

**In the matter of The Public Order Act 1986 (Serious Disruption  
to the Life of the Community) Regulations 2023**

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**OPINION**

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**A. Introduction**

1. I am asked to advise Friends of the Earth (**‘FoE’**) on the potential impact of the Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023 (**‘the Regulations’**) on protest activities.<sup>1</sup> This opinion addresses the impact of the Regulations in England and Wales only.
2. The Regulations are currently in draft.<sup>2</sup> If brought into law, they would amend sections 12 and 14 of the Public Order Act 1986 (**‘POA 1986’**), which allow a senior police officer to impose conditions on public processions and public assemblies respectively. They have been made in exercise of the Home Secretary’s power to amend sections 12 and 14 of the POA 1986 by statutory instrument, a power which was inserted by the Police, Crime, Sentencing and Courts Act 2022 (**‘PCSA 2022’**). In particular, the Home Secretary has a power to define “*serious disruption to the life of the community*”, a term which sets the threshold for police to exercise their powers.
3. The Regulations make a number of important changes to sections 12 and 14, including lowering the threshold for serious disruption to the life of the community, to activities which may cause a “*hindrance that is more than minor*” to the carrying out of day-to-day activities, including the making of a journey.
4. The Regulations were laid before both Houses of Parliament on 27<sup>th</sup> April 2023 using the draft affirmative procedure. This requires that, before becoming law, the statutory instrument in question is approved by both the House of Commons and House of Lords. The Regulations are due to be debated later this month.

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<sup>1</sup> With thanks to Ife Kubler-Agyemang, a pupil at Doughty Street Chambers, who assisted with the research for this opinion, and to Dr. Richard Martin and Professor David Mead who helpfully discussed the issues surrounding the Regulations.

<sup>2</sup> See <https://www.legislation.gov.uk/ukdsi/2023/9780348247626>

5. In summary, my advice is:

- (a) The Regulations would significantly lower the threshold for serious disruption to the life of the community, currently defined (though not exhaustively) as requiring disruption to be “*significant*” or “*prolonged*”. Police would be able to impose conditions where they have a reasonable belief that a protest “*may*” cause a “*more than minor*” disruption to day-to-day activities. A number of other changes, such as police being able to take into account disruption from unconnected protests in the same area, would further lower the threshold. The result would be that police could impose conditions on a far wider range of processions and assemblies than is currently the case under sections 12 and 14 of the POA 1986. In my view, this could give the police a far wider, nearing total, discretion as to which processions or assemblies could be made subject to conditions;
- (b) The lower threshold would have serious implications for the right to freedom of speech and protest as is protected by Articles 10 and 11 of the European Convention on Human Rights and the Human Rights Act 1998 (**‘HRA’**). The threshold would be so low that it could lead to police imposing conditions on protests which would breach the rights of protesters.. Although such conditions can in theory be challenged in advance by judicial review, including on human rights grounds, the reality is that this is well beyond the reach of most protesters as they may lack the time, experience and capacity, it is very costly and such challenges do not generally attract legal aid. This leaves individuals who want to protest with the choice of simply acquiescing to the conditions restricting their protest or risk arrest, detention and prosecution for breaching them, and hoping to successfully defend any prosecution at trial;
- (c) The lower threshold, and the unclear terms used in the Regulations, would also likely to lead to a chilling effect on people who want to attend protests. This is because people who are deciding whether to organise or attend a protest would not be able to predict with sufficient certainty whether the police are likely to impose conditions, and whether they may be prosecuted for breaching conditions. Those who breach conditions can be fined up to £2,500 if they participated and imprisoned for up to 51 weeks if they organised the procession or assembly, and it is possible

to be prosecuted even if an individual did not know, but ought to have known, about the conditions;

- (d) There is a reasonable argument that the Regulations would be unlawful as they do not comply with the Home Secretary's duty to carry out an adequate consultation. This is because only a very limited number of authorities were consulted by the Government, and it appears no groups or individuals who would be impacted by the restrictions on the right to protest were consulted.

## **B. Legal background**

### ***Sections The Public Order Act 1986***

6. Sections 12 and 14 of the POA 1986 provide that where a senior police officer reasonably believes a public procession (s.12(1)) or public assembly (s.14(1)) may result in serious public disorder, serious damage to property or, serious disruption to life in the community, that officer may impose any conditions believed necessary to prevent such disorder, damage, disruption or impact. Such conditions have included restrictions to location, duration and number of participants.
7. In *Jones & Ors v The Commissioner of Police for the Metropolis* [2019] EWHC 2957 at [72], the Divisional Court (Lord Justice Dingemans and Mr Justice Chamberlain) ruled, in relation to the Extinction Rebellion Autumn Uprising, that a condition imposed under section 14 of the POA 1986 could not be imposed simultaneously on multiple linked assemblies in different parts of London.
8. The judgment contains, at [41-52], a useful summary of the history of public order legislation going back to the Public Order Act 1936 which first conferred a statutory power on police to give directions to those organising or taking part in a public procession in response to the demonstrations organised by Sir Oswald Mosley. The judgment makes reference to the 1985 White Paper which preceded the POA 1986: *Review of Public Order Law* (Cmnd 9510). The White Paper recognised at [1.7] that the "*rights of peaceful protest and assembly are amongst our fundamental freedoms: they are numbered among the touchstones which distinguish a free society from a totalitarian one*" and announced the Government's concern to "*regulate these*

*freedoms to the minimum extent necessary to preserve order and protect the rights of others".*

9. In *James v Director of Public Prosecutions* [2016] 1 WLR 2118 at [39]-[42] the Divisional Court (Davis L.J. and Ouseley J) held that in the context of a prosecution for breaching a condition, the satisfaction of the statutory test under section 14 of the POA 1986, namely that “*the senior officer [holds] the necessary belief that a public assembly may result in serious public disorder, and [s/he has] reasonable grounds for that belief*”, is itself proof of the proportionality of the making of a direction within the meaning of Articles 10 and 11 of the European Convention of Human Rights. This approach has been followed more recently in *Bennett and Ors. v DPP* [2022] EWHC 1822 (Admin) and cited with approval by the Supreme Court in *Abortion Services (Safe Access Zones), Reference by the Attorney General for Northern Ireland* [2022] UKSC 32 at [48].
10. In *DPP v Eastburn* [2023] EWHC 1063 (Admin), the Divisional Court (Bean L.J. and Farbey J) confirmed at [25] that, applying the Supreme Court’s judgment in the *Abortion Services* case, section 14 of POA 1986 is an example of an offence creating statute where the ingredients of the offence in themselves ensure the compatibility of a conviction with the defendant’s rights under Article 10 and 11. The Divisional Court also said at [17]:

It is important to emphasize the limited scope of this appeal by way of case stated. Mr Little [for the DPP] accepted that if a section 14(1) direction were given which was wider than could reasonably appear necessary to prevent serious disruption, that could be challenged either by judicial review or by way of defence to a criminal charge. An example of this might be where serious disruption was anticipated at one specific location but a direction was given covering the whole of London. As Ouseley J said in *James*, if the direction containing the conditions were not lawful, acquittal would follow.

### ***The Police, Crime, Sentencing and Courts Act 2022***

11. The Police, Crime, Sentencing and Courts Bill was introduced with the stated purpose of strengthening police powers to tackle non-violent protests.<sup>3</sup> The PCSCA 2022

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<sup>3</sup> See the Bill’s Explanatory Notes, page 21, para. 5 <https://publications.parliament.uk/pa/bills/cbill/58-01/0268/en/200268enlp.pdf>

amended sections 12 and 14 of the POA 1986 to give police the power to impose directions on assemblies or processions where the noise generated by persons taking part in the procession or assembly may result in serious disruption to the activities of an organisation in the vicinity,<sup>4</sup> particularly where the noise may result in the organisation not being reasonably able, for a prolonged period of time, to carry on in that vicinity their activities.<sup>5</sup> The noise must have a relevant impact on persons in the vicinity, meaning they are caused intimidation, harassment, alarm or distress. When determining whether such noise may have a significant impact on persons in the vicinity, the senior police officer must have regard to the likely number of persons who may experience the impact, the likely duration of the impact and the likely intensity of the impact.

12. Section 73(3) of the PCSCA 2022 inserted a definition of “*serious disruption to the life of the community*” into section 12 of the POA 1986 (relating to public processions) and granted a power to the Home Secretary to amend that definition. The new section 2A, which is now in force, reads:

For the purposes of subsection (1)(a), the cases in which a public procession in England and Wales may result in serious disruption to the life of the community include, in particular, where—

it may result in a significant delay to the delivery of a time-sensitive product to consumers of that product, or

it may result in a prolonged disruption of access to any essential goods or any essential service, including, in particular, access to—

- (i) the supply of money, food, water, energy or fuel,
- (ii) a system of communication,
- (iii) a place of worship,
- (iv) a transport facility,
- (v) an educational institution, or
- (vi) a service relating to health.

13. Section 74(5) of PCSCA 2022 inserted the same definition into section 14 in relation to public assemblies.

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<sup>4</sup> s.73(2)(a) PCSCA 2022 amended s.12(1) POA 1986 and s.74 PCSCA 2022 amended s.14(1) POA 1986

<sup>5</sup> s.73(3) PCSCA 2022 created s.12(2C) POA 1986 and s.74(5) PCSCA 2022 created s.14(2C) POA 1986

14. A person (whether organiser or participant) who fails to comply with a condition imposed under sections 12 or 14 is guilty of an offence, unless they can prove that the failure arose from circumstances beyond their control.<sup>6</sup> A person will be guilty of an offence if at the time, they knew, or ought to have known, that the condition had been imposed.<sup>7</sup> Organisers of processions/assemblies can be imprisoned for up to 51 weeks and/or given fined up to £2,500. Attendees can be fined up to £2,500.

### ***The Public Order Act 2023***

15. Shortly after the PCSCA 2022 entered into force, Parliament debated a new public order bill, introduced into the House of Commons on 11<sup>th</sup> May 2022. The Public Order Act 2023 ('**POA 2023**') received royal assent on 2<sup>nd</sup> May 2023. It introduced new police powers to restrict and criminalise protest activity, including expanding the use of stop and search without suspicion and empowering Courts to impose orders restricting people's participation in protests. Various offences in the POA 2023 require that the offending behaviour causes "*serious disruption*", including the offence of locking on (section 1), causing serious disruption by tunnelling (section 3) or being present in a tunnel (section 4). Serious disruption is also relevant to the power to stop and search without suspicion (section 11), the power of the Secretary of State to bring civil proceedings where protest activity is causing or is likely to cause serious disruption (section 18) and the power for a Court to make a Serious Disruption Prevention Order under sections 20 and 21.
16. Section 34 of the POA 2023 defines serious disruption "*for the purposes of this Act*"; in other words the definition does not apply to any other statute, including the POA 1986. The definition reads:

(1) For the purposes of this Act, the cases in which individuals or an organisation may suffer serious disruption include, in particular, where the individuals or the organisation—

(a) are by way of physical obstruction prevented, or hindered to more than a minor degree, from carrying out—

(i) their day-to-day activities (including in particular the making of a journey),

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<sup>6</sup> s.12(4) & (5) and s.14(4) & (5) POA 1986.

<sup>7</sup> s.12(9) and s.14(9)

- (ii) construction or maintenance works, or
  - (iii) activities related to such works,
  - (b) are prevented from making or receiving, or suffer a delay that is more than minor to the making or receiving of, a delivery of a time-sensitive product, or
  - (c) are prevented from accessing, or suffer a disruption that is more than minor to the accessing of, any essential goods or any essential service.
- (2) In this section—

- (a) “time-sensitive product” means a product whose value or use to its consumers may be significantly reduced by a delay in the supply of the product to them;
- (b) a reference to accessing essential goods or essential services includes in particular a reference to accessing—
  - (i) the supply of money, food, water, energy or fuel,
  - (ii) a system of communication,
  - (iii) a place of worship,
  - (iv) a transport facility,
  - (v) an educational institution, or
  - (vi) a service relating to health.

17. Whilst the Public Order Bill was in the Report stage in the House of Lords, the Government brought forward two amendments which would have defined “*serious disruption*” for the purpose of sections 12 and 14 of the POA 1986 in essentially the same terms as section 34 as set out in the previous paragraph. The two amendments were respectively rejected by the House of Lords by 254 votes to 240 and not moved.<sup>8</sup>

***The Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023***

18. If the Regulations are brought into law, a similar definition of serious disruption contained in section 34 of the POA 2023 would apply to the police power to impose conditions on public processions and assemblies contained in sections 12 and 14 of the

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<sup>8</sup> The provisions were introduced as amendments 48 and 49. They were debated on 30 January 2023 (HL Deb, 30 January 2023, [cols 426–89](#)). Amendment 48 was defeated on division on 7 February 2023 and amendment 49 was then not moved (HL Deb, 7 February 2023, [cols 1117–23](#)) – see footnote 3 to the 38<sup>th</sup> Report of Session 2022-23 of the Secondary Legislation Scrutiny Committee <https://committees.parliament.uk/publications/39905/documents/194510/default/>

POA 1986. It would also mirror the clauses which were rejected during the passage of the 2023 Public Order bill.

19. Under Regulations 2 and 3, a public procession or public assembly in England and Wales may result in serious disruption to the life of the community where they “*may*”, by way of physical obstruction, result in prevention of, or hinderance that is “*more than minor to*”:
  - (a) The carrying out of day-to-day activities (including in particular the making of a journey)<sup>9</sup>;
  - (b) The delivery of time-sensitive product to consumers of that product; or
  - (c) Access to any essential goods or any essential service.<sup>10</sup>
20. When considering whether serious disruption may occur, the Regulations would require the senior police officer to consider “*all relevant disruption*” which would mean all disruption to the life of the community which “*may result from the procession*” or that “*may occur regardless of whether the procession is held (including in particular normal traffic congestion)*”.
21. The Regulations also permit police to consider any relevant “*cumulative*” disruption from any other public assembly or procession which was held, is being held or is intended to be held in the same area as the relevant procession or assembly. This would be a significant expansion of the kind disruption an officer can consider when deciding whether to impose conditions. Currently, gatherings separated both in time and distance, even if co-ordinated under the umbrella of one body, are not one public assembly within the meaning of section 14(1) of the 1986 Act.<sup>11</sup> Under the Regulations an officer could consider the cumulative disruption that may arise from assemblies or processions arranged by different people and in support of different causes.

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<sup>9</sup> Regulations 2(2) and 3(2)

<sup>10</sup> “*Access to any essential goods or any essential services*” is defined in identical terms to the current section 2A – see [12] of this opinion above.

<sup>11</sup> *R (on the application of Jones) v Metropolitan Police Comr* [2019] EWHC 2957 (Admin) [72]



22. The Regulations would also extend the meaning of “community” to encompass “any group of persons that may be affected by the procession, whether or not all or any of those persons live or work in the vicinity of the procession.”<sup>12</sup>

***The rights to freedom of speech and of assembly***

23. The rights to freedom of expression and freedom of assembly are enshrined in the common law and in Articles 10 and 11 of the European Convention on Human Rights.
24. The importance of the common law right to protest was underlined in R v Roberts (Richard) [2019] 1 WLR 2577 (Lord Burnett CJ, Phillips and Cutts JJ), at [37]:

"The long-established recognition in the United Kingdom of the value of peaceful protest, echoed in Lord Hoffmann's remarks [in R v Jones (Margaret) [2007] 1 AC 136], is a manifestation of the importance attached by the common law to both the right to protest and free speech [...]. 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 suppress views with which they disagree."

25. Articles 10 and 11 relevantly provide:

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers [...]

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

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<sup>12</sup> The Regulations s.2(2)(c) and s.3(2)(c)

1. Everyone has the right to freedom of peaceful assembly

[...]

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”

26. The right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society: Kudrevičius v Lithuania [2016] 62 EHRR 34 (‘Kudrevičius’) at [9].
27. All forms of peaceful (i.e. non-violent) assembly fall within the ambit of Articles 10 and 11: Cisse v. France (2002), App. No 51346/99, 9 April 2002 [37]. That includes protests that cause inconvenience or obstruction and conduct “*that may annoy or cause offence to the persons opposed to the ideas or claims that it is seeking to promote*”: Faber v. Hungary [2012] ECHR 984 at §37.
28. Intentionally disruptive protests fall within the scope of Articles 10 and 11: Hashman v. United Kingdom (2000) 30 EHRR 241, §28. As underscored by Laws LJ in Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23, [43]: “*Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others*”. Even conduct which is not at the core of Article 10 and 11 “*still requires careful evaluation in determining proportionality*” and the fact that conduct is not at the core of the right is “*not determinative of proportionality*” (DPP v Ziegler [2021] UKSC 23 [67] *per* Lord Hamblen and Lord Stephens).
29. In City of London v Samede [2012] EWHC 34 (QB) at [43] Lord Neuberger cited with approval [44] of the ECtHR’s decision in Kuznetsov v Russia [2008] ECHR 10877/04:

as a general principle, the court reiterates that any demonstration in public life inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by art 11 of the convention is not to be deprived of all substance....

30. Lord Neuberger went on to consider the limits of the right of lawful assembly on the highway which he said at [39] (a statement which was cited in Ziegler at [17])

is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.

31. Articles 10 and 11 are qualified rights. However, they may only be limited in strictly circumscribed circumstances set out in Articles 10(2) and 11(2). Any interference must be (a) prescribed by law, (b) necessary in a democratic society; and (c) proportionate to the legitimate aim pursued.
32. “*Prescribed by law*” refers not only to laws in force but to the quality of those laws and so incorporates the principle of legal certainty. Any restriction of a right, particularly where it might lead to criminalisation, must be described in precise and unambiguous language that narrowly defines the prohibited conduct and precisely distinguishes it from non-prohibited conduct: see *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, [49]; *Kudrevicius*, [109].
33. What is “*necessary in a democratic society*” means more than “*admissible*”, “*useful*”, “*reasonable*” or “*desirable*” (*Handyside v United Kingdom* (1976) 1 EHRR 737 at [46]). The interference must correspond to a pressing social need, must be proportionate to the legitimate aim pursued, and the reasons given to justify it must have been relevant and sufficient under Articles 10(2) and 11 (2) . As emphasised by Lord Nicholls in *Attorney General v Punch Ltd* [2003] 1 AC 1046 at [27]:

“restraints on freedom of expression are acceptable only to the extent that they are necessary and justified by compelling reasons. The need for restraint must be convincingly established.”

34. In *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2004] EWCA Civ 1639, Lord Woolf CJ said at [35]

“The rights to freedom of expression, and assembly and association, which are protected by Articles 10 and 11 of the ECHR respectively,

are of the greatest importance to the proper functioning of any democracy. Any intrusion upon the rights, either by the developing common law or by the intervention of statute law, has to be jealously scrutinised.”

35. What constitutes the appropriate “*degree of tolerance*” in any case “*cannot be defined in abstracto: the Court must look at the particular circumstances of the case and particularly at the extent of the “disruption to ordinary life”*”, bearing in mind that “*any demonstration in a public place may cause a certain level of disruption to ordinary life, including disruption of traffic. This fact in itself does not justify an interference with the right to freedom of assembly*”, as held by the ECtHR Grand Chamber in Kudrevicius [155]. The starting point is that “[a] *peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction*”, and that such sanctions “*require particular justification*”: *ibid*, [146]. The Court found no violation in cases where there was a two-day blockade of the three largest highways in the country - the authorities had sought “*to balance the interests of the demonstration with those of the users of the highway, in order to ensure the peaceful conduct of the gathering and the safety of all citizens*” (Kudrevicius [177]). See, more recently, Bumbes v Romania (18079/15, 3 May 2022) at [95].
36. The ECtHR in Kudrevičius at [97] recognised that intentional disruption of traffic was “*not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, ...*”. However, the court continued that “*physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by article 11 of the Convention*” (emphasis added). The court also added that “[t]his state of affairs might have implications for any assessment of ‘necessity’ to be carried out under the second paragraph of article 11” (emphasis added). The Supreme Court in Ziegler at [67] said that “[i]t is apparent from Kudrevičius that purposely obstructing traffic still engages article 11 but seriously disrupting the activities carried out by others is not at the core of that freedom so that it “might”, not “would”, have implications for any assessment of proportionality. In this way, such disruption is not determinative of proportionality”. (emphases added). In summary, deliberately disruptive activity such as (but not limited to) blocking traffic may not be at the core of the rights protected by Article 10/11, however it is still within the scope of those rights

and therefore require a proportionality assessment to justify any interference: see also *G v Germany* 13079/87 [1989] ECHR 28; *Eva Molnar v Hungary* [2009] (Application no. 10346/05); *Ekrem Can and Others v Turkey* [2022] (Application no. 10613/10).

### C. Opinion

37. I will take the questions posed in my instructions in turn:

***(1) Whether the amendments contained in the Regulations will create a lower threshold for what constitutes serious disruption***

38. In my view, the answer is ‘yes’.

39. The requirement for there to be “*serious disruption to the life of the community*” is one of the four ‘statutory triggers’ which permit the police to impose conditions on public processions and public assemblies under sections 12 and 14 respectively of the POA 1986.<sup>13</sup> Prior to the PCSCA 2022, the term was not defined. The amendments made by the PCSCA 2022 non-exhaustively defined serious disruption to the life of the community as including “*significant delay*” to the delivery of certain time sensitive products, and “*prolonged disruption*” to access to essential goods or essential services. “*Significant*” and “*prolonged*” are important qualifiers which retain a semblance to the central statutory language of “*serious disruption*”, as do the references to “*essential*” services and “*time-sensitive*” products.

40. The Regulations would significantly lower the threshold for the statutory trigger of “*serious disruption to the life of the community*” for the following reasons:

41. First, “*prevention of, or hindrance that is more than minor to the carrying out of day-to-day activities (including in particular the making of a journey)*” is so broad as to encompass a huge range of human activities which occur in public and private spaces. “[D]ay-to-day activities” could include people walking to work, listening to music, conversing with friends, relaxing in the park, walking a dog, feeding the pigeons – the list could be almost endless. Moreover, a “*hindrance that is more than minor*” is a very

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<sup>13</sup> See David Mead, *The New Law of Peaceful Protest*, Hart Publishing, 2010, p. 185

low threshold for the kind of interference with those daily activities which would be required to trigger the power.

42. The definition is so broad it is difficult to understand how it really is a definition of “*serious disruption*” at all – in effect, it defines serious disruption as non-serious disruption. As a matter of ordinary language, “*more than minor*” disruption is less severe than “*serious disruption*”. It might be said that although the Regulations purport to define “*serious disruption*”, their real effect is to amend sections 12 and 14 to water down the requirement for there to be serious disruption to the life of the community. This risks both incoherence in the statutory scheme and also undermining the overall purpose of the POA 1986, which is supposed to be focussed on protecting public order, not public convenience.
43. Second, the threshold would be lowered for relevant interference with the delivery of time-sensitive products and access to essential goods or essential services. The current requirements for the delay to the delivery of essential products to be “*significant*”, and for the disruption to access to essential goods and services to be “*prolonged*” will be replaced by “*more than minor*” prevention or hindrance. There is no doubt that “*more than minor*” is a broader category than “*significant*” or “*prolonged*”. It should be noted that the language of significant and prolonged is itself not particularly clear – would a prolonged delay be 30 minutes, 60 minutes, or two hours?<sup>14</sup> However, it is entirely clear that “*more than minor*” would lower the threshold.
44. Third, the police would be able to consider any relevant “*cumulative*” disruption from any other public assembly or procession which was held, is being held or is intended to be held in the same area as the relevant procession or assembly. This would be a significant expansion of the disruption an officer can consider when deciding whether to impose conditions. Currently, separate gatherings, separated both in time and by many miles, even if co-ordinated under the umbrella of one body, are not one public assembly within the meaning of section 14(1) of the 1986 Act.<sup>15</sup> Under the Regulations an officer could consider the cumulative disruption that may arise from assemblies or processions arranged by different people and in support of different causes.

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<sup>14</sup> See the discussion in relation to *Ziegler* at [53-54] below

<sup>15</sup> *R (on the application of Jones) v Metropolitan Police Comr* [2019] EWHC 2957 (Admin) [72]

45. Fourth, the Regulations would extend the meaning of “community” to encompass “any group of persons that may be affected by the procession, whether or not all or any of those persons live or work in the vicinity of the procession.”<sup>16</sup> It is unclear exactly what situations this is aimed at but it may allow, for example, the disruption to Person A, who is caught in “more than minor” traffic because of a protest and will therefore be late for a meeting, and also Person B, who does not live in the vicinity of the protest but is the one meeting Person A. More broadly, it would encourage police to speculate about whether individuals in different areas “may” be affected by a protest.
46. Fifth, when considering whether serious disruption may occur, the Regulations would require that the senior police officer consider “all relevant disruption” which would mean all disruption to the life of the community which “may result from the procession” or that “may occur regardless of whether the procession is held (including in particular normal traffic congestion”. The meaning of this provision is somewhat difficult to understand, but according to the Secondary Legislation Scrutiny Committee (which also found it difficult and sought clarification), the Home Office say that it is intended to “avoid the circumstances where deliberate acts are justified by the fact that certain forms of disruption [such as traffic jams] may occur regularly in an area when there are no protests”. It appears that the intention is that police could include in their consideration disruption which has nothing to do with a protest or a planned protest when deciding whether to impose conditions. This seems again to lower the threshold for “serious disruption” because it (somewhat illogically in my view) allows police to consider disruption which is not caused by the protest. This could lead to some strange results: for example, conditions could be imposed on a protest held by environmentalists based in part of the anticipated disruption caused by a protest by climate change deniers in the same area.
47. The overall result of the above changes would be that police could impose conditions on a far wider range of processions and assemblies than is currently the case under sections 12 and 14 of the POA 1986. Given that it is difficult to imagine many protests which would not lead to a police officer reasonably believing they “may” lead to a “more than minor” hinderance to day-to-day activities, and in combination with the other changes highlighted above, it is my view that (on the plain wording of the

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<sup>16</sup> The Regulations s.2(2)(c) and s.3(2)(c)

amended powers, and subject to the point I make about the need for a proportionality assessment at [59b] below) police could be given a close to unlimited discretion as to whether to impose conditions on protests.

***(2) Whether specified activities are likely to be caught by the Regulations' serious disruption provisions***

48. I am asked to advise on whether a number of specific activities are likely to be caught by the definition of '*serious disruption*' under the Regulations. It is worth recalling that the threshold only requires that a senior police officer reasonably believe that a public procession or public assembly "*may*" result in prevention, hindrance etc. Even leaving aside the points made above about the width of the proposed new "*serious disruption*" definition, the use of "*may*", as opposed to, for example, "*likely to*"<sup>17</sup>, itself widens the discretion available to officers, and arguably endorses police speculation about the possible impacts of a protest. This makes it more difficult to say whether specific activities would be caught by the definition in the Regulations, particularly without knowing the full facts (which would generally not be known in advance in any event). With that qualification in mind, I address the specific activities below:

***(a) A gathering of people outside a building on the pavement, with placards, shouting and banners where there is no impediment to vehicles and/or pedestrians accessing the building or moving***

49. In principle, this example should not meet the threshold given the movement of people is not being impeded, but because of the low threshold it is conceivable that conditions would be imposed in any event. Any disruption caused by the noise generated would fall to be considered under section 14(ab), which require (along with s.14(2D)) that a person is intimidated or harassed, or "*may cause such persons to suffer alarm or distress*". It would be odd (though it is not inconceivable) that the noise generated by a protest could fall to be considered both under the new serious disruption definition and section 14(ab), given that the latter is specifically focussed on disruption caused by noise. However, the power to impose conditions is prospective, and a senior officer

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<sup>17</sup> Which appears, for example, in relation to the power under section 18 of the POA 2023 for government to take civil proceedings where protest activity is causing or is likely to cause serious disruption



only needs to “*reasonably believe*” that the assembly “*may*” result in more than minor hindrance to day to day activities. It is therefore entirely plausible that conditions would be imposed because it could feasibly cause a more than minor hinderance to the carrying out of day-to-day activities such as meeting a friend at a pavement-side café.

***(b) Larger gathering of people outside a building on the pavement or a public space where, owing to the numbers, pedestrians could be impeded or blocked from accessing the building through the main door and might have to use another door and passers by would have to divert round the protest;***

50. In principle, this example should not meet the threshold given that the hindrance seems to be minor, but because of the low threshold it is conceivable that conditions would be imposed in any event, for the reasons set out in relation to the previous example. Although the definition “*prevention of, or hinderance that is more than minor to the carrying out of day-to-day activities*” is very broad, any hinderance which is *merely* minor as opposed to more than minor would not be caught by it. In my view, having to enter a building by a different entrance is likely to be a “*minor*” hindrance, as is passers by having to divert. However, given how low the threshold is, it is possible that a senior officer would speculate that more than minor disruption may be caused, and impose conditions for that reason.

***(c) ‘Die-ins’ – where e.g. a group of people occupying a significant part of the entrance hall, foyer or concourse of a building (for example a bank or supermarket) by lying down as a protest tactic for a short period of time in such a way that normal operation of the premises cannot take place;***

51. This is likely to fall within the new definition of “*serious disruption*” given that the normal operation of the premises cannot take place. Even if that were for a short period of time (for example 15 minutes), it is easy to imagine individuals who were delayed in accessing services, or employees from working, particularly in a relatively large building, stating that the hindrance to their day-to-day activities was “*more than minor*”.

*(d) Slow-walking along a carriageway of a minor road or roads in such a way the traffic cannot flow normally;*

52. This is likely to fall within the new definition of “*serious disruption*”, particularly given that the Regulations refer to the carrying out of day-to-day activities “*including in particular the making of a journey*”. However, it is also my view that this kind of protest action is potentially already caught by the existing definition of “*serious disruption to the life of the community*”. The Metropolitan Police appear to agree this to be the case, given that they have repeatedly imposed section 12 conditions on slow walking protests in recent weeks.<sup>18</sup>

*(e) Sitting down in roads for a short period of time, in such a way that traffic is not absolutely prevented from flowing and there are alternative routes too that can be used (the thinking here is along the factual position in Ziegler) halt and delays to traffic;*

53. The facts of *Ziegler* were that the appellants lay down in the middle of one side of the dual carriageway of an approach road leading to the Excel Centre (the side for traffic heading to it) where an arms fair was being held. They attached themselves to two lock boxes. It took around 90-100 minutes for the police to remove them from the road, during which time traffic was obstructed but not entirely – only one side of the road was blocked. There was discussion in the Supreme Court as to how to describe the disruption caused by the incident. Lord Hamblen and Lord Stephens (with whom Lady Arden concurred) said that the “*appraisal as to whether the period of time was of “limited duration” or was for “a not insignificant amount of time” or for “a significant period of time” was a fact-sensitive determination for the district judge which depended on context including, for instance the number of people who were inconvenienced, the type of the highway and the availability of alternative routes*”. They could, however, discern no error in the District Judge’s reasoning that there was “*no evidence of any significant disruption caused by the obstruction*” [84].

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<sup>18</sup> See e.g. <https://twitter.com/MetPoliceEvents/status/1666113461321908226> (6th June 2023); <https://twitter.com/MetPoliceEvents/status/1665654426273497089> (5th June 2023); 18<sup>th</sup> May 2023 (<https://twitter.com/MetPoliceEvents/status/1659102991037652994>)

54. In my view, the example is likely to fall within the new definition of “*serious disruption*”, again because the Regulations refer to the carrying out of day-to-day activities “*including in particular the making of a journey*”. *Ziegler* demonstrates that assessing disruption is not straightforward, and is fact-sensitive, and the fact that a road is not completely blocked will be a relevant factor. However, the threshold under the Regulations is low enough that it would in my view allow conditions to be imposed where part of a road is blocked, even for a short period.

***(f) A protest march of a significant number of people (hundreds plus) which requires the complete closure of roads and diversion of traffic for a period of time (these sorts of marches have of course been organised many times previously, and with the cooperation of the police e.g. consider the recent XR “The Big One” protest***

55. This would undoubtedly be “*serious disruption*” within the meaning of the new Regulations.

***(g) Sitting down in roads for a short period of time, resulting in halt and delays to traffic***

56. In my view, the example is likely to fall within the new definition of “*serious disruption*”, again because the Regulations refer to the carrying out of day-to-day activities “*including in particular the making of a journey*”. The same reasoning as in relation to (e) above would apply.

***(3) What level of certainty FoE can give to staff and supporters who undertake protest activities***

57. As is apparent from my advice on the particular examples above, the threshold for “*serious disruption*” in the Regulations would be sufficiently lowered that it would make advising on whether a particular protest activity would fall within it difficult. This uncertainty is compounded by (a) the requirement that a senior police officer reasonably believes that the procession or assembly “*may*” cause the relevant disruption, (b) the discretion given to police to consider “*cumulative*” disruption which could include the potential or actual disruption from any other public procession or assembly in the area,

even if unconnected to the FoE protest, and (c) the fact that disruption can (somewhat illogically) include that which may occur regardless of whether the procession is held, including normal traffic congestion. Taking these factors together, it would be very difficult for FoE to give staff and supporters any level of certainty as to whether police would have the power to impose conditions on any particular protest, except in relation to the most clear and obvious examples, for example where an assembly takes place in an area with few or no passers-by. However, one might ask, would anyone want to organise such a protest if it was not going to be seen by passers-by?

**(h) One of the first campaigns that FoE ever ran in 1971 involved returning bottles to the Schweppes company headquarters in order to raise awareness of the need to encourage reuse and recycling of waste products. This included leaving 1000s of empty bottles outside the door of their premises. That could be said to have caused disruption to Schweppes.**

58. This example is difficult to assess without knowing whether the bottles left outside the door would cause more than minor disruption to everyday activities, or perhaps to essential services which include “*the supply of... food*”, i.e. whether leaving the bottles would lead to people being prevented from entering the building, or obstruct deliveries. Moreover, it is not clear how leaving the bottles would require either a public procession or public assembly – it may be that police would consider a group of people would have to assemble in order to deliver the bottles, but it is not obvious that this would be the case. On balance, I am doubtful that this example would fall within the definition of “serious disruption”, however it is ultimately fact-sensitive and the police might still reasonably believe that serious disruption, as defined in the Regulations, may occur and therefore impose conditions.

***(4) Whether the amendments render the Regulations incompatible with Articles 10 and 11 of the European Convention on Human Rights (ECHR)***

59. I am doubtful that a challenge to the substantive effect of the Regulations on Article 10 and 11 rights would succeed. I have advised above that the Regulations significantly lower the threshold for potential police intervention through the imposition of conditions on public processions and public assemblies. However:

- (a) First, the powers to impose conditions are discretionary. Just because police have a power to impose conditions does not mean they necessarily will do so, still less that they must do so. What constitutes the appropriate “*degree of tolerance*” to Article 10 and 11 rights in any case “*cannot be defined in abstracto: the Court must look at the particular circumstances of the case*” Kudrevicius [155]. In my view, a Court would consider that a challenge to the widening of police discretion in itself to be abstract.<sup>19</sup> That is not to say that a challenge to a particular decision taken under the Regulations would not succeed – but it would depend on the particular facts.
- (b) Second, any court considering the Regulations would take into account the fact that, as a public authority, the police are under a statutory duty to act in a way which is incompatible with a Convention right (HRA section 6(1)). Moreover, under HRA section 3, so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. These statutory duties place important limits on the police’s discretion, and require that a proportionate approach (in the Convention sense) is taken to deciding whether to impose conditions or not. This is, in my view, analogous to the position taken by the Divisional Court in Leigh & Ors v The Commissioner of Police of the Metropolis [2022] EWHC 527 (Admin) , in relation to the application of Coronavirus Regulations to peaceful protest – see in particular [29]: “*it is clear that an exercise of these powers would be likely to interfere with or restrict the exercise of the rights under Articles 10 and 11 and, if it did, such conduct would require justification by reference to the Convention requirements of necessity and proportionality*”. A court considering the general impact of the Regulations may conclude that the threshold must be tempered (and perhaps raised) by the application of the HRA.

60. Whilst a challenge to the Regulations on their substantive effect would be unlikely to succeed, given how far the threshold in the Regulations appears to have decoupled from the case law relating to Article 10/11, it is arguable, in my view, that the line of cases exemplified by James which concluded that a police officer applying the statutory test under section 14 can also be taken to have satisfied requirements under the HRA is no

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<sup>19</sup> See further Christian Institute v Lord Advocate [2016] UKSC 51, per Lady Hale SCJ, at [2] and [60], and Lord Hodge SCJ, at [69].

longer applicable. Whilst states enjoy a margin of appreciation in striking a proportionality balance through criminal legislation (*Abortion Services* [55]) this is not unlimited. In my view, if the police applied the plain text of POA 1986 sections 12 and 14 as it would be amended by the Regulations, and given the low threshold and the other factors of concern as raised above, then there could be situations where rights under Articles 10 and 11 are breached by disproportionate conditions imposed on protests. This would also raise the possibility that protesters could raise a human rights proportionality defence if convicted of breaching a section 12/14 condition, leading to longer and more complex criminal trials.

61. It is also important to highlight that the Regulations may – on a practical level – lead to police using sections 12 and 14 more often, and also signal to police that they should be imposing conditions where protests will lead to “*more than minor*” disruption. Dr. Richard Martin has highlighted<sup>20</sup> (commenting on the 2022 reforms) that police powers under sections 12 and 14 have been rarely used since they came into force, but reducing the threshold for conditions “*may re-orient the legal basis for pre-emptive tactics in relation to static assemblies, including containment and dispersal of protestors, from breach of the peace to section 14*”, which, importantly, does not contain the safeguards which were identified by the Supreme Court in *Laporte* (e.g. that harm is likely to - as opposed to “*may*” - be caused and that the risk of a breach of the peace is imminent). Whilst some instances may be litigated in the courts, it is likely that many will not be and this could lead to a very significant impact on Article 10 and 11 rights – not to mention a chilling effect on those who want to peacefully protest but are unwilling to risk being arrested or prosecuted for breaching a section 12/14 condition which they may not even have known about (a 2022 amendment makes it an offence to breach a condition even if a person “*ought*” to have known about the condition).
62. Another potential challenge which could be considered against the Regulations is in relation to the ‘quality of law’ requirement under Article 10/11, which requires that any restriction of a right, particularly where it might lead to criminalisation, must be described in precise and unambiguous language that narrowly defines the prohibited conduct and precisely distinguishes it from non-prohibited conduct: see e.g.

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<sup>20</sup> Richard Martin, *The protest provisions of the Police, Crime, Sentencing and Court Bill: A “modest reset of the scales”?*, LSE Working Papers, 2022

Kudrevicius [109]. I have advised above that the threshold for police intervention is so low it is difficult to predict when the discretion would be exercised. However, given that the Regulations do not lower the threshold for the offence provisions (for breaching a police condition), I am not convinced that a general challenge to the Regulations on quality of law grounds would succeed.

***(5) Whether there is a constitutional issue in relation to the government utilising secondary legislation to bring in amendments that had previously been rejected by Parliament.***

63. In its 38<sup>th</sup> Report of Session 2022-23, Secondary Legislation Scrutiny Committee ('SLSC') was critical of the Government's approach to the Regulations which mirror clauses in the Public Order Bill which were very recently rejected by the House of Lords, concluding that:

the Home Office has not provided any reasons for bringing the measures back in the form of secondary legislation, which is subject to less scrutiny, so soon after they were rejected in primary legislation. We are not aware of any examples of this approach being taken in the past; the House may wish to verify this with the Minister. We believe this raises possible constitutional issues that the House may wish to consider.

64. The SLSC also criticise the consultation process undertaken by the Government:

20. The EM stated that the Home Office had consulted a number of law enforcement bodies and National Highways, the body that looks after England's major roads, when drawing up the policy. The Home Office told us its view was that "consulting those who would help ensure the Statutory Instrument would be operationally useful was most important".

21. However, the Government's own Consultation Principles<sup>4</sup> state that departments should "consider the full range of people, business and voluntary bodies affected by the policy." In an Economic Note accompanying the Regulations, the Home Office acknowledges that a wide range of groups will be affected, including the public and protestors.

22. Given that this is a controversial policy with a wide range of interested parties and strongly felt views, the consultation processes described in the EM are not adequate. A full public consultation, before bringing forward the proposals, would have been appropriate

to maximise the chances that the outcome was clear and workable. A wider consultation have resulted in clearer definitions within the Regulations.

65. Tom Hickman K.C. and Gabriel Tan have explored the potential legal implications of the issues identified by the SLSC in a recent article<sup>21</sup>. They conclude that “*the underdeveloped jurisprudence on the operation and limits of Henry VIII powers provides thin gruel for an argument*” along the lines that the Regulations would be contrary to the express terms of the Public Order Act 2023 which deliberately set different thresholds for different situations, “*despite the undeniable political reality that the draft regulations would reverse the policy agreed by Parliament in the 2023 Act.*” I agree with that conclusion.
66. Hickman KC and Tan consider that there are better prospects for a challenge relating to the inadequacy of the consultation undertaken by the Government, as highlighted in the SLSC report. They say:

The law on this point is reasonably clear. Where a public authority chooses to conduct a consultation process, that consultation must be conducted properly and fairly (e.g. MP at [29]). This includes that the consultation is not one-sided and that affected persons are included. In *R (Article 39) v Secretary of State for Education* the Court of Appeal found that a consultation conducted prior to the making of Covid-19 regulations had been unlawful because it had been “conducted... on an entirely one-sided basis” and had “excluded those most directly affected by the changes” (at [83]). The court reached these findings despite the serious difficulties presented by the Covid-19 pandemic. It is surprising in light of such authorities that the Government took such a lopsided and narrow approach to its consultation on the draft regulations.

67. I also agree with this analysis. The strongest potential challenge to the Regulations is on the basis of a lack of adequate consultation. I should also point out that such a challenge might also raise issues under Articles 10 and 11 ECHR, as if the Regulations are unlawful in public law terms they – and any interference with those articles taken

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<sup>21</sup> *Reversing Parliamentary Defeat by Delegated Legislation: The Case of the Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023*, UK Constitutional Law Blog, 22<sup>nd</sup> May 2023



under them – would also not be in accordance with the law for the purposes of the Convention.

**D. Conclusion**

68. I would be happy to elaborate on any aspect of this opinion.

**ADAM WAGNER**  
**Doughty Street Chambers**

7<sup>th</sup> June 2023