

LIBERTY

BRIEFING ON THE PUBLIC ORDER ACT 1986 (SERIOUS DISRUPTION TO THE LIFE OF THE COMMUNITY) REGULATIONS 2023, MAY 2023

1. The Government's clampdown on the right to protest continues apace through the extraordinary introduction of the Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023 ('the Serious Disruption regulations'). These regulations are remarkable in three senses – first, in their unprecedented sidelining of parliamentary scrutiny, with the **Secondary Legislation Scrutiny Committee reporting that this is the first time a Government has sought to make changes to the law through secondary legislation that have already been rejected when introduced in primary legislation.** Second, in its use of a power that has been criticised by a former Home Secretary, cross-party parliamentarians, and multiple parliamentary committees as creating license for executive overreach. And finally, in its attempt to redefine 'serious disruption' from 'significant' and 'prolonged' to 'more than minor' – effectively an attempt to divorce words from their ordinary meaning in ways that will have significant implications for our civil liberties.
2. In the aftermath of the heavy-handed policing of protest at the Coronation and the passage of the Public Order Act 2023, **we urge Parliamentarians to safeguard the right to protest and decline to approve the Serious Disruption regulations.**

GOVERNMENT BY DIKTAT

3. The content of the Serious Disruption regulations first appeared when the Government attempted to add them to the Public Order Act 2023 (POA 2023) by way of amendment between Committee and Report Stage in the House of Lords. The same had happened the year before, when the Government attempted to make late additions to the PCSC Act. On both occasions, peers in the House of Lords voted by majority to throw out the late additions, in large part because they had not had the benefit of scrutiny on the part of the House of Commons. The measures removed from the PCSC Act were subsequently reintroduced in the form of the POA 2023 and debated in the usual fashion for primary legislation.
4. The same cannot be said of the Serious Disruption regulations. **According to the cross-party Secondary Legislation Scrutiny Committee (SLSC), the bringing forward of the Serious Disruption regulations marks the first time a Government has sought to make changes to the law through secondary legislation that have already been rejected when introduced in primary legislation:**

“As well as not justifying the substance of the provisions, **the Home Office has not provided any reasons for bringing the measures back in the form of secondary legislation... We are not aware of any examples of this approach being taken in the past...** We believe this raises possible constitutional issues that the House may wish to consider.”¹
5. In its report, the SLSC highlights three other key issues with the process by which the Serious Disruption Regulations were introduced. First, the SLSC criticises the Government's Explanatory Memorandum to the Regulations for being “not satisfactory”,² given that it does not include the fact that the House of Lords previously rejected them when they appeared as Government amendments to the POA 2023.

¹ House of Lords Secondary Legislation Scrutiny Committee, *38th Report of Session 2022-2023*: <https://committees.parliament.uk/publications/39905/documents/194510/default/>

² Ibid.

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6. Second, while the Government argues that the reason for the SI is to create consistency on the statute book for public order legislation by harmonising the definition of ‘serious disruption’ across the POA 2023 and POA 1986, the SLSC notes that “the Regulations seek to introduce changes wider than would be necessary solely to create consistency within the statute book and no justification has been advanced for bringing back these wider changes.”³ The SLSC elaborates further that it might have been the House of Lords’ deliberate wish that different situations merit different thresholds of ‘serious disruption’ – for example, the threshold of ‘serious disruption’ as caused by locking on might be different to the threshold needed for a regular static assembly.
7. Finally, the SLSC notes that the SI had an “inadequate” consultation process, whereby only law enforcement bodies and National Highways (the body that looks after England’s major roads) were consulted rather than the wider public. The SLSC states: “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.”
8. As noted by the Delegated Powers and Regulatory Reform Committee and the SLSC in their report, *Government by Diktat: A call to return power to Parliament*, parliamentary scrutiny of secondary legislation is far less robust than that afforded to primary legislation in three ways:
 - Secondary legislation cannot be amended and so the two Houses have only an “all or nothing” choice – to accept or reject the legislation in its entirety, even if members of either House may only wish to object to certain parts.
 - It is not subject to line-by-line scrutiny and ping pong between the Houses, unlike primary legislation, and is only debated once.
 - Rejection of secondary legislation is a very rare occurrence.⁴
9. The Serious Disruption regulations feature measures that were previously rejected by the House of Lords, partially because there was no time to adequately scrutinise them. The Government is now rushing them through using a statutory instrument, knowing full well that this is not conducive to proper scrutiny, with the SLSC having identified significant issues with the way that the regulations were introduced and consulted upon. **Notwithstanding the substance of the measures, the process by which the Government is seeking to rush them through is highly worrying from the standpoint of democratic accountability.**

RIGHTS AT THE WHIM OF THE HOME SECRETARY

10. The Serious Disruption regulations are made under s.12(12) and s.14(11) of the Public Order Act 1986 (POA 1986) as added by the Police, Crime, Sentencing and Courts Act 2022 (PCSC Act). Sections 12 and 14 POA 1986 relate to the conditions under which the police may impose conditions on public assemblies and processions. Sections 12(12)(b) and s.14(11)(b) give the Secretary of the State the power to redefine “serious disruption to the life of the community” and to give examples of cases in which a protest is (or is not) to be treated as resulting in such “serious disruption”, definitions which the police will use when deciding whether to impose conditions and what kinds of conditions should be imposed on public assemblies and processions.
11. The Secretary of State’s power to redefine “serious disruption” came under intense scrutiny during the passage of the PCSC Act, for effectively giving the Government of the day an

³ Ibid.

⁴ Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament*, 24 November 2021: <https://committees.parliament.uk/publications/7941/documents/82225/default/>

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expansive power to effectively declare the kind of protests and causes it deems inconvenient and unacceptable and giving the police a license to limit them. For example, the Joint Committee on Human Rights said:

“The retention of powers to amend what falls within and without lawful protest where this is deemed necessary by the Secretary of State raises the risk that a future Home Secretary could respond to particular protests to which the Government objects and specify those as falling within the ‘serious disruption’ triggers. It is of course vitally important that peaceful protests are policed on the basis of the harm they cause, not their political content.”⁵

Former Prime Minister and Home Secretary Theresa May also voiced concern about this power:

“It is tempting when Home Secretary to think that giving powers to the Home Secretary is very reasonable, because we all think we are reasonable, but future Home Secretaries may not be so reasonable [...] I would urge the Government to consider carefully the need to walk a fine line between being popular and populist. Our freedoms depend on it.”⁶

The Select Committee on the Constitution went so far as to recommend the removal of this power, arguing that it could result in executive overreach into the police’s statutory functions.⁷

“SERIOUS DISRUPTION” AS “MORE THAN MINIMAL” IMPACT

12. The wider context for the introduction of these regulations is the Government’s stated aim of cracking down on ‘slow walking’ protests.⁸ It is highly concerning for the Government to be effectively legislating to target specific groups and tactics, but the effects of these regulations will also extend far beyond these cases.
13. Sections 12 and 14 of the POA 1986 give the police powers to impose conditions on protests. Examples of conditions could include preventing a trade union from marching past their employer’s building;⁹ limiting the number of people who can attend a protest, and requiring a protest to end at a certain time. If a person fails to comply with a condition, and knows or ought to have known that it had been imposed, they could commit an offence and face a maximum 51 week prison sentence, a fine not exceeding level 4, or both.¹⁰
14. The Serious Disruption regulations lower the threshold of “serious disruption” at which the police may impose conditions on a protest, from “significant” and “prolonged” to “more than minor”. The changes are summarised in the following table. Effectively, whereas under the current law “serious disruption to the life of the community” would mean a “significant delay” or

⁵ Joint Committee on Human Rights, *Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)*, Second Report of Session 2021–22, 16 June 2021, at pp. 23-24 available at <https://committees.parliament.uk/publications/6367/documents/69842/default/>

⁶ HC Deb 15 March 2021 vol 691

⁷ “The provisions on the use of secondary legislation raise two distinct concerns. The first is that the Secretary of State is authorised to define a statutory term whose function is central in regulating the relationship between public protest and police powers. Secondly, the power to “give examples of cases in which a public procession is or is not to be treated as resulting in serious disruption” comes close to a power to control and perhaps even effectively ban particular protests by discretion.” House of Lords Select Committee on the Constitution 7th Report of Session 2021-2022, *Police, Crime, Sentencing and Courts Bill*, 9 September 2021: <https://committees.parliament.uk/publications/7225/documents/75867/default/>.

⁸ Dearden, L., *Police to get power to break up slow-walking climate protests, Braverman says*, 27 April 2023: <https://www.independent.co.uk/news/uk/home-news/climate-protest-slow-walking-police-b2328346.html>

⁹ In November, West Yorkshire Police attempted to use s.12 POA to impose conditions on a march planned by Leeds University UCU which would have prevented them from marching past the university. They were forced to back down after Liberty threatened legal action: https://twitter.com/libertyhq/status/1597969151410466818?s=20&t=m4M8xMFDTs0CYgtB_KRmjQ

¹⁰ This is the position in England and Wales – see s.12(5A) and s.14(5A) of the POA. In Scotland, a person will commit an offence if they knowingly fail to comply with a condition and the maximum sentence is a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both (see s.14(8))

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“prolonged disruption”, under the new Serious Disruption regulations it could mean a “more than minor” hindrance to everyday activities, the delivery of products, or access to goods or services.

	Current law (s.73(2) PCSC Act and s.12(2A) POA 1986)	Proposed Serious Disruption regulations
“Serious disruption to the life of the community” may include	a significant delay to the delivery of a time-sensitive product	the prevention of, or a hindrance that is more than minor to , the carrying out of day-to-day activities (including in particular the making of a journey)
	a prolonged disruption of access to any essential goods or any essential service	the prevention of, or a delay that is more than minor to , the delivery of a time-sensitive product to consumers of that product
		the prevention of, or a disruption that is more than minor to , access to any essential goods or any essential service

15. Examples of protest actions that may meet the ‘more than minor’ threshold, and that could subsequently have conditions imposed on them, include:
- The police could consider that a static assembly outside a train station by a trade union will result in a ‘more than minor’ delay in access to public transportation services. The police could subsequently impose a condition that the trade union cannot protest outside the train station – even though they are seeking to protest at their workplace/against their employer.
 - The police could consider that a public procession on the pavement that risks spilling onto the road could result in a ‘more than minor’ delay to people driving on the road. This could lead the police to impose a condition saying that the march must take place on a street where there is limited traffic but also limited footfall, thereby undermining the awareness-raising purpose of the march.
16. Additionally, when considering if a protest will have one of the above effects, the police will be required to take into account “all relevant disruption”, which is defined as “all disruption to the life of the community that may result from the procession or that may occur regardless of whether the procession is held (including in particular normal traffic congestion)” (Regulation 2(3)). The SLSC said that it found this concept “unclear.”¹¹ What it would appear to mean in practice is that the police, when considering whether to impose a condition on a protest on the basis that it might cause a “more than minimal” disruption to access to goods must consider the disruption that already exists in an area (e.g. a traffic jam) in deciding the form and manner in which a protest may go ahead – regardless of whether it is the protest itself that caused that ‘lawful’ disruption. Thus, in the recent case of the Coronation, were the Serious Disruption regulations in place, the police would have needed to consider the relevant (lawful) disruption caused by the events and road closures in deciding whether and how protests could go ahead.
17. In addition, the police may also have regard to the “cumulative disruption to the life of the community” resulting from the protest; any protest previously held, currently being held, or

¹¹ House of Lords Secondary Legislation Scrutiny Committee, *38th Report of Session 2022-2023*: <https://committees.parliament.uk/publications/39905/documents/194510/default/>

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intended to be held in the same area; and any other protest that will take place in the same area, when deciding what conditions to impose.¹² “Area” is defined as such area as a “senior police officer considers appropriate” having regard to the potential disruption. How the police will seek to group protests for the purposes of establishing their “cumulative impact” is unclear but it seems likely that it will be based on their substantive content, given that the SI also stipulates that it does *not* matter whether the protests are “organised by the same person, are attended by any of the same persons or are held or are intended to be held at the same time”.

18. Protest is the lifeblood of our democracy; the importance accorded to the rights to freedom of expression and assembly mean that restrictions on them must be proportionate, clear, and robustly justified. **The words ‘serious disruption’ imply a high threshold – they simply cannot mean a ‘more than minor’ hindrance** to the carrying out of everyday activities, delay to the delivery of a time-sensitive product, or access to any essential goods or services. The practical effect of other terms in the Serious Disruption regulations also remain unclear and uncertain.
19. **The ‘more than minor’ threshold would give the police unprecedented power and discretion to impose conditions on protests.** The unlimited nature of the conditions that could be imposed and the requirement on the police to consider all “relevant disruption” when considering whether to impose conditions, including lawful disruption that is not related in any way to a protest (such as a traffic jam), would further mean that the police could effectively gut protests of their relevance and effectiveness (e.g. by rerouting them away from sites of power). The police could even effectively stop protests from happening altogether, if the conditions imposed are too onerous and/or if people are deterred from protesting as a result of the risk of the criminal consequences of breaching a condition.
20. **Such broad discretion, in the context of a broader clampdown on particular protest movements, may result in the police facilitating some protests based on their content (or at least the perception of this) while imposing restrictions on others.** This has practical implications for public order policing, placing an unhelpful political burden on frontline officers exercising their professional discretion. These concerns were similarly raised during the passage of the PCSC Act by a range of former police chiefs such as Sir Peter Fahy, the former chief constable of Greater Manchester Police, who stated people should be “really worried” about the Government “bringing in legislation on the back of the Black Lives Matter and Extinction Rebellion demonstrations...putting in some really dodgy definitions which the police are supposed to make sense of”.¹³

CONCLUSION

21. The Serious Disruption regulations will expand the police’s powers to intervene in and restrict protest, while exacerbating legal uncertainty. The Government has progressed them in a highly irregular and arguably undemocratic way, using a much-maligned power created by the PCSC Act that has been criticised for giving the Government of the day the power to clamp down on protests that it does not like. **For the above reasons, we urge Parliamentarians to decline to approve the Serious Disruption regulations.**

¹² It does not matter if the protests are organised by the same person; if any of the same persons take part in the different protests; the protests take place at the same time; or if directions have been given in relation to the other protest. The Government amendment provides that “‘area’ means such area as the senior police officer considers appropriate, having regard to the nature and extent of the disruption that may result from the assembly and the procession.”

¹³ Sophia Sleight, ‘Really dodgy definitions’: Ex-police chief sounds warning over proposed powers for policing protests’, *Evening Standard*, 15 March 2021 <https://www.standard.co.uk/news/politics/policing-bill-protests-warning-sir-peter-fahy-b924136.html>