protest and giving police the ability to manage protests to minimise serious disruption. It was noted that whilst this is a Government Bill, the substance of the public order aspects discussed here was not included in the Conservative manifesto which might allow for more room for amendment in the House of Lords.

It was suggested that lessons might be learned from Northern Ireland and the Parades Commission there. Some of the panellists shared their thoughts on the differences and challenges involved in transposing such an approach to protest in the UK including the less predictable nature of when protests might happen and where.

One person protests were discussed, as these would for the first time be included in police powers to set conditions.

There was some discussion of historical protests and the role of protest in British history. A Parliamentary Question from 1909 was raised, which asked what costs of policing suffragette protests were and who would bear the cost. This was agreed to be evidence of the value of protest and the importance of ensuring rights are protected.