LAWYERS ARE RESPONSIBLE

Thursday 15 August 2024

The Rt Hon Yvette Cooper MP
House of Commons
London
SW1A 0AA

Dear Home Secretary,

Lawyers Are Responsible is a group of lawyers committed to holding the legal profession to account for its role in enabling the fossil fuel industry. We also support people peacefully exercising their democratic right to protest, especially those seeking to defend the earth at a time of climate and ecological emergency.

We write to request that the Government repeals as soon as possible the Public Order Act 2023[1], and the amendments to the Public Order Act 1986 inserted into sections 12 (processions), 14 (assemblies), 18, 14ZA (one person protests), and 14A to 14C (trespassory assemblies) as introduced by the Police, Crime, Sentencing and Courts Act 2022 ("PCSCA") and section 78 (codification of public nuisance) PCSCA. For the reasons set out below we consider, as lawyers, that these laws are a threat to democracy and are oppressive. They are a textbook example of 'rule by law' rather than the 'rule of law', as exemplified by the imprisonment of peaceful protesters, including the group known as the Whole Truth Five who received sentences that are considerably higher than the sentences which have been properly imposed on the thugs recently convicted for violent and racist conduct.

We note that in response to the civil society letter sent on 29 July 2024 calling for a halt to the erosion of protest rights, you committed to review these amendments. We also note that you consistently voted against these amendments during their passage through Parliament.

Should you decide not to move forward with repeal we would be most grateful if you would provide us with a written statement of your reasons, including as appropriate, any assessment of the perceived threat which you believe requires these draconian provisions.

We further note that a stay of Liberty's case challenging the secondary legislation passed pursuant to the 2023 Act is in place whilst you review whether to continue

[1] Save for sections 15-16 specifying police forces and ranks to the pre-PCSCA Public Order Act 1986 offences and section 17 which preserves the role of journalists reporting on protests.

the appeal.[2] **We also urge you to accept the findings of the High Court that amendments brought by way of secondary legislation were unlawful.**

The rights to freedom of assembly and expression are fundamental to a democratic society. These rights include not only popular ideas and opinions but to "offend, shock or disturb".[3] The rights to protest and to free speech have also long been held at common law.[4] In the context of climate protesters, these rights are also protected under Article 3(8) of the Aarhus Convention 1998.[5]

Public Order Act 2023

The amendments passed by way of the Public Order Act 2023 were all brought forward in the late stages of the Police, Crime, Sentencing and Courts Bill and defeated, save for one, by the House of Lords led by Labour Peers. Yet the previous Government returned them the following year despite the concerns raised by Parliament. These provisions create vague and troubling offences for preparatory acts towards protests that cannot be determined in advance to be either peaceful or reach the threshold of public disturbance. But they create an offence by the nature of being "capable of causing serious disruption" to two or more persons. In this definition "serious" becomes "more than minor", which turns the meaning of the term on its head.[6] The offence of locking on (section 1) can be made out with reckless intent, which captures people linking arms as they walk, securing a bike to railings or a dog outside a shop, as can tunnelling, being present in a tunnel, obstruction of major transport works, interference with use or operation of key national infrastructure and interference with access to or provision of abortion services. Many of these offences are poorly defined (what is "major"; what is "key"?), leaving protesters at the whim of unsympathetic police officers. The offence of going equipped to lock on (section 2) could capture an even broader range of legitimate and peaceful activities. While the defence of reasonable excuse is provided for in the offences created by sections 1 to 7, this does not justify the clear interference with legitimate protest activities, and for which the defence can only realistically be utilised at trial, following months of stress, expense and possible remand in custody.

---

[2] See footnote 7.

[3] *Handyside v United Kingdom* (App. no. 5493/72) (Judgment of 7 December 1976) ECtHR, para 49.

[4] In a free society all must be able to hold and articulate views, especially views with which many disagree. Free speech is a hollow concept if one is only able to express "approved" or majoritarian views. It is the intolerant, the instinctively authoritarian, who shout down or worse supress views with which they disagree: *R v Roberts (Richard)* [2018] EWCA Crim 2739.

[5] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Article 3(8) provides that: *Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement.*

[6] Section 34 defines serious disruption as physical obstruction that prevents or hinders "to more than a minor degree" day-to-day activities, construction or maintenance of works or activities related to such work; a "more than minor" delay to delivering or receiving a time-sensitive product or accessing of essential goods or services. See the judicial treatment in *Liberty* at footnote 7.

Section 10 expands powers of stop and search to capture the above offences, section 78 Police, Crime, Sentencing and Courts Act ("PCSCA") and wilful obstruction of the highway (s137 Highways Act 1980) – and pursuant to section 11, without even having suspicion. When confidence in the police is at an all-time low due to year-on-year racially profiled searches, adding such powers preliminary to these kinds of offences is wholly unnecessary and disproportionate. What would officers be searching for; A leaflet inadvertently taken as a person walks down the wrong street? A mobile phone to see if certain contacts are stored? Worse still, objection to a section 11 search is made an offence pursuant to section 14, despite the possibility that a search may be of a person wholly unconnected with anything they perceive to be criminal in nature.

Not satisfied with the creation of criminal offences, section 18 provides for the Home Secretary to be able to mount civil proceedings against persons carrying out a protest that causes serious disruption to use or operation of key national infrastructure or access to essential goods or services. In creating this provision the intention is clearly to follow the lead of private companies in seeking injunctions and prohibitive costs orders against persons with legitimate public interest concerns. It is deeply troubling that the executive has been able to achieve this level of power.

Protest Banning Orders ("Serious Disruption Prevention Orders") are created under Part 2 of the Act, both available upon application and upon conviction where during a 5 year period on two occasions a "protest-related offence" or "protest-related breach of an injunction" resulting in contempt of court has taken place. These orders can effectively prevent a person from attending a protest for falling foul of the broadly drawn offences and powers set out above, or any other offence directly related to a protest. This includes attendance at any kind of procession or gathering for any cause or celebration. Far more broadly, conditions can prevent entry of a geographical area, being with particular persons, participating in particular activities and carrying particular articles. They can last for two years and carry the maximum summary term of imprisonment. The breadth of these powers is staggering.

Police, Crime, Sentencing and Courts Act 2022

The amendments to the Public Order Act 1986 at sections 12 (processions), 14 (assemblies) and s14ZA (one person protests) introduced by the Police Crime Sentencing and Courts Act ("PCSCA") dangerously reduced tolerance to the expression of opinion through peaceful protest by increasing the police powers to impose restrictions on peaceful processions and assemblies: Serious disruption to the life of the community was given the same definition as footnote 5 above by way

of subordinate legislation[7]. Most significantly the Act created the police power to impose conditions where the noise of a procession *may* have a relevant impact on persons in the vicinity and the impact *may* be significant.[8] Where any conditions are breached, an offence is committed. The noise may also cause significant disruption to the life of the community, where persons are not reasonably able for a "prolonged" period to carry on activities in that vicinity. Yet noise is integral to protest.

Finally, we draw attention to the codification of the common law offence of public nuisance by way of section 78 PCSCA. This purports to put on the statute book recommendations of the Law Commission but was introduced as "police powers to tackle non-violent protests", another clear interference with fundamental rights.[9] The offence is acting or omitting to act, either intentionally or recklessly, in a way that creates a risk of, or causes serious harm to the public, or obstructs the enjoyment of a right that may be exercised by the public at large. The defence of reasonable excuse is available, but has been disapplied in climate related cases since there is no protection in section 78 of article 10 or 11 ECHR rights.

Consequences

It is no surprise that since these provisions have come into force many environmental defenders (and other protesters with just causes) have been arrested for offences pursuant to these amendments when their actions have genuinely and with all sincerity intended to call attention to the climate crisis.

Michel Forst, UN Special Rapporteur on Environmental Defenders, has voiced serious concern at the legislative developments in the UK and the consequential arrests:

---

[7] This definition was introduced by the Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023/655 reg.2(2) (June 15, 2023). The High Court in May 2024 found that the definition was unlawful. The Government had attempted to introduce the same definition through Parliament during passage of the Public Order Bill 2022 but this was defeated. Delegated powers were provided to the Minister and these were used to present the Regulations by affirmative resolution. The Court found that the word "serious" is intended to set the threshold for police intervention at a relatively high level [72] and that the Ministerial power was to clarify not change the definition [85]. "More than minor" is different from and materially lower down the scale than serious [91]. The phrase in fact contemplates police intervention in conduct which is much closer to that which is normal or everyday [93]: (*R (National Council for Civil Liberties) v Sec State for the Home Department* [2024] EWHC 11181 (Admin) (DC)).

[8] This is defined in ss 12(2D), 14(2D) and s14ZA(7) as resulting in the intimidation and harassment of persons of reasonable firmness with the characteristics of persons likely to be in the vicinity, or may cause such persons to suffer alarm or distress. This is to be contrasted with the s5 POA offence where threatening and abusive behaviour is required to trigger the possibility of harassment, alarm or distress.

[9] We note that the Law Commission in discussing whether a defendant's conduct was an exercise of their Article 10 or 11 ECHR rights observed that it was, "*somewhat difficult to imagine examples in which this point arises in connection to Public Nuisance*." The Law Commission clearly did not envisage Public Nuisance being used to respond to non-violent protest. See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency*, 2015, para 3.61 and note 122.

> "*By deriding environmental defenders, the media and political figures put them at risk of threats, abuse and even physical attacks from unscrupulous persons who rely on the toxic discourse to justify their own aggression. The toxic discourse may also be used by the State as justification for adopting increasingly severe and draconian measures against environmental defenders."*[10]

We trust that, in light of this assault on the freedoms of citizens in the UK and the threat to the rule of law, you will speedily move to repeal the amendments. We look forward to your reasoned response.

Yours faithfully,

Lawyers Are Responsible

[10] M. Forst, Visit to London, UK, 10-12 January 2024 End of Mission Statement, https://unece.org/sites/default/files/2024-01/Aarhus_SR_Env_Defenders_statement_following_visit_to_UK_10-12_Jan_2024.pdf