LIBERTY

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6 June 2023

Letter in accordance with the Pre-action Protocol for Judicial Review – The Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023

Dear Secretary of State

Proposed claim for judicial review

1. We are writing on behalf of the National Council for Civil Liberties ("**Liberty**") in respect of a proposed claim for judicial review to challenge the decision, if and when made, of the Secretary of State to exercise her powers under sections 12 and 14 of the Public Order Act 1986 ("**POA 1986**") by making the Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023 (the "**Serious Disruption Regulations**") in the form of the draft presently proceeding through Parliament.

2. The Serious Disruption Regulations purport to widen the circumstances in which the police can impose conditions on people organising or taking part in public processions or public assemblies. Such a measure could only properly be pursued through primary legislation and following an even-handed consultation.

3. Instead, the Secretary of State pursued a one-sided consultation with institutions that she knew would support the principle of her legislative amendments. She sought to make these amendments through primary legislation (namely via the POA 2023) but, having suffered a defeat in the House of Lords, is now seeking to make the same amendments through secondary legislation. It is believed 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 draft primary legislation.

4. As set out in further detail below, any decision to make the Serious Disruption Regulations will be unlawful for the following reasons:

   4.1. **First**, the making of the Serious Disruption Regulations would be *ultra vires* sections 12(12) and 14(11) of the POA 1986 insofar as the purpose and/or effect of the Serious Disruption Regulations would be to lower the threshold at which the power to impose

conditions may be exercised. Parliament defined that threshold as being where (1) the procession or assembly in question, (2) may cause "*serious disruption to the life of the community*". It then empowered the Secretary of State to specify examples of cases involving "*serious disruption to the life of the community*". However, Parliament did not empower the Secretary of State to alter that threshold in and of itself. Yet the Secretary of State is seeking to pass secondary legislation to provide that (1) the police must have regard to disruption that will be caused to the community by matters other than the process or assembly in question, and (2) that cases of "*more than minor*" disruption fall to be treated as cases involving "*serious disruption*". In this way, the Secretary of State is seeking to amend the threshold set by Parliament by the back door in ways that expand the powers of the police to restrict protest activity.

4.2. **Second**, the making of the Serious Disruption Regulations would otherwise be *ultra vires* the enabling powers conferred on the Secretary of State insofar as their exercise in this case would have the purpose and/or effect of giving effect to a legislative scheme which had been expressly rejected by Parliament when initially pursued through primary legislation. Parliament cannot have intended to confer a power upon the Secretary of State to amend primary legislation for the purpose of and/or where this would have the effect of circumventing the will of Parliament in this way. That would amount to an incursion into the constitutional principle of the separation of powers.

4.3. **Third**, the making of the Serious Disruption Regulations would be unlawful by reason of being an unjustified interference with the principle of Parliamentary sovereignty for all the same reasons. The Secretary of State has put forward no reasonable justification for seeking to amend the POA 1986 in the manner proposed through secondary legislation.

4.4. **Fourth**, the making of the Serious Disruption Regulations would be vitiated by procedural unfairness in that it would be a discretionary decision preceded and informed by a one-sided, unfair consultation. The Secretary of State consulted a narrow group of stakeholders which she knew would support the principle of her legislative amendments. She did not go on to consult any group which might reasonably be concerned by the proposal to expand the powers of the police to restrict protest activity. It is well-established that if a decision-maker voluntarily embarks upon a consultation, then they must do so fairly (irrespective of whether any duty to consult might otherwise have arisen at common law).

5. We hope this Letter of Claim will help narrow the issues between the parties and bring about early resolution of this matter so as to limit the time and costs incurred by either party. Please respond to this letter by 20 June 2023 confirming that you will carry out the action listed below (see '**Action to be taken by you'**).

Proposed Claimant

6. The proposed Claimant is Liberty. Liberty is a not-for-profit company limited by guarantee and registered in England and Wales (Co. No.326084). It is a membership organisation that promotes the values of individual human dignity, equal treatment and fairness as the foundations of a democratic society. Liberty campaigns to protect basic rights and freedoms, including through litigation. As set out further at ¶61 below, since its foundation, Liberty has campaigned to protect the right to peaceful protest.

7. The solicitor with conduct of this case is Katy Watts:

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Proposed Defendant

8. The proposed Defendant is the Secretary of State for the Home Department (the "**Secretary of State**"), as the Minister who laid the Serious Disruption Regulations in draft before Parliament and thus the Minister with responsibility for deciding whether or not to make the Serious Disruption Regulations in due course.

Decision under challenge

9. The proposed claim for judicial review will seek to challenge a decision of the Secretary of State to make the Serious Disruption Regulations in the form of the draft presently proceeding through Parliament.

10. We recognise that this Letter of Claim is therefore framed in terms of a challenge to an anticipated decision. However, it would be eminently sensible for the parties to engage in pre-action correspondence now to avoid unnecessarily wasting Parliamentary time should the Secretary of State agree that the Serious Disruption Regulations would be unlawful if made (or, alternatively, to avoid delay to the issuing of these proceedings if the Secretary of State does not agree).

11. That is *a fortiori* in circumstances where it would be open in principle for Liberty to seek to challenge the prior decision of the Secretary of State to propose to make the challenged amendments by secondary legislation. Objections of prematurity to such challenges have routinely failed given the obvious practical advantages to determining an *ultra vires* challenge to secondary legislation as soon as possible once a Ministerial decision to lay a draft of the same before Parliament has been taken (see, e.g. *R v Her Majesty's Treasury ex parte Smedley* [1985] QB 657, ("***Smedley***") at 666F- 667E, 672C-H; and *R (Public Law Project) v Lord Chancellor* [2016] AC 1531 which was framed as a challenge to draft subordinate legislation ("***Public Law Project***")).

Background to the claim

<u>The power to impose restrictive conditions under the Public Order Act 1986</u>

12. Sections 12 and 14 of the Public Order Act 1986 empower the police in certain circumstances to give directions which impose restrictive conditions upon those organising or taking part in any public procession or public assembly. These provisions are structured in a materially identical manner.

13. Subsection 1 provides that a senior police officer may impose conditions where he or she "*reasonably believes"* that "*it"* (i.e. the public procession or assembly) may give rise to various defined consequences, or where the purpose of the organiser is to intimidate others into doing or not doing something which they have the right to do or not do.

14. For this purpose, there are five defined consequences set out in subsection (1)(a), (aa) and (ab). They comprise:

    14.1. where the public procession or assembly may result in serious public disorder;

    14.2. where the public procession or assembly may result in serious damage to property;

    14.3. where the public procession or assembly may result in serious disruption to the life of the community;

    14.4. where the noise generated by persons taking part in the procession or assembly may result in serious disruption to the activities of an organisation which are carried on in the vicinity of the procession; and

    14.5. where the noise generated by persons taking part in the procession or assembly may have a significant impact on persons in the vicinity of the procession or assembly.

15. Subsection 2A and 2B set out non-exhaustive examples of cases in which a public procession or assembly may result in "*serious disruption to the life of the community*" as defined in subsection 1(a). Subsection 2A provides (emphasis added):

> "*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 –*
>
> *(a) it may result in a **significant delay** to the delivery of a **time-sensitive** product to consumers of that product, or*
>
> *(b) 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."*

16. Subsection 2B further defines a "*time-sensitive product"*. Subsection 2C and 2D perform the same function for cases in which the noise generated may result in serious disruption to the activities of an organisation or have a significant impact on persons in the vicinity.

17. Subsections 4 to 10A then back conditions imposed under subsection 1 with criminal sanctions. As a result of these provisions, it is a criminal offence in England and Wales for anyone organising or taking part in a public procession or assembly to knowingly or recklessly fail to comply with a condition imposed under these sections (subject to the conditions set out therein).

18. Sections 12(12) and 14(11) confer a materially identical power on the Secretary of State to amend subsections 2A to 2C:

> *"The Secretary of State may by regulations amend any of subsections (2A) to (2C) for the purposes of making provision about the meaning for the purposes of this section of -*
> *(a) serious disruption to the activities of an organisation which are carried on in the vicinity of a public [procession/assembly], or*

(b) serious disruption to the life of the community.

19. Sections 12(13) and 14(12) make further provision about the scope of that Henry VIII power:

> "*Regulations under subsection [12/11] may, in particular, amend any of those subsections for the purposes of –*
>
> *(a) defining any aspect of an expression mentioned in subsection [12/11](a) or (b) for the purposes of this section;*
>
> *(b) giving examples of cases in which a [public procession or public assembly] is or is not to be treated as resulting in –*
>
> *(i) serious disruption to the activities of an organisation which are carried on in the vicinity of the procession, or*
>
> *(ii) serious disruption to the life of the community."*

20. Sections 12(14)-(15) and 14(13)-(14) then relevantly provide that regulations made under subsection 12 are to be made by statutory instrument, are subject to the affirmative resolution procedure in each House of Parliament, and may only apply in relation to public processions or assemblies in England and Wales.

21. Subsections 2A – 2D and the powers in subsections 12(12) and 14(11) were all inserted into the POA 1986 by amendment through sections 73 and 74 of the Police, Crime, Sentencing and Courts Act 2022 ("**PCSC Act 2022**").

Parliament rejects the Government's attempt to amend subsection 2A by primary legislation

22. In 2022, the Government introduced the Public Order Bill into Parliament. Among other things, this Bill was intended to create new offences (e.g. offences relating to "locking on", "tunnelling" or obstructing major transport works) and to empower the courts to make new "serious disruption prevention orders". These new offences were defined by reference to conduct which is, *inter alia*, capable of causing "*serious disruption"*.

23. As originally introduced into the House of Commons, the Public Order Bill did not seek to amend sections 12 or 14 of the POA 1986. However, the Government sought to pass two amendments to the Bill during the Report stage in the House of Lords which would have amended those sections in much the same way as the Serious Disruption Regulations would now seek to do.[1]

24. Following a debate on 30 January 2023, the House of Lords voted to reject the first of these proposed amendments on 7 February 2023. The second amendment was then not moved. These provisions were therefore not included within the POA 2023.

The Secretary of State proposes to make equivalent amendments to subsection 2A by secondary legislation

[1] See the amendments proposed by Lord Sharpe of Epsom in HL Bill 82(f) Amendment for Report, 16 January 2023 (numbered Amendments 48 and 49 during the Report Stage): https://bills.parliament.uk/publications/49327/documents/2718

25. On 27 April 2023, the Secretary of State laid the draft Serious Disruption Regulations before both Houses of Parliament. These Regulations reflect the defeated amendments to the Public Order Act 1986.

26. Thus, regulations 2 and 3 would amend sections 12 and 14 of the POA 1986 by substituting new subsections 2A and 2B. As amended, sections 12(2A)-(2B) and 14(2A)-(2B) would read as follows (emphasis added):

> *"(2A) For the purposes of subsection (1)(a):*
>
> *(a) the cases in which a [public procession or public assembly] in England and Wales may result in serious disruption to the life of the community include, in particular, where it may, by way of physical obstruction, result in -*
>
> *(i) 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),*
> *(ii) the prevention of, or a delay that is **more than minor to**, the delivery of a time-sensitive product to consumers of that product, or*
> *(iii) the prevention of, or a disruption that is **more than minor to**, access to any essential goods or any essential service,*
>
> *(b) in considering whether a [public procession or public assembly] in England and Wales may result in serious disruption to the life of the community, the senior police officer –*
> *(i) **must** take into account **all relevant disruption**, and*
> *(ii) **may** take into account **any relevant cumulative disruption**, and*
>
> *(c)"community", in relation to a [public procession or public assembly] in England and Wales, means any group of persons that may be affected by the [procession or assembly], whether or not all or any of those persons live or work in the vicinity of the [procession or assembly].*
>
> *(2B) In subsection (2A) and this subsection –*
>
> *"access to any essential goods or any essential service" includes, in particular, access to -*
>
> *(a) the supply of money, food, water, energy or fuel,*
> *(b) a system of communication,*
> *(c) a place of worship,*
> *(d) a transport facility,*
> *(e) an educational institution, or*
> *(e) a service relating to health."*
>
> *"area", in relation to a [public procession or public assembly], means such area the senior police officer considers appropriate, having regard to the nature and extent of the disruption that may result from the [procession or assembly];*
>
> ***"relevant cumulative disruption", in relation to a [public procession or public assembly] in England and Wales means the cumulative disruption to the life of the community** resulting from –*
>
> *(a) the [procession or assembly],*
> *(b) **any other [public procession or public assembly]** in England and Wales that was held, is being held or is intended to be held **in the same areas** as the area in **which the [procession or assembly] mentioned in** paragraph (a) is being held or intended to be held (whether or not directions have been given under subsection (1) in relation to that other [procession or assembly]), and*
> *(c) **any [public assembly or public procession] in England and Wales** that was held, is being held or is intended to be held **in the same area** in which the [assembly or procession] mentioned in paragraph (a) is being held or is intended to be held (whether or not directions have been given under section 14(1A) in relation to that [assembly or procession]),*

and it does not matter whether or not the [procession or assembly] mentioned in paragraph (a) and any [procession or assembly] within paragraph (b) or (c) 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*;*

*"**relevant disruption**", in relation to a [public procession or public assembly] in England and Wales, means **all disruption** to the life of the community –*

*(a) that may result from the [procession or assembly], **or***

*(b) **that may occur regardless of whether the [procession or assembly] is held (including in particular normal traffic congestion**)."*

27. Liberty is concerned by three features of these Regulations:

27.1. **First**, the proposal to amend subsection 2A in such a way as to provide that cases in which the activity may by physical obstruction result in "*more than minor*" hindrances to the carrying on of day-to-day activities, delays to delivery of time-sensitive products, or disruptions to access to essential goods and services may be cases of "*serious disruption to the life of the community*".

27.2. **Second**, the proposal to amend subsection 2A in such a way as to provide that the assessing police officer must take into account "*all relevant disruption*" – meaning all disruption that may be caused to the life of the community whether or not that results from the procession or assembly in question – when deciding if the "*serious disruption*" threshold is met. As indicated by the proposed amendment, a police officer would thus be obliged to take into account disruption that might otherwise be suffered by the community as a result of "*normal traffic congestion*".

27.3. **Third**, the proposal to amend subsection 2A in such a way as to provide that the assessing police officer may take into account "*any relevant cumulative disruption*" – meaning all disruption that may be caused from processions and assemblies in the same area, whether or not they are organised by or attended by the same people – when deciding if the "*serious disruption*" threshold is met.

28. The draft Regulations have already been reviewed and criticised by the House of Lords Secondary Legislation Scrutiny Committee (the "**Committee**").[2] The following aspects of its report dated 9 May 2023 are noted:

28.1. **First**, the Committee considered that the effects of the Regulations would, *inter alia*, be: (1) to reduce the threshold at which the police can intervene in protest activity from "*serious disruption*" to "*more than minor*"; (2) to allow the police to rely upon the cumulative impact of repeated protest activity in the same area in assessing whether the threshold had been met; and (3) to allow the police to rely upon the level of 'absolute disruption' to an area (i.e. having regard to disruption caused by matters such as traffic jams).

28.2. **Second**, the Committee noted that the measures in the Regulations were originally brought forward in the same form as amendments to the Public Order Bill, which amendments were rejected by the House of Lords. The Committee recorded that it had asked the Home Office why it considered it appropriate to bring back a measure which had been defeated during the passage of primary legislation as secondary

[2] See Secondary Legislation Scrutiny Committee, 38th Report of Session 2022-2023, 11 May 2023.

legislation, which is subject to less scrutiny. The Home Office's response was that the amendments were designed to align the definition of serious disruption for the purposes of the powers to impose restrictive conditions on public processions and assemblies in the POA 1986 with the definition of serious disruption for the purposes of the offences of "locking-on" and "tunnelling" in the POA 2023. However, the Committee noted that: (1) these arguments as to consistency were unsuccessfully made during debate in the Lords; (2) the House may have wished that different situations merit different thresholds; and (3) the Regulations seek to introduce changes which are wider than the definition in the POA 2023 and hence wider than would be necessary to create consistency (for example, by providing for reference to other causes of disruption). The Committee therefore concluded (¶18):

> "*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, 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…"*.

28.3. **Third**, the Committee noted that the draft Explanatory Memorandum to the Regulations failed to mention that the measures which they contain were defeated in the House of Lords during the passage of the POA 2023 and when asked to explain this, the Home Office "*did not directly respond"* (¶19).

28.4. **Finally**, the Committee concluded that the consultation conducted by the Home Office was not adequate. The Home Office had chosen to consult "*a number of law enforcement holders and National Highways"* only and had sought to justify this on the grounds that it was "*most important"* to consult those "*who would help ensure the Statutory Instrument would be operationally useful"*. However, these Regulations give effect to "*controversial policy with a wide range of interested parties and strongly held views".* Further, the Government's own Consultation Principles [3] state that departments should "*consider the full range of people, business and voluntary bodies affected by the policy"* and the Home Office had otherwise acknowledged in an Economic Note accompanying the Regulations that a wide range of groups will be affected. The Committee further rejected the argument that debate of materially identical provisions during the House of Lords Report Stage of the POA 2023 was an effective substitute for fair and even-handed public consultation because "*a debate in Parliament is not a substitute for in-depth consideration by a range of interested parties and those with expert knowledge at the policy formation stage"*. See ¶¶20-23.

29. To date, a non-fatal motion to object to the Regulations and a motion to stop the instrument becoming law have both been tabled in the House of Lords. However, even if the Houses of Parliament vote to approve the draft Serious Disruption Regulations, it is widely accepted that secondary legislation is subjected to far lesser scrutiny in Parliament even where it is subject to the affirmative procedure (see e.g. *Public Law Project* at ¶22).

The Grounds

[3] Cabinet Office, 'Consultation principles: guidance' (March 2018): https://www.gov.uk/government/publications/consultation-principles-guidance .

Ground 1: The Serious Disruption Regulations are *ultra vires* because they would be made for the impermissible purpose and/or have the impermissible effect of lowering the threshold for the exercise of the power to impose restrictions

Relevant legal principles

30. Once secondary legislation has been made, no question of Parliamentary sovereignty or privilege prevents a court from declaring that it was invalid having been made *ultra vires* the delegated power conferred upon the relevant Secretary of State. That includes cases in which the secondary legislation is made for a purpose and/or has a practical effect which is outside the scope of the statutory power pursuant to which it had purportedly been made. See *Smedley* at 666H and 670D; and *Public Law Project* at ¶23. Indeed, it has been recognised that an exercise of any power outside of the policy and objects for which it was conferred will be *ultra vires* (*R (Palestine Solidarity Campaign Ltd) v SSHCLG* [2020] 1 WLR 1774 at ¶¶20-22).

31. It is also clear that provisions purporting to confer a power to amend primary legislation by means of secondary legislation fall to be restrictively construed such that any doubt about the scope or valid exercise of such a power will be resolved by a restrictive approach: see *Public Law Project* ¶27. Thus, where a Henry VIII power is conferred by general words, a purported exercise of such a power might be outside of Parliament's contemplation even if it might be within the literal meaning of the words by which it has been conferred. That reflects the Court's proper constitutional role in upholding Parliamentary supremacy, which role is all the more important in the context of Henry VIII powers.

32. The principle of legality also calls for a restrictive approach to interpretation where Henry VIII powers may be used in a manner which gives rise to interferences with established fundamental rights and freedoms. If Parliament had intended to confer a power upon the Executive to materially widen the power of the police to restrict public protest activity, rather than merely elucidate the scope of the powers otherwise conferred, one would expect it to have done so through clear and unambiguous words. See *AXA General Insurance Ltd v Lord Advocate* [2012] 1 AC 868 ¶152 per Lord Reed (with whom the other justices agreed): "*The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so"*.

Application to this case

33. The Secretary of State intends to make the Serious Disruption Regulations by exercising her delegated powers conferred by sections 12(12) and 14(11) of the POA 1986. However, that power does not extend to making provision whose purpose and/or effect is to materially amend the threshold for exercise of the power to impose conditions upon public processions or assemblies.

34. This construction of the delegated power is clear from an examination of the words used to confer the power:

    34.1. **First**, it is a power to amend subsections 2A to 2C only (i.e. the provisions by which Parliament provided non-exhaustive examples of cases which may result in a "*serious disruption to the life of the community"* or the activities of an organisation carried on in the vicinity). It is not a power to amend subsection 1, which contains the overriding threshold test. Parliament evidently intended that the Executive would

not be able to simply override the threshold which it considered appropriate. Rather, it intended to empower the Executive to provide helpful and illustrative examples of cases that fall within the scope of "*serious disruption to the life of the community*", in order to assist the police in applying that threshold in practice. As a result, any such examples must accord with the meaning of the words used to define the threshold.

34.2. **Second**, that construction is reinforced by the fact that it is expressed to be a power "*to make provision about the meaning ... of ... serious disruption to the life of the community*". The scope of the power is thus bounded by the criterion of "*serious disruption to the life of the community*".

34.3. **Third**, that reading is also supported by the requirement that these Henry VIII powers fall to be construed restrictively (see ¶¶31-32 above). The practical effect of the Serious Disruption Regulations would be to empower the police to take broader action to restrict public protest activity. Had Parliament intended to grant the Executive a blank cheque to determine the fundamental scope of the police's powers in this regard, one would expect it to have conferred such a power in clear and unambiguous words. No such words appear in sections 12 or 14.

35. This construction is also supported by a review of the remarks made during the debate of what is now sections 73 and 74 of the PCSC Act 2022 and which inserted the delegated legislative powers we are here concerned with. In the course of those debates, Victoria Atkins MP (then Under Secretary of State for Crime, Safeguarding and Vulnerability at the Home Office) stated that "*[a]ny definition created through this power will need to fall within what can reasonably be understood as "serious disruption". That threshold will be clarified, not changed: such definition will be used to clarify the threshold beyond which the police can impose conditions on protests, should they believe them necessary to avoid serious disruption"* (*Hansard,* PCSC Deb (Bill 005), 8 June 2021, col. 398).

36. Yet what the Secretary of State is intending to do by the Serious Disruption Regulations is to lower the threshold at which the power to impose conditions may be exercised by each of the three methods outlined at ¶27 above.

37. If there were any doubt that this is the Secretary of State's purpose, one needs only have regard to the draft Explanatory Memorandum to the Regulations. This states expressly that:

37.1. the amendments are being pursued because the examples already given in subsection 2A "*set a threshold which is in many cases too high"* (¶7.4); and

37.2. the amendments to subsection 2A "*change the threshold for when disruption should be considered to constitute "serious disruption to the life of the community"* (¶7.10).

38. That this would also be the practical effect of the amendments outlined at ¶27 above is also clear:

38.1. The Secretary of State wishes to amend subsection 2A so as to provide that the power to impose conditions may be exercised where a public procession or assembly may result in physical obstruction causing "*more than minor"* hindrances to the carrying-on of "*day-to-day activities"* or "*more than minor"* delays to delivery of time-sensitive products or access to essential goods and services. The language

of "*more than minor"* clearly represents a clear departure from the ordinary and natural meaning of "*serious disruption"*. That is *a fortiori* when "*serious disruption"* is construed in the light of Parliament's original references to "*significant"* and "*prolonged"* delays in subsection 2A. In reality, the Secretary of State has sought to replace the criterion of "*serious"* via the backdoor.

38.2. The Secretary of State wishes to amend subsection 2A and 2B so as to provide that the police must take into account all other sources of disruption to the community howsoever caused in deciding whether the public procession or assembly in question will give rise to "*serious disruption"*. The draft Explanatory Memorandum describes this as taking into account the level of "*absolute disruption"* in an area (¶7.7). Similarly, police are empowered to take into account all relevant "*cumulative disruption"* caused by all procession and assembly activity in the same area. The effect of these amendments as drafted would be to allow the police to impose conditions upon a particular procession or assembly where its effects, when combined with the effects of other independent causes, will give rise to "*serious disruption"* even if its effects would not give rise to serious disruption when assessed in isolation. However, that represents a marked departure from the threshold test established by Parliament in subsection 1 which instructs the police officer to assess only whether the particular procession or assembly in question may cause serious disruption.

39. Any decision to make the Serious Disruption Regulations will thus be *ultra vires* because the Regulations would be made with the purpose and/or would have the practical effect of lowering the threshold for exercise of the power to impose conditions upon public processions and assemblies.

Ground 2: The Serious Disruption Regulations are *ultra vires* because they would be made for the impermissible purpose and/or have the impermissible effect of circumventing a scheme established by Parliament

40. Further or alternatively, the Serious Disruption Regulations would be *ultra vires* because they seek to alter a scheme laid down in primary legislation in ways which Parliament had specifically rejected when originally pursued by means of primary legislation.

41. As set out above, the Secretary of State had originally attempted to amend sections 12 and 14 of the POA 1986 through primary legislation in the form of the Public Order Bill introduced into Parliament in 2022. The amendments thereby pursued were, for present purposes, materially identical to those now pursued via secondary legislation. The House of Lords rejected those amendments following a debate, and they formed no part of what then became the POA 2023.

42. The only proper inference is thus that Parliament intended that a lower threshold would not govern the powers to impose conditions in section 12 and 14 of the POA 1986, even if a lower threshold might be appropriate in the context of the new offences created by the POA 2023 (including "*locking-on"* and "*tunnelling"*). That distinction is readily understandable in circumstances where it would be a defence to the new criminal offences of "*locking-on"* and "*tunnelling"* for a defendant to show that they had a 'reasonable excuse' and/or may be a defence to show that a conviction would violate their own individual rights under Articles 10 and 11 of the European Convention on Human Rights. However, neither safeguard applies with respect to the criminal offence of knowingly/recklessly failing to

comply with a condition imposed under sections 12 or 14 of the POA 1986 (see *James v DPP* [2016] 1 WLR 2118).

43. In what is believed to be a constitutionally unprecedented move (see ¶28.2 above), the Secretary of State is now seeking to amend that primary legislative scheme in the manner rejected by Parliament through exercise of a Henry VIII power. The purpose and effect of the Serious Disruption Regulations will therefore be to undermine the will of Parliament and materially alter the legislative scheme it had approved.

44. Parliament cannot have intended that the delegated legislative powers conferred upon the Executive by sections 12(12) and 14(11) of the POA 1986 could be used for this purpose and/or to have this effect:

    44.1. The primacy of Parliamentary sovereignty as a fundamental constitutional principle has been repeatedly affirmed at the highest judicial levels. See, for example: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 ("***Miller 1***") at ¶43 *R (Miller) v Prime Minister* [2020] AC 373 ("***Miller 2***") at ¶41. See, further, *ex parte Fire Brigades Union* [1995] 2 AC 513, 567-568 on the principle of the separation of powers.

    44.2. These constitutional principles apply to powers conferred upon the executive by statute as well as prerogative powers: *Miller 2* at ¶40. Thus, one consequence of these constitutional principles is that executive powers cannot generally be exercised in ways that frustrate or run counter to the policy or purposes of Acts of Parliament for example by rendering them ineffectual: see *Miller 1* at ¶45, 51. Nor can they be exercised so as to seek to bypass Parliament by indirect means, by circumventing the scheme established by an existing statute (*Re De Keyser's Royal Hotel Ltd* [1920] AC 508).

    44.3. The practical effect of conferring a power to make delegated legislation where primary legislation to the same effect has been rejected by Parliament would be to allow the executive to seriously curtail Parliament's ability to carry out its role in scrutinising legislation. It is undeniable that the opportunities for Parliamentary scrutiny of delegated legislation are far more attenuated than compared with primary legislation (see further below), even where the affirmative resolution procedure applies.

    44.4. As a result, Parliament should only be taken to have conferred such a power where it has done so using clear and unambiguous words. No such words are present in the POA 1986.

45. It is no answer to this ground of challenge for the Secretary of State to say that the Serious Disruption Regulations will be made only if they are approved by a resolution of both Houses through the affirmative resolution procedure, which is the means by which the will of Parliament is expressed. Parliament has, at best, a theoretical ability to perform what is a more attenuated form of scrutiny over delegated legislation. Even where the affirmative resolution procedure applies (and it does not always apply, even as regards Henry VIII powers), it inevitably results in far lesser scrutiny of the legislative measures in question. For example, both Houses are prevented from seeking to table amendments to the measure (save for in a few exceptional instances). Further, as a matter of practical reality, it is extremely rare for the House of Lords to vote against delegated legislation. The last occasion was in 2015 in respect of the Tax Credits (Income Thresholds and Determination

of Rates) (Amendment) Regulations 2015, and this caused the Government of the time to a commission a review of the powers of the House of Lords which referred to the "*longstanding convention"* that the Lords should not reject secondary legislation[4]. The question is whether Parliament ought to be taken, through the general words in sections 12(12) and 14(11) of the POA 1986, to have intended that the Secretary of State could curtail the full expression of Parliamentary sovereignty in the manner now contemplated. The answer, plainly, is no.

Ground 3: A decision to make the Serious Disruption Regulations would be unlawful by reason of being an unjustified interference with the principle of Parliamentary sovereignty

46. Where an exercise of a power conferred by statute or prerogative is liable to restrict the operation of a constitutional principle (which will include the ability of Parliament to carry out its constitutional functions as a legislature), then the extent to which the exercise of that power impedes or frustrates the operation of that relevant principle must have a reasonable justification: see *Miller 2* ¶¶49-50.

47. An exercise of the delegated powers conferred by sections 12(12) and 14(11) of the POA 1986 in the circumstances of this case will have the practical effect of curtailing Parliamentary sovereignty by undermining the statutory scheme approved by Parliament in the passage of the POA 2023.

48. In those circumstances, an exercise of those delegated powers to pursue such measures falls to be justified. However, the explanation provided by the Secretary of State for seeking to make the Serious Disruption Regulations – namely, to achieve consistency between the definition of "*serious disruption"* between the POA 1986 and the POA 2023 – does not begin to adequately justify the action taken. First, this justification does not begin to explain why these amendments must be pursued through delegated rather than primary legislation. Further, as noted by the Committee, the amendments go beyond what would be needed to achieve consistency (particularly as regards the taking into account of cumulative disruption).

Ground 4: A decision to make the Serious Disruption Regulations would be vitiated by procedural unfairness as a result of the Secretary of State's one-sided consultation

Relevant legal principles

49. A decision to make secondary legislation may be declared without legal effect because it is not authorised by statute or by common law principles of public law (cf. *Smedley,* 666H – 667A, 672C, 673A). Thus, it would be open to a court to declare that a Ministerial decision to make secondary legislation is invalid by reason of having been a *Wednesbury* irrational exercise of the Minister's discretion whether or not to make that legislation. It should similarly be open to a court to impugn a Ministerial decision to make secondary legislation as invalid where it is vitiated by procedural unfairness.

50. Bodies which exercise public functions are under a duty to take decisions in a manner which is fair in all the circumstances. What fairness demands depends on the context. See, e.g., *R v Secretary of State for the Home Department, ex p. Doody* [1994] 1 AC 531, 560D-G, per Lord Mustill, who went on to observe that *"Fairness will very often require*

[4] Strathclyde Review: Secondary legislation and the primacy of the House of Commons, CM 9177, December 2015 p.15.

that a person who may be adversely affected by the decision will have an opportunity to make representations…".

51. *"*[W]*hether or not a consultation is a legal requirement, if it is embarked on it must be carried out properly and fairly"*, even if the situation is urgent, and the consultation embarked upon is carried out *"informally and over a limited period"*: *R (Article 39) v Secretary of State for Education* [2021] PTSR 696, ¶¶77-78. In that case, it was held that the Secretary of State acted unlawfully by conducting an informal one-sided consultation with some interested parties, while not inviting representations from those most directly affected by the proposals at issue (see ¶83). See also *R (Milton Keynes Council) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 1575, in which Pill LJ said at ¶32 that a decision-maker cannot *"routinely pick and choose whom he will consult"*, since *"*[a] *fair consultation requires fairness in deciding whom to consult"*.

52. The question of whether a fair procedure has been followed is objective: the court does not merely *"…review the reasonableness of the decision-maker's judgment of what fairness required"*: *R (Osborn) v Parole Board* [2014] AC 1115 at ¶65. The standards for a fair consultation are well-established and derived from *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168 and endorsed in *R (Moseley) v Haringay LBC* [2014] 1 WLR 3947 at ¶25.

Application to this case

53. The Secretary of State embarked upon a process of consultation with respect to the amendments she now proposes to make to sections 12 and 14 of the POA 1986.

54. She explained the nature of those consultations to the Secondary Legislation Scrutiny Committee, which recorded that evidence in its report. She has also provided details as to the consultations undertaken in ¶¶10.1-10.3 of the draft Explanatory Memorandum accompanying the Serious Disruption Regulations. Based upon those documents, Liberty understands that:

    54.1. The Secretary of State consulted the National Police Chiefs Council, the Metropolitan Police Service, the Police and Crime Commissioners of the police forces whose areas include the M25 and National Highways. This consultation took place "*at a roundtable chaired by the Prime Minister"*;

    54.2. Drafts of the proposed amendments to the POA 1986 were shared with and commented on by both the National Police Chiefs Council and the Metropolitan Police Service; and

    54.3. The consultees were chosen because the view of the Home Office was that "*consulting those who would help ensure the Statutory Instrument would be operationally useful was most important"*.

55. As noted by the Secondary Legislation Scrutiny Committee (see ¶28.4 above), the Secretary of State's approach to that consultation was inadequate. The consultation conducted was one-sided, and deliberately so. The Secretary of State only consulted bodies who could reasonably be expected to be supportive of the principle of the amendments she is seeking to make to the POA 1986. She has failed to consult any body or person who could reasonably be expected to be critical of the need or justification for these amendments, still less any body or person who might be able to give a more

nuanced view of whether the amendments fall within the scope of the powers conferred upon the Executive. On this latter point, it is inferred that the consultations undertaken by the Secretary of State preceded the debate around the relevant provisions of the Public Order Bill such that the proper scope of the Secretary of State's delegated powers would not have been addressed by the consultees.

56. As a result, if the Secretary of State were to decide to make the Serious Disruption Regulations in these circumstances, that decision would be vitiated by procedural unfairness and would fall to be quashed.

57. It is no answer to this ground of challenge that the amendments will have been the subject of debate during the passage of the Public Order Bill and as part of the affirmative resolution procedure. Neither offered an adequate substitute for fair and even-handed consultation:

    57.1. **First**, these amendments were originally introduced as amendments to the Public Order Bill ahead ofthe Report stage of the House of Lords. As they were rejected, they progressed no further. That meant that there was no opportunity for civil society organisations, expert witnesses and/or the general public to submit written evidence on these provisions during the committee stages. This point is well-illustrated by a cursory examination of the list of written evidence submitted to the House of Commons Public Bill Committee, all of which was submitted in June 2022 (before the amendments were tabled). Nor did the Joint Committee on Human Rights scrutinise the amendments.

    57.2. **Second**, there is far more limited scope for debate in the course of the affirmative legislative procedure given the restrictions on the ability of both Houses to amend the drafting of the Regulations and the practical restraint upon the House of Lords' power to reject delegated legislation.

    57.3. **Third**, a fair consultation ought to take place at a point in time where the decision-maker remains open-minded. The fact that Parliament may seek to debate a draft legislative measure does not remove the vice of a one-sided consultation conducted at an earlier stage in the process.

58. It is also immaterial that there might otherwise be no express or implied duty upon the Secretary of State to consult before seeking to make delegated legislation. The point is that, having voluntarily chosen to embark upon a process of consultation, the Secretary of State was obliged to ensure that was conducted in accordance with common law standards of procedural fairness.

59. Finally, it is no answer to this ground of challenge to suggest that Parliamentary privilege would in some way bar the Court from ordering the relief sought by Liberty:

    59.1. It is accepted that Parliamentary privilege would prevent a court from granting any relief which would serve to restrict or interfere with proceedings in Parliament. As a result, a court cannot entertain any challenge which would serve to restrict or delay the ability of the Secretary of State to lay draft delegated legislation before Parliament and/or the ability of Parliament to vote to reject or approve that draft.

    59.2. However, the challenge proposed by Liberty is not to the decision to lay the draft Serious Disruption Regulations before Parliament. Neither is it a challenge to the

ability of the Parliament to consider and to vote to approve or reject those Regulations. Liberty's proposed challenge is to the decision of the Secretary of State which would follow all of that – i.e. the decision to actually make the Serious Disruption Regulations. That would be a distinct decision, flowing from an exercise of the Secretary of State's discretion as to whether or not to make the Regulations if and when approved by Parliament. The Secretary of State is not compelled to make delegated legislation which has been approved by Parliament - an affirmative resolution of the Houses of Parliament is a power of veto, and nothing more. Thus, a challenge to that discretionary decision does not involve restricting or interfering with any proceedings in Parliament at all. See: *Smedley* pp.668H, 672B-C; and see *R (Adiatu) v HMT* [2021] 2 All ER 484 at ¶¶216- 228 and 236 holding that the public sector equality duty could give rise to a judicial review of executive action in the context of making delegated legislation but not primary legislation (reflecting that the ultimate decision to make delegated legislation lies with the executive, not Parliament).

Standing

60. For the avoidance of doubt, Liberty would plainly have standing to bring the proposed proceedings:

    60.1. These proceedings are concerned with a decision to make legislative provision which will have wide-ranging consequences for members of the public engaged in protest activity.

    60.2. It is eminently sensible that the lawfulness of the Serious Disruption Regulations is determined as quickly as possible, before they have any opportunity to produce any 'chilling effect' upon protest activity. It would not be appropriate for the court to sit back and wait until the powers expanded by these Regulations are sought to be exercised in respect of a particular procession or assembly.

    60.3. Liberty is well-suited to bring such a challenge and has a sufficient interest in the proceedings as an organisation that has been campaigning to protect the rights of the public to engage in protest since its foundation. By way of example only, Liberty has recently intervened in three criminal appeals in the context of public protest (*R v Roberts (Richard)* [2019] 1 WLR 2577, *R v Thacker (Edward)* [2021] QB 644, and *Attorney General's Reference (No. 1 of 2022)* [2023] KB 37) and in an ongoing Supreme Court appeal regarding the impact of persons unknown injunctions on protest rights (*Wolverhampton City Council and others v London Gypsies and Travellers and others* (UKSC 2022/0046)). It has also provided detailed briefings to Parliamentarians in respect of the impact on protest rights of recent legislation[5],

[5] Including in respect of the passage through Parliament of the Serious Organised Crime and Police Act 2005, the Constitutional Reform and Governance Act 2010, the Crime and Security Act 2010, the Police Reform and Social Responsibility Act 2011, the Counter-Terrorism and Border Security Bill 2018, and the PCSC Act 2022.

including what is now the POA 2023 and the draft Serious Disruption Regulations[6] and played an active role in public consultations about public protest.[7]

Alternative Dispute Resolution

61. We would be willing to consider any proposal you may make in respect of alternative dispute resolution.

Details of information sought

62. Please provide us with any documents on which the Secretary of State relies to justify the decisions under challenge. In particular, the Secretary of State is invited to confirm whether Liberty's understanding of the consultation process undertaken with respect to the measures now pursued by means of the draft Serious Disruption Regulations, as set out in ¶54 above, is materially accurate.

Action to be taken by you:

63. In order to avoid the need for our client to issue proceedings against you, please confirm that the Secretary of State will not proceed to make the Serious Disruption Regulations even if they are approved by resolution of both Houses of Parliament.

64. Should it be necessary to issue proceedings against you, we will be applying for a Cost Capping Order; please could you confirm if you will oppose our application.

Proposed reply date

65. The pre-action protocol for judicial review requires that your response is provided within 14 days. Therefore, we request that you provide us with a letter of reply by 20 June 2023.

66. If you fail to respond, Liberty will have no option but to issue proceedings against you without further notice and will necessarily be put to the cost of doing so. Therefore, if after this period of time, you provide Liberty with the relief sought, and/or if Liberty obtains a Court Order granting the same, then we will consider you to be liable for our costs.

67. In any event, please confirm receipt of this letter.

Yours sincerely,

[6] See, e.g. https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/03/Briefing-on-Govt-amends-to-Public-Order-Bill-ahead-of-Consideration-of-Lords-amendments-March-2023.pdf and https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/03/Briefing-on-the-The-Public-Order-Act-1986-Serious-Disruption-to-the-Life-of-the-Community-Regulations-2023-May-2023.pdf.

[7] Including the Home Office consultation on "*Managing Protest Around Parliament*" (January 2008), the Joint Committee on Human Rights inquiry into policing protest (in June 2009), the Home Office consultation on "*Police Powers to Promote and Maintain Public Order*" (2012), the Greater London Authority public engagement on the police use of a water cannon (2014), and the Home Office consultation on buffer zones for abortion clinics (2018).

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