Thursday 22 August 2013

Dear Dr. Francis MP,

I understand the Joint Committee on Human Rights have recently scrutinised the Anti-Social Behaviour, Crime and Policing Bill and that in your capacity as chair of the Committee you have written to the Home Secretary about the Bill. I wanted to raise a few concerns I have about the Bill with you. I would be grateful if you could consider the points I raise and communicate my concerns with the Home Secretary inviting her to respond.

I have acted as a legal observer for a variety of protests and so have looked at the Bill in terms of how it could impact on the right to protest in practice. My involvement in protest is as an objective observer and so I have experience in a variety of different forms of protest and have become acutely aware of how often police action may be inconsistent with legal principles established through the courts. I am concerned that if enacted the Bill will have unintended consequences which in practice could have a chilling effect on the right to protest.

In your letter to the Home Secretary [1] you rightly raise concern about the Bill. I am particularly concerned about Injunctive powers through Part 1 and of dispersal powers afforded through Part 3.

I will first consider Part 3. I fear that given the current wording of Clause 32(3) - whereby an order can be made for the purpose of "reducing the likelihood of" harassment/alarm/distress/crime and disorder - that such an order can be made regardless of whether any questionable behaviour has occurred.

The Government's Impact Assessment for the Bill defines anti-social behaviour as "all behaviour that is detrimental to the amenity of the locality and/ or having a negative impact on the local communities quality of life" [2] and so in that context the scope of the dispersal powers is very broad. If this is taken alongside case law which has determined that an officers' "reasonable suspicion" can be based solely on information recorded on the Police National Computer [3] there exists the potential for a situation where an individual or a group need not have done anything or have been complained about by anyone, but where the reasonable belief of an officer supported by intelligence on the PNC would be enough for an order to be given.
You may be aware of the National Domestic Extremist Unit which operate under Special Operations for the Metropolitan Police; they have recently been found to monitor 9000 ‘domestic extremists’ many of whom have no criminal record. The Guardian covered this. [4] Whilst the recent legal case of Catt [5] determined that the retention of intelligence on Mr. Catt who had no criminal record was not justifiable, it is possible that the judgment could be interpreted to allow for the continued retention of intelligence for such persons where the police consider the information to be sufficiently important and in the public interest. [6] I am seeking clarification from the Metropolitan Police and ACPO on how they have responded to the Catt judgment but until it is clear that they have destroyed all intelligence gathered on peaceful protesters who have no criminal record, I fear the dispersal order could be used to hinder legitimate and peaceful protest.

I would like the home secretary to clarify whether or not the reasonable belief of the authorising officer could be based solely on information taken from the PNC or whether harassment, alarm or distress, or evidence of crime and disorder needs already to have occurred.

In response to concerns that the dispersal power would impeded on our right to protest, the Government have replicated the provision from the Anti-Social Behaviour Order Act 2003 preventing a dispersal order being given when people are taking part in a public procession for which advanced notice has been given in accordance with Section 11 Public Order Act 1986. This is Clause 34(4)(b). I fear this very limited exemption does not go far enough and will allow the police to conclude that any behaviour which has not previously been sanctioned, by virtue of no request having been made, would be anti-social in nature. As the threshold for a dispersal order is far lower in the Bill than in the previous Act, it is likely far more people will be impacted.

I have acted as legal observer for a variety of different groups and have also been involved in the planning for a number of direct actions. All of the people I have worked with have been absolutely committed to the principle of non-violence and yet very few of those who organise direct actions will inform the police. There is an understanding that if the target of a particular direct action is known, the police will inform them undermining the purpose of the protest. This was famously the case when the Occupy London movement attempted to set up camp outside the London Stock Exchange. The square outside the stock exchange was owned by Mitsubishi Corporation and run through a wholly owned subsidiary Paternoster Square Limited who, upon receiving intelligence from the police, were able to acquire an injunction which resulted in the subsequent and unintended occupation of St Paul’s Churchyard. The point is that there are often legitimate reasons why a person would choose not to inform police in advance.

The advanced notice requirement was introduced through the Public Order Act in 1986 before the internet was common and was intended to reduce the risk of large groups of people coming together to cause havoc; as many people will promote their protest on social media there is an understanding that the organisers of a protest
have little control over the mass of people they call together as public events are open to anyone. There is consequently a reluctance of organisers to notify police where doing so will result in their being criminally liable for the actions of others. [7]

There is a profound difference between having the right to protest with conditions and being able to protest in a way that is effective. The Human Rights Act 1998 requires that public bodies have regard to the rights of others, including the right to freedom of expression and association. I fear we are at a watershed moment where – should this Bill pass as it stands – the right to effective protest will be lost. I fear it is a further step in a move towards the criminalisation of dissent. The police would have far-reaching powers with Courts obliged to apply Statute in a way they have largely avoided to this point, given the supremacy of Parliament.

Many people will highlight the failure of the anti-Iraq war protest as a reason why they believe protest to be ineffective. My view is that part of the reason that particular protest was ineffective was because other than highlight the fact that millions of people were against the war the protest failed to engage in other relevant issues – such as whether the intelligence was credible. As the protest was a procession that lasted a day it was very quickly yesterdays news. Effective protest has traditionally had to go further and toe a very fine line with what the law finds acceptable. Just as the Suffragettes took that risk, so too have others - for example, the occupation of St Paul’s Churchyard by Occupy London presented a level of inconvenience for those who worked in the area, tourists and those who sought to use St Paul’s Cathedral and yet it contributed to an important discussion that has had a profound and lasting impact. It helped promote discussion within the Church of England and through the consistent national media interest it attracted it contributed to a national debate. Perhaps most significantly it resulted in Andy Haldane as Executive Director of Financial Stability of the Bank of England agreeing that the movement was right in its criticism of the financial sector. He further suggested it had persuaded bankers and politicians to behave in a more moral way. It is conceivable that if the Bill became law such a gathering would have been deemed illegal and would have been moved on before it was given the opportunity to set up camp. It is conceivable that intelligence gathered on social media would have been sufficient to impose a dispersal order against protests most recently seen in Balcome against Cuadrilla and the Government’s policy on hydraulic fracturing. The protest had no given no prior notification but was able to very effectively present a message to the media and Government in a way that was resolutely peaceful.

I would ask that you challenge the pre-emptive nature of Clause 32 given the potential impact as identified above and that you request the scope of Clause 34(4)(b) is extended so to take account of the broad nature of protest.

In relation to Q17 where you question the term "may be necessary" in place of "is necessary," I suspect this terminology has been chosen to allow for an order to be made where an authorising officer is responding to intelligence pre-emptively rather than to situations where harassment, alarm or distress has been identified. It would indicate that there is an intention to use such a power
You may be interested to read the recommendations made to the UK Government by Mr Maina Kiai, the UN special rapporteur on the rights to freedom of peaceful assembly and of association. His report provides the Government with an extensive list of recommendations [8] that have been listed by Article 19 [9] and include criticism of the current legal framework in England and Wales. He considers it wrong that the law does not provide for spontaneous processions and claims many of the conditions under Section 11 Public Order Act 1986 are unnecessary and disproportionate.

The Bill also introduces ‘Injunctions to Prevent Nuisance and Annoyance.’ (IPNA) Clause 1 of the Bill details the powers of a Court to grant Injunctions introducing the lower threshold of “nuisance or annoyance.” This would extend the currently limited use of such injunctions as a power by social landlords (ASPI). [10] The use of the wider definition outside of the housing context sets too low a threshold for the imposition of an order that can set extensive restrictions on and individual’s liberties and which if breached can lead to imprisonment.

Injunctions to prevent nuisance or annoyance will not require ‘mens rea,’ or rather ‘intent’ and so a court need not concern itself as to whether the respondent intended or was reckless as to causing annoyance or nuisance, but simply whether the individual engaged in the behavior as alleged. For those who do not fully comprehend their actions and the impact they have on others including young people and those with disabilities there would be a danger that marginalised groups would be unnecessarily criminalised.

The injunction (IPNA) removes the criminal element of the ASBO that it replaces, but breach of the injunction could still ultimately lead to imprisonment. Due to the Injunction having a lower standard of proof than the ASBO on application (51% rather than 99.9%) and as it is available to more agencies than the ASBI, widening access to IPNA risks imposing severe restrictions on more people. The Government has previously responded to concerns over the lack of mens rea test indicating that requiring it add the test could “jeopardise the clarity, and slow the injunction process down.” [11]

The Government is also satisfied that the “just and convenient” test would be sufficient to ensure that IPNA’s were not too readily provided to authorities request them, insisting that Courts should be trusted to use their discretion. [12] This test is a lower threshold than the corresponding requirement for an ASBO where the court considers an order “necessary to protect the victim from further Acts of anti-social behaviour.” If the Government trusts the Court only to impose the Injunctions where absolutely necessary, I don’t understand why there would need to be a lowering of the appropriate tests. I see that you have also questioned the logic of this in Q6.

My concern is that by not requiring mens rea and by lowering the threshold test those engaging in their right to freedom of expression and association could find the IPNA is used to silence them. Working as a legal observer on a number of protests, experience suggests that for many people, when demonstrating against something
they believe strongly in, the threat of arrest or even prison will not deter them. On many occasions I have seen arrests of fellow supporters and other tactics used by police deepen their resolve.

Whilst experience indicates that Courts are also usually inclined to acquit those arrested under current public order legislation when human rights are engaged, I am concerned that those arrested under these new powers will not be so lucky. There are two reasons for this;

First, recent legal aid reform will almost certainly mean that those facing what is essentially a civil injunction will not have access to a legal aid lawyer to help them fight against it. Many defendants will be required to self-represent in a situation that they will undoubtedly find intimidating. It may not be clear to defendants that do self-represent that in order to mount a successful defense they will need to explicitly indicate they were engaging in their qualified rights of freedom of expression and association. In-fact through experience I foresee that many defendants will see the Court as an opportunity to air many grievances they have which will in many instances not be pertinent to the matter before the Court. As the Government has indicated that they would like the process of granting Injunctions to be a speedy one, defendants may find they have very little time to seek professional advice.

Second, a move from public order legislation towards the use of anti-social behaviour legislation would significantly change what the Court had to consider. The reason why on many occasions those engaging their qualified rights have been acquitted is because the Public Order Act 1986 requires a high threshold of ‘serious public disorder,’ ‘serious damage to property’ or ‘serious disruption to the life of the community’ before an order restricting public processions or assemblies can be made. [13] On most occasions I have found that the police have made unlawful arrests as these high thresholds have not been met. The Court will usually find it is not in the public interest to convict individuals when protests have been peaceful – with the Director of Public Prosecutions writing guidance for prosecutors to that effect. [14] The Act also provides the power of arrest where a person is causing harassment, alarm or distress when he continues an activity after being asked by a police officer to stop, [15] or a power of arrest when ‘intent’ can be proved. [16] Again, through experience peaceful protesters are not convicted as by virtue of their peaceful nature they do not intend to be threatening, abusive or insulting to others.

If the Court were asked to consider the matter on grounds of anti-social behaviour under the proposed law, guilt could be determined regardless of ‘mens rea,’ or rather ‘intent.’ The threshold applied when determining guilt would be ‘on the balance of probabilities’ (51%) rather than beyond reasonable doubt (99.9%) and an injunction could be applied whether or not anyone actually found the behaviour in question to be a nuisance or annoying. The Courts would be far more compelled to grant prohibitive injunctions because there would be less opportunity for them to justify not granting them.
I have found that arrests are often made as a way of dissuading protesters from continuing their protest as often the police will know through experience that an arrest won’t result in a conviction at Court. Arrests will give the police the opportunity to set police bail conditions acting as police imposed injunctions similar to those that would be possible through Clause 1. Experience suggests that police will impose extensive and potentially unnecessary and disproportionate conditions so to introduce an element of risk to the arrestee if they continue their behaviour regardless of whether a Court would be convinced at a later point that their behaviour was criminal. These injunctions could have a similar chilling effect.

I fear there is a move towards criminalising dissent. By blurring the lines between anti-social behaviour and what should be considered engagement in qualified rights, we risk undermining the importance or those rights.

I would ask that you question the Government on their stance that requiring mens rea, or rather intent, as a necessary evidentiary burden would jeopardise the clarity of the injunction and slow the injunction process down. I believe it would be unjust for an injunction to be granted based on the prejudices of others.

Kind Regards,

Matthew Varnham


[6] Ibid. Para 44.

[7] s.11(7)(b) Public Order Act 1986 allows for all organisers of a pubic procession to be found guilty of a criminal offence if anyone who participates in the protest attends at a different time or date, or if the specified route designated by the police is not followed.


[12] Ibid.


[15] s.5 Public Order Act 1986
[16] s.4A Public Order Act 1986